Orders Reserved on 14.08.2024	Orders Pronounced on 29.11.2024

Application No.3313 of 2024
in C.S.No.145 of 2024

RMT.TEEKAA RAMAN, J.

The petition is filed under Order XIV Rule 8 of the Original side Rules and under Order XXXVIII Rule 5 of the Code of Civil Procedure, 1908.

2. This petition is filed to direct the respondent to furnish security for the entire suit claim of Rs.1,49,63,167/- failing which to attach the respondent's share over the schedule mentioned properties subject to the existing mortgage before judgment.

3. The plaintiff is the applicant herein. He filed the above suit for recovery of Rs.1,49,63,167/- with interest @ 12% per annum for the principal amount of Rs.1,25,00,000/-. Pending suit, he preferred this application seeking attachment of the property of the respondent/defendant subject to the existing mortgage.

4(a). The case of the plaintiff is that the respondent/defendant and her husband Kannan are operating a restaurant business in the name and style of "Thaligai". The defendant's husband proposed to the plaintiff/petitioner to invest a sum of Rs.1,25,00,000/- and promised to make the petitioner as a shareholder in the to-be incorporated Company.

4(b). According to the petitioner, he has invested a sum of Rs.60,00,000/- by way of cheque on 25.10.2022 and another Rs.65,00,000/- by way of cheque on 11.11.2022 and hence he has paid Rs.1,25,00,000/- to the respondent.

4(c). It is a specific case that loan agreement was entered between the parties acknowledging the receipt of loan. It is an understanding between the parties that the petitioner should become partner or shareholder within three years from the date of agreement. The loan agreement is dated 15.03.2023 and hence it is alleged that the respondent failed to form a company as per the terms of the loan agreement and hence, he filed the present suit.

4(d). He also admitted that the subject matter of the petition is already mortgaged to Religare Finvest Limited and secured loan amount of Rs.1,82,00,000/- on 27.10.2024 and further availed additional loan facility for a sum of Rs.21,14,061/- on 22.03.2016. The present market value of the property is Rs.4,00,00,000/-. Hence, subject to the mortgage, he seeks the above said attachment before judgment.

5. Counter filed.

6. Typeset of papers by both the petitioner and respondent filed. Argument of the petitioner heard.

7(a). The formation of the loan agreement about the investors are not disputed. According to the respondent/defendant Rs.5,00,00,000/- has to be deposited for 37.5% of the shares to the newly incorporated Company. According to the respondent, it is a document loan agreement dated 15.03.2023 though it is titled as a loan agreement, it is only an investment agreement. They referred to Clause 4 to 7 of the said agreement.

7(b). The fact contain that the auditor of the petitioner/plaintiff by name M/s.ASA & Associates handling the documents pertaining to the incorporates of the Company. The incorporate of the Company provided by none other than the auditor of the plaintiff new Company incorporated on 02.10.2023 within the time as contemplated in the loan agreement dated 15.03.2003. It was communicated to both the plaintiff and the plaintiff's own auditor. After incorporation of the due fact, it is alleged by the respondent that the plaintiff refused to enter into a definite agreement and he expressed his inability and make payment of Rs.3,75,00,000/-.

7(c). Hence notice was issued to the respondent, in short, as per the terms of the agreement, the respondent formed the new Company by name M/s.Ksheerannam Foods Private Limited and it was formed in association with the plaintiff's auditor with his knowledge. It is the specific allegation that the plaintiff had concealed the material fact that new company was incorporated in the month of May 2013 and referred in the typeset.

8(a). After hearing the learned counsel for the petitioner and the learned counsel for the respondent, I find that the 'material fact' namely new company was incorporated in the month of May 2013 as could be seen in the typeset of papers filed by the respondent it was established as to assistance of the plaintiff's own auditor assumes significance.

8(b). According to the respondent it is not a loan agreement, but it is an investment agreement. On perusal of Clause 4 to 7 of the said agreement dated 15.03.2023, I find that as per the terms of the agreement dated 15.03.2023 more specifically Clause 4, respondent has to incorporate a new company in order to facilitate the plaintiff to become one of the shareholders of such newly incorporated company. In terms of Clause 5 of the agreement, a sum of Rs.1,25,00,000/- has to be treated as a loan. Till such time the respondent incorporate a new company. Subsequent to such incorporation of the new company, the sum of Rs.1,25,00,000/- has to be treated as an investment. Further, in terms of Clause 6, the plaintiff has the right to become a shareholder of such newly incorporated company at any time within three years from 15.03.2023. The company was in fact incorporated on 02.05.2023 well within the time period of 6 months as contemplated in the loan agreement dated 15.03.2023.

8(c). The "newly incorporated company" was called M/s.Ksheerannam

Foods Private Limited and the certificate of incorporation was communicated to both the plaintiff and by the plaintiff's own auditor M/s.ASA and Associates vide email dated 03.05.2023.

9(a). As per the respondent's version, he has to invest Rs.5,00,00,000/- of 37.5% to share. If such leave to be incorporated, the plaintiff was not interested or willing to invest Rs.3,75,00,000/- after pursuant to the subject loan agreement. I find that the plaintiff has “suppressed the material fact” of incorporation of the new company as contemplated under the loan agreement. Further, it is his own auditor who had coordinated with the defendant for making registration of the company.

9(b). Hence, I find that the petitioner has not made out a *prima facie* case to call upon the respondent to furnish the security and further order attachment before the judgment on his failure to do so does not arise since it is an arguable point with regard to the interpretation of the clauses 4 to 7. Admittedly, the company was incorporated within the stipulated time and the further case is to be adjudicated in the suit. Hence, I am not inclined to grant any relief to the petitioner for the present. Accordingly, this application is dismissed.

29.11.2024

PJL

<u>RMT.TEEKAA RAMAN, J.</u>

PJL

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