



A.No.5967
in C.S.(comm.div).No.251 of 2022

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S.SOUNTHAR, J.

This application has been filed by the applicants/plaintiffs seeking direction to the respondents/defendants to furnish security for the suit amount and in default seeking attachment of schedule mentioned properties before judgment.

2. The applicants herein laid a suit for recovery of principal amount of Rs.8,56,00,000/- together with interest amount of Rs.2,27,99,250/-. According to the applicants, the 3rd applicant is the Power Agent of other applicants. The applicants herein based on the recommendations of 3rd applicant advanced loan to one Pramod V.Naik, Promotor of the 4th respondent-company. It was claimed by the applicants that respondents 2 and 3 are Ex-directors of 4th respondent-company. It was also claimed that Pramod V.Naik and respondents 2 and 3 stood as personal guarantors for the loan transaction. It was represented by the respondents that the loan amount paid by the applicants would be used for the benefits of running the 4th respondent-company. It was also claimed that the respondent Pramod V.Naik and respondents 2 and 3 had given cheque as a security for the loan amount advanced. In addition to the same, corporate guarantee was given by the 4th respondent.



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3. The aforesaid Pramod V.Naik died on 03.03.2020 without repaying the loan amount received by him. The 1st respondent herein is the wife and only surviving legal heir of Pramod V.Naik. It is stated by the applicants that the liability of the respondents is parallel and co-extensive as they stood as personal guarantors for proper repayment of loan amount obtained by Pramod V.Naik.

4. Since the respondents failed to make any payment, the applicants was constrained to file a suit for recovery of money before this Court on 07.07.2022. Thereafter, the 3rd respondent herein approached the applicants and executed a letter of undertaking on 16.07.2022 acknowledging his liability to pay the principal amount of Rs.8,56,00,000/-. Under the said letter of undertaking, the 3rd respondent allegedly undertook to repay the amount within 12 months and also agreed to hand over the original title documents of his properties at Chennai on or before 01.08.2022. The 3rd respondent failed to act in accordance with the letter of undertaking and consequently, the applicants apprehended that the 3rd respondent was taking steps to alienate the schedule mentioned properties to third parties and consequently, had come up with this application.

5. A reading of affidavit and perusal of the schedule of properties would indicate that Items - 1 to 3 were originally owned by deceased Pramod V.Naik.



The Item-4 belonged to 2nd respondent and Items 5 and 6 belonged to the 3rd respondent.

6. The 1st respondent herein filed a counter affidavit stating that she was not aware of suit money transactions. She also denied Items 1 to 3 belonged to Pramod V.Naik.

7. The 3rd respondent herein filed a counter affidavit stating that notice in the present application was served on his counsel by e-mail on 25.01.2023 and the signed copy of the same was served on 01.02.2023. It was further averred in the counter affidavit of the 3rd respondent that Item-6 of the schedule mentioned property was purchased jointly by him and his wife. It was further stated that he and his wife sold the said property by way of Registered Sale Deed dated 12.01.2023 and the said proceeds were utilised for settlement of educational loan availed for studies of his daughter. It was further stated that Item-5 of the schedule mentioned property was originally owned by his late father and after his death in the year 1992 it devolved upon him, his brother and mother. It was further averred in his counter that his share in the said item was released in favour of his brother by Release Deed dated 02.02.2023. Thus, 3rd respondent claimed that as on today, the only asset held by him was his saving bank account maintained with SBI,



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8. Heard the arguments of the learned counsel for the applicants and respondents.

9. The learned counsel for the applicants mainly contended that the 3rd respondent herein after acquiring knowledge about the pendency of the suit hurriedly sold the Items 5 and 6 that stood in his name to third parties in order to defeat the decree likely to be passed against him. In support of his contention, the learned counsel relied on the orders passed by this Court in ***Sivagangai Municipality vs. C.Meenakshisundaram and another*** reported in **2009 (2) CTC 68**.

10. The learned counsel for the 3rd respondent submitted that the documents relied on by the plaintiffs were obtained by putting the 3rd respondent under duress. The learned counsel by taking this Court to the loan agreement filed by the plaintiffs dated 9th January, 2019 submitted that the stamp paper in which the loan agreement was prepared bears the date as 10.01.2019 and therefore, the same should have been a concocted document. The learned counsel further submitted that in order to seek an order for attachment before judgment, the



applicants should establish (i) *prima facie* case, (ii) the attempt of the respondents to remove or dispose of the assets with intention to defeat the decree likely to be passed. The learned counsel submitted that in the case on hand the applicants failed to establish any *prima facie* case. In support of his contention, he relied on the judgment in ***Raman Tech and Process ENGG. Co. and another vs. Solanki Traders*** reported in ***(2008) 2 SCC 302***.

11. As mentioned earlier, as per the averments in the affidavit, items 1 to 3 of schedule mentioned properties belonged to deceased Pramod V.Naik. Item - 4 belonged to 2nd respondent and Items 5 and 6 belonged to 3rd respondent. In the affidavit filed in support of this application, there is no averment by the applicants that the respondents 1 and 2 are making any attempt to remove or dispose of the properties in their name in order to obstruct or delay the execution. Therefore, in the absence of essential averment as against the respondents 1 and 2, the applicants are not entitled to maintain a prayer under Order 38 Rule 5 of Civil Procedure Code. Further, the sole surviving legal representative of deceased Pramod V.Naik namely the 1st respondent filed a counter affidavit stating that Items-1 to 3 are not the properties of the deceased Pramod V.Naik. The applicants/plaintiffs have not produced any material to show atleast *prima facie* that Items 1 to 3 belong to deceased Pramod V.Naik. In the absence of any



averments in the affidavit stating that his legal representative, namely 1st respondent and the owner of item 4, namely the 2nd respondent are making attempts to remove or dispose of the properties in their name, the present application is liable to be dismissed as against the respondents 1 and 2 are concerned.

12. A perusal of the records would indicate that notice in this application was ordered to the respondents on 23.12.2022, returnable by 23.01.2023. Thereafter, the matter was listed on 23.01.2023 and 3rd respondent entered appearance and took time for filing counter and at his request, the matter was adjourned to 06.02.2023. As per the counter affidavit filed by the 3rd respondent the Item-6 was sold by him and his wife to a third party on 12.01.2023 before receipt of notice in this application.

13. It is the specific case of the 3rd respondent that notice in this application was served on his counsel by e-mail only on 25.01.2023 and the same has not been controverted by applicants by filing any reply to the counter. From the records, it is seen that the batta filed by the applicants in this application in Sr.No.38056 of 2022 was returned on 28.12.2022 and the same was mentioned in the office note dated 19.01.2023. Therefore, till 19.01.2023, the Court notice in



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this application was not served on the 1st respondent. As far as Item-5 suit property is concerned, even as per the admitted case of the 3rd respondent his share in the said property was released in favour of his brother only on 02.02.2023. Subsequent to service of notice in this application. Even prior to service of notice in this application on 23.01.2023, the 3rd respondent appeared before this Court and took time to file counter. Therefore, after taking time in this application in the pretext of filing counter, the 3rd respondent appeared to have released his share in Item-5 of the schedule mentioned property in favour of his brother by way of registered Document No.397/2023 on the file of Sub Registrar, Adyar. The conduct of the 3rd respondent is highly deplorable. Though the applicants have not pleaded specifically that respondents 1 and 2 are attempting to remove or dispose of Items 1 to 4 in order to defeat applicants rights, there are averments in the affidavit to the effect that the 3rd respondent is making attempt to dispose of the properties namely Items-5 and 6 in order to defeat the decree likely to be passed against him. The said averments of the applicants is fortified by the undesirable conduct of the 3rd respondent. However, as on today, both Items 5 and 6 are transferred in favour of the third party. Therefore, the applicants herein is not entitled to maintain a prayer for attachment before judgment when the property is transferred in favour of a third party. However, it is always open to the applicants to challenge the transfer made by the 3rd respondent pending this application in the



manner known to law.

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14. The validity or otherwise of the transfer made by the 3rd respondent pending this application cannot be considered in the absence of the transferee. Therefore, technically the prayer made by the applicants in this application cannot be granted at this stage. However, the applicants are not without any remedy. It is always open to them to impugn the validity of the alienation made by the 3rd respondent in the manner known to law, if so advised.

15. In view of the above, the application is dismissed with liberty to the applicants to explore the other remedies available to them under law as against the 3rd respondent.

12.06.2023

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