

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 30.01.2017

PRONOUNCED ON 09. 02..2017

CORAM

THE HON`BLE MR.JUSTICE N.SATHISH KUMAR

Application No.5531 of 2014 in C.S.No.287 of 2012

1. M/s. Manajwasree Constructions Pvt.Ltd
Rep.by its Director Mr.G.Srikumar
No.37/15, Varadharajan Street
T.Nagar, Chennai - 600 017
2. Mr.G.Srikumar
No.37/15, Varadharajan Street
T.Nagar, Chennai - 600 017 .. Applicants/defendant
vs.
Mrs.Jyothi Prem
Proprietrix
M/s. Gemma Habitats
Rep.by its Authorised Signatory
Mr.Prem Metharan
102/1, Royapettah High Road
Chennai -600 014 .. Respondent/Plaintiff

Application filed under Section XIV Rule 8 of Original
Side Rules read with Order XXXVIII Rule 6(2) of CPC to
raise the order of attachment dated 30.4.2014 made in
A.No.2163 of 2012

For applicant :Mr.S.R.Raghunathan

For respondent : Mr.M.A.Lakshmipathi
and M.P.Mohandas

ORDER

The original defendants have come forward with this
application to raise the order of attachment dated

2. The original defendants undertaken to construct Villa for a sum not exceeding Rs.38,32,400/-. As per the said agreement, the entire construction should be completed before the expiry of 5 months from the date of agreement i.e.15.07.2010. The original defendants were bound by the terms of the said agreement. Since, they have committed breach of terms not only with regard to time limit but also in the quality of work, the respondent/original plaintiff filed a suit claiming an imaginary amount of Rs.1,47,97,831/- (Rupees One Crore Forty Seven Lakhs Ninety Seven Thousand Eight Hundred and Thirty One only). Pending suit, the original plaintiff also filed an application being A.No.2163 of 2012 to furnish security to the suit claim and in the event of non furnishing the same, to pass an order of attachment of the schedule mentioned property. This Court, by order dated, 11.04.2014, directed the original defendants to furnish security to the suit claim, for a sum of Rs.1,47,97,831/- on or before 28.4.2014, failing which, this Court indicated that it shall be constrained to pass an order of attachment. Despite service of the said order, i.e order dated 11.4.2014, the original defendants have not come forward to comply with the aforementioned conditional order. Therefore, this Court, by order dated 30.4.2014, has given direction to attach the suit schedule property by 11.06.2014.

3. In these circumstances, the captioned application

has been filed by the applicant herein / original defendants to raise the order of attachment dated 30.4.2014, passed in A.No.2163 of 2012, on the ground that the said order of attachment has been effected over the property belonged to the original 2nd defendant.

4. The learned counsel for the original defendants submitted that the original 2nd defendant is in no way connected with the contract and that the contract, in fact, was entered into between the original 1st defendant company and the original plaintiff. It is the submission of the learned counsel for original 2nd defendant that the original plaintiff unilaterally cancelled the construction agreement suddenly and filed the present suit on the specific ground that the construction work was defective in nature. All the claims are in the nature of damages and compensation. The learned counsel for the original defendants further submitted that unless and until, the damages are ascertained and adjudicated by the Courts, the same cannot be construed as a debt. That apart, the property of the original 2nd defendant could not have been attached by this Court for the alleged breach committed by the original 1st defendant company. It is also the contention of the learned counsel for the original defendants that except vague allegations in the application filed under Order 38 Rule 5 of CPC, 1908, no evidence, whatsoever adduced by the original plaintiff to get the

order of attachment.

5. The learned counsel for the original defendants further submitted that when the original 2nd defendant came to know the about the order of attachment, immediately, he preferred an application for recalling the said order, but before the same could be numbered, order of attachment was effected by this Court. In support of his arguments, the learned counsel for the original defendants has relied on the judgments of the Hon'ble Apex Court reported in (1974) 2 SCC 231 (**UNION OF INDIA V. RAMAN IRON FOUNDRY**) and (2008) 2 SCC 305 (**VINAY DEVANNA NAYAK V. RYOT SEWA SAHAKARI BANK LTD.,**).

6. *Per contra*, it is the contention of the learned counsel for the original plaintiff that the 2nd defendant had entered into a contract in the name of the 1st defendant for construction of Villas and received excess payment. However, he did not complete the building as per the contract, which resulted in huge loss to the original plaintiff. The learned counsel for the original plaintiff further submitted that the original 2nd defendant is making an attempt to transfer the property in his name to defeat the rights of the plaintiff. It is submitted that the order of attachment passed by this Court is well founded

the security, as ordered by this Court. Hence, he prayed for dismissal of the application.

7. In the light of the above submission, now the point arises for consideration is that as to whether the order of attachment passed by this Court is liable to be raised?

8. The suit has been filed for recovery of a sum of Rs.1,47,97,831/- from the original defendants. When the entire plaint pleading is carefully perused, it is seen that a sum of Rs.47,03,046/- is said to be the excess payment made by the original plaintiff. Further, more than a sum of Rupees one crore is claimed towards cost for rectification work and other expenses. The amount claimed in the plaint is in the form of damages.

9. Be that as it may, pending suit, the attachment was sought for by the original plaintiff in respect of the property of the original 2nd defendant. The plaint pleadings clearly show that only the original 1st defendant company had entered into the contract with the original plaintiff.

10. It is the contention of the learned counsel for the original defendants that the individual property of the original 2nd defendant has been attached and even in the attachment application, no details whatsoever, pleaded

except bald allegation that original 2nd defendant borrowed money from various persons and he is planning to wind up his business. There is no specific instances whatsoever, pleaded in the application to seek an order of attachment. Unless and until the original plaintiff establishes that the original 2nd defendant is attempting to dispose of his assets, an attachment before judgment will not be issued. In this case, as already stated above, except bald allegations, specific instances have not been made.

11. It is well settled that before passing an order of attachment, there must be proper evidence before the Court that the original defendants are likely to sell the property to defeat the rights of the parties. Mere reproduction of the ingredients of Order 38 Rule 5 of CPC itself are not sufficient. The power under Order 38 Rule 5 CPC is drastic and extra ordinary power and the same should not be exercised mechanically or merely for the asking. The purpose of Order 38 Rule 5 is not to convert an unsecured debt into the secured debt. Therefore, without concrete evidence, mere allegation itself is not sufficient to order the attachment of the property.

12. It is the contention of the learned counsel for the applicant /original defendants that 2nd defendant is a Director of the original 1st defendant company and his individual property has been attached. The individual

property of the Directors is distinct and unconnected with the company affairs and hence, the same cannot be easily attached. Similarly, the suit itself is filed claiming damages on the basis of the alleged breach of contract by the original defendants.

13. In this regard, it is useful to refer the judgment reported in **(1974) 2 SCC 231** cited supra, wherein the Hon`ble Apex Court has held as follows:

"11. ... Now the law is well settled that a claim for unliquidated damages does not give rise to a debt until the liability is adjudicated and damages assessed by a decree or order of a Court or other adjudicatory authority. When there is a breach of contract, the party who commits the breach does not *eo instanti* incur any pecuniary obligation, nor does the party complaining of the breach become entitled to a debt due from the other party. The only right which the party aggrieved by the breach of the contract has is the right to sue for damages. That is not an actionable claim and this position is made amply clear Jones v. Thomson "Exparte Charles and several other cases decide that the amount of a verdict in an action for liquidated damages is not a debt till judgment has been signed.

... ..

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... .. " In my opinion it would not be true to say that a person who commits a

breach of the contract incurs any pecuniary liability, nor would it be true to say that the other party to the contract who complains of the breach has any amount due to him from the other party.

As already stated, the only right which he has is the right to go to a Court of law and recover damages. Now, damages are the compensation which a Court of law gives to a party for the injury which he has sustained. But, and this is most important to note, he does not get damages or compensation by reason of any existing obligation on the part of the person who has committed the breach. He gets compensation as a result of the fiat of the Court. Therefore, no pecuniary liability arises till the Court has determined that the party complaining of the breach is entitled to damages. Therefore, when damages are assessed, it would not be true to say that what the Court is doing is ascertaining a pecuniary liability which already existed. The Court in the first place must decide that the defendant is liable and then it proceeds to assess what that liability is. But till that determination there is no liability at all upon the defendant. "

14. Having regard to the above judgment and considering the fact that mere bald allegations alone have been made in the applications while seeking an order of attachment and also the fact that individual property of the original 2nd defendant has been attached, I am of the

view that the same is liable to be raised. That apart, the nature of the claim made in the suit can be ascertained only, after proper adjudication in the suit.

15. In view of such circumstances, the captioned application is allowed and the order dated 30.04.2014 will stand raised qua the property referred to in the schedule attached to the Judge's summons.

16. This order will be transmitted by the Registry to the Principal Judge, City Civil Court, Chennai as also to the office of the concerned Sub Registrar.

sd/.N.S.K.J

09.02.2017

//Certified to be a true copy//

Dated this the day of 2017

R.s/04.04.2017

COURT OFFICER

From 25.09.2008 the Registry is issuing certified copies of the Order/Judgment Decree in this format.

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