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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

**APPEAL FROM ORDER NO.529 OF 2018
WITH
CIVIL APPLICATION NO.710 OF 2018.**

Mahesh Govind Nawathe ... Appellant.
V/s.
Girish Kanhaiyalal Oswal ... Respondent

Mr. Raju Digambar Suryawanshi, for the Appellant.
Mr. Suresh Pakale, i/by Ranjit Ajit Agashe, for
respondent

CORAM : DR.SHALINI PHANSALKAR-JOSHI, J.

DATE : 6th SEPTEMBER, 2018.

P.C. :

1] Heard learned counsel for the appellant and respondent.
2] This Appeal from Order takes an exception to the order dated 08.03.2018, passed by Special Court, Ratnagiri, below application Exh-6, in Special Civil Suit No.4 of 2017, thereby allowing the application for attachment of the property, and at the same time, allowing present appellant to make construction on the suit property and sell out the said suit property, but with the permission of the Court.

3] Facts of the case are to the effect that on 9.2.2011, a

development agreement came to be executed between appellant and respondent in respect of the suit property. However, as per terms and conditions of the development agreement, the appellant could not complete the construction, as a result of which respondent was constrained to file the suit for recovery of amount of Rs.9,50,00,000/- due from appellant towards the loss caused to him.

4] During the pendency of the suit, as respondent has apprehended that appellant may create third party interests in the flats constructed in the suit property, respondent had filed an application for attachment of the suit property under Order XVIII rule 5 of the Code of Civil Procedure. This application was resisted by the appellant.

5] However, the appellant admitted the execution of the development agreement and the fact that as per the agreement, development could not take place and could not be completed. It was also brought on record that as the construction could not be completed as per the agreement, there were several proceedings, not less than 74 in number, filed against respondent, for completion of the construction and /for return of the amount. Out of 74 suits, details of 14 proceedings are given in the application filed by the respondent before the trial Court.

6] In view thereof, in order to protect the interests of

respondent, the trial Court has passed order restraining the appellant from selling out the suit property without the permission of the Court, but at the same time allowed the appellant to complete the construction.

7] Being aggrieved by this order passed by the trial Court, appellant, has filed the present appeal. By relying upon the judgment of the Hon'ble Apex Court, in the case of **Raman Tech & Process Engg. Co. and anr -vs- Solanki Traders**, [(2008) 2 SCC 302], and the judgment of Division Bench of this Court, in the case of **Swan Mills Ltd and ors -vs- Dhirajlal @ Dhirubhai Babaria and ors**, [2012 (2) Bom. C.R.20], it is submitted by learned counsel for the appellant that the order of attachment before judgment being of a drastic nature, before passing such order, the Court has to satisfy about prima facie case made out by the parties and also that defendant is likely to transfer his property to delay the execution of decree that may be passed in the suit.

8] Here in the case, it is submitted that the order passed by the trial Court does not record its satisfaction that any prima facie case is made out by the respondent for issuance of such drastic order. Further, it is submitted that the application does not contain the details and the number of the properties which are owned by the appellant and in which the appellant is carrying out the construction.

The trial Court, has however, passed the order of attachment of all the properties and not limited it to the suit property in respect of which development agreement is executed with respondent. Hence according to learned counsel for the appellant, the impugned order passed by the trial Court cannot be sustained in law.

9] Learned counsel for respondent has fairly conceded that he has no objection if, this order of attachment before judgment is restricted to the suit property, in respect of which development agreement is executed between the appellant and respondent and which is the subject matter of this suit.

10] In view thereof, though the trial Court has not expressly recorded its prima facie satisfaction, the facts of the case which are stated by the trial Court and which are not in the realm of dispute, are sufficient to make prima facie case in favour of respondent. The very fact that as many as 74 proceedings are filed against respondent in respect of this development project which the appellant could not complete is sufficient in itself to grant such relief of attachment of property before the judgment. Moreover, the trial Court has also allowed the appellant even at this stage, to complete the construction and he can even sell the flats constructed therein. The only condition imposed is that appellant should obtain the permission of the Court before doing so. In the facts of present case, therefore, I do not find

that this condition imposed by the trial Court, is in any way onerous.

11] In view thereof, the appeal holds no merit and is disposed off with clarification that the order of the trial Court of attachment of property is restricted only to the property in respect of which development agreement is executed between the appellant and the respondent.

12] On the request of learned counsel for respondent, liberty is given to respondent to file separate application in respect of other properties, if he desired to do so. If any such application is filed, it will be decided on its own merits by the trial Court.

13] The Appeal from Order, thus, stands disposed off in above terms.

14] In view of disposal of Appeal, the Civil Application filed therein becomes infructuous and the same is disposed off accordingly.

[DR.SHALINI PHANSALKAR-JOSHI, J.]