IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO.336 OF 2018

Ranjit Arjan Hira .. Appellant
Versus
Kavita Vijay Mehta .. Respondent

Dr. Abhinav Chandrachud with Mr. Sanjay Udeshi with Ms. Shweta Satardekar and Mr. kaushal Udeshi with mr. Parth Chaudhary I/b. M/s. Sanjay Udeshi & Co. for appellant
Mr. Gautam Ankhad with Sunny Shah and Ms. Hetal Master I/b. Ashwin Ankhad & Associates for respondent.

CORAM : DR.SHALINI PHANSALKAR JOSHI, J.

DATE : 17th September 2018.

P.C.

Heard the learned Counsel for the appellant and respondent.

2] This appeal takes exception to the order dated 3rd March 2018 passed by the City Civil Court, Mumbai thereby allowing the Notice of Motion No.1229 of 2015 filed in Suit No.787 of 2015 in terms of prayer clause (b) and thereby restraining the present appellant from creating any third party interest over the suit flat being Flat No.1-E, Sundatta Apartments, Situated at Mount

Pleasant Road, Mumbai 400 006 till the decision of the suit on merits.

3] The said notice of motion was taken out by the respondent herein. She has filed the suit seeking following two reliefs:-

> "(a) that this Hon'ble Court be pleased to order and decree the defendant to pay to the plaintiff Rs.46,93,000/- together with interest on the principal sum at the rate of 24% per annum from the date of the death of Mrs. Chandra A. Hiranandani till payment and/or realisation;
>
> (b) The defendant be directed to hand over all the original title documents and other papers pertaining to the Ananta Flat to the plaintiff;"

4] The facts of the suit are to the effect that the appellant is the brother of respondent. Their mother Chandra Hiranandani has died and as and by way of family arrangement dated 3rd April 2013, the appellant was to give to the Respondent an amount of Rs.46,93,000/- as more particularly set out in the plaint, which amount, according to the respondent is outstanding from the appellant. Hence, she has filed the suit for recovery of this amount with interest. Along with suit, she has filed the notice of motion for seeking relief of interim injunction as stated above.

5] This notice of motion came to be resisted by the appellant herein, contending inter alia, that the notice of motion restraining him from creating third party interest in the suit property is not tenable as it is as good as asking the relief of attachment before judgement, under Order 38 Rule 5 of Code of Civil Procedure, 1908 (for short CPC) and the motion is thus, required to be dismissed.

6] As regards the possible legal argument that the notice of motion is tenable under Order XXXIX Rule 1(b) of CPC, it was contended that, in order to get such relief of injunction, restraining the appellant from creating third party interest in the flat, the respondent has to show prima facie, that the appellant has any intention to defraud her. In the instant case, it was submitted that except for bare averment made in the plaint, that the appellant is likely to sell the said flat, there is no prima facie case made out and hence, on this ground also, the notice of motion is liable to be dismissed.

7] As regards, the other relief of asking the appellant to return the title documents in respect of the flat concerned, the trial court has rejected the said relief on the ground that it would be granting of final relief at the admission stage.

8] The only issue, therefore, arising for consideration in the present appeal is whether in a suit filed, simplicitor for recovery of the amount of Rs.46,93,000/-, the respondent can restrain the appellant from selling the flat which, strictly speaking is not even the subject matter of the suit as such, because, no substantial relief of declaration or possession is claimed in the suit as regards this flat.

9] In this respect, according to the learned Counsel for the appellant, having regard to the provisions of Order XXXVIII Rule 5 of CPC, which are drastic in nature, such order could not have been passed by the trial court unless the conditions laid down therein were satisfied. To substantiate this submission, the learned Counsel for the appellant has relied upon the judgement of Calcutta High Court in the case of **Premraj Mundra Versus Md. Maneck Gazi & Ors., reported in A.I.R. 1951 Cal 156**, wherein in para 10 of the judgement, the High Court has laid down various guiding principles as to when the order of attachment of property under Order XXXVII Rule 5 and 6 of C.P.C. can be passed. One of the guiding principles is to the effect that, a mere allegation that the defendant was selling and his properties is not sufficient unless the particulars thereof are stated. The another guiding principle which is relevant for the purpose of this appeal is that,

“the mere fact of transfer is not enough, since nobody can be prevented from dealing with his properties simply because a suit has been filed. There must be additional circumstances to show that the transfer is with an intention to delay or defeat the plaintiffs' mail. It is open to the court to look to the conduct of the parties immediately before suit, and to examine the surrounding circumstances, and to draw an interference as to whether the defendant is about to dispose of the property, and if so, with what intention. The Court is entitled to consider the nature of the claim and the defence put forward”.

10] Guideline No.11 as laid down in this judgement makes it clear that,

“where however the defendant starts disposing of his properties one by one, immediately upon getting a notice of the plaintiff's claim and/or where he had transferred the major portion of his properties shortly prior to the institution of the suit, and was in an embarrassed financial condition, these were grounds from which an inference could be legitimately drawn that the object of the defendant was to delay and defeat the plaintiff's claim”.

It was further laid down that mere removal of properties outside jurisdiction, is not enough, but where the defendant with notice of the plaintiff's claim, suddenly begins removal of his properties outside the jurisdiction of the appropriate court, and without any other satisfactory reason, an adverse inference may be drawn against the defendant. Where the removal is to a foreign country, the inference is greatly strengthened”.

11] If above guidelines are applied to the present case, then, there is neither any averment, even for sake of it in the plaint or in the notice of motion that the appellant intends to sell out the flat with intention to delay, defraud or defeat the respondent's claim or he is suffering from any financial condition, which is embarrassing, so as to compel him to dispose of properties after properties or that he is shifting the properties to a foreign country. There is nothing on record to that effect. Hence, mere vague allegation that appellant intends to sell the property is not sufficient as held in the above guidelines to grant such drastic relief of attachment of proeprty before the judgment.

12] It is pertinent to note that the guidelines laid down by the Calcutta High Court are considered by the Apex Court and approved in the case of **Raman Tech & Process Engineering Co. and Another Vs. Solanki Traders, reported in (2008) 2 S.C.C. 302**, wherein the Apex Court in paragraphs 5 and 6 has observed as follows:-

> "5. The power under Order 38 Rule 5 of CPC is a drastic and extraordinary power. Suhc 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 covert an unsecured debt into a secured debt. Any attempt by a plaintiff to utilise 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 judgement and forcing the defendants for out of court settlements 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 judgement. 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 ob obstructing or delaying the execution of any decree that may be passed against him, before power is exercised under Order 38 Rule 5 of CPC. Courts should also keep in view the principle relating to grant of attachment before judgement. (See Premraj Mundra Vs. Md. Manech Gazi – for a clear summary of the principles)".

13] Thus the law relating to attachment of property before judgement is very well crystalised and it is held that the court has to be careful in passing such orders, which may have the effect of as good as securing the unsecured debt, that too before the judgment.

14] Here in the case, it may be true that the respondent is not directly seeking the relief of attachment of the property before the judgement but respondent is seeking relief of restraining the appellant from creating third party interest therein. Needless to state that this has an effect of as good as attaching the property, pending decision in the suit, so that the appellant cannot create any third party interest therein.

15] According to the learned Counsel for respondent, in a suit for recovery of money also, the court can pass such temporary injunction under Order XXXIX Rule 1(b) of CPC, which can have the same effect as an order under Order XXXVIII Rule 5 of C.P.C. According to him, such a power is inherent in the court and the court is not precluded from exercising it. It is submitted that this view is upheld by this Court also in the judgement of Division Case in the case of **La-Fin Financial Services Pvt. Ltd. Vs. IL & FS Financial Services Pvt. Ltd. Reported in 2015 SCC Online Bom 4794,** wherein the Division Bench of this Court relying upon a judgement of Apex Court in the case of **Manohar Lal Chopra Vs. Rai Bahadur Rao Raja Seth Hiralal, reported in A.I.R. 1962 S.C. 527** has held that, “the provisions of C.P.C. are not exhaustive for the simple reason that the Legislature was incapable of contemplating all the possible circumstances, which may arise in future litigations, and consequently providing a procedure for them”. It was further held in para 19 that, “there was nothing in Order 39 Rules 1 and 2 which provide specifically that a temporary injunction is not to be issued in cases which are not mentioned in those Rules. The Rules only provide that in circumstances mentioned in them the Court may grant a temporary injunction". The Division Bench further held that, "it would be difficult to agree that in a money suit, if no case for attachment before judgement is made out, no injunction can also be granted. This is too sweeping a proposition to accept".

16] It may be true that as per the law laid down in this judgement, the relief of interim injunction restraining the defendant from creating a third party interest, may be granted even in a suit filed for recovery of money. However, then, in that case, the provisions of Order XXXIX Rule1(b) of C.P.C. are required to be considered. These provisions lay down that if the defendant threatens or intends to remove or dispose of his properties, with a view to defrauding his creditors, then, the court may grant temporary injunction to restrain him from dispossessing the plaintiff or otherwise causing injury to the plaintiff.

17] Here, in the case as stated above, the suit is for recovery of Rs.46,93,000/-. The claim of the respondent is only for return of title documents of the flat. In such a suit for recovery of money and when there is no apparent dispute raised as to the title to the flat and no substantial relief is claimed in respect of the said flat and there is no allegation as such made out that the appellant intends to sell the flat, to defraud the respondent, whether the relief of interim temporary injunction, restraining the appellant from creating third party interest, which is as good as granting the drastic and extra ordinary relief of attachment before judgement can be granted? The answer has to be in the negative because, apparently no property as such is involved. The main relief is only for recovery of money. There is no allegation in the plaint that the appellant intends to sell the flat for the purpose of defrauding the respondent. It is also not the case that the appellant, after selling or disposing the flat, intends to go outside India or he is intentionally cheating the respondent by doing so.

Further, in this appeal an affidavit is also filed placing on record the fact that, for the purpose of major surgery, the appellant wants to raise some funds by selling the flat, which according to him, is standing in his name and is valued for more than Rs.15 Crores. The alleged claim of the respondent is only for the amount of Rs.46,93,000/- and he is ready and willing to deposit the said amount in the Court after the said flat is sold.

Therefore, it is clear that, it is not the intention of the appellant to defraud the respondent. Hence, at this stage, in view of the solemn statement of the appellant that he has no intention of defrauding the respondent in any way and as stated above, it being a suit simplicitor for recovery of the amount, the order passed by the trial court restraining the appellant, that too, on a bare allegation that the appellant is likely to sell the flat, without giving any particulars or only by stating that he intends to do so to defraud claim of respondent, such an order cannot be sustainable in law.

18] According to the learned Counsel for the respondent, there are several issues involved in the suit, pertaining to the will deed of Respondent's mother, family arrangement etc. and those issues are still to be decided, the trial court has therefore, taken a possible view in the matter by granting the relief of temporary injunction. Hence, this Court should not interfere in the same. It is true that while deciding the appeal against the order granting or refusing the discretionary relief of injunction, the appellate court should be slow in interfering with the case. However, in particular facts of the present case this interference is called for, as the order of restraining the appellant from creating a third party interest in the flat, which was not subject matter of the suit is passed and such an order is having drastic effect and that too, when the relief is granted without considering whether such prima facie case, showing that the appellant intends to defraud the respondent by creating third party interest in the suit flat is made out. Hence, the view taken by the trial Court is not the possible view of the matter which is sustainable in law. Therefore, the interference therein is warranted.

As a result, the appeal is allowed. The impugned order is quashed and set aside. In consequence the notice of motion filed by the Respondent before the trial court stands dismissed.

19] At this stage, the learned Counsel for the respondent submits that the ad-interim statement made by the learned Counsel for the appellant before the trial court that the appellant does not intend to create third party interest in the said flat be continued for a period of eight weeks, in order to enable the respondent to challenge the order passed by this Court in the Hon'ble Supreme Court.

20] Learned Counsel for the appellant, however, strongly resists the said request by submitting that the statement which was made on 3rd March 2018 was only upto filing of the reply. After the reply was filed, the said statement was not continued. Secondly it is submitted that the appellant requires the money for his medical treatment and that was the reason why the matter was circulated urgently. If the prayer for stay is granted, it is as good as again restraining the appellant from selling the property, which is worth more than Rs.15 Crores and out of which he has to spend for his medical treatment. Therefore, no stay should be granted to the order passed by this Court.

21] I have considered the submissions advanced by both the learned Counsel and I do not find that this is a fit case where this Court should stay its own order. Hence, this request stands rejected.

(Dr. Shalini Phansalkar-Joshi, J.)

Yogeshwar Bhalchandra Gokhale
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Date: 2018.10.09 23:48:23 -0400