

THE HON'BLE SRI JUSTICE M.SEETHARAMA MURTI

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Civil Revision Petition Nos.4915 and 4978 of 2015

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COMMON ORDER:

The CRP.no.4978 of 2015, under Article 227 of the Constitution of India, is filed by the petitioner/plaintiff assailing the order dated 01.09.2015 of the learned IX Additional District Judge, Chittoor passed in IA.no.17 of 2014 in OS.no.29 of 2014 filed under Order XXXVIII Rule 5 of the Code of Civil Procedure, 1908 ('the Code', for brevity) requesting to order attachment before judgment of the petition schedule property.

1.1 The CRP.no.4915 of 2015, under Article 227 of the Constitution of India, is also filed by the plaintiff assailing the order dated 01.09.2015 passed in IA.no.19 of 2014 in IA.no.17 of 2014 in the aforementioned suit filed by the defendant under Order XXXVIII Rule 5 read with Section 151 of the Code requesting the Court to accept the undertaking given by him in the above mentioned application filed for attachment before judgment and not to order attachment of the petition schedule property.

2. I have heard the submissions of the learned counsel for the revision petitioner/plaintiff ('the plaintiff', for brevity) and the learned counsel for the respondent/defendant ('the defendant', for brevity). I have perused the material record.

3. The facts, which are necessary for consideration, in brief, are as follows:

The plaintiff having brought a suit against the defendant for recovery of money on the foot of a promissory note for Rs.10,00,000/- had filed an interlocutory application in IA.no.17 of 2014 under Order XXXVIII Rule 5 of the Code requesting to order attachment before judgment of the property of the defendant viz., a residential house bearing municipal bearing no.14-1208 (part) – Ground floor, RCC house, first floor ACC sheet with vacant house site

situate within the respective boundaries stated in the schedule annexed to the petition. The trial Court granted an *ex parte* interim order in the aforementioned interlocutory application by directing the defendant to furnish security for a sum of Rs.11.00 lakhs or to appear and show cause why she should not furnish security within 48 hours after the receipt of the notice in the said application. In the said interim orders, the trial Court had also directed that the property shall be attached on failure of the defendant to either furnish security or showing cause for not furnishing such security. The defendant while resisting the said application by filing a counter had also filed the other interlocutory application in IA.no.19 of 2014 requesting the Court to raise the interim order of attachment and dismiss the petition filed by the plaintiff for attachment before judgment of the petition schedule property after accepting the undertaking given by her to the effect that she would not alienate the property. That application was resisted by the plaintiff by filing a counter. The trial Court by separate orders dated 01.09.2015, disposed of both the applications; the application filed by the defendant was allowed; and, after duly accepting the undertaking given by the defendant, the interim order of attachment before judgment of the petition schedule property was raised. Therefore, the aggrieved plaintiff filed these two revision petitions before this Court.

4. The case of the plaintiff in support of his request for ordering attachment before judgment of the petition schedule property of the defendant and for making absolute the interim attachment already ordered by the Court without accepting the undertaking given by the defendant, in brief, is as follows:

The suit is filed by him for recovery of money on the foot of a promissory note for Rs.10.00 lakhs. The said amount was borrowed by the defendant to meet her family necessities and for construction of a residential building at Ramnagar Colony, Chittoor Town and District. She had agreed to repay the amount borrowed with interest at 24% per annum simple and had duly executed the suit promissory note in favour of the plaintiff. In spite of oral requests, the defendant did not repay the amount due to the plaintiff under the suit promissory note. The plaintiff reliably came to know that the defendant is

making hectic attempts to alienate her only property and is trying to shift her family to some other place. Therefore, and in view of the urgency the plaintiff could not issue a legal notice prior to the institution of the suit. The plaintiff came to know through third parties that the defendant is making serious and hectic efforts to alienate her only property which is described in the petition schedule to third parties and to migrate along with her family to some other place only with a view to defraud the plaintiff and defeat the suit claim. Negotiations for sale by her are going on. The affidavit given by a third party in proof of the said contentions is also filed. Except the petition schedule property, the defendant is not having any other immovable or movable properties of her own. If the defendant succeeds in alienating the only property, which is mentioned in the petition schedule, the plaintiff will not be in a position to recover the debt due under the decree that may ultimately be passed. Hence, the application is filed seeking attachment before judgment of the petition schedule property of the defendant. If attachment is not ordered, the plaintiff suffers serious loss and hardship and the very purpose of the filing of the suit would be defeated. Though the defendant has given an undertaking that she is not intending to sell the suit schedule property to any third parties and that she had stated in the undertaking affidavit that she is prepared to abide by the orders of the Court, she had further stated in her undertaking affidavit and in her pleading that the petition for attachment before judgment is filed to defame her and to make her to surrender to the illegal demands of the plaintiff. The said allegations are ridiculous and invented. The undertaking memo and the affidavit of the defendant cannot be considered and accepted as they are against the principles of natural justice. Order XXXVIII Rule 5 of the Code does not contemplate and does not permit the defendant to give an undertaking in the petition filed for attachment before judgment. The said provision only contemplates for ordering attachment before judgment of the petition schedule property and prescribes the procedure in that regard. The said provision is enacted with an object to give inviolability to the Court decrees and avoid unnecessary and further complications and to enable the Decree Holder to enjoy the fruits of the decree that may ultimately be passed. Acceptance of undertaking in a

petition for attachment before judgment is against law. The defendant has failed to comply with the interim order whereby she was directed to either furnish security or show cause as to why she should not furnish the security. On failure of the defendant to comply with the said orders, the interim attachment order has become operative. The defendant is still making serious attempts to sell the schedule property. There are no merits in the request of the defendant to accept her undertaking affidavit and raise the interim order of attachment. The Court below grossly erred in accepting the undertaking given by the defendant and raising the interim order, which has become operative.

5. Per contra, the case of the defendant, in brief, is this:

She had never borrowed any amount much less the amount of Rs.10,00,000/- from the plaintiff. It is false to say that she had executed the suit promissory note. It is a rank forgery. Therefore, there was no occasion for the plaintiff to demand the defendant to repay the alleged debt. The allegations in the plaint and the affidavit filed in support of the application seeking attachment before judgment are invented. The said allegations are denied. This defendant has no intention to defraud anybody. This defendant had already filed, along with her application, an affidavit undertaking not to sell the plaint schedule property till the disposal of the suit. The third party affidavits and the contents therein are created for the purpose of the petition filed by the plaintiff. The application for attachment before judgment is filed by the plaintiff only with an intention to achieve an illegal object. The mandatory provisions of law, which govern the grant of an order of attachment, are not complied with. Since this defendant has no intention to sell the property and has given an affidavit undertaking not to alienate the property till the disposal of the suit and had further undertaken to abide by the orders that may be passed by the Court while accepting the undertaking, the undertaking may be accepted and the interim order of attachment may be raised in the interests of justice as otherwise the defendant would suffer serious and irreparable loss. The Court below had rightly accepted the undertaking of the defendant and had rightly raised the interim order of

attachment; as the undertaking given by the defendant and accepted by the Court below adequately protects the interests of both the parties and as the said orders are passed on equitable consideration, the said orders impugned in these revisions do not call for interference.

6. I have given earnest consideration to the facts and the submissions. Before proceeding further it is necessary to refer to the provision of law and also the decisions cited.

Order XXXVIII Rule 5 of the Code reads as under:

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.

In the decision in **Raman Tech. & Process Engg.Co., v. Solanki Traders**^[1] the Supreme Court explained the object, nature and scope under the said provision of law as follows:

“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 realisation 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.

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 utilise the provisions of Order 38 Rule 5 as a leverage for coercing the defendant to settle the suit claim should be discouraged.....

6. A plaintiff should show, prima facie, that his claim is bonafide and valid and also satisfy the court that the defendant is about to remove or dispose of the whole or part of his property, with the intention of obstructing or delaying the execution of any decree that may be passed against him, before power is exercised under Order 38 Rule 5 CPC. Courts should also keep in view the principles relating to grant of attachment before judgment. (See *Premraj Mundra v. Md. Manech Gazi* [AIR 1951 Cal 156] for a clear summary of the principles).”

In *Premraj Mundra v. Md. Manech Gazi*^[2] after referring to a few

authorities, the following guiding principles are deduced:

- (1) That an order under O.38, Rr.5 and 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 debts. would not be prejudiced.**
- (4) That the affidavits in support of the contentions of the applicant, must not be vague, and 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 and his properties is not sufficient. Particulars must be stated.**
- (6) There is no rule that transactions before suit cannot be taken into consideration, but the object 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 transfer is with an intention to delay or defeat the pltf.'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 has diminished, is not enough.**

(11) Where however the deft. starts disposing of his properties one by one, immediately upon getting a notice of the pltf.'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 pltf's. claim.

(12) Mere removal of properties outside jurisdiction, is not enough, but where the deft. with notice of the pltf'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. Mere neglect, or suffering execution by other creditors, is not a sufficient reason for an order under O.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 pltf's. claim. The Court must however be very cautious about the evidence on these points and not rely on vague allegations.

7. I have gone through the decisions cited. There is no dispute about the legal propositions. In the case on hand, the vital questions are – ‘whether or not the law permits acceptance of the undertaking given by the defendant?’ and, if not, whether or not the interim order made in the application filed for attachment before judgment of the property should be made absolute? What shall be the appropriate order to be made in the matter?

8. The facts and the contentions of the parties are already stated supra. The plaintiff had categorically pleaded that the defendant having borrowed the principal sum mentioned in the promissory note had executed the suit promissory note agreeing to repay the debt with interest at 24% per annum simple and that despite oral requests she did not repay the debt. He had further pleaded that he reliably came to learn through third parties that the defendant is making hectic attempts and serious efforts to alienate her only

property, that is, the petition schedule property and is further trying to shift her family to some other place to defraud the plaintiff and to delay and defeat the just claim of the plaintiff. It is also his case that in view of the said facts and the urgency in the matter, a legal notice could not be issued before instituting the suit. It is further averred in the affidavit of the plaintiff as follows: "Negotiations for sale are going on. The affidavits of third parties are also filed in support of the case of the plaintiff. The defendant has no other properties except the petition schedule property; and that if she alienates her only property the plaintiff will not be in a position to realize the debt due under the decree that may ultimately be passed. Therefore, it is in the interests of justice to order attachment before judgment." In fact the trial court by an interim order directed the defendant to furnish security within 48 hours or appear and show cause as to why such security shall not be furnished. In its order the trial Court had also directed that the property shall be attached on failure of the defendant to comply with either of the above said directions. The defendant while denying the claim of the plaintiff and *inter alia* contending that the suit promissory note and third party affidavits are created had denied her liability and had pleaded that she has no intention to alienate the property or defraud anybody. She had further given an undertaking affidavit stating that she is not going to alienate the property and that she undertakes not to alienate her property till the disposal of the suit. Having given such an undertaking affidavit and filed an undertaking memo, she had requested the trial Court to accept her undertaking and raise the interim order of attachment and dismiss the application of the plaintiff.

9. It is pertinent to note from the facts borne out by record that no motive *prima facie* was attributed to the plaintiff to bring a false suit against the defendant. The defendant did not state that she is a solvent person and that she is having properties other than the petition schedule property. She did not admittedly appear before the trial Court within the time frame fixed by the Court and did not either furnish security as directed by the trial court or appear and show any cause as to why such security shall not be furnished. However, she had filed a counter resisting the application seeking

attachment before judgment and also an independent petition along with her undertaking affidavit. On an overall consideration of the facts and the submissions and considering that the amount due is a substantial amount, this court is satisfied that a *prima facie* case is made out and the factual and legal requirements for ordering attachment before judgment of the petition schedule property after following the due procedure contemplated under law are satisfied, in the facts and circumstances of the case.

10. Coming now to the core question whether the undertaking affidavit of the defendant shall be accepted or not, what is to be noted is that in case of an injunction there is a settled legal position that when an undertaking not to interfere with the possession of the plaintiff is given, the court can decline to grant a temporary injunction by recording the undertaking. But this court did not come across any decisions laying down an established position to the effect that an undertaking affidavit filed by the defendant can be accepted while considering an application filed by the plaintiff for attachment before judgment of immovable property. The learned counsel for both the sides did not bring to the notice of this Court any decision on the said aspect directly applicable to the facts of the case. Be that as it may.

11. It is apt to call in aid the decision in **Thomson Press (India) Ltd., v. Nanak Builders & Investors P. Ltd.**,^[3]. In this cited case, the question that fell for consideration is this:

“Whether the Appellant who is the transferee *pendente lite* having notice and knowledge about the pendency of the suit for specific performance and order of injunction can be impleaded as party under Order 1 Rule 10 on the basis of sale deeds executed in their favour by the Defendants Sawhneys’.

It is trite to mention that the facts of the cited case disclose that after the institution of the suit, the counsel who had appeared for the defendants gave an undertaking not to transfer and alienate the suit property and that notwithstanding the order passed by the Court recording the undertaking given on behalf of the defendants and having full notice and knowledge of all these facts the sister concern of the appellant entered into series of

transactions and finally the appellant M/s.Thomson Press got a sale deed executed in their favour by the defendants in respect of the suit property. Therefore, the alienation in that case was made in violation of an undertaking given to the Court and recorded by the Court.

Hon'ble Sri Justice M. Yusuf Eqbal, in his Lordship's judgment rendered in the cited case finally held as under:

Having regard to the law discussed hereinabove and in the facts and circumstances of the case and also for the ends of justice the Appellant is to be added as party-Defendant in the suit. The appeal is, accordingly, allowed and the impugned orders passed by the High Court are set aside.

Before parting with the order, it is clarified that the Appellant after implement as party-Defendant shall be permitted to take all such defences which are available to the vendor Sawhneys' as the Appellant derived title, if any, from the vendor on the basis of purchase of the suit property subsequent to the agreement with the Plaintiff and during the pendency of the suit.

Hon'ble Sri Justice T.S. Thakur, (as His Lordship then was) in his Lordship's judgment rendered in the cited case held as under:

There is, therefore, little room for any doubt that the transfer of the suit property *pendete lite* is not void ab initio and that the purchaser of any such property takes the bargain subject to the rights of the Plaintiff in the pending suit. Although the above decisions do not deal with a fact situation where the sale deed is executed in breach of an injunction issued by a competent Court, we do not see any reason why the breach of any such injunction should render the transfer whether by way of an absolute sale or otherwise ineffective. The party committing the breach may doubtless incur the liability to be punished for the breach committed by it but the sale by itself may remain valid as between the parties to the transaction subject only to any directions which the competent Court may issue in the suit against the vendor.

We are not on virgin ground in so far as that question is concerned. Decisions of this Court have dealt with similar situations and held that a transferee *pendente lite* can be added as a party to the suit lest the transferee suffered prejudice on account of the transferor losing interest in the litigation post transfer.

His Lordship having then referred to the ratio in the decision in **Khemchand Shanker Choudhary v. Vishnu Hari Patil** [(1983) 1 SCC 18], further held as under:

To the same effect is the decision of this Court in *Amit Kumar Shaw v.. Farida Khatoon* (2005) 11 SCC 403 where this Court held that a transferor *pendente lite* may not even defend the title properly as he has no interest in the same or collude with the Plaintiff in which case the

interest of the purchaser *pendente lite* will be ignored. To avoid such situations the transferee *pendente lite* can be added as a party Defendant to the case provided his interest is substantial and not just peripheral.

Finally, his Lordship referred to the decision in **Rikhu Dev, Chela Bawa Harjug Dass v. Som Dass (deceased) through his Chela Shama Dass** [(1976) 1 SCC 103] and summed up the findings as follows:

- (1) The Appellant is not a bona fide purchaser and is, therefore, not protected against specific performance of the contract between the Plaintiff's and the owner Defendants in the suit.
- (2) The transfer in favour of the Appellant *pendente lite* is effective in transferring title to the Appellant but such title shall remain subservient to the rights of the Plaintiff in the suit and subject to any direction which the Court may eventually pass therein.
- (3) Since the Appellant has purchased the entire estate that forms the subject matter of the suit, the Appellant is entitled to be added as a party Defendant to the suit.
- (4) The Appellant shall as a result of his addition raise and pursue only such defenses as were available and taken by the original Defendants and none other.

Thus from the ratio in the latest decision it is clear that in a given case, if any alienation is made violating an injunction order not to alienate the property or an undertaking given and recorded by the Court, such violator is liable to be hauled up for contempt; but, the alienation is not void. However, such transfer *pendente lite* is effective in transferring title to the purchaser but such title shall remain subservient to the rights of the plaintiff in the suit and subject to any direction which the Court may eventually pass therein. Therefore, mere recording of undertaking given does not prevent the defendant from alienating/transferring the property; As per the rule of *lis pendens* the transfer is valid but cannot affect the rights of a party arising out of the suit. Thus any alienation or transfer of a property involved in the suit *pendente lite* whether in violation of an order of the Court or an undertaking recorded by the Court is not invalid even in a suit where the subject matter of the suit is the very same property which is transferred in violation of an order of the Court or an undertaking recorded by the Court. In a suit for perpetual injunction, the main relief is a larger relief when juxtaposed with the relief of temporary injunction. That is not so in the case of a suit for recovery of money where an interlocutory application is filed for attachment before judgment of an immovable property. In the case of an application filed for attachment before

judgment in a suit for recovery of money, the property to be attached and which is the subject matter of such application is not the property involved in the suit and it cannot be termed as the suit property as the suit is one for recovery of money. Thus, in a suit for recovery of money, the property, which is the subject matter of the application filed for attachment before judgment, cannot be said to be suit property being not directly related to the main relief, which is only recovery of money. The decree that would eventually be granted in the suit for recovery of money would only be a decree for money. Such decree would not affect the rights in any immovable property as the subject matter of the suit is money and not any immovable property; therefore, the rule enshrined in the doctrine of *lis pendens* dealing with alienation of suit property during the pendency of the suit does not apply to a suit for recovery of money as any immovable property is neither directly or specifically involved in the suit or the proceeding.

It is significant to refer to Section 64 of the Code which reads as under:

64. Private alienation of property after attachment to be void.-

(1) Where an attachment has been made, any private transfer or delivery of the property attached or of any interest therein and any payment to the judgment debtor of any debt, dividend or other moneys contrary to such attachment, shall be void as against all claims enforceable under the attachment.

(2) Nothing in this section shall apply to any private transfer or delivery of the property attached or of any interest therein, made in pursuance of any contract for such transfer or delivery entered into and registered before the attachment.

Explanation : For the purposes of this section, claims enforceable under an attachment include claims for the rateable distribution of assets.

As per the above provision where an attachment has been made, any private transfer or delivery of the property attached or of any interest therein and any payment to the JD or any debt due or other monies contrary to such attachment shall be void as against all claims enforceable under the attachment. This provision has no counter part in the principles relating to injunctions. Therefore, when an attachment before judgment of an immovable property is ordered by a court and the attachment is affected, any alienation of property after the attachment shall be void. Whereas in the case

of a temporary injunction or an undertaking recorded, as per the precedential guidance of the Supreme Court in **Thomson Press** [supra], the alienation in violation of an order of temporary injunction or an undertaking recorded is not void but is only hit by the principle enshrined in the doctrine of *lis pendens*. Therefore, ordering attachment in a case where the party is entitled to such a relief, would sub serve the ends of justice more efficaciously and would avoid any further complications that may arise by virtue of any alienations that may be made in violation of the order of attachment before judgment passed by the Court. Therefore, in the well considered view of this court, an application for attachment before judgment stands on a different footing than an application for temporary injunction wherein an undertaking can be recorded while declining to grant a temporary injunction.

12. The Rules under Order XXXVIII of the Code and other allied provisions in the code dealing with 'Attachment before judgment' are self contained. Further, Rule 5 of Order XXXVIII lays down a detailed procedure and also the consequences of any violations of the provisions contained therein. Where a power is given to do a certain thing in a certain way, the thing must be done in that way or not at all. When the Legislature has prescribed a mode for exercising of any power that power can be exercised only in that manner and in no other manner, [vide the decision in **Gujarat Electricity Board v. Girdharlal Motilal** (AIR 1969 SC 267)]. Without disturbing the findings supra and assuming for a moment that in a given case it may be possible to hold that an undertaking of the defendant can be recorded having regard to the facts peculiar to that particular case, be it noted that the case on hand is not a fit case to record the undertaking of the defendant and deny to the plaintiff the efficacious relief of attachment before judgment even on the failure of the defendant to furnish security to the satisfaction of the Court. The reasons in support of the conclusion that the instant case is not a fit case to record the undertaking and deny to the plaintiff the main relief are already recorded supra.

13. Having regard to the discussion coupled with reasons supra, this court finds that the request for accepting an undertaking affidavit filed by the

defendant without offering to furnish security or showing cause as to why security shall not be furnished cannot be countenanced. Therefore, this court finds that the order of the trial Court raising the interim order of attachment after accepting the undertaking affidavit filed by the defendant is unsustainable under facts and in law and is liable to be set aside.

14. In the result, the CRP.no.4915 of 2015 is allowed and the order of the Court below in IA.no.19 of 2014 accepting the undertaking of the defendant is set aside. As a sequel, the CRP.no.4978 of 2015 is allowed and the order impugned therein is set aside; and, keeping in view this Court's finding that sufficient case as required under facts and in law is made out by the plaintiff for ordering attachment before judgment of the application schedule property, IA.no.17 of 2014 is remitted to the trial court subject to the following directions: "The trial Court pursuant to the instant orders of this court shall now fix a reasonable time in its discretion and give a fresh opportunity to the defendant by directing the defendant to furnish, within such fixed reasonable time, any immovable property security or such security for the suit amount to the satisfaction of the trial court. It is needless to say that on failure of the defendant to avail the said opportunity to furnish the security within the time fixed by the trial Court, the trial Court shall pass final orders of attachment before judgment as per procedure." It is made clear that till the disposal of the application afresh by the trial court as directed in these orders there shall be in force the interim order of attachment before judgment of the petition schedule property. There shall be no order as to costs.

Miscellaneous petitions, if any, pending in these revisions shall stand closed.

M. SEETHARAMA MURTI, J

1st June, 2016

Note: LR copy to be marked.

(B/o)

Vjl

[\[1\]](#) (2008) 2 SCC 302

[\[2\]](#) AIR 1951 Cal 156

[\[3\]](#) 2013 (3) ALD 111(SC)