

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY.
CIVIL APPELLATE JURISDICTION.**

**APPEAL FROM ORDER NO. 156 OF 2015
WITH
CIVIL APPLICATION NO. 199 OF 2015**

Rachit Packers Pvt. Ltd.	... Appellant.
V/s.	
Newtec Industries & Anr.	... Respondents

Mr. U. B. Nighot for the appellant.
Mr. M. L. Palav i/b Jayshree Thakkar for the respondent.

**CORAM : K. K. TATED, J.
DATED : 10/02/2015.**

PC.:

. Heard learned Counsel for the parties.

2 This appeal from order is preferred by original plaintiff being aggrieved by the order dated 09.10.2014 passed by Bombay City Civil Court, Bombay in Notice of Motion No. 3533 of 2014 rejecting the appellant's prayer for attachment before judgment under Order 38 Rule 5 of the C.P.C.

3 The learned counsel for the appellant plaintiff submits that they filed Summary Suit No. 4598 of 2013 against the respondents defendants for recovery of sum of Rs.52,90,225/- together with further interest due on principal amount of Rs.34,69,000/- along with 18% interest per annum from the date of filing of suit till the payment and/or realisation.

4 The learned counsel for the plaintiff submits that as soon as the plaintiff learnt from the reliable sources that defendants are trying to create third party right, title and interest in respect of the their business premises and they are running in loss, they preferred Notice of Motion under Order 38 Rule 5 of the C.P.C. for following reliefs.

“ a) That till the hearing and final disposal of the suit, the Defendants be ordered and directed to furnish a security in the sum of Rs.52,90,225.00 being the plaintiff's claim in the above suit to the satisfaction of the Registrar, City Civil Court, Mumbai;

b) That till the Security in terms of prayer (a) above is furnished, this Hon'ble Court may be pleased to attach all the movable and immovable properties of the Defendants as mentioned in the Schedule annexed hereto by issuing Warrant of Attachment under Order XXXVIII Rule 5 and Under Order XXI Rules 43 and 54 of the Code of Civil Procedure, 1908;

c) That pending the hearing and final disposal of the suit, the Defendants themselves, their agents, servants and all persons, acting by or under them be restrained by an order and injunction of this Hon'ble Court from disposing of, alienating, encumbering, letting, sub-letting and/or parting with possession of the Defendants assets as mentioned in the Schedule annexed hereto or any part or portion thereof and/or creating any third party rights in any manner whatsoever;

d) Ad-interim reliefs in terms of prayers (b) and (c) hereinabove be granted;

e) Costs of this Notice of Motion be provided for; and

f) For such other and further reliefs as the nature and the circumstances of the case may require and as deem fit and proper by this Hon'ble Court.”

5 The learned Counsel for the plaintiffs submit that in paragraphs 2 and 3 of Affidavit-in-support of Notice of Motion, plaintiffs specifically made out the case on the basis of reliable sources from the market. Paragraphs 2 and 3 of affidavit in support of Notice of Motion, reads

thus:

“ 2. I say that I am aware and also being informed and I came to know from the reliable sources being businessman in Packaging materials that the Defendants are heavily indebted in the market to various including the plaintiffs and they are not in a position to meet with their liabilities in near future as they are facing acute financial difficulties and have closed down their business. I say that I am not able to give the name of the person who has given the said information of the Defendants as it is likely to spoil his business relations with the Defendants and further he requested me not to disclose his name and/or insist for filing his supporting affidavit and I have promised him to save his business relations with the Defendants.

3. I say that the business of the Defendant No.1 at 11/12, Sunita Estate, Opp. State Bank of India, L.B.S. Marg, Bhandup, Mumbai – 400 078, is not running well and is closed down due to the acute financial difficulties. I say that I varily believe that the Defendants might dispose off the said business premises in order to ditch their creditors including the Plaintiffs. I say that I have been informed from reliable sources as stated hereinabove and I believe that the Defendants may also dispose off their respective premises in order to defraud and ditch their creditors including the Plaintiffs which should not be permitted by the Hon'ble Court.”

6 The learned Counsel for the plaintiffs submit that the Trial Court failed to consider that if the respondents defendants creates third party rights, title and interest in respect of property as per Schedule annexed with the Notice of Motion during the pendency of summary suit, nothing will survive in their matter and it will be difficult for them to recover the amount, if they succeed in that proceeding. He further submits that even the defendants in their affidavit-in-reply dated 24.09.2014 in paragraph 6, made a categorical statement that they have no desire to dispose of any premises as alleged in Affidavit-in-support of Notice of Motion. Paragraph 6 of the said affidavit reads

thus:

“6. With reference to para 4 of the Affidavit in support of Notice of Motion of Plaintiffs, I deny that there is any desirous to dispose of any premises as alleged in said para or any other premises or otherwise. I deny that the Plaintiffs are creditors as alleged in the said para and we have filed defences in our reply to the Summons for Judgment.”

7 On the basis of these submissions and paragraph 6 of Affidavit-in-reply filed by the defendants, the learned Counsel for the plaintiffs submit that this Hon'ble Court be pleased to set aside the impugned order passed by the Trial Court and made Notice of Motion absolute restraining defendants from creating any third party rights, title and interest in respect of property as described in Schedule annexed to the Notice of Motion and or direct defendants to provide security for satisfaction of the plaintiffs' claim.

8 On the other hand, the learned Counsel for the defendants vehemently opposed the present Appeal from Order. He submits that the plaintiffs have not made out any prima facie case as required under Order 38 Rule 5 of the CPC. He further submits that in the entire Affidavit-in-support of Notice of Motion, plaintiffs have not disclose the source of information on what basis they made allegation in paragraphs 2 and 3 of that affidavit-in-support of Notice of Motion. He further submits that the Trial Court rightly relied on the Judgment of our High Court in the matter of ***Herald Engineers V/s. Wonderpack Industries Pvt. Ltd. reported in 2013 (4) Mh. L. J. 217*** rejected plaintiffs' Notice of Motion. Hence, there is no substance in the present Appeal from Order.

9 I heard both the sides at length. There is no dispute that the plaintiffs have filed summary suit for recovery of sum of Rs. 52,90,225/- with future interest. The summons for judgment preferred by the plaintiffs is pending for hearing and final disposal on its own merits. Bare reading of affidavit-in-support of Notice of Motion shows that plaintiffs have not disclosed the source of information on what basis they are stating that defendants are creating third party right in respect of their properties to defeat the plaintiff's claim. Even, there is no material on record to show that defendants have closed their business. The defendants specifically stated in their affidavit-in-reply that they are conducting the business from the same premises and they have no desire to dispose of the properties.

10 Considering the above facts and the law declared by our High Court in the Matter of *Herald Engineers (Supra)*, I am of the opinion that appellant has not made out any case to interfere with the impugned order dated 09.10.2014 passed by the Trial Court in Notice of Motion no. 3533 of 2014.

11 Hence, Appeal from Order is dismissed. No order as to costs.

12 In view of dismissal of the Appeal from Order, nothing survives in the Civil Application. Same is also dismissed as infructuous.

(K.K.TATED, J.)