

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER (STAMP) NO. 1660 OF 2017
WITH
CIVIL APPLICATION (STAMP) NO. 1661 OF 2017
IN
APPEAL FROM ORDER (STAMP) NO. 1660 OF 2017

Rentworks India Private Limited	..	Appellant
vs.		
E-City Digital Cinemas Pvt. Ltd.	..	Respondent

Dr. V. Tulzapurkar – Senior Advocate with Mr. N. Sakhardande, Mr. Ravi Gandhi, Mr. Mahek Kamdar and Mr. R. Jain i/b. Kanga & Co. for Appellant.

Mr. R. Carvalho with Ms M. Bhangale and Ms W. Parkar i/b. ALMT Legal for Respondent.

CORAM : M. S. SONAK, J.
DATE: 20 JANUARY 2017

P.C :

1] Heard Dr. Tulzapurkar – Senior Advocate with Mr. Sakhardande for the appellant. Mr. Carvalho with Ms Bhangale for respondent.

2] With the consent of and at the request of learned counsel for the parties, the appeal is taken up for disposal at the stage of admission.

3] The appellant is the original defendant and the respondent is the original plaintiff in suit no. 2647 of 2016 instituted before the City Civil Court, Mumbai.

4] The challenge in this appeal is to the order dated 21 December 2016 made by the City Civil Court, Mumbai, the operative portion of which reads as follows:

“ORDER

- 1. Notice of motion is partly allowed.*
- 2. Defendant is directed to furnish bank guarantee to the tune of security deposit i.e. Rs.48,49,018/- on or before next date towards protection of interest of plaintiff till conclusion of trial.*
- 3. Remaining prayers stand rejected.*
- 4. Cost will be the cause in main suit.”*

5] Dr. Tulzapurkar, learned counsel for the appellant submits that the impugned order is in the nature of an order of attachment before judgment as contemplated by Order XXXVIII Rule 5 of the CPC. He submits that power under Order XXXVIII Rule 5 of the CPC is drastic and extra ordinary. Such power should be used sparingly and strictly in accordance with the Rule. He submits that in the present case, there were no pleadings in the plaint or even averments in the affidavit accompanying the notice of motion, requisite for the exercise of powers under Order XXXVIII Rule 5 of the CPC. He submits that in the impugned order there is neither any finding that the respondent had made out any *prima facie* case, nor is there any finding that the predicates of Order XXXVIII Rule 5 of the CPC, have been complied. He submits that in fact most of the

observations in the impugned order favour the appellant, but the conclusion is harsh and unwarranted in the facts and circumstances of the present case. He relies upon ***Raman Tech. & Process Engg. Co. & Anr. vs. Solanki Traders***¹, to submit that the impugned order is quite untenable.

6] Mr. Carvalho, learned counsel for the respondent submits that in this case there is virtually no dispute regards certain facts, which are more particularly set out in paragraph 9 of the impugned order. Mr. Carvalho submits that in particular, there is no dispute that the respondent had deposited with the appellant an amount of Rs.48,49,018/- as and by way of security for the equipment hired by the appellant to the respondent. He submits that admittedly the equipment has been returned by the respondent to the appellant and therefore, there is really no serious defence to the retention of such security deposit. He submits that in such circumstances, learned trial Judge has rightly held that the respondent has made out a *prima facie* case for recovery of the security deposit amount. He submits that in paragraph 4(xxxiii) of the plaint, the respondent has clearly pleaded that the appellant was in the process of selling their properties and assets and this pleading has not even been denied by the appellant. In such a situation, Mr. Carvalho submits, the trial Court was justified in making the impugned order, which

1 (2008) 2 SCC 302

only requires the appellant to furnish a bank guarantee to secure the said amount, should, the respondent ultimately succeeded in the suit. Mr. Carvalho placed reliance upon the decision of this Court in *M/s. Caps & Tabs Trading Company vs. Elder Pharmaceuticals Limited*², in support of his case that an order of this nature is perfectly tenable.

7] Rival contentions now fall for my determination.

8] The suit instituted by the respondent is a suit simplicitor for recovery of money. From the perusal of the notice of motion taken out by the respondent and the impugned order, it is clear that interim relief of the nature contemplated by Order XXXVIII Rule 5 of the CPC was applied for by the respondent and has been substantially granted by the learned trial Judge. Therefore, the question is to whether the predicates of Order XXXVIII Rule 5 of the CPC can be said to have been fulfilled, in the facts and circumstances of the present case.

9] Order XXXVIII Rule 5 of the CPC reads thus :

“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

² Arbitration Petition No. 864 of 2015 decided on 29.10.2015.

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."

10] In the plaint or in the affidavit in support of the notice of motion, there is not even an averment to the effect that the appellant (original defendant), with the intent to obstruct or delay the execution of decree that may be passed against it, is about to dispose of the whole or any part of its property, which is one of the important predicates, which is required to be fulfilled, before exercise of power under Order XXXVIII Rule 5 of the CPC. In

paragraph 4 (xxxiii) of the plaint, all that the respondent has stated is as follows:

*“(xxxiii) The Plaintiff submits that the Defendant till date has failed to refund the security deposit of the Plaintiff and is wrongly withholding the same. **The Plaintiff learnt that the Defendant was in process of selling their properties and assets hence, the Plaintiff under a bonafide belief that there was a binding arbitration agreement between the Plaintiff and the Defendant under Clause 24 of the MRA, the Plaintiff filed a petition u/s 9 of the Arbitration and Conciliation Act, 1966 before the Hon'ble High Court of Judicature at Bombay inter alia seeking the deposit of the amount of Rs.48,49,018/- pending the commencement, hearing and final disposal of the arbitration.** The Plaintiff craves leave to refer to and rely upon the pleadings filed u/s. 9 of the Arbitration and Conciliation Act, 1966 before the Hon'ble Bombay High Court.”*

[Emphasis supplied]

11] In the notice of motion and affidavit in support thereof, even the aforesaid basic averments find no place. Though, in the affidavit in support of the notice of motion, the respondent has stated that the applicant repeats, reiterates, re-affirms and confirms all that is stated in the plaint. The pleadings in paragraph 4 (xxxiii) fall short of the pleadings, necessary for exercise of discretion under Order XXXVIII Rule 5 of the CPC.

12] Pleadings apart, there is no *prima facie* material produced on record by the respondent, on basis of which the trial Court could have been satisfied that the appellant, with intent to obstruct or delay the execution of any decree that may be passed against it, is about to dispose of the whole or any part of its property. A bald statement that the respondent has learnt that the appellant was in the process of selling its properties and assets, is not at all sufficient to invoke the provisions of Order XXXVIII Rule 5 of the CPC.

13] In the impugned order, there is really no discussion whatsoever as to whether or not the trial Court was indeed satisfied that the appellant, with intent to obstruct or delay the execution of any decree, was about to dispose of the whole or any part of its property. In fact, upon perusal of the impugned order, it is clear that the learned trial Judge has not at all applied its mind to the predicates of Order XXXVIII Rule 5 of the CPC. In paragraph 6 of the impugned order, the learned trial Court has held that the defence raised by the appellant involves interpretation of certain clauses of the rent agreement and that at the interim stage, unless both parties lead their evidence, no inference can be drawn either in favour of the appellant or the respondent. The trial Court itself states that this raises a debatable question and then proceeds to conclude on such basis, that the respondent has established the

prima facie case in its favour.

14] In paragraph 13 of the impugned order, the learned trial Court opines that any direction to the appellant to deposit the amount in the court, will virtually amount to a decision in the main suit and that too without providing any opportunity to the appellant to prove its defence. The learned trial Court holds that this is not permissible and therefore, such a direction cannot be issued. However, in paragraph 14 of the impugned order, learned trial Court has observed thus :

“14. Plaintiff is also seeking direction to disclose assets and liabilities to defendant. Pertinent to note that plaintiff is seeking refund of security deposit. I come to conclusion that furnishing of bank guarantee to the tune of security deposit by defendant is suffice for protection of interest of plaintiff. Therefore there is no necessity to issue direction for disclosure of assets of defendants. Resultantly plaintiff is not entitled for the relief also.”

15] The record of conclusion that furnishing of bank guarantee to the tune of security deposit by the appellant will suffice for the protection of the interests of the plaintiff, is really a conclusion which is neither backed by the record nor it can be said that such conclusion is consistent with the predicates of Order XXXVIII Rule 5 of the CPC, which were required to be complied before any conclusion of this nature could have been arrived at. Ultimately, it

must be stated that there is not too much difference between a direction to deposit the amount in the court or to furnish a bank guarantee to secure the said amount. In order to furnish a bank guarantee, usually, substantial amount is required to be deposited with the bank or in any case substantial amount has to be deposited towards margin. At the interim stage, the trial Court, without adverting to the predicates of Order XXXVIII Rule 5 of the CPC, ought not to have been made an order of this nature in the facts and circumstances of the present case.

16] In ***Raman Tech. & Process Engg. Co.*** (supra), the Hon'ble Supreme Court, on analysis of the provisions of Order XXXVIII Rule 5 of the CPC has held 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 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.

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.

6. A defendant is not debarred from dealing with his

*property merely because a suit is filed or about to be filed against him. **Shifting of business from one premises to another premises or removal of machinery to another premises by itself is not a ground for granting attachment before judgment. 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 - [Prem Raj Mundra v. Md. Maneck Gazi](#), AIR (1951) Cal 156, for a clear summary of the principles.)***

[Emphasis supplied]

17] The impugned order in the present case has ignored the provisions of Order XXXVIII Rule 5 of the CPC as interpreted by the Hon'ble Supreme Court in the case of **Raman Tech. & Process Engg. Co.** (supra) and is therefore, untenable.

18] The decision of this Court in **M/s. Caps & Tabs Trading Company** (supra) basically holds that powers of the nature contemplated by Order XXXVIII Rule 5 of the CPC can always be exercised whilst deciding an application seeking interim measures under section 9 of the Arbitration and Conciliation Act 1996. In the

facts and circumstances, the respondents were directed to secure the claim of the petitioners by furnishing a bank guarantee of the nationalized bank. However, there is no parallel between the facts and circumstances in the said case and the present case. In particular, in the said case, it was recorded that several winding up petitions have already been admitted against the respondent company and perusal of the financial documents produced on record by the respondent company clearly indicated that the respondent would not be able to pay any amount to the petitioner even it succeeds in arbitral proceedings. Therefore, the decision in the case of *M/s. Caps & Tabs Trading Company* (supra) is of no assistance to the respondents.

19] For the aforesaid reasons, this appeal is allowed and the impugned order is set aside. However, this shall not preclude the respondent from taking out a fresh notice of motion for seeking the same relief, if, the respondent is in a position to plead and establish that the predicates of Order XXXVIII Rule 5 of the CPC apply. Needless to observe that such notice of motion, if taken out shall be considered and decided by the learned trial Judge on its own merits and in accordance with law.

20] In view of disposal of the appeal, civil application does not survive and is disposed of accordingly.

21] All concerned to act on basis of authenticated copy of this order.

(M. S. SONAK, J.)

Chandka