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

**APPEAL FROM ORDER NO. 1049 OF 2014
WITH
CIVIL APPLICATION NO. 1266 OF 2014
IN
APPEAL FROM ORDER NO. 1049 OF 2014**

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|----|-----------------------------------|-----------------|
| 1. | Suresh Indulal Shah |] |
| | Age-55 years, Occ.- Business, |] |
| | R/at - 48, Ganraj, Rajendranagar, |] |
| | Navi Peth, |] |
| | Pune - 411 030. |] |
| 2. | Mr. Rashmikanth Jayantilal Gandhi |] |
| | Age-55 years, Occ.- Business, |] |
| | R/at - Nilkunj, 33, Sujay Garden, |] |
| | Mukundnagar, |] |
| | Pune- 411 037. |] |
| 3. | Mr. Sanjay Kiran Jain |] |
| | Age-37 years, Occ.- Business, |] |
| | R/at- Namo Villa, Bungalow No.1, |] |
| | Sujay Garden, Mukundnagar, |] |
| | Pune - 411 037. |] .. Appellants |

Vs.

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| 1. | M/s. Pratham Project Developers Pvt. Ltd. |] |
| | Having its office at Flat No.603, |] |
| | Pratham Bliss, S. No.287/6A-6B, |] |
| | Near Baner Telephone Exchange |] |
| | Baner, Pune 411 045 |] |
| | Through its director Mr. Rajiv |] |
| | Yeshwant Bhale, |] |
| | Age-56 years, Occ.- Business, |] |
| | R/at - As above. |] |
| 2. | Mr. Rajiv Yeshwant Bhale |] |
| | Age-56 years, Occ.- Business, |] |
| | R/at - As above. |] |
| 3. | Mr. Vijay Narayan Vichare |] |

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| Age - Adult, Occ.- Business, |] |
| R/at - A/14, Guruprasad Society, |] |
| 3 rd Floor, V. N. Purav Marg, |] |
| Chunabhatti, Mumbai - 400 022. |] |
| 4. Mrs. Vandana Rajiv Bhale |] |
| Age-52 years, Occ.- Business, |] |
| R/at - Bhale Mala, Survey No.166, |] |
| Aundh Gaon, Pune - 411 007. |] .. Respondents |

Mr. Parag M. Tilak for the Appellant.

Mr. Chaitanya Bhandarkar a/w. Mr. Siddharth A. Ronghe for the Respondents.

CORAM : K. K. SONAWANE, J.
DATE : 6th AUGUST, 2018.

ORAL JUDGMENT

1. Heard. Rule. Rule made returnable forthwith.
2. The matter is taken up for finality on merits with consent of both sides.
3. The appellants-original plaintiffs preferred the present appeal agitating the validity and propriety of the impugned order passed below application (Exhibit 5) in Special Civil Suit No. 1437 of 2013 by the Extra Joint Civil Judge Senior Division, Pune rebuffing the relief of attachment of properties before Judgment as contemplated under Order 38 Rule 5 of the Code of Civil Procedure.

4. The appellants-original plaintiffs initiated civil litigation bearing Special Civil Suit No. 1437 of 2013 against the respondents-original defendants for recovery of Rs.8.88 Crores. It has been alleged that respondent No.1-original defendant No.1 is a private limited company and rest of the respondents-original defendant Nos.2 to 4 are its directors. The respondent-defendant company was in need of money for purchase and development of land Survey Nos.614 and 615 admeasuring 0.80 Are each located at Bibvewadi, Pune. The respondent-company through its directors approached to the plaintiffs for financial assistance. Accordingly, the plaintiffs provided financial aid of Rs.6 Crores to the defendant-company and its directors. It was agreed to pay compensation to each of the plaintiffs towards interest on the amount of financial aid. There was also discussion that the plaintiffs may opt for purchasing built up area at a concessional rate in the proposed project of the defendant-company. However, plaintiffs grumbled about failure of the defendant-company to launch proposed scheme within stipulated period. The plaintiffs also insisted for refund of amount with compensation in lieu of interest. But the appellants-plaintiffs did not receive any response from the defendant company and its directors. The plaintiffs learnt that the defendants are indebted to bankers/creditors and their properties were being attached/auctioned/taken possession by the financial institutions. The attending

circumstances constrained the plaintiffs to initiate civil litigation for recovery of amount bearing Special Civil Suit No. 1437 of 2013, inter alia, plaintiffs moved application (Exhibit 5) for interim relief of attachment of properties under Order 38 Rule 5 pending the suit.

5. According to plaintiffs, the defendants are in financial crisis and most of the immovable properties of the defendants were notified for public auction for recovery of outstanding dues by the bankers like Suvarna Co-operative Bank Ltd., Kotak Mahindra Bank etc. It has been alleged that the defendants are trying to sell the properties bearing Survey Nos.614 and 615 located at Bibvewadi, Pune with fraudulent intention to defeat the decree if any passed in favour of plaintiffs. Therefore, plaintiffs preferred the application (Exhibit 5) under Order 38 Rule 5 of the CPC for interim relief of attachment before Judgment, the properties given in schedule. But the learned Trial Judge found reluctant to exercise powers under Order 38 Rule 5 of the CPC in favour of plaintiffs and rejected the application. The learned Trial Judge passed the impugned order which is the subject matter of present appeal.

6. Learned Counsel for appellants vehemently submits that the learned Trial Court did not appreciate the factual aspect of the matter in its proper perspective and committed error in rejecting the

application. According to learned Counsel, the Trial Judge failed to consider that the defendants availed the financial assistance from the appellants-plaintiffs for purchase and development of the properties in question to be attached in this case. There were documents of Memorandum of Understanding (MOU) for allocation of built up area in favour of plaintiffs at concessional rate @ 36% less than the market price prevailing over at the time of launching the proposed project. It was also agreed to make adjustment of fund of Rs.6 Crores already received to the defendants from the plaintiffs as an consideration amount for purchahse of built up area. But the appellants-plaintiffs did not get any response nor the proposed project was being launched in stipulated period. The learned Counsel further contends that the defendants are already indebted to several financial institutions and some of the properties of defendants were already attached for recovery of outstanding dues. He added that the defendants are trying to sell the properties bearing Survey Nos.614 and 615 shown in the schedule to defraud the plaintiffs. The learned Counsel further asserted that in case any other financial authority proceeded to attach the scheduled properties bearing Survey Nos. 614 and 615, it may frustrate the very purpose of filing the suit. According to learned Counsel the attachment of property before Judgment is essential in the interest of justice. He relied upon the observations of learned Single Judge of the Calcutta High Court

in the case of **Premraj Mundra Vs. Md. Maneck Gazi** in Suit Appeal No. 3517 of 1950 decided on 29.01.1951. The learned Counsel urged that the impugned order passed by the Trial Court be upset and application (Exhibit 5) be allowed with directions to attach the properties mentioned in the schedule before Judgment in Special Civil Suit No. 1437 of 2013.

7. Learned Counsel for respondents-original defendants vociferously opposed the contentions propounded on behalf of appellants-plaintiffs and submits that there is nothing on record to show that the defendants have any intention of obstructing or delaying the execution of decree might be passed in favour of appellants-plaintiffs in the suit. He gave emphasis that it would unjust and improper to restrain the defendants from making use of their properties merely because the suit for recovery of amount is pending against them. According to learned Counsel, the findings of the Trial Court rejecting the application (Exhibit 5) are just, proper and reasonable one. The interference is not warranted and appeal be dismissed.

8. The intense scrutiny of factual score and pleadings of the parties to proceeding reflects that the argument advanced on behalf of appellants-original plaintiffs appears not conceivable and

sustainable one. It would hazardous and unsafe to attach the properties of the defendants before Judgment at the behest of appellants-plaintiffs by invoking harsh remedy envisaged under Order 38 Rule 5 of the CPC. Undisputedly, the powers under Order 38 Rule 5 are to be exercised sparingly and attachment before Judgment is not to be granted merely the opposite party asks for it. The law postulates that the powers should be exercised with utmost care and caution. The rule is not to be utilized as a lever for the plaintiffs to coerce the defendants to come to terms.

9. In the matter in hand, the appellants-plaintiffs specifically came forward with the pleadings that the defendant company and its directors are in financial crisis. The plaintiffs cast allegations that the financial institutions like; Suvarna Co-operative Bank Ltd., Kotak Mahindra Bank Ltd. etc. attached the mortgaged properties of the defendants and put it for auction to recover outstanding dues. The suit properties bearing Survey Nos. 614 and 615 are only the properties remained free from encumbrances and defendants are trying to sell these properties to defraud the plaintiffs.

10. It would be reiterated that the provisions of Order 38 Rule 5 are meant to prevent a decree that may be passed being rendering infructuous. Its object is to safeguard the interest of the plaintiffs so

that in the event of decree is passed, the same stands satisfied without any demur and delay. The order of attachment can be passed subject to satisfaction of the Court that there is a reasonable chance of a decree being passed in the suit. Moreover, it is also incumbent on the part of the plaintiffs to establish, prima facie, that the defendants with dishonest intention attempted to remove or dispose of their assets to defeat or delay the decree that may be passed in favour of the plaintiffs.

11. As referred above, the plaintiffs initiated the civil litigation against the defendants for recovery of Rs.8.88 Crores. It has been alleged that the defendants were in need of money for purchase and development of the properties and therefore the plaintiffs provided them financial assistance of Rs.6 Crores subject to refund the amount with compensation in lieu of interest. It is further asserted that there were documents of MOU for sale of built up area in favour of plaintiffs in the proposed project of the defendants at the concessional rate and amount of Rs.6 Crores already paid would be adjusted towards consideration amount. The plaintiffs seek attachment of properties to safeguard their interest to get the decree satisfied, if any, passed in future in the litigation.

12. Admittedly, all the aforesaid factual scores are required to be

proved on the anvil of merit. There should be reasonable chance of a decree being passed in the suit in favour of plaintiffs. The pleading of the parties to the suit demonstrate that the alleged money transaction was occurred prior to year 2011 in between the parties, to purchase suit properties bearing Survey Nos. 614 and 615. There were documents of MOU executed for sale of built up area at the concessional rate @ 36% less than market value and the amount of Rs.6 Crores already paid would be adjusted being a part of consideration amount. In such backdrops, it transpires that the various facets of legal issues are seen involved in this matter, primarily, the legal issues of period of limitation, the nature of money transaction and its enforcement within the ambit of law, the issue of specific performance of alleged contract of MOU etc. In such circumstances, it would unjust and improper to restrain the defendants from making use of their own properties merely because the plaintiffs instituted suit for recovery of amount. Moreover, there are no particulars given by the plaintiffs sufficient to show that the defendants have any dishonest intention to defraud the plaintiffs. The appellants-plaintiffs did not give any details about the proposed transaction for its consideration as an attempt on the part of defendants to dispose of the properties. A mere allegation that the defendants are trying to sell their properties itself is not sufficient to establish fraudulent intention of the defendants to create

obstruction or delay in execution of the decree which may be passed in favour of the plaintiffs.

13. It is true that, the circumstances of acute financial embarrassment or defendants are in insolvent condition are relevant factors to be considered but not sufficient by itself to prevent the defendants from dealing with their own properties. There must be some positive and definite additional circumstances to show that the defendants with purported motivation attempted to sell the properties to defraud the plaintiffs. In the present matter, even there are no averments about the source of information that the defendants are likely to sell the properties in question. Unfortunately, these material circumstances are lacking the present matter for prima-facie satisfaction to exercise powers under Order 38 Rule 5 of the CPC. The attachment of the properties before Judgment cannot be directed merely on the basis of apprehension of the appellants-plaintiffs for alienation of properties by defendants pending suit. The attachment cannot be granted for security to satisfy the decree. The law does not permit to utilize the drastic remedy available under Order 38 Rule 5 of the CPC as leverage for coercing the defendants to settle the suit claim. Obviously such practice should not be allowed to be promoted and developed but it should be discouraged to uphold the highest ideal in the

administration of justice. It would preposterous and incomprehensible to prevent the defendants from dealing with their own properties merely a suit for recovery of money filed against them by the appellants-plaintiffs, otherwise in every suit, if the defendants sells some of their properties that would be at once sufficient ground to satisfy the Court that they attempted to dispose of their properties with intent to defraud the plaintiffs. In such peculiar circumstances, it is manifestly clear that there must be a positive and definite additional circumstances before the Court to arrive at the conclusion that there was dishonest intention on the part of defendants to defraud the plaintiffs.

14. In above premises, the conclusion drawn by the learned Trial Court for rejecting the application (Exhibit 5) for attachment before Judgment appears to be just, proper and reasonable one. There is no need to cause any interference in it at the behest of appellants-plaintiffs. In contrast, the impugned order for rebuffing the relief to attach the properties before Judgment required to be made confirmed and absolute. Therefore, the appeal being devoid of merits deserves to be dismissed.

15. In sequel, the appeal stands dismissed. No order as to costs.

16. Pending Civil Application does not survive following dismissal of the appeal. Hence, the Civil Application is also disposed of. The rule stands discharged accordingly.

Arjun
Machhindra
Kadam

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by Arjun
Machhindra
Kadam
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[K. K. SONAWANE, J.]