

A.No.1497, 104 and 958 of 2016
in C.S.No.100 of 2016

M.M.SUNDRESH, J.

The plaintiff is the applicant in A.Nos.104 and 958 of 2016 in C.S.No.100 of 2016. C.S.No.100 of 2016 has been filed for recovery of money and permanent injunction. A No.104 of 2016 has been filed by the applicant to grant an order of interim injunction restraining the respondent/defendant from interfering with the peaceful running of the business at M/s Master Collections, Shop No.F-60, 1st Floor, II Phase, Spencer Plaza, 769, Anna Salai, Chennai-600 002. The applicant has also filed A.No.958 of 2016 to direct the respondent/defendant to furnish security to the suit claim of Rs.31,56,000/- and on their failure to do so, order attachment before judgment of the respondent/defendant's movable described in the schedule mentioned property. A.No.1497 of 2016 has been filed by the respondent/defendant seeking to vacate the order of interim injunction granted on 07.03.2016 in O.A.No.104 of 2016 in C.S.No.100 of 2016.

2. It is a case of the applicant/plaintiff that he is a tenant of a third party. There has been money transaction between the applicant and the respondent/defendant. Though the respondent has borrowed a sum of Rs.23,00,000/- from the applicant, the same has not been

repaid. By entering into an agreement with the owner/landlord of the premises, in which, the applicant is carrying on business, the respondent/defendant are attempting to interfere with the possession.

3. The learned counsel appearing for the applicant submits that the bank transactions would show the factum of money transfer. The respondent is trying to interfere with the business of the applicant in pursuant to the agreement of sale and therefore, the applications will have to be allowed. It is also submitted that no reply is filed to the affidavit of the respondent and thus, orders may be passed on the available materials and pleadings.

4. The learned counsel appearing for the respondent/defendant submits that the applicant has not placed the correct facts before this Court. There are number of cases pending against the applicant and after obtaining bail he did not comply with the conditions and, now he is in Kashmir. A memorandum of understanding was entered into between the applicant and the respondent on 21.03.2015 and in pursuant to which, the entire possession was handed over to the respondent. The suit was filed against the brother of the applicant, who is also doing business along with him and an order of injunction

was obtained in I.A.No.1091 of 2016 in O.S.No.423 of 2016. Thereafter, as a counter blast, the present suit has been filed and based upon false averments, an order of injunction has been obtained though the applicant is neither in possession nor doing business.

5. By way of reply, the learned counsel for the applicant submits that even against the respondent, the applicant has given complaints, which were not registered initially and thereafter, in pursuant to the orders of this Court, a complaint against them was registered.

6. A perusal of the plaint would show that substantial averments are with reference to the money claim. Though a categorical statement has been made in the affidavit filed by the respondent to the effect that there is a memorandum of understanding entered into between the parties on 21.03.2015, pursuant to which, possession was handed over over the schedule mentioned property to the respondent, there is no denial of the same. The present suit has been filed admittedly after the respondent had filed the suit and obtained an interim order against the brother of the applicant herein. The mere transfer of money alone cannot be a ground to grant the

interim injunction exercising power under Order XXXIX Rule 3 of the Code of Civil Procedure. Even on a perusal of the cause of action, there is no specific allegation against the date or time, during which, the possession of the applicant is sought to be disturbed.

7. A party, who comes before Court, has to establish two factors while seeking an order of interim injunction. While satisfying three parameters required under Order 39 Rule 1 of C.P.C., the factum of possession has to be primarily established. Considering the abovesaid principle, this Court is of the view that in view of the memorandum of understanding between the parties dated 21.03.2015, an order of interim injunction sought for cannot be granted. Further more, the plaintiff is stated to be in Kashmir. It appears that he has not complied with the conditions imposed while obtaining the order of bail. This factum is also not denied by the learned counsel for the applicant. Therefore, this Court is of the view that the plaintiff is not entitled to the relief of injunction.

8. The learned counsel for the applicant makes one more submission at this point of time. It is submitted that the possession has not been handed over in pursuant to the memorandum of

understanding dated 21.03.2015. In other words, the learned counsel submitted that the said memorandum has not been given effect to and it is contrary to the earlier one entered. This Court is afraid such a contention cannot be countenanced for two reasons. Firstly, there is no whisper about this memorandum in the plaint. On the contrary, it proceeds to state that the respondent is trying to interfere with the possession based upon agreement with the vendor of the applicant. Secondly, it is not open to the applicant to question the memorandum at this point of time, without even filing a reply to the averments made in the affidavit filed by the respondent. In fact, the learned counsel, at the time of argument, submits that he is proceeding to argue on the basis of the original averments made in the plaint as well as in the application. The other deed, which the applicant seeks to rely upon to point out the contradiction is one between the applicant's brother and the respondent and is also earlier in point of time.

9. Coming to the application No. A.No.958 of 2016, in which, attachment before judgment is sought for, law is quite settled that there is a difference between the Order XXXVIII Rule 5 and Order XXXIX Rules 1 and 2 of C.P.C. In other words, an unsecured creditor

cannot be converted into secured creditor. There is no materials to hold that the respondent, in the event of suit being decreed, would make it unexecutable.

10.Considering the above, both the applications viz., A.Nos.104 and 958 of 2016 in C.S.No.100 of 2016 are dismissed. Consequently, A.No.1497 of 2016 in C.S.No.100 of 2016 is allowed.

27.06.2016

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M.M.SUNDRESH, J.

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