

THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 20.01.2017

+ **FAO(OS) 19/2017 & CM Nos. 2210/2017 & 2211/2017**

ATUL KUMRA

... Appellant

versus

OXBRIDGE ASSOCIATES LIMITED

... Respondent

Advocates who appeared in this case:-

For the Appellant : Mr Ravi Gupta, Senior Advocate with
Mr Mehul Kumar, Mr Vivek Singh
Bishnoi and Mr Yash Karan

For the Respondent : Mr Jayant Mehta with Ms Ashmi Mohan
and Ms Manisha Shukla

CORAM:-

HON'BLE MR JUSTICE BADAR DURREZ AHMED

HON'BLE MR JUSTICE ASHUTOSH KUMAR

JUDGMENT

BADAR DURREZ AHMED, J (ORAL)

1. This is an appeal against the order dated 21.12.2016 passed by a learned Single Judge of this Court in IA 487/2016 filed by the respondent/plaintiff. The said application was under Order XXXVIII Rule 5 read with Section 151 of the Code of Civil Procedure, 1908. The suit filed by the respondent was one of recovery of Rs 1,55,46,586.62/- along with *pendete* lite and future interest. We need not go into the details of the factual background of the dispute between the

parties. It is sufficient for us to set down paragraph 7 of the impugned order for the purposes of dealing with this appeal. The said paragraph 7 reads as under:-

“7. It is settled proposition that the courts at this stage is concerned with the *prima facie* case and is not required to go in the merit of the case. *Prima facie* it is apparent that the defendant owes money to the plaintiff. It is not disputed that their drug license is subject matter of a dispute before the Supreme Court in SLP (C) 5844 and 5846 of 2005 and if it is cancelled, it is obvious that the defendant would be out of business, he is doing the business of supplying pharmaceutical and medical products which he cannot run without a license. Also there are criminal cases pending before CBI against the defendant. In view of this, I hereby direct the defendant to deposit Rs 1,55,46,586.62/- with the Registrar General of this Court within four weeks from the date of this order and the Registry is directed to keep the said sum in the form of Fixed Deposit initially for one year and thereafter renewable from year to year.”

2. It is evident from the above extracted paragraph 7 of the impugned order as also upon reading the rest of the order that the learned Single Judge, while considering the application under Order XXXVIII Rule 5, has only examined the *prima facie* case of the parties. Order XXXVIII Rule 5 CPC reads as under:-

“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.”

3. On a plain reading of the provisions of Order XXXVIII Rule 5 CPC and particularly sub-rule (1) thereof, it is evident that the Court must be satisfied that the defendant, with an 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. It is only then that the direction under Order XXXVIII Rule 5 CPC can be given by the Court. These aspects specified in Clauses (a) and (b) of Order XXXVIII Rule 5(1) CPC have not at all been examined by the learned Single Judge. Consequently, the impugned order is liable to be set aside. It is ordered accordingly.

4. The matter is remitted to the learned Single Judge to consider the application under Order XXXVIII Rule 5, which has been filed by the respondent, afresh, taking into consideration the entire scope of Order XXXVIII Rule 5 and after examining all its parameters. It would be open to both sides to advance arguments in favour and against the passing of an order under Order XXXVIII Rule 5 CPC. The said matter be listed before the learned Single Judge, in the first instance, on 30.01.2017. We request the learned Single Judge to dispose of the application at the earliest.

The appeal is allowed as aforesaid.

BADAR DURREZ AHMED, J

ASHUTOSH KUMAR, J

JANUARY 20, 2017
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