

HON' BLE SRI JUSTICE C. PRAVEEN KUMAR

CIVIL REVISION PETITION No.3518 of 2018

ORDER:

1) The present Civil Revision Petition came to be filed under Article 227 of the Constitution of India, challenging the docket order dated 17.04.2018 passed in I.A.No.157 of 2018 in O.S.No.90 of 2017 on the file of the Senior Civil Judge, Razole, wherein the trial Court ordered attachment of leave salary under Section 60 of C.P.C.

2) The respondents/plaintiffs filed O.S.No.90 of 2017 seeking recovery of Rs.4,25,000/- against the defendant with interest at 12%p.a. from the date of suit till the date of realization. Pending the suit, I.A.No.157 of 2018 came to be filed seeking attachment before judgment. Docket order came to be passed ordering attachment of leave salary of arrears, if any under Section 60 of C.P.C., lying in the hands of respondent No.2. Assailing the same the present Civil Revision Petition came to be filed.

3) Learned counsel for the petitioner mainly submits that in view of the judgment of this Court in *Mandala Suryanarayana @ Babji v. Barla Babu Rao*¹ the power to attach before judgment cannot be exercised in routine manner and that has to be done only if the conditions enumerated in Rule 5 of Order 38 are satisfied.

¹ (2010) 2 ALD 417 (DB)

4) In the instant case, a perusal of the order does not clearly satisfy the requirement of Order 38 Rule 5 of C.P.C. In *Mandala Suryanarayana @ Babji* (supra), a Bench of this Court held as under:

“From a reading of Order XXXVIII Rules 5 and 6 of C.P.C., and Form Nos.5 and 7 to Appendix-F to CPC, and having regard to the provision for appeal, it becomes clear that the power to attach before judgment cannot be exercised in a routine manner. If the court is satisfied *prima facie* with regard to conditions enumerated in Rule 5 of Order XXXVIII of CPC, those reasons should be found in the order at least at the stage of ordering warrant of attachment in Form No.7. That is to say, if defendant fails to furnish security or fails to satisfy the Court as to why security is not necessary, whether defendant appears or not, the Court has to pass order giving reasons keeping in view the conditions mentioned in Rule 5 of order XXXVIII of CPC. The furnishing of reasons is also mandatory for yet another reason. As noticed supra, every order passed under Order XXXVIII Rule 6 of CPC is appealable order. Unless and until reasons are furnished, appellate Court would not be in a position to review the lower Court’s order with regard to satisfaction arrived at on *prima facie* considerations. The non-furnishing of reasons while issuing an order of attachment in Form No.7 would not be in a position to know as to which are the grounds that weighed with the lower Court for arriving at satisfaction of order of attachment before judgment.”

5) In *Raman Tech & Process Engg. Co. v. Solanki Traders*² the legal position was explained by the Apex Court, which is as under:

“The object of supplemental proceedings (applications for arrest or attachment before judgment, grant of temporary

² (2008) 2 SCJ 381

injunctions and appointment of receivers) is to prevent the ends of justice being defeated. The object of Order 38 Rule 5 CPC in particular, is to prevent any defendant from defeating the realization of the decree that may ultimately be passed in favour of the plaintiff, either by attempting to dispose of, or remove from the jurisdiction of the Court, his movables. The scheme of Order 38 and the use of the words “to obstruct or delay the execution of any decree that may be passed against him” in Rule 5 make it clear that before exercising the power under the said Rule, the Court should be satisfied that there is a reasonable chance of a decree being passed in the suit against the defendant. This would mean that the Court should be satisfied that the plaintiff has a *prima facie* case. If the averments in the plaint and the documents produced in support of it, do not satisfy the Court about the existence of a *prima facie* case, the Court will not go to the next stage of examining whether the interest of the plaintiff should be protected by exercising power under Order 38 Rule 5 CPC. It is well settled that merely having a just or valid claim or a *prima facie* case, will not entitle the plaintiff to an order of attachment before judgment, unless he also establishes that the defendant is attempting to remove or dispose of his assets with the intention of defeating the decree that may be passed. Equally well settled is the position that even where the defendant is removing or disposing his assets, an attachment before judgment will not be issued, if the plaintiff is not able to satisfy that he has a *prima facie* case.

The power under Order 38 Rule 5 CPC is a 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 realized by unscrupulous plaintiffs by obtaining orders of attachment before judgment and forcing the defendants for out-of-court settlements under threat of attachment.”

6) From a reading of the docket proceedings *prima facie* it appears that the impugned order came to be issued without issuing any notice to the defendants. But at the same time, learned counsel for the respondent would contend that since the petitioner is retired and if the impugned order is not passed, there is every possibility of the respondent encashing his leave salary, thereby making recovery of money, even if in case the suit is decreed, would become difficult.

7) Having regard to the circumstances referred to above and in view of the judgments referred to above, the Civil Revision Petition is disposed of by setting aside the docket order dated 17.04.2018 passed in I.A.No.157 of 2018 in O.S.No.90 of 2017 on the file of the Senior Civil Judge, Razole, and the trial Court is directed to follow the procedure contemplated under law and pass orders there on. Till such time, the petitioner shall not encash the leave salary.

8) There shall be no order as to costs. Miscellaneous petitions, if any, pending shall stand closed.

JUSTICE C. PRAVEEN KUMAR

10.08.2018
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