

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment Reserved on : 02.04.2018
Judgment pronounced on: 10.04.2018

CORAM

THE HONOURABLE MR.JUSTICE M.SATHYANARAYANAN
and
THE HONOURABLE MR.JUSTICE P. RAJAMANICKAM

O.S.A.No.23 OF 2018

M/s. Empee Distilleries Ltd.,
Rep. By its Managing Director,
Having registered Office at
"Empee Tower" 59, Harris Road,
Pudupet, Chennai - 600 002. ... Appellant

Vs.

Mohan Breweries and Distilleries Limited
Rep. By its Senior Deputy General
Manager Accounts
G.Samuthiram
No.7, Salva street,
Madurai Meenakshi Nagar,
Valasaravakkam,
Chennai 600 087. ... Respondent

Prayer : Original Side Appeal is filed under Order XXXVI Rule 1/11 of O.S.Rules against the Order and Decreetal Order dated 04.10.2017 passed in Appln.No.295 of 2017 in C.S.No.28 of 2017.

For Appellant : Mr. J. Ravindran
For Respondent : Mr.G.Krishna Kumar

JUDGMENT

(Order of the Court was made by P. RAJAMANICKAM., J.)

This appeal has been filed by the respondent/defendant against the Fair and Decreetal Order passed in Application No.295 of 2017 in C.S.No.28 of 2017 dated 04.10.2017 on the file of this Court.

2. The respondent herein has filed a suit in C.S.No.28 of 2017 against the appellant herein for recovery of a sum of Rs.4,38,34,396.10/- and for costs. It has also filed an application in A.No.295/2017 under Order XXXVIII Rule 5 of CPC

seeking attachment of the immovable property of the appellant herein before Judgment. The learned Single Judge by his Order dated 04.10.2017 has allowed the said application directing the appellant herein to furnish security to the value of the suit claim on or before 30.11.2017, failing which, the properties mentioned in the schedule to the Judge's Summons shall be attached. Aggrieved by the same, the respondent/defendant has filed the present appeal.

3. For the sake of convenience, the parties are referred to as described in the Civil Suit.

The brief facts are as follows:

The plaintiff Company has been supplying Indian Made Foreign Liquor bottles to the defendant Company for the past fifteen years. For supplying the bottles from January 2013 to September 2013, the defendant was liable to pay Rs.8,56,81,033.00 and a sum of Rs.1,40,86,726.00 towards interest for non-payment of invoices beyond the agreed credit period and as such, in total the defendant was liable to pay Rs.9,97,67,759.00. In spite of repeated demands made by the plaintiff, the defendant did not make payment and hence, the plaintiff has issued a statutory notice on 21.05.2014 u/s.433 (e) & (f) of the Indian Companies Act, calling upon the defendant to pay the said amount within a period of three weeks. After receipt of the said notice, the defendant has paid Rs.1,00,00,000/- (Rupees One Crore only) and failed to pay the balance amount of Rs.8,97,67,759/-. Hence, the plaintiff initiated the winding up proceedings against the defendant in C.P.No.309 of 2014 before this court. During pendency of the said petition, the matter was compromised and a memorandum of compromise dated 08.09.2015 was filed and as per the said compromise, the defendant has agreed to pay a sum of Rs.7,49,69,587/- (Rupees Seven Crores Forty Nine Lakhs Sixty Nine Thousand Five Hundred and Eighty Seven Only) in monthly instalments before 23.07.2016. Based on the said compromise memo, C.P.No.309/2014 was disposed of on 09.09.2015. But the defendant paid the aforesaid amount with delay and hence, the plaintiff is entitled to claim interest @ 18% per annum. The interest comes to Rs.4,38,34,396.10/-. Hence the plaintiff has filed C.S.No.28/2017 for recovery of the aforesaid amount.

4. The plaintiff also filed an application under Order XXXVIII Rule 5 of CPC in A.No.295/2017 seeking attachment of the defendant's immovable property, before Judgment. According to the plaintiff, through a reliable source of information, the plaintiff understands that the defendant is in heavy debts and unable to repay its liabilities to its creditors. The defendant account is declared as Non-performing Asset (NPA) by

the Banks, since the defendant failed to pay the debt even to their Banks. Despite an order passed by this court in C.P.No.309 of 2014, the defendant was irregular in paying the monthly instalments and only in pursuance of the order passed by this court dated 10.06.2016, the defendant has cleared the admitted amount. Moreover, it would be very difficult for the plaintiff to realise the decree amount in future and hence, the plaintiff requests to direct the defendant to furnish security to the value of suit amount, failing which, attachment may be ordered.

5. The defendant has filed a counter affidavit denying the allegations made in the plaint. Its further case is that there was no agreement for payment of interest and hence, the defendant is not liable to pay the suit amount. The plaintiff has not made a prima facie case. Further, the plaintiff has not satisfied the court that the defendant is not able to pay its debts to its creditors and therefore, the defendant prayed to dismiss the aforesaid application.

6. The learned Single Judge after considering the rival submissions and materials placed before him, allowed the said application directing the defendant to furnish the security to the value of the suit claim on or before 30.11.2017, failing which, the properties mentioned in the Judges Summons shall be attached. Aggrieved by the said order, the defendant has filed the present appeal.

7. Heard Mr.J.Ravindran, learned counsel appearing for the appellant/defendant and Mr.G.Krishnakumar learned counsel appearing for the respondent/plaintiff.

8. The points for consideration are as follows:

- (i) Whether the plaintiff is entitled for the relief of attachment before judgment?
- (ii) Whether this appeal has to be allowed?

9. Point Nos.1 and 2:-

Order XXXVIII Rule 5 of CPC deals with the procedures for attachment before Judgment which reads as follows:

" 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."

10. A plain reading of the aforesaid provision would show that before directing the defendant to furnish security, the Court must be satisfied that

(i) the defendant is about to dispose of his property or is about to remove the property from the jurisdiction of the court, and

(ii) the defendant is intending to do so with a view to causing obstruction to, or delaying the execution of any decree that may be passed against the defendant.

In this case, in the affidavit filed in support of the application seeking attachment before Judgment, it is not at all whispered that the defendant is attempting to remove or dispose of his asset with the intention of defeating the decree that may be passed.

11. At this juncture, it would be relevant to refer the decision in Raman Tech. & Process Engg. Co., Another Vs. Solanki Traders reported in (2008) 2 SCC 302 wherein the Hon'ble Supreme Court in paragraph Nos.5 and 6 has observed as follows:

" 5. The power under Order 38 Rule 5 CPC is drastic and extraordinary power. Such 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 convert an unsecured debt into a secured debt. Any attempt by a plaintiff to utilize 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 judgment and forcing the defendants for out of court settlement, 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 judgment. 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 of obstructing or delaying the execution of any decree that may be passed against him, before power is exercised under Order 38 Rule 5 CPC. Courts should also keep in view the principles relating to grant of attachment before judgment (See - Prem Raj Mundra v. Md. Maneck Gazi, AIR (1951) Cal 156, for a clear summary of the principles.)"

12. From the aforesaid decision, it is clear that before exercising the power under Order XXXVIII Rule 5 of CPC, the Court should be satisfied that there is a reasonable chance of decree being passed in suit against the defendant. In other words, the court should be satisfied that the plaintiff has a prima facie case. Further, the plaintiff should establish that the defendant is attempting to remove or dispose of his assets with the intention of defeating the decree that may be passed. In this case, as already stated that in the affidavit, the plaintiff has not stated that the defendant is attempting to remove or dispose of its assets with the intention of defeating the decree that may be passed. Further, no other material also produced to show that the defendant is attempting to remove or dispose of its assets or part of its property with an intention of obstruction or delaying the execution of the decree that may be passed. Therefore, the order passed by the

learned Single Judge directing the defendant to furnish security is liable to be set aside. Accordingly, the points 1 and 2 are answered.

13. In the result, this appeal is allowed and the order passed in Appln.No.295 of 2017 in C.S.No.28 of 2017 dated 04.10.2017 is set aside. No costs.

Sd/-
Assistant Registrar(CS)

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Sub Assistant Registrar

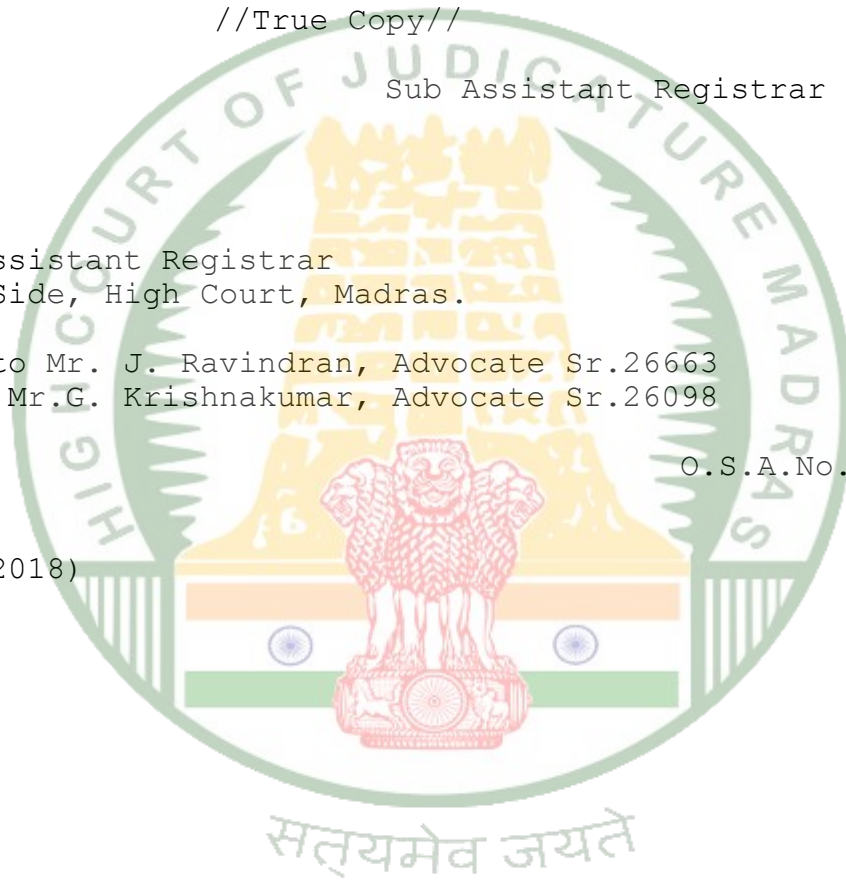
gv

To
The Sub Assistant Registrar
Original Side, High Court, Madras.

+ 2 ccs to Mr. J. Ravindran, Advocate Sr.26663
+ 1 cc to Mr.G. Krishnakumar, Advocate Sr.26098

O.S.A.No.23 OF 2018

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EU(25/04/2018)



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