

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

**APPEAL FROM ORDER NO. 886 OF 2014
WITH
CIVIL APPLICATION NO. 1061 OF 2014**

M/s. Amit Aluminium & Anr. ... Appellants.
V/s.
M/s. R.W. Sawant & Co. & Ors. ... Respondents

Mr. Deepal Natu with Sunita Gahane i/b N.D. Deepak & Co. for the
appellant.

Mr. Sachin Tigde with Laxman Thorat for the respondent nos. 1 to 3.

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

P.C.:

. Heard learned Counsel for the parties.

2 This Appeal from Order is preferred by original plaintiffs
challenging the order dated 30.04.2014 passed by the Joint, Civil
Judge, Senior Division, Thane below Exh.5 in Special Civil Suit no. 569
of 2012 rejecting Appellants' application under Order 38 Rule 5 of
C.P.C. for attachment before judgment.

3 The appellants plaintiffs filed Special Civil Suit no. 569 of
2012 in the Court of Civil Judge, Senior Division, Thane for recovery of

amount of Rs.41,23,922/- with 6% interest from the respondents defendants. In that suit, the Appellants plaintiffs filed the application below Exh.5 dated 25.09.2012 for attachment before judgment of respondents' defendants' property. That application was rejected by the Trial Court on 30.04.2014 on the ground that appellants plaintiffs failed to make out prima facie case for the recovery of amount claimed in the Special Civil Suit no. 569 of 2012. Hence, the present Appeal from Order.

4 The learned Counsel Mr. Deepak Natu appearing on behalf of appellants plaintiffs submits that Court below erred in coming to the conclusion that Appellants plaintiffs are not entitled for any relief as per Order 38 Rule 5 of the C.P.C. He submits that admittedly the respondents defendants issued a letter dated 10.04.2010 in respect of allotment of Flat No. D/403 on 4th floor of the proposed “D” building in the project known as Devashree Park, Kolshet Road, Thane(W) in favour of the Appellants. He submits that in the said letter the defendants specifically stated that total consideration for the allotment of flat no. D/403 is of Rs.29,63,000/- alongwith one open car parking space on the basis of built up area (equivalent to 860 sq.ft. salable area). He further submits that the defendants in the same letter stated

that they will adjust the amount due and payable by them to the plaintiffs towards the bills raised by M/s. Amit Aluminium, Thane by way of price of the said flat. He further submits that plaintiffs have apprehension that defendants may create third party rights, title and interest in respect of suit flat to defeat the decree, if any, passed against them. He further submits that in the interest of justice during the pendency of suit preferred by them, Court should pass an order of attachment before judgment in respect of suit flat no. D/403, failing which irreparable loss and injury will be caused to the appellants.

5 In support of his contention, the learned Counsel for the appellants relied on the Judgment of the Apex Court in the matter of ***Rajendran & Ors. V/s. Shankar Sundaram & Ors., reported in 2008 (2) SCC 724***, particularly paragraphs 11 and 12.

6 On the basis of these submissions and the law declared by the Apex Court, the learned Counsel for the appellants submits that this Hon'ble court be pleased to set aside the impugned order dated 30.04.2014 passed by the Civil Judge, Senior Division, Thane below Exh.5 and allow appellants' application dated 25.09.2012 restraining respondents defendants from creating any third party rights, title and

interest in respect of the property as mentioned in Annexure-C to the plaint i.e. allotment letter dated 10.04.2010.

7 On the other hand, the learned Counsel Mr. Sachin Tigde appearing on behalf of respondents defendants vehemently opposed the present Appeal from Order. He submits that Special Civil Suit no. 569 of 2012 filed by the Appellants Plaintiffs for recovery of the amount, is pending for hearing and final disposal on its own merits. He submits that the respondents defendants already filed their written statement and denied the claim made by the Appellants Plaintiffs. He submits that Appellants Plaintiffs have not made any averments about their apprehension in respect of selling of the entire property by the respondents defendants. He submits that Appellants Plaintiffs have failed to make out any case as per Order 38 Rule 5 of C.P.C. for attachment before judgment.

8 In support of his contention, the learned Counsel for the respondents defendants relies on the Judgment of the Apex Court in the matter of *Raman Tech. & Process Engg. Co. & Anr. V/s. Solanki Traders, reported in 2008 (2) SCC 302*. He mainly relies on paragraph 4 of the Judgment, which reads thus:

“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 that 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 5 CPC. 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.”

9 On the basis of this submissions, the learned Counsel for the respondents/defendants submits that there is no substance in the present Appeal from Order and same be dismissed with costs.

10 I heard both the sides at length. Admittedly, in the present proceeding, Special Civil Suit no. 569 of 2012 filed by the Appellants Plaintiffs for recovery of sum of Rs.41,23,922/- is pending before the Trial Court for decision on its own merits. The respondents defendants have already filed their written statement denying the Appellants' claim. Till today the Trial Court has not passed any decree. Apart from that, the application filed by the Appellants Plaintiffs below Order 38 Rule 5 of C.P.C. for attachment before judgment does not disclose any case. The Appellants Plaintiffs have not made any statement in their application about their apprehension that respondents defendants are going to dispose of their entire property before passing any decree by the Trial Court to defeat the Appellants Plaintiffs claim. Nowhere, it is stated in the said application that respondents defendants have no other property except Flat i.e. D-304.

11 The remedy of attachment before attachment is an extraordinary remedy. The Court is required to act with utmost circumspection and with maximum care and caution before issuing an order of attachment. As the attachment before judgment is likely to cause irreparable damage to, and affect the reputation and business of, the party against whom it is passed; the Court should be very slow in

exercising the power unless it is established that having regard to the facts and circumstances of the case, it is necessary to pass such an order. A care should be taken to see that it is not used as an instrument to coerce the opponent to settle the matter according to the dictates of the party who obtains the order of attachment before judgment.

12 The Calcutta High Court in **R.B.M. Pati Joint Venture Vs. Bengal Builders** AIR 2004 Cal 58 held as under:

“14. Perusal of the law relevant for the purpose as contained in Rule 5 of Order 38 of the Code, is felt relevant. Therefore, the said provision is quoted hereinabove:--

"Attachment before Judgment

R. 5. Where defendant may be called upon to furnish security for production of property.-- (1) Where, at any stage of a suit, the Court is satisfied, by affidavit, or otherwise, that the defendant, with intent to obstruct or delay the execution of any decree that may be passed against him,--

(a) is about to dispose of the whole or any part of his property; or

(b) is about to remove the whole or any part of his property from the local limits of the jurisdiction of the Court,

the Court may direct the defendant, within a time to be fixed by it, either to furnish security, in such sum as may be specified in the order, to produce and place at the disposal of the Court, when required, the said property or the value of the same, or such portion thereof as may be sufficient to

satisfy the decree, or to appear and show cause why he should not furnish security.

(2) The plaintiff shall, unless the Court otherwise directs, specify the property required to be attached and the estimated value thereof.

(3) The Court may also in the order direct the conditional attachment of the whole or any portion of the property so specified.

(4) If an order of attachment is made without complying with the provisions of Sub-rule (1) of this rule, such attachment shall be void."

15. The said Rule 5 is under the heading Attachment before judgment. It appears from the said provision that Court was entitled to exercise the power for attachment before judgment only when the defendant with intent to obstruct or delay the execution of any decree that may be passed against him, is about to dispose of the whole or any part of his property from the local limits of the jurisdiction of the Court. It appears from the impugned order that the said aspects were not at all taken into consideration and no satisfaction in that respect was recorded by the trial Court as appears from the impugned order. Law in this regard as settled in the case of Premraj Mundra (supra) is relevant and in paragraph 10 of the said judgment, guiding principles have been noted as follows :--

"10. From a perusal of all the authorities, I think that the following guiding principles to be deduced :

(1) That an order under Order 38 Rules [5](#) & [6](#), can only be issued, if circumstances, exist as are stated therein.

(2) Whether such circumstances exist is a question of fact that must be proved to the satisfaction of the Court.

(3) That the Court would not be justified in issuing an order for attachment before judgment, or for security, merely

because it thinks that no harm would be done thereby or that the defts. would not be prejudiced.

(4) That the affidavits in support of the contention of the applicant, must not be vague, & must be properly verified. Where it is affirmed true to knowledge or information or belief, it must be stated as to which portion is true to knowledge the source of information should be disclosed, and the grounds for belief should be stated.

(5) That a mere allegation that the debt. was selling off his properties is not sufficient. Particulars must be stated.

(6) There is no rule that transaction before suit cannot be taken into consideration, but the subject of attachment before judgment must be to prevent future transfer or alienation.

(7) Where only a small portion of the property belonging to the debt, is being disposed of, no inference can be drawn in the absence of other circumstances that the alienation is necessarily to defraud or delay the pltf.'s claim.

(8) That the mere fact of transfer is not enough, since nobody can be prevented from dealing with his properties simply because a suit has been filed; There must be additional circumstances to show that the transferrer is with an intention to delay or defeat the plft.'s claim. It is open to the Court to look to the conduct of the parties immediately before suit, and to examine the surrounding circumstances, and to draw an inference as to whether the debt, is about to dispose of the property, and if so, with what intention. The Court is entitled to consider the nature of the claim and the defence put forward.

(9) The fact that the debt, is in insolvent circumstances or in acute financial embarrassment is a relevant circumstance, but not by itself sufficient.

(10) That in the case of running businesses, the strictest caution is necessary and the mere fact that a business has been closed, or that its turnover had diminished, is not enough.

(11) Where however the deft, starts disposing of his properties one by one, immediately upon getting a notice of the plft.'s claim, and/or where he had transferred the major portion of his properties shortly prior to the institution of the suit, and was in an embarrassed financial condition, these were grounds from which an inference could be legitimately drawn that the object of the deft. was to delay and defeat the plft.'s claim.

(12) Mere removal of properties outside jurisdiction, is not enough, but where the deft. with notice of the plft.'s. claim, suddenly begins removal of his properties outside the Jurisdiction of the appropriate Court, and without any other satisfactory reason, an adverse inference may be drawn against the deft. where the removal is to a foreign country, the Inference is greatly strengthened.

(13) The deft. in a suit is under no liability to take any special care in administering his affairs, simply because there is a claim pending against him. Here neglect, or suffering execution by other creditors, is not a sufficient reason for an order under Order [38](#) of the Code.

(14) The sale of properties at a gross undervalue, or benami transfers, are always good indications of an intention to defeat the plft.'s claim. The Court must however be very cautious about, the evidence on these points and not rely on vague allegations."

13 The Authority cited by the learned Counsel for the Appellants Plaintiffs is not applicable to the facts and circumstances of

the present case. In that case, the decree was passed by the Competent Court and therefore, the Apex Court held that to protect the interest of decree holder Court can pass the attachment before judgment. In the present case, there is no decree passed by the Trial Court. Apart from that, Appellants Plaintiffs have not made out any case in their application. The Apex Court in the matter of Raman Tech. & Process Engg. Co. (Supra) specifically held that it is well settled that merely having a just or valid claim or a prima facie case, will not entitled 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 intension of defeating the decree that may be passed. In the present proceeding, plaintiffs have not made out these grounds.

14 Hence, I do not find any substance in the Appeal from Order. Same is rejected.

15 In view of rejection of Appeal from Order, nothing survives in the Civil Application. Same is also rejected.

(K.K.TATED, J.)