



IN THE HIGH COURT OF JUDICATURE AT MADRAS

(ORDINARY ORIGINAL CIVIL JURISDICTION)

THURSDAY, THE 9th DAY OF SEPTEMBER 2021

THE HON'BLE MR. JUSTICE V.PARTHIBAN

A. No.1409 of 2021

in

C.S. No.284 of 2020

Pritha Ratnam,
D/o.late R.Ratnam,
No.10, Cenotaph 2nd Lane,
Teynampet, Chennai-600 018
rep. by her Power Agent,
Mr.R.Narasimhan,
S/o.Late P.S.Rajagopalan,
No.39, Sekkizhar II Street,
MGR Nagar, Chennai-600 078.

... Applicant/Plaintiff

-Versus-

1. V.Saravanan,
S/o.K.K.N.Vasu,
2. V.Balamurugan,
S/o.K.K.N.Vasu,
both residing at Old No.39,
New No.2, Ramasamy Street,
T.Nagar, Chennai-600 017.

... Respondents/Defendants

A. No.1490 of 2021:-

Original Application praying that this Hon'ble Court be pleased to pass an order of attachment of the immovable property described in the schedule hereunder pending disposal of the suit.

This application having been heard on 11.08.2021 in the presence of



Mr.P.L.Narayanan, Advocate for the respondents herein and upon reading the Judge's Summons and the affidavit of R.Narasimhan filed herein and the order dated 10.11.2020 made in O.A.Nos.528 & 529 of 2020 and A.No. 2481 of 2020 and having stood over for consideration till this date and coming on this day before this Court for orders in the presence of the said advocates for the parties hereto and it is ordered as follows:-

That the immovable properties more fully set out in the schedule hereunder be and is hereby attached and the same do remain under attachment until further orders of this Court.

2.That 2 copies of this order be transmitted to the District Munsif, Alandur for effecting the attachment and the said court do cause the said immovable properties to be attached through Senior Bailiff of the said Court in respect of the claim of a sum of Rs.2,47,37,753/-(Rupees Two Crores Forty Seven Lakhs Thirty Seven Thousand Seven Hundred and Fifty Three only) and communicate the effect of such attachment to the Registering Officer within the local limits of whose jurisdiction the whole or any part of the immovable properties are situated.

SCHEDULE

All that piece and parcel of the property being the land and residential building bearing Plot No.B-40, AGS Staff Cooperative Building Society Layout now known as AGS Colony (Approved layout by the Director of



Town Planning, Madras vide Ref. No.102/66), Kottivakkam Village, Shozhinganallur Taluk, Kancheepuram District, comprised in S. No.227/5, as per Patta S. No.227/26 measuring an extent of 2 grounds and 172 sq.ft. (i.e. 4972 sq.ft.) bounded on the

North by : 30 feet wide common road

South by : Lands owned by Sababathi and Gothandarama

East by : Plot No.39, AGS Colony

West by : Plot No.C22, AGS Colony

Measuring

Eastern side : 95 feet

Western side : 100 feet

Northern side : 50 feet

Southern side : 52 feet

situated within the Registration District of South Chennai and Sub Registration District of Adyar.

WITNESS THE HON'BLE MR. JUSTICE SANJIB BANERJEE, CHIEF JUSTICE, HIGH COURT AT MADRAS AFORESAID, THIS THE 9TH DAY OF SEPTEMBER 2021.

Sd/-

ASSISTANT REGISTRAR (O.S. II)

//Certified to be true copy//

Dated at Madras this the day of 2021.

COURT OFFICER(O.S.)



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26/10/2021

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A. No.1409 of 2021
in
C.S. No.284 of 2020

ORDER

DATED : 09.09.2021

THE HON'BLE MR.JUSTICE
V.PARTHIBAN

FOR APPROVAL: 29/10/2021

APPROVED ON: 29/10/2021



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IN THE HIGH COURT OF JUDICATURE AT MADRAS

Order reserved on 11.08.2021

Order delivered on 09.09.2021

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THE HONOURABLE MR.JUSTICE V.PARTHIBAN

A.No.1409 of 2021

in

C.S.No.284 of 2020

Pritha Ratnam
D/o Late R.Ratnam
No.10, Cenotaph 2nd Lane,
Teynampet, Chennai - 600 018
rep. by her Power Agent,
Mr.R.Narasimhan
S/o lae P.S.Rajagopalan
No.39, Sekkirzhar II Street,MGR Nagar,
Chennai - 600 078. ...Applicant /Plaintiff
Vs

1. V.Saravanan,
S/o K.K.N.Vasu

2. V.Balamurugan,
S/o K.K.N.Vasu
both residing at
Old No.39, New No.2
Ramasamy Street,
T.Nagar,
Chennai - 600 017 ... Respondents /Defendants
Prayer:

Application filed under Order XIV Rule 8 of O.S.Rules read with Order

<https://hcservices.ecourts.gov.in/hcservices/>

XXXVIII Rule 6 of C.P.C. to pass an order of attachment of the immovable



property described in the schedule hereunder pending disposal of the suit.

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SCHEDULE

All that piece and parcel of the property being the land and residential building bearing Plot No.B-40, AGS Staff Cooperative Building Society Layout now known as AGS Colony (Approved layout by the director of Town Planning, madras vide Ref. No.102/66) Kottivakkam village, Shozhinganallur Taluk, Kancheepuram District, comprised in S.No.227/5 as per Patta S.No.227/26 measuring an extent of 2 Grounds and 172 sq.ft. (i.e., 4972 sq.ft.) bounded on the

North by : 30 feet wide common road
South by : Lands owned by Sababathi and Gothandarama
East by : Plot No.39, AGS Colony
West by : Plot No.C22, AGS Colony

For Applicant : Mr.George Cheriyan

For Respondents : Mr.P.L.Narayanan

ORDER

The applicant herein is the plaintiff in the suit. The respondents herein are the defendants.

2. The suit has been filed for the following prayers.

i) Direct the Defendants jointly and severally to pay the plaintiff the sum of Rs.2,47,37,753/- (Rupees Two Crores Forty Seven Lakhs Thirty Seven Thousand Seven Hundred and Fifty Three only) (i.e. Rs.2,10,00,000/- under Demand promissory notes 15.09.2019/24.09.2019; dated 30.12.2019;



and 01.02.2020 executed by the Defendants in favour of the Plaintiff and Rs.37,37,753/- (Rupees Thirty Seven Lakhs Thirty Seven Thousand Seven Hundred and Fifty Three only) towards interest at the rate of 24% p.a. from the respective dates of the Demand Promissory Notes till 16.09.2020);

ii) Direct the Defendants jointly and severally pay to the Plaintiff future interest at the rate of 24% p.a. on the Demand Promissory Notes of Rs.2,10,000/- (Rupees two Crores Ten Lakhs only) from the date of the plaint till the realization of the payment.

iii) Direct the defendants to pay cost of the suit.

3. The facts which gave rise to the present dispute are briefly stated hereunder.

(a) The applicant/plaintiff was looking for house property in and around Kottivakkam and she had come to know that the Respondents/defendants was owing a property situated at Plot No.B-40, AGS Staff Cooperative Building Society Layout, now known as AGS Colony, Kottivakkam Village, Shozhinganallur Taluk, Kancheepuram District.

(b) Evincing interest in the schedule property, she appeared to have expressed her inclination for buying the property through outright sale.

While the decision was taken to purchase the property, the plaintiff also appeared to have expressed her reservation in regard to a discrepancy in the



extent of the land which is shown in the sale deed as 2 grounds and 172 sq.ft. (i.e., 4972 sq.ft.), but the extent shown in the patta was only 4307 sq.ft., having a short fall of 660 sq.ft. patta. According to the plaintiff, the defendants volunteered to rectify the error and the discrepancy in the patta and on the basis of the assurance, the plaintiff entered into a sale agreement on 15/24.09.2019. At the time, when the sale agreement was entered into, Rs.49,50,000/- had been paid as advance. The total consideration fixed for the sale of the subject property was Rs.9,00,00,000/- (Rupees Nine Crores only).

(c) It was mutually agreed in terms of the sale agreement that the sale transaction would be completed by 06.11.2019 and the balance sale consideration would be settled before the said date. For the amount received by the defendants as advance from the plaintiff, the defendants appeared to have executed a demand promissory note dated 15/24.09.2019 in terms of Clause 11 and Clause 12 of the sale agreement. There were other conditions in the sale agreement like, in case of failure to execute the sale deed, the defendants were to return the advance amount paid along with the liquidated damages of Rs.5 lakhs, without prejudice to the rights of purchaser to claim specific performance.

(d) It transpired subsequently that the defendants could not rectify the

discrepancy in the patta relating to the shortfall in the extent of the



property. In terms of the agreement between the parties as provided in clause 4, rectification of patta was a condition precedent for completion of the sale transaction, which according to the applicant/ plaintiff, the defendants failed to discharge their obligation.

(e) According to the applicant/plaintiff, the defendants had approached her to extend further time for completion of the sale transaction and she readily agreed for the same. The respondents/ defendants, at this, insisted further advance of Rs.50 lakhs and accordingly, the applicant/plaintiff paid another sum of Rs.49,50,000/- and in total, the advance paid to the respondents/defendants was Rs.99,00,000/-. When the second payment was made, the sale consideration which was originally fixed at Rs.9,00,00,000/- had also been reduced substantially to Rs.8,50,00,000/-, for which, supplementary agreement was also entered into between the parties and the time was extended for completion of the sale transaction on or before 29.02.2020. The defendants, after having received the payment had volunteered and issued demand promissory note dated 30.12.2019 for a sum of Rs.55,00,000/- in favour of the plaintiff and issued a cheque dated 30.12.2019 for a sum of Rs.1,10,00,000/- drawn on Karur Vysya Bank in favour of plaintiff in substitution of the earlier cheque for a sum of Rs.55,00,000/-.

(f) Thereafter, it appeared that the respondents/defendants insisted on



yet another payment of Rs.1,00,00,000/- and according to the applicant/plaintiff, she obliged and paid a sum of Rs.99 lakhs by issuing two cheques Nos.000079 and 000080 dated 01.02.2020 drawn in favour of the 1st and 2nd respondents/defendants respectively. On receipt of the two cheques, the respondents/defendants voluntarily executed demand promissory note dated 01.02.2020 for a sum of Rs.1,00,00,000/- and issued further cheque dated 01.02.2020 for a sum of Rs.1,00,00,000/- drawn on Karur Vysya Bank, T.Nagar Chennai, in favour of the applicant/plaintiff. The execution of promissory note and issuance of cheques by the respondents/ defendants was in the nature of securing the interest of the applicant/plaintiff, in case of failure by the respondents/defendants in executing the sale transaction, enabling the applicant/plaintiff to proceed against the defendants for realising the amount paid to them. On the whole, the applicant/plaintiff had paid Rs.1,98,00,000/- to the respondents/ defendants as advance.

(g) According to the applicant/plaintiff, despite taking huge advances and the lapse of considerable time, no steps were initiated by the respondents/ defendants towards completion of the sale transaction. While the applicant/ plaintiff had been waiting for the completion of the sale transaction, she was issued with legal notice dated 14.07.2020 on behalf of the respondents/defendants alleging that the applicant had committed default in completion of the sale transaction from her side. According to the



applicant/ plaintiff, several allegations had been made in the legal notice by the respondents/ defendants for not going ahead with the sale, which were untrue and contrary to facts.

(h) In response to the legal notice dated 14.07.2020, a reply notice was sent on behalf of the applicant/ plaintiff on 29.07.2020 refuting all the allegations contained in the notice sent on behalf of the respondents/ defendants. According to the applicant/plaintiff, the respondents/defendants failed to honour their commitment and obligation in terms of the original sale agreement and the supplementary agreement as aforementioned and having received huge advance amounts, they were unwilling to perform their part of the contract.

(i) According to the applicant/plaintiff, the condition precedent for completion of the sale is the rectification of patta i.e., showing proper extent of the suit property, which had not been done by the respondents/ defendants at all. The respondents/ defendants, while on one hand, had taken huge advance from the applicant/plaintiff and on the other, not willing to perform their part of the contract. Making matter worse, the respondents/ defendants are also attempting to alienate the schedule property to third parties. In the said circumstances, the applicant/ plaintiff has approached this Court for recovery of the amounts from the respondents/defendants paid by her with interest.



(j) At the time when the suit was entertained by this Court, the learned Judge has passed an order on 10.11.2020 granting interim injunction against the respondents/ defendants herein from alienating the suit property, pending disposal of the suit in Application No.528/2020. While ordering injunction, the learned Judge has also directed the respondents/ defendants to furnish security for a sum of Rs.2,47,37,753/- before 14.12.2020 in Application No.2481/2020. O.A.No.529 of 2020, which was filed for injunction restraining the defendants from opening the locker and removing the original documents pertaining to the suit property, consequently, stood closed. Subsequently, it appeared that furnishing of security, ordered by this Court on or before 14.12.2020, has not been complied with, by the respondents/defendants. In the said circumstances, the present application has been filed for attachment of the suit property.

4. Mr.George Cheriyan, learned counsel appearing for the applicant, referred to Clause 4 of the sale agreement dated 15/24.09.2019 which imposed the obligation on the respondents/ defendants to have the discrepancy rectified regarding the total extent of the schedule mentioned property which appeared to have been wrongly shown in the patta, by obtaining fresh patta, duly corrected showing correct extent as agreed.



5. According to the learned counsel, Clause 4 of the original sale agreement imposed further condition on the respondents/ defendants to execute and register the sale deed in favour of the applicant/ plaintiff, free from all encumbrances and Clause 9 further stipulated that in case of failure to perform their part of the contract, the respondents/ defendants had been mandated to refund a sum of Rs.50,00,000/- together with liquidated damages of Rs.5 lakhs without prejudice to the right of the applicant/ plaintiff for enforcing specific performance. Clause 11 of the agreement recorded the factum of the execution of the demand promissory note of Rs.55 lakhs by the respondents/ defendants herein.

6. The learned counsel also referred to the supplementary sale agreement dated 30.12.2019. The agreement recorded the facts of payment of further sum of Rs.50,00,000/- to the defendants in aggregate Rs.1,00,00,000/-. The said supplementary condition reiterated clause 9 compliance, namely that the property should be conveyed free of all encumbrances. The sale was to be completed as per supplementary agreement by 29.02.2020.

7. The learned counsel also referred to a document, evidencing the fact that one of the close relatives of the applicant/plaintiff was admitted in



a Hospital in Chennai, affected by brain tumour and she had been shifted to Singapore for further medical care. In view of the admission of her close relative in the hospital for treatment in Singapore, the applicant/plaintiff was unable to focus on the sale transaction for a brief period of two weeks during February, 2020. In any event, according to the learned counsel, the time was never the essence of the contract, as earlier, extension had been granted at the very instance of the respondents/ defendants. Mere two weeks of absence of the applicant/plaintiff could not have made any difference in the discharge of mutual contractual obligation of the parties.

8. While matters stood thus, a legal notice was issued on 14.07.2020, wherein various allegations have been made as if that the applicant/plaintiff had not performed her part of the contract. In the notice, it has been clearly admitted by the respondents/ defendants, the receipt of advance amounts from the applicant/plaintiff.

9. Learned counsel also referred to the counter affidavit filed on behalf of the respondents/ defendants in O.A.Nos.528 and 529 of 2020. In the counter, the entire case of the plaintiff has been admitted in paragraph Nos 3, 4, 5, 6 & 9. According to the learned counsel, particularly, in



conditions of the rectification of patta to the subject property and averred as "the revenue authorities, especially in our State, most of the time it is impossible to adhere to any time frame, hence by a month's time the correction of patta got delayed".

10. In the face of the admission in the legal notice dated 14.07.2020 and the averments in the common counter, the respondents/ defendants have gone to the extent of alleging that the normal and standard clauses which had been included in the sale agreement labelling the same amounting to *terrorem* and therefore, not enforceable in law. The execution of the promissory notes had also been admitted by the respondents/ defendants, however, it was cleverly clarified by alleging that it was not voluntarily tendered. In the counter affidavit, the respondents/ defendants thus, claimed that a month's delay cannot be construed as a material breach of agreement at all.

11. The learned counsel further referred to the averments in paragraph 14 of the common counter affidavit which stated that the extended date for the execution of the sale was not agreeable to the respondents/ defendants as if the applicant/ plaintiff was at fault for the delay. The avements in this regard are mischievous and contrary to the facts on record. From the entirety



of facts, it could be seen that the respondents/ defendants were responsible for the undue delay for the execution of the sale agreement but unfortunately, the respondents/ defendants are now attempting to turn the table over the applicant/ plaintiff with a malicious intention as if she was responsible for the delay. Blaming the applicant/ plaintiff for the delay for non-execution of the sale transaction, in the circumstances of the case, is a clear attempt on the part of the respondents/ defendants to wriggle out of the liability imposed by the terms of the sale agreements.

12. The learned counsel further submitted that when the receipt of payments has been categorically accepted by the respondents/ defendants and the order was passed by this Court as early as on 10.11.2020 for furnishing of security for the suit claim on or before 14.12.2020, admittedly the same being not complied with, the present application for attachment of the suit property has to be necessarily allowed in order to protect and secure the interest of the applicant/ plaintiff herein. This is particularly so, when the respondents/ defendants, even in the legal notice dated 14.07.2020 and in the common counter affidavit filed in O.A.Nos.528 and 529 of 2020, have disclosed the fact that they were in urgent need of funds in order to meet their liabilities, in which case, it is very likely the respondents/

defendants may encumber the suit property by alienating the same to some



third parties.

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13. In the above circumstances, to avoid any third party interest, affecting the suit claim, the present application seeking attachment as a corollary for the act of non-furnishing security by the respondents/defendants, is liable to be allowed. The learned counsel, particularly emphasised the point that in the absence of any averment on the part of the respondents as to why furnishing of security cannot be given, the present application is necessarily to be ordered in favour of the plaintiff. The learned counsel finally submitted that on behalf of the respondents/defendants, not an iota of justification has been forthcoming as to why they did not furnish security as ordered by this Court in the first place and in such circumstances, it is not open to the respondents/defendants to oppose the present application.

14. Per contra, the learned counsel Mr.P.L.Narayanan appearing for the respondents/defendants submitted that furnishing of security or ordering of attachment is not automatic as certain legal requirements to be fulfilled before such orders could be passed by this Court. According to the learned counsel, for ordering furnishing of security or attachment of property under Order 38 Rule 5 CPC, there should be a specific plea and



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averment that the defendants with an intention to obstruct or delay the execution of any decree that may be passed against them by disposing of the property etc. According to the learned counsel, not a single averment is found in the plaint that the suit property is likely to be disposed of by the defendants. In this regard, the learned counsel referred to the entire plaint and affidavit in order to demonstrate that there was no proper plea of the property likely to be alienated by the respondents/ defendants. Therefore, the requirement of Order 38 being not satisfied, the applicant/ plaintiff is not entitled to either for order of furnishing of security or for order of attachment of the property.

15. The learned counsel referred to the affidavit filed in O.A.Nos.528 and 529 of 2020 and submitted that only in paragraph No.28, the fact of the defendants attempting to surreptitiously alienate the suit property to third party is inconspicuously mentioned. According to the learned counsel, such cursory statement is not enough to satisfy the requirement of Order 38 Rules 5 and 6 CPC. Such averment should be made with all seriousness with supportive materials. He would referred to the affidavit filed in the present application contending that not a single averment is made in the affidavit regarding the fact that the suit property is likely to be disposed of by the respondents/ defendants. When this Court is called upon to attach the



property before judgment, unless statutory requirements are fulfilled, no matter any counter is filed or not or the arguments advanced on behalf of the respondents/ defendants or not, the Court may not grant the order of attachment of the property simply on the basis of application being filed on behalf of the applicant/plaintiff for attachment of the suit property.

16. In fact, the learned counsel had also stated that in the counter affidavit filed on behalf of the respondents/ defendants, it has been clearly spelt out that the alienation of the suit property will happen only with the permission of this Court.

17. In support of his legal contention, the learned counsel relied on the following decisions.

i) ***Vol.98 L.W. 78 (Srinivasan,T. v. Srinivasan)***. He would refer to paragraph Nos.4 to 6 which are extracted hereunder.

4. A mechanical adaptation of the language of the relevant provision of the Civil P.C., hereinafter referred to as the Code, namely, O. XXXVIII, R. 5 thereof would not suffice the purpose. There must be positive and definite material on the two points set out in O. XXXVIII, R. 5 of the Code, namely, (1) that the defendant is about to dispose of the whole or part of his property, and (2) that the disposal is with the intention of obstructing or



delaying the execution of any decree that may be passed against him. An attachment before judgment is not a process to be adopted as a matter-of course. The suit is yet to be tried and the defence of the defendant is yet to be tested. The plaintiff only stands a prima facie chance of success in the suit. At this nebulous juncture, an extraordinary relief is being sought for by the plaintiff. This relief could be granted only if the conditions for its grant, as per the provisions of the Code, stand satisfied. This process is never meant as a lever for the plaintiff to coerce the defendant to come to terms. Hence utmost caution and circumspection should guide the court. The court must advert to the provisions of the Code in this regard, advert to and investigate the allegations thrown against the defendant, satisfy itself that a case for attachment before judgment has been made out and then pass the requisite order. These principles have come to be recognised as mandates to the Court and if the Courts act in breach thereof, such an order of the Court will have to be ignored as the result of dereliction of duty.

5. In the present case, the plaintiff is stated to have-filed an affidavit of one Jagannathan on the question of apprehended alienations to defeat and delay the execution of any decree which may ensue against the defendants. Nothing is disclosed and much less, the Court below has discussed as to the credentials of the said Jagannathan to speak about the material averments and the persuasive or evidentiary value of such



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averments. Furthermore, the Court below has not given a finding that the apprehension of the plaintiff that the first defendant is about to dispose of his properties with a view to defeat and delay the claims of the plaintiff requires acceptance. This certainly will not be a proper exercise of the extraordinary power as contemplated under O. XXXVIII R. 5 of the Code. Ratnam J. in Pappammal vs. Chidambaram, has also taken note of the rule for that the Court must be satisfied from the particulars made available that the defendant is about to dispose of the whole or any part of his property with a view to defeat and delay the claims of the plaintiff. I do not find that the requisite satisfaction has been expressed in the fair order of the Court below. Bare allegations, as stated above, would not suffice the purpose. In this view, I find that the orders passed by the Court below cannot be sustained and they require quashing in appellate jurisdiction.

6. My attention is also drawn to the fact that even at the time of filing of the suit, the defendants have taken notice of the application for attachment before judgment and the first defendant himself has made an endorsement that he will not alienate the properties till the disposal of the petition. Mr. R. Gandhi learned counsel for the defendants, states that his clients will stand by the endorsement, which could enure till the disposal of the suit. Is also recorded. Accordingly, the appeal , is allowed. No costs.



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18. The above observation of the learned Judge of this Court would fortify the arguments that mechanical adaptation of the language of the relevant provision of the Code of Civil Procedure, particularly, Order 38 Rule 5, would not be enough for grant of the relief to the parties.

19. The learned counsel also relied on another decision of this Court reported in (ii) **2009 (5) LW 510 (M.K.Hariprasad vs. Uma Keshav)**. He would refer to paragraphs No.9 to 11 which are extracted hereunder.

9. It is not that whenever any claim for recovery of money is made before a Court of civil law, every application filed for attachment before judgment should be ordered. It is well settled proposition of law that in a given case, asking for a direction to the defendants to furnish security and in default an order of attachment is an extraordinary remedy. It is also settled proposition of law that in a given case if the allegations are bald, the Court has no option than to deny the relief. What is all mentioned in paragraph 11 of the affidavits in support of the applications is as follows:

“11. I reliably understand that the 2nd respondent herein is making hectic efforts to dispose of the land to keep it out of the reach of the creditors and particularly me. I have come to understand



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that the real estate agents in the area have been pressed into service for the purpose and this fact is known to the people stationed locally. If the second respondent is allowed to sell the property, I would be left with no remedy to recover my suit claim and any decree that may be passed would only be on paper, incapable of execution. This would lead to great hardship and loss and could well result in serious miscarriage of justice also.”

10. The very reading of the above would clearly indicate that the allegations are bald. There is no specific averment or allegation made. In the absence of any specific allegation, it is well settled by the Apex Court and also by this Court that this extraordinary remedy should not be granted. It is true that the Court is vested with powers to exercise under Order 38 Rule 5 of CPC. But it remains to be stated that if it is a fit case, it should be exercised.

The learned Single Judge in order to dismiss the applications fortified the decision of the Apex Court reported in (2008) 2 MLJ 1058 = 2008-3-L.W. 744 (SC) (Raman Tech & Process Engg. Co. and another v. Solanki Traders) wherein the Apex Court has held as follows:

“5. The power under Order 38 Rule 5 C.P.C. is a drastic and extraordinary power. Such power should be exercised mechanically or merely for the asking. It should be used sparingly and strictly in accordance with the Rule. The purpose of



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Order 38 Rule 5 is not to convert an unsecured debt into a secured debt. Any attempt by a plaintiff to utilize the provisions of Order 38 Rule 5 as a leverage for coercing the defendant to settle the suit claim should be discouraged. Instances are not wanting where bloated and doubtful claims are realised by unscrupulous plaintiffs, by obtaining orders of attachment before judgment and forcing the defendants for out of Court settlements, under threat of attachment.

6. A defendant is not debarred from dealing with his property merely because a suit is filed or about to be filed against him. Shifting of business from one premises to another premises or removal of machinery to another premises by itself is not a ground for granting attachment before judgment. A plaintiff should show, prima facie, that his claim is bona fide and valid and also satisfy the Court that the defendant is about to remove or dispose of the whole or part of his property, with the intention of obstructing or delaying the execution of any decree that may be passed against him, before power is exercised under Order 38 Rule 5 C.P.C. Courts should also keep in view the principles relating to grant of attachment before judgment (See Prem Raj Mundra v. Md. Maneck Gazi, AIR 1951 Cal. 156, for a clear summary of the principles)."

11. It would be quite clear that either filing of a suit for recovery of money or the averment in the affidavit cannot by itself suffice for granting the relief of attachment before judgment. In order to get the relief of direction for furnishing security or in default,



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attachment before judgment, the plaintiff who seeks the remedy must make a specific averment which would warrant for getting such a relief. In the case on hand, it is quite absent in the considered opinion of the Court. It is a drastic and extraordinary power vested in the hands of the Court under Order 38 Rule 5 of CPC. The Court need not go into at this stage whether the claim is barred by limitation or not. So long as ground is not made out for exercising the powers of the Court under Order 38 Rule 5, the learned Single Judge was perfectly correct in dismissing the applications. Both the appeals do not require admission. Accordingly, they are dismissed. No costs. Consequently, connected MP is also dismissed.

20. In the above case, the Division Bench of this Court has clearly held that the order of attachment being extraordinary remedy that in the absence of any specific allegation of the property being disposed of or alienated, such remedy should not be granted. The Division Bench further held that in order to get the relief of direction for furnishing security or in default, attachment before judgment, the plaintiff who seek remedy would make specific averment which would warrant for getting such a relief. The learned counsel therefore submitted that though there was a trite mention in the plaint about the disposal of the property, however, it cannot be a specific



averment which would entitle the applicant/plaintiff either the relief of furnishing of security or failing to furnish security, attachment of the suit property.

21. The learned counsel further submitted that the absence of any specific counter in response to the present application for attachment, in the face of the legal arguments being advanced, may not be taken to mean that the respondents/defendants have no case against the applicant/plaintiff at all. The point for consideration put-forth before this Court is whether at all the applicants/ plaintiffs have made out a case in terms of the Order 38 CPC Rule 5. In this case, the applicant/plaintiff has not come out with clear case against the respondents/ defendants in this regard. Therefore, the order of attachment sought in the present application is liable to be rejected.

22. By way of reply the learned counsel Mr.George Cheriyan, would submit that it is clearly stated that in paragraph No.28 of the affidavit filed in O.A.Nos.528 and 529 of 2020 that the defendants had been evading refund and are surreptitiously attempting to alienate the plaint schedule property to third party. This fact would get further strengthened by the respondents/defendants own admission in their legal notice dated



due to the applicant/plaintiff can happen only after the sale of the property.

Therefore, the intention of the respondents/defendants is very clearly disclosed in their legal notice issued on their behalf. In the same notice, it is also stated in paragraph No.1 that the respondents/defendants were in urgent need of funds and was thinking of selling the suit property. In the face of their own statement, it is not open to the respondents/ defendants to contend that there was no averment that the suit property would be disposed of. The fact of the matter before this Court is that the payments received by the respondents/ defendants from the applicant/ plaintiff are admitted and intention to sell the property to third parties is also clearly disclosed, both in the counter affidavit and also in the legal notice dated 14.07.2020 of the respondent/defendant. On behalf of the applicant/ plaintiff, it is also disclosed in the affidavit that the defendants are attempting to sell the property surreptitiously. Therefore, the arguments of non-fulfilment of the statutory requirement under Order 38 Rule 5 are without substance.

23. As regards the decision, ***Vol.98 L.W. 78 (Srinivasan,T. v. Srinivasan)*** relied on by the learned counsel for the respondents/defendants, the learned counsel for the applicant/plaintiff would submit that it was a case of filing of affidavit by a third party and the credential of the deponent was under serious doubt and only in that factual context, the



judgment was rendered by the learned single Judge of this Court. As regards the other decision relied on by the learned counsel for the respondents/ defendants, in paragraph No.11, it is stated that in order to get the relief of furnishing security or attachment, a specific averment must be made in the affidavit or in the plaint. The applicant/ plaintiff has specifically averred about the disposal of the property both in the plaint as well as in the affidavit filed in support of the O.A.Nos.528 and 529/2020. According to the learned counsel the attachment under Order 38 Rule 6 CPC is automatic when the defendant failed to show cause or fails to furnish security within the time fixed by this Court. Therefore, the contention that there is no averment in the affidavit filed in support of the present application is to be rejected as being without any merit.

24. The learned counsel finally submitted that no counter affidavit is filed in this application and no reasons have also been spelt out as to why the order passed by this Court on 10.11.2020 has still not been complied with. In fact, in the face of clear admission of receiving the payments, it does not lie in the mouth of the respondent/ defendants to refuse to furnish security by taking refuge under statutory provisions of C.P.C. Therefore, the learned counsel would pray that the attachment would be ordered in order to secure the interest of the applicant/ plaintiff.



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25. Considered the submission of the learned counsel for the parties, perused the pleadings and the materials placed on record.

26. This Court, earlier, passed an order of injunction and also furnishing of security on 10.11.2020. The Learned Judge of this Court, in his order has recorded all the relevant facts relating to the transaction between the applicant/ plaintiff and the respondents/ defendants. After having found a *prima facie* case in favour of the applicant/ plaintiff the injunction not to alienate the suit property and also furnishing of security of the suit claim was ordered by the learned Judge. Thereafter, the matter was adjourned from time to time and this Court was informed when the matter was listed for hearing on 28.04.2021 that the respondents/ defendants failed to comply with the order of furnishing security passed by the learned Judge, vide order dated 10.11.2020. At that point of time, this Court was about to order attachment of the property by allowing the above application. The learned counsel for the respondents/ defendants at this development intervened and submitted that he had serious objection as to the maintainability of the application itself seeking furnishing of security and for ordering of attachment and requested this Court to provide him a chance

to put-forth his submission and thereafter, the matter was adjourned from



time to time.

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27. When this matter was taken up for hearing finally today, the learned counsel Mr.PL.Narayanan appearing on behalf of the respondents made his submissions entirely focussing on the entitlement of the applicant/ plaintiff for grant of the reliefs of furnishing security and the attachment before Judgment being in terms of Order 38 Rule 5 CPC.

28. The learned counsel painstakingly has taken the Court to the averment as contained in the plaint as well as the in affidavit and contended that there was no specific plea as to the fact that the subject property was being disposed of by the respondents/defendants. In the absence of any serious or valid averments, the Courts cannot simply grant such relief in terms of Order 38 Rule 5 CPC.

29. This Court is unable to countenance such arguments considering the present facts and circumstances of the case.

30. First of all, it is a fact that the applicant/ plaintiff has specifically stated both in the plaint as well as in the affidavit filed in support of



attempting to alienate the property by selling the same to third parties. As rightly contended by the learned counsel for the applicant/ plaintiff, both in the reply notice dated 14.07.2021 and in the common counter affidavit filed in response to the applications, the intention to sell the property had been clearly conveyed by the defendants. In the face of their own admission both in the legal notice issued on their behalf and in their counter affidavit contending that they were in need of funds and repayment of the advance received by them from the applicant/ plaintiff would have to be arranged only after the sale of the subject property, the contention of the learned counsel for the respondents/ defendants cannot be either countenanced in law or on facts.

31. This Court on the other hand finds that no sincere effort has been spared by the respondents/ defendants to file any counter affidavit to the present application denying the averments or refuting any allegations of the applicant/ plaintiff. In fact, even in response to Application No.2481/2020 for furnishing of security, no counter appeared to have been filed as on date. In any event, the learned counsel representing the defendants has confined his arguments only on the rigid and strict compliance of Order 38 Rule 5 CPC, which alone could entitle the applicant/ plaintiff to get the reliefs under the said provisions. According to him, a cursory or a perfunctory



mention of likely alienation of the subject property, was not fair enough to satisfy the mandate of Order 38 Rule 5 CPC requirements.

32. From the pleadings and the materials as made available for consideration of this Court, it is admitted that the respondents/ defendants have received advance amounts from the applicant/ plaintiff. In the said circumstances, to what extent the applicant/ plaintiff is entitled to the relief in terms of recovery of the amount is a matter to be decided in the final determination of the suit. However, in the interregnum, on the face of the clear admission by the respondents/ defendants about the receipt of payments, the interest of the applicant/ plaintiff needs to be secured so that in the event of the plaintiff succeeding in the suit at the future point of time, the applicant/plaintiff should not be left in the lurch without being able to realise the fruits of the decree in her favour.

33. Although there is an order of injunction against the respondents/ defendants not to alienate the property, this Court along with the said order of injunction also granted a direction, by directing the respondents to furnish security on or before 14.12.2020. When the order is staring at the respondents/ defendants without meeting the averments as contained in the



2481/2020, the respondents/ defendants are precluded from contending that they are under no obligation to furnish security. The stand taken by the respondents/ defendants is amounting to flouting the directions of this Court brazenly and with impunity. The legal arguments advanced only on the barren letter of Order 38 CPC sans the spirit of its application appear to be a crafty attempt to wriggle out of the obligation for furnishing security in terms of the high pitched hyper technical objection which has to necessarily be rejected outright, when the facts of the case otherwise disclose enough justification for grant of the reliefs.

34. This Court also does not appreciate that on one hand, the respondents/ defendants would not file an affidavit in response to the applications, on the other, would embark upon confining their contentions solely within the frame work of Order 38 Rule 5 and 6 of CPC. At the risk of repetition, it has to be held that in the face of their own admission about the receipt of payments and also in the face of their own statement that they were intending to sell the property as they were in dire need of funds, it is not open to the respondents to raise the contentions that the applicant/ plaintiff has not come out with clear legal case for granting of the relief under Order 38 Rules 5 and 6 of CPC. In the considered opinion of this



and no modicum of conviction is to be given credence to, at all.

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35. The decisions cited in this regard by the learned counsel for the respondents/defendants cannot be made applicable to the present case as those decisions have been rendered in completely different set of factual context which cannot be blindly imported and applied to the present dispute.

36. In any event, the fact of the matter is that the direction of this Court for furnishing security by its order dated 10.11.2020 has still not been complied with and as rightly contended by the learned counsel for the applicant/ plaintiff, the order of attachment is automatic as an inevitable corollary to the failure of furnishing of security in terms of Order 38 Rules 5 and 6 CPC. In the absence of any explanation for non-furnishing of security, the order of attachment is to inevitably follow and this Court has no hesitation in allowing the application.

37. As a consequence of this Court holding that the legal arguments advanced on behalf of the respondents/ defendants with reference to Order 38 Rules 5 and 6 CPC failed to persuade or convince this Court a wee bit, and no arguments or contentions advanced in the realm of the factual matrix

worthy of consideration of this Court, the application has to be necessarily



ordered as prayed for.

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38. Accordingly, Application is allowed. There shall be an order of attachment before judgment in respect of the immovable property described in the schedule to the application.

Sd./-V.P.N.J.
09/09/2021

//Certified to be true copy//

Dated at Madras this the day of 2021.

COURT OFFICER(O.S.)

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