IN THE HIGH COURT OF BOMBAY AT GOA

APPEAL FROM ORDER NO. 8 OF 2018

Shri Rajendra Devisingh Shekhawat,
Son of Devisingh Ramsingh Shekhawat,
50 years old, married, Indian National,
Businessman, resident of
Flat No.1701, Vain Ganga Building,
Sir Pochkhanwala Road, Worli,
Mumbai – 400 030. …. Appellant

V e r s u s

1. Shri Levino Agnelo Dias,
2. Shri Anthony Dias,
3. Smt. Ermilina Dias,
4. Smt. Anita Maria Dias,

All the above respondents are
Major, Married, India Nationals and
residents of H. No.475, Dias Mansion,
Naranpoi, Chinchinim,
Salcete-Goa. …. Respondents

Shri S. G. Desai, Senior Advocate with Ms. Shalka Shelke, Advocate for the Appellant.

Shri J. A. Lobo, Advocate for Respondents No.1 and 4.

Shri Gustavo Monteiro, Advocate for Respondents no. 2 and 3.

CORAM: C. V. BHADANG, J.
Reserved on: 6/9/2018.
Pronounced on: 7/9/2018.

ORAL ORDER:

By this appeal, the appellant/plaintiff is challenging the order dated 22/9/2017 passed by the learned Senior Civil Judge at Vasco, in Special Civil Suit No.31/2016/A. By the impugned order, an application (Exhibit 3) purportedly 'seeking temporary injunction', filed by the appellant has been dismissed.

2. The appellant filed the aforesaid suit against the respondents for recovery of money and for foreclosure and sale. According to the appellant, he is a businessman and the Managing Director of Aum C & F Pvt. Ltd. The first respondent is a partner of M/s. Kari Logistics, a partnership firm having its office at Margao Goa. The second and the third respondent are his parents while the fourth respondent is the sister of the first respondent and she is also a partner in the aforesaid partnership firm.

3. The first respondent was introduced to the appellant, somewhere in the year 2012, by one Sidharath Bhandari, from Mumbai. The appellant had agreed to invest an amount of Rs.2,30,000.00 in a staggered manner, in the iron ore export trade of the partnership firm of the first respondent. Accordingly an agreement was executed between the appellant (the Lender) and the respondent no.1 as the Borrower. The respondent nos.2 and 3 are also parties to and signatories to the agreement as “Pledger” which is styled as a 'loan agreement, with security' on 10/1/2013. Clauses 1, 2, 3, 4 and 7 of the said agreement are material which may be reproduced thus **:**

> 1. At the request of the Borrower the Lender lends an advance to the Borrower an loan of Rs.100 Lakhs (Rupees

One Hundred Lakhs only), for a period of 3 years beginning from the date of disbursal i.e. 01/02/2013.

2. The said inter corporate deposit shall carry an interest @ 2% per month. In case of delay or default in payment, whether of the principal or of the interest or any part thereof the Lender shall be entitled and the borrower shall be liable to pay a penal interest @ 24 % per annum over and above the interest mentioned herein above.

3. As a security towards timely repayment of loan along with interest, the Pledger has agreed to pledge in favour of the lender, Bungalow named "Casa Dias" situated at Vasco-da-Gama, Mormugao-Goa, fully standing in the name of Pledger as stated in the papers attached herewith hereto and treated as an integral part of the agreement and the current market price of property as per valuation is agreed to e Rs.390 lakhs (Rupees Three hundred Ninety lakhs only), as per valuation certificate bearing number Val/153/2013, dated 09/01/2013 from Kiran Kalangutkar, B.E (Civil), Consulting Engineer & Valuer.

4. In case the Lender sends the notice to the Borrower to make good the margin in the property and the Borrower fails and/or neglects to make good the margin within the stipulated period as mentioned in the notice the Borrower shall be deemed to have committed default of the terms of this agreement and in that event it shall be lawful for the Lender (but not compulsory) to demand from the Borrower repayment of the loan along with the interest then outstanding and the Borrower shall be liable to repay the

loan in full along with interest thereon without any objection and/or demur.

7. In case the Borrower fails and/or neglects to repay the amount of loan or the amount of interest on the due date it shall be lawful for the Lender to sell or dispose off, at the cost and expenses of the borrower, all or some of the property either by way of private arrangement or in the open market and to apply the net proceeds thereof towards satisfaction of the amount of loan or the interest then outstanding.

In short, in terms of the said agreement, the appellant had lent an amount of Rs.1,00,00,000/- (one crore) to the respondent no.1 for a period of three years beginning from 1.2.2013. The respondent no.2 and 3 had agreed to “pledge" in favour of the appellant, a bungalow as described in Clause 3 of the agreement. The valuation of the said bungalow as per the valuation report dated 9/1/2013 was Rs.3,90,00,000. As per Clause 7, it was agreed that if the respondent no.1/borrower fails or neglects to repay the amount of loan and interest on the due date it shall be lawful for the appellant to sell or dispose off the aforesaid bungalow, either by way of private sale or in the open market and to apply the sale proceeds towards satisfaction of the amount of the loan or the interest outstanding. It further appears that the amount was to carry an interest at the rate of 2% per month and in case of delay and default in payment, the respondent no.1 was liable to pay a further penal interest at the rate of 24% per annum. Thus the total interest payable in the event of delay or default in payment was to the extent of 48% p.a.

4. Be that as it may, according to the appellant the respondent no.1 defaulted in the matter of repayment of the principal amount and the interest, which led the appellant to file the aforesaid suit for recovery of an amount of Rs.1,86,59,500/- as set out in prayer clause “A” of the plaint.

5. The appellant filed an application for “temporary injunction” seeking the following substantive reliefs **:**

> (A) During the pendency of the suit, for an order of attachment directing attachment of the suit Bungalow as described in the plaint forthwith, until it is sold by a Public Auction by this Hon'ble Court and for a further direction that the auction amount be paid to the plaintiff first towards interest dues on the suit loan an next towards repayment of the principal loan;
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> (B) For an order of temporary injunction, restraining the second and third defendants from creating any third party rights in respect of the suit bungalow and they be further restrained from wasting, damaging or alienating or selling the suit bungalow and/or otherwise causing any injury to the plaintiff in relation thereto till the same is attached and sold by this Honourable Court or till the final disposal of the suit, whichever is earlier.

6. The application was resisted by the respondents, inter alia on the ground that the 'loan agreement with security' is not properly valued, nor it is

registered, as required by law. It was also contended that the respondent no.1 had made timely payments. However, Mr. Bhandari began to mishandle the funds of the defendant no.1 thereby causing monetary loss. It was contended that the agreement was only executed as a guarantee and did not convey nor was it intended to convey any title to the appellant, as the same was not executed before any notary. It was contended that the agreement was executed only by way of security, in case there was any default in payment in the next six months, from March 2014. It was contended that there was no default, as such, in repayment by the respondent no.1.

7. The learned trial court by the impugned order has dismissed the application. Feeling aggrieved the appellant has come up in appeal.

8. I have heard Shri Desai, the learned Senior Counsel for the appellant, Shri Lobo, the learned counsel for the respondents no.1 and 4 and Shri Monteiro, the learned counsel for the respondents no.2 and 3. With the assistance of the learned counsel for the parties I have gone through the record and the impugned order passed.

9. It is submitted by Shri Desai, the learned Senior Counsel for the appellants that the impugned order demonstrates perversity inasmuch as the

trial court has considered the application to be the one under Order XXXVIII of C.P.C i.e. for attachment before judgment. It is submitted that the application was never intended to be made or considered under Order XXXVIII of C.P.C. It is submitted that although the application did not set out any particular provision under which it was filed, the prayers were essentially covered by section 94 r/w Order 39 Rule 2 and section 151 of C.P.C. It is submitted that admittedly there is an agreement executed between the parties, creating a mortgage in the 'nature of mortgage by deposit of title deeds', in respect of the bungalow as described in Clause 3 of the agreement. It is submitted that as per Clause 7 the appellant is entitled to dispose of the bungalow either by private arrangement or in the open market and to apply the net proceeds towards satisfaction of the loan amount, along with interest. The learned Senior Counsel submitted that the due date as referred to in Clause 7 would be 19/9/2015 and the respondents having failed to pay the principal along with interest as agreed, the appellant is entitled to get the bungalow attached and sold through a court auction. At one stage it was submitted by the learned Senior Counsel for the appellant that the application filed before the trial court is in the nature of a 'mandatory injunction', at the interim stage for attachment and sale of the bungalow and for applying the proceeds towards the satisfaction of the amount of the loan and the interest. The learned Senior Counsel has also referred to section 67 and 69 of the

Transfer of Property Act and sections 176 and 178 of the Contract Act in order to submit that a case for grant of the relief of attachment and sale of the bungalow was clearly made out. It is submitted that the learned trial court failed to properly consider the case of the appellant particularly in the context of the agreement, the default in payment made by the respondent no.1 and the relevant principles applicable for grant of the relief as claimed. Reliance on behalf of the appellants is placed on the decision in the case of **(i) Jagjit Singh Khanna Vs. Dr. Rakhal Das Mullick and anr. AIR 1988 Cal 95 (ii) Gujarat Bottling Co. Ltd. and others Vs. Coca Cola Company and others (1995) 5 SCC 545. (iii) Rachpal Mahraj Vs. Bhagwandas Darukar and others AIR 1950 SC 272 (iv) United Bank of India Ltd. Vs. Lekharam Sonaram and Co. and others AIR 1965 SC 1591 (v) Sunita Jugal Kishore Gilda Vs. Ramanlal Udhoji Tanna (dead) and others (2013) 10 SCC 258 (vi) Manohar Lal Chopra Vs. Rai Bahadur Rao Raja Seth Hiralal AIR 1962 SC 527 and (vii) State of Haryana and others Vs. Narvir Singh and another (2014) 1 SCC 105 .**

10. On the contrary it is submitted by Shri Lobo, the learned counsel for the respondents that there are triable issues which arise in the suit, as has rightly been held by the learned trial court. Shri Lobo, the learned counsel for respondents no. 1 and 4 submitted that there is a dispute as to whether there is

any default in repayment of the principal and the interest amount. It is submitted that in any event the application as framed and filed before the trial court was not maintainable as the appellant cannot seek an order of attachment and sale at an interim stage, particularly when the claim of the appellant is not under Order XXXVIII of C.P.C. It is submitted that the application and the relief claimed therein also do not fall within the ambit of section 94 r/w Order 39 Rule 2 and section 151 of C.P.C. It is submitted that the appellant has failed to establish the necessary ingredients of existence of a prima facia case, balance of convenience and irreparable loss, for grant of the drastic relief of attachment and sale of the bungalow at an interlocutory stage. It is submitted that the provisions of sections 67 and 69 of the Transfer of Property Act or sections 176 and 186 of the Contract Act are not attracted in this case.

11. On behalf of the respondents reliance is placed on the decision of the Supreme Court in the case of **Sameer Narain Bhojwani Vs. M/s. Aurora Properties and Investments and anr. (Civil Appeal No.7079 of 2018) MANU/SC/0884/2018** in order to submit that the principle of moulding of relief cannot be applied at an interim stage and the relief can be moulded at best at the time of consideration of the final relief in the suit. It is submitted that the appellant has not made out any case for grant of mandatory relief at

an interlocutory stage.

12. I have carefully considered the rival circumstances and the submissions made.

The following points arise for my determination in this appeal.

i) Whether the application as framed and filed and the reliefs claimed would fall within the ambit of section 94 r/w Order 39 Rule 2 and Section 151 of C.P.C.

ii) Whether the appellant has made out a prima faice case for grant of relief of attachment and sale of the suit bungalow by public auction at an interim stage and for a further direction to appropriate the amount of auction towards interest and the principal due and payable to the appellant?

iii) Whether the appellant would suffer irreparable loss if the relief as claimed is not granted?

iv) Whether the balance of convenience lies in favour of the appellant.

13. The substantive relief claimed in the application by the appellant is as contained in prayer clause "A". The prayer in clause "B" is a consequential prayer for restraining the respondents not to create any third party interest in the suit bungalow "till the same is attached and sold by the Court or till the final disposal of the suit (whichever is earlier)". According to the appellants,

the application is not the one relatable to Order 38 of C.P.C. but the relief claimed is under section 94 r/w Order 39 Rule 2 and section 151 of C.P.C. At the outset it is necessary to note that although the application is styled as one for 'injunction', the appellant is not seeking any injunction in so far as prayer clause “A” of the application is concerned, against the respondents. It is trite that an injunction is always an order of the Court which is addressed to a party. Thus the prayer clause “A” of the application cannot be considered as a prayer seeking an injunction and cannot fall under Order 39 Rule 1 and 2 of C.P.C. Rule 2 of Order 39 of C.P.C provides for injunction to restrain the repetition or continuation of breach. Here again, the plaintiff can seek an order which is directed against the party and not simplicitor for attachment and sale of the suit bungalow as has been sought in the present case. Furthermore, there is no breach which is either alleged or demonstrated which is repetitive or of a continuous nature. According to the appellant, there is already a breach of the agreement whereunder the respondent has failed to repay the loan along with the interest as agreed. Thus it is not possible to see as to how the relief of the attachment and sale of the bungalow at an interim stage can fall under Rule 2 of Oder 39 of C.P.C. A bare perusal of the Rule 2 of Order 39 of C.P.C shows that an application seeking such relief can lie in a suit for restraining the defendant from committing a breach of the contract. In the present case the suit is not filed for restraining the defendant from committing the breach of the contract or other injury of any kind. The suit is simplicitor for recovery of money towards the principal and the accrued interest. Thus the contention that the relief as claimed is relatable to rule 2 of Order 39 of C.P.C to my mind cannot be accepted.

14. Coming to section 94 of C.P.C it provides for supplemental proceedings and it reads thus **:**

> 94. Supplemental proceedings-In order to prevent the ends of justice from being, defeated the Court may, if it is to prescribed,
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> (a) issue a warrant to arrest the defendant and bring him before the Court to show cause why he should not give security for his appearance, and if he fails to comply with any order for security commit him to the civil prison;
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> (b) direct the defendant to furnish security to produce any property belonging to him and to place the same at the disposal of the Court or order the attachment of any property;
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> (c) grant a temporary injunction and in case of disobedience commit the person guilty thereof to the civil prison and order that his property be attached and sold;
>
> (d) appoint a receiver of any property and enforce the performance of his duties by attaching and selling his property;
>
> (e) make such other interlocutory orders as may appear to the Court to be just and convenient.

15. Section 94 has to be read along with the relevant order, for instance, section 94 (c) has to be read with Order 39 Rule 1 and 2. Reliance is placed on section 94 (e) in order to submit that the Court can make such other

interlocutory orders as may appear to the Court to be 'just and convenient'. For the Court to exercise the power under section 94 (e), a party has to demonstrate that such 'other interlocutory order' is necessary and is just and convenient. It has not at all been demonstrated as to how the making of the the drastic order of attachment and sale of the bungalow at an interim stage would be 'just and convenient'. It is well settled that an interim relief can be in aid of the final relief and normally the interim relief cannot itself be the final relief which can be granted in the suit. In the present case, the relief sought is in the nature of a final relief in prayer clause “B” of the plaint. For this reason also in my considered view the relief could not have been granted. Thus the reliance placed on section 94 is entirely misplaced.

16. Coming to section 151 of C.P.C. when there are specific provisions governing the field normally section 151 would not apply. In the exercise of inherent powers the Court can pass an order which is necessary to be passed in the interest of justice. No such case can be said to be made out by the appellant in the present case.

17. Even assuming that the relief as claimed by the appellant can be considered by way of an 'injunction' the appellant would be obliged to demonstrate the well recognized principles which govern the grant of such

relief namely, existence of a prima facie case, irreparable loss and balance of convenience in its favour. It is contended that under the agreement, in the event of default, the appellant is entitled to put the bungalow for sale by private arrangement or by public sale. At one stage it was contended on behalf of the appellant that the appellant under the agreement is entitled to put the bungalow for sale without intervention of the Court and to apply the proceeds towards the repayment of the interest and the principal. Even assuming that the appellant has such a right under the agreement, the appellant has not exercised the same but has chosen to seek the assistance of the Court in attachment and sale of the bungalow at a Court auction. Thus in order to get the said relief, the appellant has essentially to demonstrate that a case for attachment and sale of the suit bungalow at a court auction is made out. A bare perusal of the issues as framed in the suit show that there is a dispute on the amount which is due and outstanding and payable by the respondent. For instance, issues no. 12 and 13 cast a burden on the appellant to prove that he is entitled to a money decree in the sum of Rs.1,86,590/-. Thus, the Trial Court is right in concluding that there are triable issues that arise in the the suit.

18. Now coming to the aspect of irreparable loss, the appellant has not demonstrated that in the event, the relief is not granted, he would suffer

irreparable loss. Irreparable loss is one, which cannot be estimated or compensated in terms of money. Normally, in a suit for recovery of money, as in the present case, there would not be any irreparable loss and in fact, there would be no such occasion for seeking injunction for attachment and sale of the bungalow, at the interim stage. The record shows that the appellant had advanced an amount of Rs.1,00,00,000/- (one crore), while the price of the bungalow in the year 2013 was Rs.3,90,00,000/- (three crores ninety lakhs). In any event, the appellant has not demonstrated that he would suffer irreparable loss namely, a loss which cannot be compensated in terms of money, if the relief is not granted. On the contrary the respondents would suffer irreparable loss if the bungalow is attached and sold at an auction at an interim stage. Thus, the appellant has failed to demonstrate that the balance of convenience lies in his favour.

19. The contention that the relief is in the nature of mandatory injunction, is entirely misplaced. The relief of attachment and sale of the property cannot be a relief in the nature of a mandatory injunction, more so when it is not directed against any party. That apart, it is now well settled that grant of mandatory injunction at interim stage is a drastic relief and although, the Court can grant such a relief, it can only be granted on demonstration of a strong prima facie case and other factors and such a relief can be granted for

restoration of status quo ante. Examined in this context, the relief sought, does not fall within the ambit of the parameters for grant of mandatory relief at an interim stage.

20. Section 67 of the Transfer of Property Act provides for right to fore-closure or sale, which is the final relief claimed in the suit. Section 69 provides for a power of a mortgagee, or any person acting on his behalf, to sell the mortgaged property or part thereof, in default of payment of the mortgage-money, without interference of the Court. As noticed earlier, the appellant has not chosen to put the property for sale, either by way of private or public sale, as according to the appellant, he is entitled to do so under the terms of the agreement. Section 69 applies where the mortgagee sells the mortgaged property without the intervention of the Court.

21. Coming to Sections 176 and 178 of the Contract Act. Both these sections fall under chapter pertaining to 'bailment'. Sections 172 to 181, in particular, provide for bailment of pledge. The agreement in the present case, can hardly be said to be of a bailment. Thus, the reliance placed on Sections 176 and 178 of the Contract Act, to my mind, is misplaced.

22. It is true that the Trial Court has considered the application in the

context of Order XXXVIII of CPC. As noticed earlier, the application as framed and filed, before the Trial Court, did not name the provisions under which it was filed. The written notes of arguments, to which my attention was drawn by the learned Senior Counsel for the appellant, does not show that it was pointed out to the Trial Court that the relief as sought was not being claimed under Order XXXVIII of CPC. Be that as it may, once, it is found that the reliefs as sought cannot be granted under Section 94 read with Order XXXIX Rule 2 and Section 151 of CPC, the mere fact that the Trial Court has considered the application *inter alia* in the context of Order XXXVIII of CPC, would not make any difference.

23. In the case of **Jagjit Singh Khanna** (supra), the Trial Court had granted mandatory injunction at an interim stage, while issuing show cause notice, which was challenged in an appeal before the Calcutta High Court. All that the High Court has said is that it would be for the appellant-defendant to file a reply to the show case notice and then it is for the Trial Court to decide the application for injunction, as expeditiously as possible.

24. The decision in the case of **Gujarat Bottling Co. Ltd.** (supra) turned on its own facts, in which, the trade mark of Coca Cola Company was given to Gujarat Bottling Company to manufacture, bottle, sell and distribute

beverages under the Coca Cola Company's Trade Marks.

25. The case of **Rachpal Mahraj** (supra), the case of **United Bank of India Ltd.** (supra) and the case of **Narvir Singh** (supra) involved the question as to the compulsory registration of a deed of memorandum of title deeds. At this stage, it is not necessary to go into the question as to whether, the agreement requires registration, in as much as, even assuming that it does not require registration, no case for grant of relief, as claimed, is made out.

26. In the case of **Sunita Jugal Kishore Gilda** (supra), the question was about the right of a mortgagor, to lease the mortgaged property, during the pendency of the suit. It was held by the Hon'ble Supreme Court that the right of mortgagor to lease and the right of the lessee of any such lease, are subject to Section 52 of the Transfer of Property Act and such a lessee is bound by the result of the litigation, when the mortgagor grants lease, during the pendency of the suit for sale by mortgagee. It is difficult to see as to how the decision can come to the aid of the appellant.

27. The decision in the case of **Manohar Lal Chopra** (supra) deals with the powers of the competent Court to issue temporary injunction in exercise of inherent powers, in cases which were not covered by the

provisions of Order XXXIX of CPC. There cannot be any manner of dispute with the proposition that in an appropriate case, the Court can grant injunction in the exercise of inherent powers, particularly, in cases which are not covered by Order XXXIX of CPC. The question is, however, about exercise of such powers. It is trite that the existence and exercise of the power are two distinct aspects. Although, the existence of power cannot be disputed and its exercise would invariably depend upon facts and circumstances of each case. In the case of **Manohar Lal Chopra** (supra), the question was about restraining the plaintiff from prosecuting a suit filed in another jurisdiction and it was held that the plaintiff can be restrained from proceeding with such a suit only if, the suit is found to be vexatious. Thus the principles apart, the case clearly turned on its own facts. In the present case, in my considered view a drastic relief of attachment and sale of bungalow, at an interim stage, could not be granted, in the exercise of inherent powers of the Court.

28. After the present appeal was heard and the judgment was reserved on 06.09.2018 and the matter was posted for judgment on 07.09.2018, it was pointed out by the learned Senior Counsel for the appellant on 07.09.2018 that there is a Commercial Appeal No. 2/2018, pending before the Commercial Appellate Division of this Court, involving a

similar issue. Shri Lobo, the learned Counsel for the respondent nos. 1 and 4 has pointed out that the said appeal arises out of the order passed by the Commercial Court, which is in respect of a different agreement. It is not disputed that the said Commercial Appeal is in respect of a different property arising out of a separate agreement. Thus it is not necessary to defer the decision of the present appeal.

In the result, the appeal is dismissed, with no order as to costs.

C. V. BHADANG, J.

Ap/