IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

IN ITS COMMERCIAL DIVISION

INTERIM APPLICATION NO. 1 OF 2019
IN
COMMERCIAL SUMMARY SUIT SUIT NO. 1430 OF 2019

Hindustan Unilever Limited .. Applicant

In the matter between :

Hindustan Unilever Limited .. Plaintiff
Vs.
Samir N. Bhojwani .. Defendant

Mr.Priyank Kapadia a/w. Ms.Anusa Jhunjhunwalla, Ms. Natasha Bhot i/b M.Mulla Associates for applicant/plaintiff.

Mr.Cherag Balsara a/w. Mr. Parimal K. Shroff, Mr.D.V. Deokar, Ms.Jasmine Upadhye and Mr.D. Parikh i/b Parimal K. Shroff and Co. for defendant.

CORAM : N.J. JAMADAR, J.

DATE : 28th JANUARY 2020

ORAL ORDER :

1. This interim application is taken out by the plaintiff for *inter-alia* the following reliefs :-

> *"(a) Pending the hearing and final disposal of the Suit, this Hon'ble Court be pleased to direct the Defendant to secure by way of depositing in this Court or by furnishing an appropriate security/bank guarantee a sum of Rs.5,00,00,000/- (Rupees Five Crores only) being the security deposit to be refunded by the Defendant to the Applicant payable under the Leave and License Agreement or in the alternate direct the Defendant to create a registered charge on the Licensed Premises in favour of the Applicant to the extent of Rs.5,56,91,780.82/- (Rupees Five Crores Fifty-Six Lakhs*

> *Ninety-One Thousand Seven Hundred Eighty and Eight-Two paise only);*
>
> *(b) Pending the hearing and final disposal of the Suit, this Hon'ble Court be pleased to restrain the Defendant from interfering with the Applicant's occupation of the Licensed Premises, till such time as the security deposit of Rs.5,00,00,000/- (Rupees Five Crores Only) is repaid with interest.;*
>
> *(c) Pending the hearing and final disposal of the Suit, this Hon'ble Court be pleased to restrain the Defendant, his officers, servants, agents, representatives from dealing with the Licensed Premises in any manner whatsoever."*

2. This suit is instituted under the provisions of Order 37 of the Code of Civil Procedure, 1908 ('The Code') purportedly for the recovery of a sum of Rs.5 crores along with interest at the rate of 15% per annum, which was kept with the defendant by way of a security deposit in connection with the leave and licence agreement in respect of flats bearing Nos.71 and 81 admeasuring 2699 sq.ft. located on the 5th and 6th floor of the building known as 'Narain Terraces' situated CTS No. C/1629-A 1/5, Union Park, Pali Hill, Bandra West, Mumbai – 400 050 along with the right to use two car parking spaces (hereinafter referred to as "licensed premises").

3. The plaintiff claims that the licensed premises was initially given under registered Leave and License Agreement executed on 28-10-2013

('The First Agreement'). The period of licence was 36 months from 1-12-2013 to 30-11-2016. Under the terms of the said agreement, a sum of Rs. 5 crores was kept with the defendant as a security deposit. After the expiry of the term of the First Agreement, the licence was renewed and another Leave and License Agreement came to be executed on 29-11-2016 ('2016 Agreement') and the period of license was extended by 24 months, i.e., upto 30-11-2018. The amount of security deposit paid under the First Agreement was continued as a security deposit for the 2016 Agreement as well. Under clause 4.2 of the 2016 Agreement, the defendant- licensor is under an obligation to forthwith refund to the licensee the security deposit amount of Rs. 5 Crores simultaneously with the licensee removing its employees and his/her her family members and their articles, goods and belongings from the licensed premises and the licensee handing over vacant possession thereof to the licensor. In the event of default in refunding the security deposit, the licensor shall be liable for payment of interest at the rate of 15% per annum from the date of expiry or termination of this license agreement till repayment thereof. Additionally, till the refund of the security deposit, the licensee is entitled to continue to occupy the licensed premises without payment of any licence fees.

4. The plaintiff avers that after expiry of the term of the 2016 Agreement, by mutual consent, the period of license was extended by one month under the letter dated 30-11-2018. The defendant further extended the period of licence by one month and permitted the plaintiff to store its belongings during the licenced period till 31-01-2019. However, for the said period, no licence fees was payable. The defendant, by the letter dated 17-12-2018 assured to refund the security deposit of Rs. 5 crores.

5. The plaintiff further avers that the plaintiff made all the arrangement to deliver the vacant possession of the licensed premises to the defendant. The plaintiff called upon the defendant by addressing letters on 25th January, 30th January and 26 February 2019 to refund the security deposit, as agreed, and take delivery of possession of the licensed premises. The defendant failed to refund the security deposit. In the meanwhile, the plaintiff noticed that the defendant had barged into the premises. The plaintiff thus addressed legal notice to the defendants on 11-01-2019 and called upon the defendant to refund the security deposit. The defendant paid no heed. Hence the plaintiff is constrained to institute the suit for recovery of the security deposit of Rs.5 crores along with interest @ 15% per annum under the terms of the contract.

6. The writ of summons has been served on the defendant.

7. In the meanwhile, the plaintiff has taken out this application for the reliefs, extracted above. As in the plaint and the instant application, the plaintiff has sought reliefs in the nature of protection of possession of the plaintiff over the licensed premises, at the first hearing of this application, it was made clear to the plaintiff that the reliefs relating to the possession of the licensed premises are required to be sought from the Court of competent jurisdiction. Thereupon, the plaintiff has restricted this application to the relief as sought in prayer clause (a), extracted above.

8. An affidavit in reply is filed on behalf of the defendant. The defendant, at the outset, assailed the tenability of the suit under the provisions of Order 37 of the Code. It is contended that in breach of the prescription contained in Rule 2 of Order 37, the plaintiff has sought diverse reliefs, including perpetual injunction, which are beyond the ambit of the said provision. Thus, the summary suit does not deserve to be entertained.

9. On the merits of the application, the defendant contends that prayer clause (a) of the application is in the nature of prayer of attachment before judgment, as envisaged by Order 38 of the Code. The plaintiff has neither made out a case for grant of such a relief nor the circumstances of the case warrant grant of such extraordinary relief. Moreover, there is no whisper about any act on the part of the defendant with intent to delay or defeat the execution of the decree, which may be ultimately passed in favour of the plaintiff. As the plaintiff is in occupation of another premises being the Duplex Apartment Nos.5 and 6(E) admeasuring 1007 sq. ft. carpet area on 3rd and 4th floor and the residential Apartment known No.6(E) admeasuring 746 sq. ft. carpet area on the 4th floor of the residential building as "Shimira" situated at 16th Road, Khar (West), Mumbai 400 052, under another registered Leave and License Agreement dated 19-12-2018, and has not paid the license fees thereof from 1-07-2019, no case for grant of the prayer is made out.

10. I have heard Shri Priyank Kapadia, the learned counsel for the applicant and Shri Cherag Balsara, the learning counsel for the defendant, at some length.

11. The learned counsel for the plaintiff would urge that the liability of the defendant to refund the security deposit is beyond the pale of controversy. Not only in the 2016 Agreement, there is a clear and categorical obligation on the part of the defendant to refund the security deposit, no sooner the period of license comes to an end but also in the communications, especially communication dated 17-12-2018, the defendant had acknowledged the liability to refund the said amount without any qualification. The defence now sought to be advanced of breach on the part of the plaintiff of the terms of the 2016 Agreement, and the endeavour to hold on to the security deposit on that count is a subterfuge.

12. The learned counsel for the plaintiff also invited the attention of the Court to a public notice issued on behalf of the prospective purchaser wherein it is mentioned that the defendant has been in negotiations with the prospective purchaser for sale of Duplex Apartment No.73 and 83 of Unit No.3, admeasuring about 276 sq. mtrs. built-up area (including internal stair case-3) on the 5th and 6th floor in the same building in which the licensed premise is located. It was further urged that the defendant is in a straitened financial condition and even criminal prosecution has been initiated against the defendant and thus there is strong possibility that the defendant may dispose of all his properties and in that event the plaintiff would be left in the lurch, even if a decree is passed in the instant suit.

13. In opposition to this, the learned counsel for the defendant stoutly submitted that the application is wholly misconceived. Laying emphasis on the provisions contained in Order 38 Rule 5 and the conditions which ought to be satisfied before an order can be passed thereunder, the learned counsel for the defendant submitted that the application is conspicuously silent about the acts on the part of the defendant which would bring the case within the ambit of the provisions contained in Rule 5. It was further submitted that the plaintiff is indisputably in occupation of another premises owned by the defendant, the value of which is in Crores. The defendant cannot be restrained from disposing of or dealing with his properties merely because the suit has been instituted against him, urged the learned counsel for the defendant.

14. To begin with the governing provisions which are required to be kept in mind while determining the prayer in the nature of attachment before judgment. Section 94 of the Code deals with

Supplemental Proceedings. The object of the Supplemental Proceedings is to prevent the ends of justice from being defeated. Clause (b) of section 94 reads as under :

> ***"Section 94 CPC Description***
>
> *In Order to prevent the ends of justice from being defeated the Court may, if it is so prescribed,-*
>
> *.......................*
>
> *(b) direct the defendant to furnish security to produce any property belonging to him and to place the same at the disposal of the Court or Order the attachment of any property;*

15. The procedural requirements are spelled out by the provisions contained in Order 38 Rule 5.

> ***"Order 38 Rule 5(1) :***
> *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.”*

16. From a conjoint reading of the aforesaid provisions, it becomes abundantly clear that the direction to make deposit or furnish security is required to be passed only when the Court is satisfied that otherwise the ends of justice would be defeated. Twin conditions are required to be satisfied before an order under Order 38 Rule 5 is passed. First, there should be material to indicate that the defendant, with intent to delay or obstruct or defeat the execution of any decree that may be passed against him is taking certain actions. Secondly, those actions are in the nature of disposal or removal of the whole or any part of his property from the local limits of the jurisdiction of the Court. Undoubtedly, the object of attachment before judgment is to ensure that in the event of passing of the decree there exists property which would satisfy the decree.

17. The Court has to exercise the said power of attachment before judgment with caution and upon satisfaction that all the conditions prescribed by Rule 5 are satisfied. A profitable reference in this context can be made to a judgment of the Supreme Court in the case of ***Raman Tech. & Process Engg. Co. & Anr. Vs. Solanki Traders***[1], wherein the parameters of the exercise of the power under Order 38 Rule 5 were illuminatingly postulated. Paragraph Nos. 4 and 5 read as under :

> *"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.*

1 (2008) 2 SCC 302

> *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.”*

18. In one of the earliest pronouncements on this aspect, the Calcutta High Court, in the case of ***Premraj Mundra Vs. Md. Maneck Gazi & Ors.*** [2], enumerated the guiding principles for exercise of discretion under Order 38 Rule 5 :

> *“10. From a perusal of all the authorities, I think that the following guiding principles can be deduced :*
>
> *(1) That an order under Order 38, Rules 5 & 6, can only be issued, if circumstances exist as are stated therein.*
>
> *(2) Whether such circumstances exist is a question of fact that must be proved to the satisfaction of the Court.*
>
> *(3) That the Court would not be justified in issuing an order for attachment before judgment, or for security, merely because it thinks that no harm would be done thereby or that the defendants would not be prejudiced.*
>
> *(4) That the affidavits in support of the contentions of the applicant, must not be vague, &*

2 AIR 1951 Calcutta 156

must be properly verified. Where it is affirmed true to knowledge or information or belief, it must be stated as to which portion is true to knowledge, the source of information should be disclosed, & the grounds for belief should be stated.

(5) That a mere allegation that the deft. was selling off & his properties is not sufficient. Particulars must be stated.

(6) There is no rule that transactions before suit cannot be taken into consideration, but the object of attachment before judgment must be to prevent future transfer or alienation.

(7) Where only a small portion of the property belonging to the deft. is being disposed of, no inference can be drawn in the absence of other circumstances that the alienation is necessarily to defraud or delay the plaintiff's claim.

(8) 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 plaintiff's claim. It is open to the Court to look to the conduct of the parties immediately before suit, & to examine the surrounding circumstances, & to draw an inference as to whether the deft. is about to dispose of the property, & if so, with what intention. The Court is entitled to consider the nature of the claim & the defence put forward.

(9) The fact that the deft. is in insolvent circumstances or in acute financial embarrassment, is a relevant circumstance, but not by itself sufficient.

(10) That in the case of running businesses, the strictest caution is necessary & the mere fact that a business has been closed, or that its turnover has diminished, is not enough.

(11) Where however the defendant starts disposing of his properties one by one, immediately upon getting a notice of the plaintiff's claim, &/or where he had transferred the major portion of his properties shortly prior to the institution of the suit &

> *was in an embarrassed financial condition, these were grounds from which an inference could be legitimately drawn that the object of the deft. was to delay and defeat the plaintiff's claim.*
>
> *(12) Mere removal of properties outside jurisdiction, is not enough, but where the deft. with notice of the plaintiffs' claim, suddenly begins removal of his properties outside the jurisdiction of the appropriate Court, & without any other satisfactory reason, an adverse inference may be drawn against the deft. Where the removal is to a foreign country, the inference is greatly strengthened.*
>
> *(13) The defendant in a suit is under no liability to take any special care in administering his affairs, simply because there is a claim pending against him. Mere neglect, or suffering execution by other creditors, is not a sufficient reason for an order under Order 38 of the Code.*
>
> *(14) The sale of properties at a gross undervalue, or benami transfers, are always good indications of an intention to defeat the plaintiff's. claim. The Court must however be very cautious about the evidence on these points & not rely on vague allegations."*

19. Reverting to the facts of the case, in the backdrop of the aforesaid exposition of the legal position, it would be apposite to first consider the averments in support of the application. Paragraphs 12 and 13 of the application contain the averments which bear upon the determination of the application. They read as under :

> *"12 The Applicant has a serious apprehension that the Defendant may attempt to create third-party rights on the Licensed Premises and continue to unjustly enrich himself by not refunding the security deposit of Rs.5,00,00,000/- (Rupees Five Crores only) to the Applicant.*

> *13 In view of the aforesaid facts, in the interest of justice, the Applicant respectfully submits that the relief as prayed for in the present interim Application be granted in favour of the Applicant. The applicant states that the balance of convenience is in favour of the Applicant. Therefore, in the event the relief as sought for by the Applicant are not granted, grave harm and irreparable loss and injury will be caused to the Applicant. On the other hand, no harm, loss or injury will be caused to the Defendant if the reliefs as sought for in the present Interim Application are granted by this Hon'ble Court."*

20. From a bare perusal of the aforesaid averments it becomes evident that, at best, the apprehension is that the defendant may create third party rights on the licensed premises. The element of intentional action on the part of the defendant, actuated with the design to delay or defeat the decree, which may ultimately be passed in favour of the plaintiff, is conspicuous by its absence in the application and affidavit in support thereof. As indicated in the case of ***Premraj Mundra*** (Supra), the general assertions of the nature that no prejudice will be caused to the defendant in the event an order of attachment before judgment is passed, is of no consequence.

21. Even otherwise, the material on record indicates that the defendant is endowed with multiple properties. One of the property, i.e., the Duplex Apartment Nos.5 and 6(E), admeasuring 716 sq. ft.

carpet area, on 4th floor for the residential building known as "Shimira" situated at 16th Road, Khar (West), Mumbai 400 052 is in the occupation of the plaintiff in the capacity of a licensee. The period of license is upto March-2021. There is no material on record to indicate that any endeavour was made by the defendant to alienate or otherwise dispose of the licensed premises. On the contrary, the public notice was in respect of sale of Duplex Apartment No.73 and 83 of Unit No.3, admeasuring about 276 sq. mtrs. built-up area (including internal stair case-3) on the 5th and 6th floor, 'Narain Terraces' situated CTS No. C/1629-A 1/5, Union Park, Pali Hill, Bandra West, Mumbai – 400 050. This again indicates that the defendant has a number of properties and adequate means to satisfy the decree, which may eventually be passed in favour of the plaintiff.

22. It is trite that on account of mere pendency of the suit, the defendant cannot be restrained from dealing with the properties. In the circumstances of the case, a direction to the defendant to deposit the amount claimed by the plaintiff or provide security for the same, would be wholly unjustified. Thus, I am inclined to hold that the prayer of the plaintiff in the interim application does not deserve countenance.

23. Hence, the following order :

O R D E R

(i) The interim application stands rejected.

(ii) The suit be listed as per C.M.I.S. date.

[N.J. JAMADAR, J.]