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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO.9591 OF 2015

Annarao s/o Govindrao Patil,
Age : 57 years, Occ : Legal Practitioner,
R/o Sham Nagar, Latur,
Taluka and District Latur.

...Petitioner/ Orig. Plaintiff

-VERSUS-

Dnyanoba s/o Vithal Bade,
Age : 35 years, Occ : Agri,
R/o Dhanora (Bk.), Tq.Ahmedpur,
District Latur.

...Respondent/ Orig.Defendant

...

Shri N.V.Gaware h/f Mr. Gajanan K. Sontakke & Mrs.P.G.Sontakke,
Advocates for the Petitioner.

Shri N.P.Patil Jamalpurkar, Advocate for the Respondent.

...

CORAM: RAVINDRA V. GHUGE, J.

DATE :- 22nd September, 2015

Oral Judgment:

1 Not on Board. Mentioned. Taken on Board.

2 Rule. Rule made returnable forthwith and heard finally by the
consent of the parties.

3 The Petitioner is aggrieved by the order dated 14.09.2015 passed by the learned Trial Court below application Exhibit-5 which was filed under Order 38 Rule 5 of the Code of Civil Procedure in RCS No.442/2015.

4 The Petitioner/ Plaintiff is a legal practitioner. The Respondent/ Defendant had engaged the services of the Petitioner in LAR No.1625/2001, in Special Darkhast No.131/2009 as well as in Special Darkhast No.37/2015.

5 The issue is as regards the unpaid professional fees as well as expenses incurred by the Petitioner in conducting the above said three cases on behalf of the Respondent.

6 The Petitioner has preferred Regular Civil Suit No.442/2015 before the Trial Court seeking recovery of the unpaid fees and expenses. An application Exhibit-5 for seeking attachment of the decretal amount in LAR proceedings to the extent of unpaid fees and expenses of Rs.1,42,975/-, was preferred under Order 38 Rule 5 of the Code of Civil Procedure. By the impugned order dated 14.09.2015, the Trial Court has rejected the said application Exhibit-5.

7 The grievance of the Petitioner is that the only property available with the Respondent has been acquired in the acquisition proceedings. There is no other property held by the Respondent. The decretal amount which is being sought to be recovered by the Respondent in Special Darkhast No.37/2015 is the only amount available with him.

8 The Petitioner contends that he had exerted in prosecuting three cases on behalf of the Respondent. The professional fees were agreed for an amount of Rs.15,000/-. The expenditure incurred by the Petitioner in conducting all these cases on behalf of the Respondent were set out in a tabular form below paragraph 11 in the suit.

9 The Petitioner further contends that the Trial Court has rejected the application Exhibit-5 without even framing proper issues as to whether, the Petitioner has made out a prima facie and whether, balance of convenience lies in his favour. The Trial Court has lost sight of the fact that if the decretal amount is withdrawn by the Respondent, the Petitioner would not be able to recover the said amount despite succeeding in the suit.

10 Reliance is placed upon the judgments of this Court in the

matter of *Iridium India Telecom Limited v/s Motorola INC*, 2004 (supp.2) B.C.R. 808 and in *Bandekar Brothers Pvt. Ltd. v/s V.G.Quenim*, 2001(4) B.C.R. 390.

11 The Petitioner, therefore, prays that an amount of Rs.1,42,975/- be preserved/ attached so as to enable the Petitioner to prosecute the suit.

12 Shri N.P.Patil Jamalpurkar, learned Advocate has appeared on behalf of the sole Respondent. He submits that an amount of Rs.15,000/- was agreed by way of professional fees to be paid by the Respondent to the Petitioner/ Plaintiff. No other fees were agreed upon. The expenditure purportedly incurred by the Petitioner is merely stated by way of an averment in the tabular form below paragraph 11 in the suit. Not a shred of evidence in the form of documents have been placed on record to suggest that an amount of Rs.1,42,975/- was owed by the Respondent to the Petitioner.

13 He further submits that the Trial Court has considered the contentions of the litigating sides and has arrived at a conclusion that besides the admission of the Respondent that an amount of Rs.15,000/- is to be paid, there is no prima facie justification in claiming an amount of

Rs.1,42,975/-.

14 He relies upon the judgment of the Apex Court in the matter of *Raman Tech and Process Engineering Company v/s Solanki Traders*, **2008(3) Mh.L.J. 6**, to support his contention that the power under Order 38 Rule 5 of the Code of Civil Procedure has drastic and extraordinary ramifications. The said power has to be exercised with due care, caution and circumspection. Such orders are not to be passed mechanically or at the mere askance. He, therefore, prays that this petition be dismissed.

15 I have considered the submissions of the learned Advocates as have been recorded herein above.

16 It cannot be ignored that the Petitioner has moved an application Exhibit-21 in Special Darkhast No.37/2015 seeking orders from the Executing Court in the nature of preventing the Respondent from receiving the entire decretal amount in the light of the pending RCS No.442/2015. That application was already disposed of by the order dated 07.09.2015, which reads thus:-

- “1) *The third-party Adv.A.G.Patil is hereby directed to file pursis in this matter mentioning the amount claimed in civil suit against the claimant.*
- 2) *After deducting that amount, remaining amount of enhanced compensation shall be paid to the claimant.*

- 3) 15 days time is granted to the third-party Adv.A.G.Patil for bringing the stay order from higher court. If he failed to bring the stay the deducted amount shall be paid thereafter to the claimant.
- 4) The application is disposed of accordingly.”

17 The Petitioner, therefore, was permitted to file a purshis before the Executing Court to indicate the amount which is recoverable from the Respondent. The Petitioner has not challenged the said order.

18 Paragraphs 61 and 68 from the judgment of this Court in the matter of *Iridium India Telecom Ltd. v/s Motorola INC* (supra) read as under:-

“61. When we are examining the case of the appellant for interlocutory order, we are not required to give a finding that they have fool-proof case of fraud or misrepresentation. We have to see whether, the appellant has made out a case of existence of legal rights and their violation due to fraud or misrepresentation as claimed and the resultant prejudice if protection is not granted. We have to see if the appellant has made out a case for protection until the matter goes for trial. In *(Martin Burns Ltd. v. R.N.Bannerjee)*, A.I.R. 1968 S.C. 79 the question before the Apex Court was with respect to the order of the Labour Appellate Tribunal (LAT). The LAT had to determine the material before it as to whether the employer had made out a prima facie case for the termination of the employees service. In that context, the Apex Court in para 27 stated about the prima facie case in the following words:-

“27. A prima facie case not mean a case proved to the hilt out a case which can be said to be established if the evidence which is led in support of the same

were believed. While determining whether a prima facie case had been made out the relevant consideration is whether on the evidence led it was possible to arrive at the conclusion in question and not whether that was the only conclusion which could be arrived at on that evidence.”

If the appellant has no such case, it will certainly not get the interim order, but if it has made out any such case, it cannot be denied it either.

68. The second point for our determination is with respect to the powers of the Court to grant the kind of prayers that are sought through the two motions. The motions seek a direction to furnish security and/or a warrant of attachment under Order XXXVIII Rule 5 of C.P.C.. Those are prayers (a) and (b) of the two motions. Prayers (c) and (d) of the first motion and prayers (d) and (e) of the second motion are in the nature of a garnishee order for attaching the money receivable by the respondents. Order XXXVIII, Rule 5 requires a plaintiff to prima facie show that the respondent (a) is about to dispose of whole or any part of his property, or (b) is about to remove whole or part of his property from the local limits of jurisdiction of the Court with an intent to obstruct or delay the execution of a decree that may be passed against him. In the present case, respondent No.1-Motorola does not have any fixed assets in India. The learned counsel appearing for the appellant made a statement before the learned Single Judge that the appellant was not in a position to show that the respondent was about to dispose of the property with an intent to obstruct or delay the execution of the decree, yet in the peculiar facts and circumstances of the case, the garnishee order was passed with respect to the receivables of the respondents in India and for that purpose reliance was placed on Section 151 of C.P.C..”

Order 38 Rule 5 of the Code of Civil Procedure are to be considered in the backdrop of prima facie evidence that whole property or part of the property deserves to be attached. This Court has held that there ought to be material available before the Trial Court to pass an order under Order 38 Rule 5.

20 In the matter of Bandekar Brothers (supra), this Court has drawn its conclusions in paragraphs 16 and 17 which read thus:-

“16. After perusing the documents/pleadings relied by the respective parties, I am of the opinion that, the trial Court - in the first place, ought to have thoroughly examined the rival claims and found out whether the respondents were liable to pay to the appellants as claimed by the appellants or whether the appellants were liable to pay to the respondents as claimed by the respondents. Unless this opinion was reached, neither the application for attachment before judgment nor the relief of injunction as prayed for could have been considered. Since there is basic error in the approach of the trial Court, it is not possible to sustain the order which is under challenge in the present appeals. The appropriate course in such a situation, as submitted by both the Advocates, would be to set aside this order and remand the matter to the trial Court to adjudicate all the pending applications together in the other three suits referred to above and the applications in the present suit, so that a complete picture emerges before the Court to record on the issue of liability of the parties. The Court may thereafter examine the merits of the contentions. It is made clear that I am not expressing any opinion on the merits of the rival contentions.

17. By now, it is well settled that even for granting

injunction the Court has to record clear finding with regard to three cardinal principles, namely, prima facie case, balance of convenience and irreparable loss. The trial Court has not recorded any finding on these three aspects separately, though it proceeded to grant injunction partly in favour of the appellants. The parameters that would apply while considering the relief of attachment before judgment would be far more severe as the said relief can be granted only in exceptional situations. It would be, therefore, imperative for the trial Court to examine all these aspects afresh on merits and in accordance with law.”

21 This Court has, therefore, held that three cardinal principles for granting injunction are founded upon making out of a prima facie case, balance of convenience and irreparable loss. It is held that these principles would apply even in the case of relief of attachment.

22 I find from application Exhibit-5 and the order impugned that besides the averments and submission of statistical data below paragraph 11 in the suit, there was no shred of evidence in the form of documents before the Trial Court which could have convinced it to grant the said application. There was no material before the Trial Court to prima facie conclude that the Respondent was liable to pay the amount as claimed by the Petitioner. It cannot be overlooked that the Respondent is an agriculturist and the amount at issue is compensation that is to be paid to him on account of acquisition of his land.

23 The Apex Court, in the matter of Raman Tech and Process Engineering v/s Solanki Traders (supra), has concluded that the object of Order 38 Rule 5 is to prevent any Defendant from defeating the realization of the decree that may ultimately be passed in favour of the Plaintiff by attempting to dispose of or alienate his property or remove the movables. Paragraphs 4 and 5 of the said judgment read as under:-

- “4. The object of supplemental proceedings (applications for arrest or attachment before judgment, grant of temporary injunctions and appointment of receivers) is to prevent the ends of justice being defeated. The object of order 38 rule 5 CPC in particular, is to prevent any defendant from defeating the realization of the decree that may ultimately be passed in favour of the plaintiff, either by attempting to dispose of, or remove from the jurisdiction of the court, his movables. The Scheme of Order 38 and the use of the words 'to obstruct or delay the execution of any decree that may be passed against him' in Rule 5 make it clear that before exercising the power under the said Rule, the court should be satisfied that there is a reasonable chance of a decree being passed in the suit against the defendant. This would mean that the court should be satisfied the plaintiff has a prima facie case. If the averments in the plaint and the documents produced in support of it, do not satisfy the court about the existence of a prima facie case, the court will not go to the next stage of examining whether the interest of the plaintiff should be protected by exercising power under Order 38 Rule 5CPC. It is well-settled that merely having a just or valid claim or a prima facie case, will not entitle the plaintiff to an order of attachment before judgment, unless he also establishes that the defendant is attempting to remove or dispose of his assets with

the intention of defeating the decree that may be passed. Equally well settled is the position that even where the defendant is removing or disposing his assets, an attachment before judgment will not be issued, if the plaintiff is not able to satisfy that he has a prima facie case.

5. The power under Order 38 Rule 5 CPC is drastic and extraordinary power. Such power should not be exercised mechanically or merely for the asking. It should be used sparingly and strictly in accordance with the Rule. The purpose of 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 settlement, under threat of attachment.”

(emphasis is mine)

24 It, therefore, has to be borne in mind that Order 38 Rule 5 is not to be exercised mechanically and casually. It is that power which has to be exercised sparingly and so to say in the rarest of rare case where the intended object of the Defendant is prima facie visible in frustrating the claim of the Plaintiff. In the instant case, besides the admission of the Respondent that an amount of Rs.15,000/- is to be paid by way of professional fees, the details put forth by the Petitioner/ Plaintiff below paragraph 11 in the suit, prima facie appear to be a mere statistical data, unsupported and unsubstantiated by any document.

25 In the light of the above, I do not find that the impugned order could be termed as being perverse or erroneous so as to cause an interference.

26 This Writ Petition being devoid of merit is, therefore, dismissed. Rule is discharged.

27 Needless to state, the observations of the Trial Court as well as this Court are in relation to Exhibit-5 and Order 38 Rule 5 of the Code of Civil Procedure.

28 At this juncture, Shri Gaware on behalf of the Petitioner, prays that an amount of Rs.1,42,975/-, as is claimed by the Petitioner and as was kept secured by the Executing Court by its order dated 07.09.2015 below Exhibit-21 in Special Darkhast No.37/2015, be further kept secured for a period of four weeks.

29 Shri Patil vehemently opposes the said request.

30 The proceedings in Special Darkhast No.37/2015 are not a subject matter of adjudication before this Court in any form. This Court is,

therefore, unable to accede to the request of the Petitioner. However, liberty is granted to the Petitioner to make the said request before the Executing Court, if he so desires.

(RAVINDRA V. GHUGE, J.)