

IN THE COURT OF THE III ADDITIONAL DISTRICT JUDGE, SALEM.

PRESENT : Thiru. G.SRI RAMA JEYAM, B.L.,

III Additional District Judge,

Salem

Thursday, the 27th day of April 2023

I.A.No.1/2023 in O.S. No.52/2023

Ponnaiyan

..... Petitioner / Plaintiff

/ Versus /

Ponnusamy

..... Respondent / Defendant

This petition came up on 17.04.2023 for final hearing before me in the presence of Tmt.J.K.Raajeswari, Advocate for the Petitioner / Plaintiff and Thiru.C.Jayaprakasham, Advocate for the Respondent / Defendant and upon hearing the arguments of both sides and upon perusing the records and having stood over for consideration till this day, this Court delivers the following

ORDER

Plaintiff in OS.No.52/2023 is the Petitioner in the above Application, which is filed under Order 38 Rule 5 C.P.C. praying this Court to Order attachment of the Petition mentioned property before passing Judgment in the above suit.

2) According to the Petitioner, himself and the Respondent were close friends and they were doing Real Estate Business for the past 20 years. In the year 2019, Sri Ram Finance Limited auctioned a Plot, bearing No.M53 at Membalam Nagar, with an extent of 1465 sq.ft, for the sum of Rs.20,15,000/-. The Respondent had asked the Petitioner to give Rs.10,00,000/- and he had agreed to pay the balance amount of Rs.10,15,000/- so that the property could be purchased. The Respondent had also agreed that after purchasing the said property, the same would be sold to some 3rd Parties and both of them could share the sale price. After receiving Rs.10,00,000/-

from the Petitioner, the Respondent took the property in Court action sale in his name. On 06.01.2020, the Respondent has executed a Promissory Deed in favour of the Petitioner and he has also agreed to return back the money after selling that property. Now, the Respondent has been refusing to pay the money inspite of repeated demands made by the Petitioner. The Police Complaint dated 29.11.2022 preferred by the Petitioner also did not yield any fruitful result. On 01.01.2023, the Petitioner came to know that the Respondent has been making arrangements to alienate the property. If he is allowed to do so, it would be impossible for the Petitioner to realize the loan amount. Furthermore, the Petitioner is entitled to ½ share in the Petition mentioned property. Therefore, the Petitioner has filed the above Suit seeking recovery of money along with the present Application seeking attachment of the property before passing Judgment.

3) In the Counter, the Respondent has denied all the allegations raised by the Petitioner. It is the case of the Respondent that he never received Rs.10,00,000/- from the Petitioner as alleged and he had not executed any document, favouring the Petitioner as alleged. The document allegedly executed by the Respondent is fabricated, tailored and forged one and therefore, the Petition is liable to be dismissed. Since, the Respondent does not have any proposal to sell the Petition mentioned property, the property can not be attached.

4) Now, the Point that arises for consideration in the above Application is that whether the property, which is morefully described in the Petition, can be attached before passing Judgment in O.S.No.52/2023 ?

Point:

5) This Court has heard the submission of both sides and perused the materials available on record.

6) Perusal of records would show that the Petitioner as the Plaintiff has filed the above Suit seeking recovery of money on the basis of a document dated 06.10.2020, which is styled as “ உறுதிமொழி ஆவணம்”, alleging that on 06.10.2020,

the Respondent has received Rs.10,00,000/- from the Petitioner, for the purpose of purchasing the property through Court action sale and executed the said document whereby he had agreed to sell the said property to 3rd parties and both of them can share the sale price equally. In the said Suit, the Petitioner has filed the present application seeking to attach the Petition mentioned property before passing Judgment, alleging that he came to know that the Respondent is making arrangements to alienate the said property and if it is permitted, it would not be possible for the Petitioner to realize the suit claim.

7) It is settled proposition of law that in an application filed under Order 38 Rule 5 CPC, before ordering attachment of the property, the Court must be satisfied that the Respondent is about to dispose of his / her property or about to remove the property from the jurisdiction of the Court and the Respondent has intended to do so with a view to cause obstruction to or delay the execution of the decree that may be passed against the Respondent.

8) Furthermore, in an application seeking attachment of property before passing Judgment, merely making a bald allegation that the Petitioner has come to know that the Respondent has been making arrangements to dispose of his property or he is attempting to transfer his property to others, fraudulently in an illegal manner in order to defeat the payment regarding the suit document may not be sufficient and there must be specific averments / allegations with respect to the same and in the absence of specific allegations/ averments, it is well settled law that extraordinary remedy of attachment before Judgment could not be granted.

9) It is also a settled preposition of law that by ordering attachment before Judgment, in the absence of acceptable and clinching materials to show that the Respondent has been attempting to dispose of his property solely with the intention to delay the execution of the decree or defeat the decree that may be passed against him, an unsecured debt can not converted into a secured debt.

10) In the present case, the Petitioner has simply stated in his affidavit that “ On 01.01.2023 the Plaintiff came to know that the defendant making arrangements to alienate the property. If he is allowed to alienate the property then it will not be possible for the Plaintiff to realize the amount”. Nothing more is averred in the affidavit. No specific allegations / averments are made in the affidavit with respect to the steps that have been taken by the Respondent. It is not even stated that the Respondent has been taking steps to dispose of the property only with an intention to defeat or to cause obstruction or delaying the execution of the decree that may be passed against the Respondent.

11) The 3rd Party Affidavit sworn by one Thiru.Selvaraj also does not appear to be an acceptable material. Because the same also does not specifically state as to what are all the steps that are taken by the Respondent to alienate the property and when those steps have been taken. Therefore, based upon the 3rd party Affidavit allegedly sworn by one Selveraj, we cannot conclude that the allegations of the Petitioner are supported by acceptable materials.

12) Furthermore, in the Counter filed by the Respondent, it is specifically stated that the Respondent is not having any proposal to sell the Petition mentioned property and therefore, the property need not be attached. The said stand taken by the Respondent is hereby recorded.

13) In the absence of any acceptable materials, in the considered opinion of this Court, the Petitioner is not entitled to the extraordinary relief of attachment before passing Judgment. The Judgment of the Hon'ble Apex Court rendered in the case Rajendran and Others versus Shankar Sundaram and others (2008-2- SCC 724) , which is relied upon by the learned Counsel appearing for the Petitioner is not applicable to the facts and circumstances of the present case.

14) In the light of the aforesaid discussions, this Court is of the considered view that this is not a fit case to grant the extraordinary relief of attachment before passing Judgment. Therefore, the Petitioner is not entitled to the relief prayed for in

the present application and the Petition deserves to be dismissed.

In result, the above application shall stand dismissed. However, the stand taken by the Respondent in his counter that he does not have any proposal to sell the petition mentioned property is hereby recorded. No Cost.

Dictated to the Steno-Typist, transcribed by her, corrected and pronounced by me in open court, this the 27th day of April 2023.

III Additional District Judge,
Salem.

APPENDIX:

Petitioners' Side Witnesses and documents : NIL

Respondents' Side Witnesses and documents : NIL

III Additional District Judge,
Salem.