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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ FAO 297/2018, REVIEW PET. 298/2018, CM APPL. 31328/2018

PURAN SINGH ..... Appellant

Through: Mr. C.S. Gupta, Advocate.

versus

KARAN MOTORS PRIVATE LIMITED & ORS ..... Respondents

Through: Mr. Kaushal Gautam, Advocate.

CORAM:
HON'BLE MS. JUSTICE ANU MALHOTRA

O R D E R

% **16.08.2018**

In FAO No.297/18, the appellant thereof had assailed the impugned order dated 23.04.2018 of the Court of the learned ADJ-02, West in CS No.411/18 whereby an application under Order 39 Rule 1 & 2 of the CPC filed by the plaintiff, i.e., the appellant of the said case who is the respondent to the present review petition No.298/18, seeking interim relief in favour of the plaintiff and against the defendant arrayed as respondent nos. 1 to 4 to the FAO No. 297/14 from selling the immovable property was declined, it having been observed to the effect that the suit has been filed by the plaintiff for recovery and that an application for temporary injunction was not maintainable.

In view of the verdict in "**SWAN MILLS LTD. VS. DHIRAJLAL @ DHIRUBHAI BABARIA**" in **2012(4) ALL MR 51** with further observation to the effect that if the plaintiff, i.e. the appellant of the FAO had any apprehension that the defendants, i.e., the present applicants would sell their immovable properties then the remedy lay somewhere else and not by filing an application under Order 39 Rule 1 & 2 of the CPC. Significantly, vide proceedings dated 11.06.2018. In FAO No.297/2018 it was observed on as follow:

> "4. It appears that the learned Additional District Judge has, while passing the impugned order dated 23rd April, 2018, relied on a judgment of a Single Judge of the High Court of Bombay in **Swan Mills Ltd. vs. Dhirajlal @ Dhirubhai Babaria & Ors. 2012 (4) ALL MR 51,** which stands overruled by a Division Bench judgement of the High Court of Bombay in **LaFin Financial Services Pvt. Ltd. vs. IL & FS Financial Services Pvt. Ltd. 2015 SCC online BOM 4794."**

It is essential to observe that the verdict in "**SWAN MILLS LTD. VS. DHIRAJLAL @ DHIRUBHAI BABARIA**" (SUPRA) **2012(4) MHLJ 937**, is a Division Bench Judgment of High Court of Bombay and observations in **"La-Fin Financial Services Pvt. Ltd. Vs. IL & FS Financial Services Pvt. Ltd."** also a Division Bench judgment of the High Court of Bombay in Para 44, which read to the effect:-

> *"44. To be fair to Mr.Naphade, the decision of this Court in the case of Swan Mills Ltd.'s case, and on which heavy reliance w as placed, does seem to suggest that if the Appellant could not be successful in getting the order of temporary injunction which has practically the same effect of restraining the Respondent from transferring his*

property. However, on going through the said judgment we find that neither the decision of the Supreme Court in Manohar Lal Chopra's case nor the decision of this Court in the case of Triangle Drilling Ltd., were brought to the notice of the Division Bench that decided the Swan Mills Ltd.'s case. We are certain that had these decisions been pointed out to the learned Judges deciding the Swan Mills Ltd.'s case, they would not have taken the view that they did. To that extent, we find that the judgment in Swan Mills Ltd.'s case does not lay down the correct law. In view thereof, the reliance placed by Mr. Naphade on the said decision is of no assistance to the Defendant. We must add here that we are not for a moment suggesting that in every case an injunction ought to be granted by resorting to section 151 of the CPC, 1908. The discretion to grant or refuse the grant of injunctions, has to be exercised on well settled principles and would depend on the facts and circumstances of each case.

Vide order dated 10.07.2018 of this Court of which review is sought by the respondents to the said FAO 297/18, i.e., the present petitioner, it has been submitted that the directions dated 10.07.2018 vide which the respondent no.1, i.e., the present petitioner was directed to deposit the principal amount as claimed by the plaintiff in CS No.411/18 to the tune of Rs.46,74,705/- in the form of an FDR before the Trial Court within a period of three weeks from the date 10.07.2018 in the name of the District & Sessions Judge, West which on deposit was directed to be converted into an auto renewal mode, with the release of the said amount being subject to the orders of the disposal of the suit, were operating harshly upon the present petitioner who was in financial difficulty and apart from the same, a submission is made on behalf of the petitioner herein that the claim made in the suit is also time barred and it has further been submitted on behalf of the applicant that a sum of Rs.2,59,530/- in the form of an FDR in the name of the District & Sessions Judge, West drawn on the Indian Overseas Bank, Rajouri Garden, New Delhi has already been prepared and had been sought to be submitted before the learned Trial Court which was however not accepted in view of the directions of this Court dated 10.07.2018 directing the deposit of the entire principal amount prayed in the suit.

Inter alia it has been submitted on behalf of the present petitioner that such an order dated 10.07.2018 of this Court was in fact an order in terms of Order 38 Rule 5 of the CPC which could not have been made ordinarily and reliance has thus been placed on behalf of the petitioner on the verdict of the Hon'ble Supreme Court in "**RAMAN TECH. & PROCESS ENGG. CO. AND ANOTHER VS. SOLANKI TRADERS" (2008) 2 SCC 302** with reference to observations in paragraphs 4 & 5 of the said verdict which read to the effect:-

> ***4.*** *The object of supplemental proceedings (applications for arrest or attachment before judgment, grant of temporary 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 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 5CPC. 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.

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.", to contend that the power under Order 38 Rule 5 of the CPC being drastic and extra-ordinary ought not to be exercised merely for the asking and mechanically and needs to be exercised sparingly and strictly in accordance with rules and that the purpose of Order 38 Rule 5 of the CPC is not to convert an unsecure debt into a secured debt and that any attempt by the plaintiff to utilize the provisions of Order 38 Rule 5 as an endeavour for coercing the tenant to settle the suit claim should be discouraged and that there can be cases where there are doubtful and inflated claims that may be realized though invocation of such power.

The prayer is vehemently opposed on behalf of the respondent to the present petition submitting *inter alia* to the effect that the contention of the petitioner herein that the claim made by the respondent was time barred is subjudice before the learned Trial Court and no determination in relation thereto is presently necessitated and that the petitioner ought to comply with the directions dated 10.07.2018. The contentions raised on behalf of the respondent to the present petition to the effect that the aspect of determination of the claim made in the suit being time barred is subjudice and subject to trial in the said suit, i.e., CS No. 411/18 pending before the ADJ-03, West is undoubtedly correct.

Without any observations on the merits or demerits of submissions that would be made during the trial in CS No. 411/18, and the prima facie contention raised on behalf of the defendant to the said suit, i.e., the present petitioner qua the contention of the time barred claim having been sought to be agitated and invocation of power under Order 38 Rule 5 of the CPC, and financial difficulty contended on behalf of the petitioner, i.e., the defendant to the suit, the FDR bearing no.0709307 for the sum of Rs.2,59,530/- drawn on the Indian Overseas Bank, New Delhi in the name of the District & Sessions Judge, West is allowed to be deposited before the learned Trial Court within a period of three days by the petitioner, which on deposit is directed to be converted into an auto renewal mode with the release of said amount being subject to orders of disposal in CS No.411/18.

As observed vide order dated 10.07.2018, nothing stated hereinabove would amount to an expression of the merits or demerits of the case qua the contentions that may be raised on behalf of either side before the learned Trial Court.

The Review Petition is disposed of accordingly.

Copy of the order be given Dasti, as prayed.

ANU MALHOTRA, J

AUGUST 16, 2018/NC