



A.No.2217 of 2021 & OA.No.304 of 2015 in C.S.No.224 of 2015

IN THE HIGH COURT OF JUDICATURE AT MADRAS

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Reserved on : 02.02.2022

Pronounced on :04.02.2022

CORAM : JUSTICE N.SESHASAYEE

A.No.2217 of 2021 & O.A.No.304 of 2015  
in C.S.No.224 of 2015

1. M/s.Viprah Technologies Limited  
Rep by its Managing Director  
C.K.Anantha Subramanian  
S.F.No.79, Aalambapalayam Road  
Thekkalur, Avinashi Taluk  
Coimbatore District – 641 654.
- 2.C.K.Anantha Subramanian  
Managing Director  
M/s.Viprah Technologies Limited  
No.9, III Floor, 'Vintage Castle'  
First Cross Street, Thirumangalam Street  
Near Buhari Hotel  
Kasturibai Nagar, Adyar,  
Chennai – 600 020.
- 3.Sujatha Ananth  
W/o. C.K.Anantha Subramanian  
Director, M/s.Viprah Technologies Limited



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No.9, III Floor, 'Vintage Castle'  
First Cross Street, Thirumangalam Street  
Near Buhari Hotel  
Kasturibai Nagar, Adyar,  
Chennai – 600 020.

.... Applicants / Defendants

Vs

1.T.Ganesan

2.M/s.Hi Power Solutions Private Limited  
Rep. By Managing Director T.Ganesan  
No.9, Vembuli Amman Second Street  
Gowrivakkam, Chennai – 600 073.

3.Sri Rajeswari Enterprises  
Rep by its Managing Partner T.Ganesan  
No.9, Vembuli Amman Second Street  
Gowrivakkam, Chennai – 600 073.

.... Respondents / Plaintiffs

**Prayer in A.No.2217 of 2021:** Application filed to raise the attachment over the Schedule A property being the land and factory building thereon belonging to Viprah Technologies Limited, the 1<sup>st</sup> respondent / 1<sup>st</sup> defendant herein, situated at S.F.No.79, Alampalayam Road, Thekkalur, Avinashi Taluk, Coimbatore together with all the machineries, furniture, fixture and all other movable items.



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**Prayer in O.A.No.304 of 2015 :** Application filed seeking to grant an order of interim injunction restraining the respondents 2 and 3 / defendants 2 & 3 from in any manner alienating or encumbering the schedule mentioned property which is morefully described in the Schedule to the Judge's summons

For Applicants : Mr. Kaushik N.Sharma  
for M/s.KNS Law Chambers

For Respondents : Mr.P.J.Sriganesh

### **ORDER**

1.1 This application is filed for vacating an order of interim attachment or what is come to be known as *attachment before judgment* (henceforth ABJ for short) of one of the items of properties of the defendants made Vide order of this Court in A.No.2152 of 2015

1.2 For any Court exercising civil jurisdiction in this genre, the frequency of the occasions that requires its engagement with the law on ABJ has made it more into an instinctive-skill, except perhaps for the starters. Not a shade of



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interpretation is untouched in this branch of procedural law. Still, when this application came up for consideration, there is something that awakened the Court to a certain reality - something that has always existed and available but has possibly managed to hide itself beneath the veil of ABJ.

1.3 An attachment of defendant's property post passing of a decree in a suit for money- claim is inevitable. By then the adjudicatory process is complete and the liability of the defendant is ascertained and crystalized. Therefore, the attachment of defendant's – now the Judgement debtor's property, is resorted to for the Court to take custody of the power of alienation which the judgement debtor has over his property on its course to sale in execution of the decree. However, is it fair to attach the same property before a decree is passed when the plaintiff has a mere probability of 50% success in his case, as in every suit litigated, at a time when the liability of the defendant as alleged is still inchoate? Order XXXVIII Rule 5 and 6 CPC may have granted it a flair of legitimacy, but given the consequences of an order of ABJ, is it a fair



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option to grant it on a mere anticipation of a probable success of the plaintiff in the suit?

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1.4 The utility of ABJ may have been hyped that it has managed to over-stay as a judicial order of choice in a suit for money-claim ever since the CPC has arrived into our legal system a century ago. This requires a certain degree of exposition, still it needs to be reiterated with an underscore that it is not anything that did not exist before. This prompted this Court to unlayer ABJ to lay bare the consequences it produces.

### **Facts:**

2.1 Facts are along the classical lines as they are in any other cases of ABJ.

They are:

- ◆ The plaintiffs have laid a suit for realisation of Rs.1,11,62,661 with interest at 21%, totalling Rs.1,80,05,212 with future interest at the



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same rate. The foundational facts on which the plaintiffs rest their cause of action is not necessary for the current purpose.

- ◆ To secure the payment of suit-claim in the eventuality of the plaintiffs succeeding in their action, they moved two applications:  
(i) A.2152 of 2015 under Order XXXVIII Rule 5 CPC for directing the defendants to offer security and in default of which to attach two items of properties belonging to the defendants (hereinafter would be referred to as an application for ABJ); and (ii) O.A. 304 of 2015 under Order XXXIX Rule 1 and 2 CPC for an order of interim injunction seeking to restrain the defendants from alienating those very properties involved in the application for ABJ.
- ◆ On 23-03-2015, this Court passed an order of interim injunction against the defendants not to alienate their two items of properties. In the application for ABJ, the Court directed notice to the defendants. The matter then came up before this Court on 20-04-2015. On that date this Court extended the order of interim injunction passed



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in O.A.304 of 2015, and directed the defendants to furnish security in the application for ABJ. Subsequently, when the matter came before this Court on 12-06-2015, this Court has passed an order, perhaps by oversight, restraining the defendants not to alienate or encumber the same two items of properties, since an order for the same purpose had been earlier passed in O.A.304 of 2015 and was in force.

- ◆ The application for ABJ came up before this Court again on 28-07-2015. On that date, the Court extended the earlier order of injunction passed in the application for ABJ on 12-06-2015.
- ◆ The plaintiffs now attempted to have this order passed in the application for ABJ registered before the concerned Sub Registry. The Registration officials however, refused to register it since the order did not state that the properties have been attached before judgement in the application for ABJ in A.2152 of 2015. Hence the plaintiffs came forward with a set of applications in A.No:5370 of 2017 and



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5114 of 2017. Of them application in A.5370 of 2017 is for modifying the order of interim injunction granted in the application for ABJ in A.2152 of 2015 into one for attachment before the judgement as was sought, and the other application in A.5114 of 2017 is for a direction to the Registry to communicate the said order to the concerned Sub Registry.

- ◆ On 06-10-2017, this Court allowed these applications, and accordingly an order of attachment before judgement of the two items of properties of the defendants was formally passed on that date.
- ◆ Subsequently, the plaintiffs had taken out an application in O.A.1110/2019 again for an order of interim injunction to restrain the defendants from encumbering the very same two items of properties that had been attached. The only difference between their earlier application in O.A.304 of 2015 and O.A.1110 of 2019 is that, when they moved O.A.304 of 2015, no order of attachment had been passed, and now an order to that effect has been passed. It ap-



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appears from the tenor of the affidavit filed in support of this application (A.1110 of 2019) that it is indeed filed to implement the order of attachment. It appears strange as to why should the plaintiffs multiply ancillary proceedings to secure something which has been already secured Vide the order of ABJ. After referring to the order of interim attachment passed earlier by the court, and relying on Sec.64 CPC, this Court vide its order dated 06-03-2020, granted an order of injunction restraining the defendants from creating any encumbrance. This Court is informed that violating this order of injunction, the defendants have leased out one of the items of properties, and hence the plaintiffs have taken out another application for initiating an action for contempt of court, and this is stated to be pending before the learned Single Judge of this Court who had passed the order in A.1110 of 2019.



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2.2 The first item of property covered by the order of ABJ is Sy.No:79 of Thekkalur village, and the present application is filed by the defendants to vacate attachment over a portion of this item of property and is stated to be in Sy.No:79/4. This is part of the factory unit that belonged to the first defendant-company. It is averred in the affidavit filed in support of this application that the defendants are keen to mobilise the funds for settling their dues, that due to pandemic situation they struggle to mobilise funds etc.

3.1 Be that as it may, in the last few postings before this court, the counsel for the defendants is seen making optimistic statements of settlement of the suit claim, but this is dismissed by the counsel for the plaintiffs with considerable skepticism and in equal measure. It is apparent that the plaintiffs are disinterested in optics and hollow promises, but requires something to happen in real terms. This anxiety is appreciable, but what the plaintiffs appear to have overlooked is that with an order of ABJ, and two orders of injunction, one before and one after the order of ABJ, they have managed to tie down the



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defendants to their knees, and arrested every possibility of the latter raising funds for them to make a realistic offer with their ability to manoeuvre through the labyrinthine procedural law. This Court is amused, as it may amuse every right thinking person, except perhaps those with a Shylockian attitude.

3.2 On 03.01.2022, when this matter came up before this Court, this Court required a valuation statement from both the parties to ascertain if the properties that have been attached are in excess of the property that can be attached to satisfy the suit claim in the eventuality of a plaintiffs' success in the suit. Indeed, Court can attach only so much property of the defendants as would be sufficient to satisfy the decree that might be passed, and no more. The Code therefore, mandates that the plaintiff has to provide a valuation-statement of the property to be attached under Order XXXVIII Rule 5(2) CPC, to enable it to identify the extent of property that may be attached. The perusal of the re-



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cord does not indicate that the plaintiffs have produced any statement on the valuation of the properties which they intended to attach.

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3.3 Pursuant to the directions of the Court, the defendants have produced its valuation statement for the property, the attachment over which they seek to raise. This property is in S.No:79/4 measuring 0.95 acres and it is valued at Rs.2.85 crores. It is part of item 1 in the application for ABJ. According to the counsel for the defendants the order of ABJ includes the entire property in S.No:79 which included the property of third parties as well. The plaintiffs, however, are yet to produce a valuation statement [which they ought to have filed even at the pre-attachment stage in terms of Order XXXVIII Rule 5(2)].

4. Heard both sides. The counsel for the defendants/applicants seek that the ABJ over 0.95 acres in Sy.No: 79/4 be raised. He stated that the entire Sy.No:79 has been attached, that Sy.No:79 has been sub-divided into Sy.No:79/1 to 79/4. Of them Sy.No:79/1 belongs to a third party.



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Sy.No:79/2 and 79/3 were outstanding on a statutory charge in relation to certain Provident Fund issue and the same has been raised in October, 2021. So far as the 95 cents in Sy.No:79/4 is concerned there is no other encumbrance over it, and hence prayed that attachment over it may be raised to enable the defendants to raise funds.

### **ABJ – A Fair Option & An Only Option?**

5. The anxiety of the plaintiff to secure his claim beforehand - before a decree is obtained from the court, is reasonable. Indeed, the Court itself requires certain powers to deal with situations that may arise during the pendency of the suit, that it may have to ensure that a certain *status quo* is preserved even as it is engaged in adjudicating the cause. This is enabled by Sec.94 CPC. It reads:

***“94. Supplemental proceedings :- In order to prevent the ends of justice from being defeated the Court may, if it is so prescribed,-***

- a) issue a warrant to arrest the defendant and bring him before the Court to show cause why he should not give security for his ap-*



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*pearance, and if he fails to comply with any order for security commit him to the civil prison;*

- 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;*
- c) grant a temporary injunction and in case of disobedience committed person guilty thereof to the civil prison and order that his property be attached and sold;*
- d) appoint a receiver of any property and enforce the performance of his duties by attaching and selling his property;*
- e) make such other interlocutory orders as may appear to the Court to be just and convenient.”*

Order 38 Rules 1 to 4 relate to Sec.94(a), while Sec.94(b) CPC is backed by Rule 5 thereof. Grant of temporary injunction as authorised under Sec.94(c) is regulated by Order XXXIX, and the appointment of Receiver as enabled by Sec.94(d), specific Rules have been made in Order XL. Having stated thus, an order that may be passed under Sec.94(b) to 94(d) CPC leaves different



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consequences on the right of the defendants<sup>1</sup>. This court is now concerned more with an order of ABJ under XXXVIII Rule 5 and 6 CPC.

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6.1 The basic premise that cannot be dislodged is that when a plaintiff institutes the suit, he starts with a probable success rate of a mere 50%, with the other half of the probability feeding hopes to the defendant of the latter's success in the suit. An order of ABJ goes to secure the hopes of the plaintiff which is no larger than that of the defendant. While Order XXXVIII Rule 5 & 6 read along with Rule 11-B CPC completes the procedural formalities of

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1. A brief statement on the legal implication on the defendants to right to his property can be explained: An order injunction the defendant from alienating his property/not to alter the physical feature of a property operates in personem, and it does not affect the right of ownership over the property, nor its possession, if the defendant is already in possession. In other words, the defendant, as an owner of a property has his power of alienation (which is the core-feature of right of ownership) will be in tact, but his personal right to exercise it alone is curtailed. Accordingly, a violation of an order of injunction against alienation will invite only an action for contempt, and it per se will render the alienation void. Only in exercising the power to deal with the contempt of its order, the Court, if it considers it necessary to restore status quo ante, may order setting aside an alienation made in violation of the order of injunction, but de hors an order of the court, the alienation made will remain valid. Turning to an order attaching the property of the defendant is concerned, unlike an order of interim injunction against alienation, it operates directly on the right of ownership. The power of alienation is frozen on a combined reading of Order XXXVIII Rule 5 & 6 read with Sec.64 CPC, and it is brought at the disposal of the Court. But the possession of the property, will continue with the defendant. And, it is because the power of alienation had come under the disposal of the Court, there is no need for re-attaching the property when it is brought to sale during execution. See: Order 38 Rule 11. In receivership, both the power of alienation as well as the possession of the property comes under the custody of the Court. However, where an order of ABJ differs from an order of receivership is that in the former the order is passed to preserve the interest of the plaintiff, whereas in receivership the aim is to preserve it generally for the benefit of all the parties.



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ABJ, Sec.64 CPC read along with Order XXXVIII Rule 11A(1) backs them

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up with its statement on the consequence thereof. Sec.64 “*any private transfer of the property attached or of any interest therein ... contrary to such attachment shall be void as against all claims enforceable under the attachment.*”

6.2 While theoretically an order of ABJ does not freeze the power of alienation, by declaring that every private alienation made contrary to it as void, it has rendered the power of alienation of the defendant to an exhibit which he may not even showcase. The functional reality in this State is that when once an order of ABJ is notified to the Sub Registry in terms of Rule 11-B, the Registering officials would not even register an alienation. All the aforesaid provisions relating to ABJ thus cumulatively ensures that the power of alienation – not just of ownership, but even any interest which the defendant has over the property attached, is effectively frozen.



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6.3 The law is well anchored, free of any frills and embroideries and is capable of uncomplicated administration, but is the process too tedious for meticulous application? It appears to be so, as the manner of working the law on ABJ often ends up in diluting its mandatory compliance. A close observation of the procedure prescribed for ABJ reveals that the Code is seemingly struggling to balance its concern for securing the interest of the plaintiff with its hesitancy to interfere with the proprietary rights of the defendant. It mandates a preparatory stage when it insists that the defendant be asked to show cause and requires him to furnish security, and goes for attachment as an option without an alternative, when neither happens. It thus prepares itself adequately, satisfies itself many times that it has been fair to the defendant, before it begins to operate on his right to property. If Sec.64 is turned to on its face it makes alienation only to the extent of suit claim as void, but where the property attached is an indivisible property and is alienated for a sum higher than the suit-claim, then sale will be invalid to the proportionate value, but that may end up creating more complication than what ABJ intends to



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achieve. As will be seen later, the anxiety of the Code for extending procedural fairness of hearing the defendant before an order of ABJ, however, is not seen adequately matched by its fairness in evaluating the consequences that ABJ may produce.

7. When once an order of ABJ is set in motion, it refuses to cease till it is raised in terms of Order XXXVIII Rule 9, only when the defendant furnishes security, or the suit is dismissed. In all other cases, ABJ will last as long as the suit lasts, and even beyond it, if the suit is decreed in favour of the plaintiff. It necessarily leads to the question on the fairness of freezing the power of alienation of the defendant almost infinitely in the timelessness of our adjudicatory process.

8. This now takes this Court to the point it raised in the opening paragraph - Is ABJ as provided under Order XXXVIII Rules 5 & 6 backed by the consequences declared in Sec.64 CPC a fair option, and to secure the plaintiff's



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claim, is it the only option? What will happen, if after securing plaintiff's anticipated claim with an order of ABJ, the plaintiff loses the suit? Its consequences are lethal; plainly lethal in its effect on defendant's right to property. The Courts have seen false claims but since the courts are not clairvoyants, they still opt to secure even false claims with orders of ABJ. Ultimately, when the suit is dismissed, the loss to the plaintiff is the court fee he had paid, whereas the loss to the defendant is that which his right over the property could have given him. The legal system does not appear to be adequately sensitive to the magnitude of the harm an ABJ, unlimited by time, may inflict on the property-rights of the defendant, but veils over the pain of the sufferer with the justification of its procedural legitimacy. Here, none can be blamed. But the damage is done and in the name of law. The legal system that has been over anxious to rush to the aid of the plaintiff, is now remorseless in its inability to recompense the damage the defendant might have suffered. The legal system moves on, but only the defendant is stranded.



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9. Order XXXVIII Rule 5 and 6, unbacked by Sec.64 consequences are innocent provisions, for they do not arrest alienation. Attachment of properties then will be akin to a charge, and a bonafide purchaser without notice of an order of attachment will be protected as in the case of a charge. But Sec.64 – consequences alter the complexion, as the procedural law now provides the Courts with teeth and claws to ensure that an order of ABJ is not a wasted judicial effort. It needs to be stated that an order of ABJ, with its effect on the power of alienation even on the interest in the property of the defendant, it has reduced him to a watchman of his own property. And this state of affairs will continue till the lis is completed. Turning to the generosity of the Code in providing for raising an ABJ in terms of Rule 9 CPC, it is beneficial for only those who can afford to offer security or substitute the security offered earlier, but not for the millions who still struggle to make their ends meet.

10. The power of alienation or disposition is the soul of ownership. It provides the freedom to the owner of the property to explore alternatives, ex-



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periment with the choices they create, and enable him to enhance the quality of his life. The expanding frontiers of human rights jurisprudence has recognised right to property, with all its associated nuances, as an integral component to its character, and hence it has been accommodated within the meaning of right to life under Article 21 of the Constitution. See: ***Vidya Devi Vs State of Himachal Pradesh*** [(2020) 2 SCC 569], ***Delhi Airtech Services Private Limited v State of U.P*** [2011 9 SCC 354].

11.1 The ramification, which the working of ABJ of pre-constitutional vintage leaves on the right to property of the defendant, and hence his right to life in the post-Constitutional times, does not encourage an understanding of the power of alienation as a mere jurisprudential consequence of ownership, un-associated with the life of the owner. An order of ABJ is conceptually unifocal as it attempts to balance an equation in which plaintiff alone figures on both sides of the equation. The plaintiff's right to a money-claim meets the plaintiff's procedural right to secure it, with the defendant's rights



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smokescreened by the very effects of the equation. Any concept that requires that procedural protection be provided to the plaintiff for securing a claim, to which he has only a mere chance of success, with the defendant's fundamental right to life is disproportionately harsh and might well be arbitrary. Hence, sanctifying the power of an order of ABJ in freezing the power of the defendant to deal with his property, unlimited in duration, fails as an outdated philosophy and is a Constitutional anathema. The processual fairness ought not to know of any discrimination, and hence it is imperative that none should be aided with an unreasonable advantage over the other, definitely not with his fundamental right to live with dignity. It may now be stated that ABJ as a supplementary proceedings is perilously close, at a teasing distance to infringing the defendant's fundamental right to live. See: ***Maneka Gandhi Vs Union of India.***<sup>2</sup>

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<sup>2</sup> [(1978)1 SCC 248]



11.2 The pre-eminent V.R.Krishna Iyer J has thundered in ***Jolly George***

***Varghese & another Vs The Bank of Cochin***<sup>3</sup> even in the context of the post-decretal arrest of the judgement debtor, “*the modern Shylock must be shackled by the law’s humane handcuffs*”<sup>3</sup>, does it not now require a need for reviewing the easy resort to ABJ as a judicial order of choice for securing the plaintiff’s claim? This, therefore, mandates a re-visit for a compulsive re-orientation towards higher levels of Constitutional sensitivity. Is the situation at hand similar to the one in ***Jolly George Varghese case***,<sup>3</sup> which presents, in the words of Krishna Iyer J, “*...a challenge to the nascent champions of human rights in India whose politicised pre-occupation has forsaken the civil debtor whose personal liberty is imperilled by the judicial process itself.*” May there not therefore, be an ABJ for an unlimited and hence for an unreasonable duration.

12. The issue on right to life operates in yet another way. In all suits for a money-claim, when the plaintiff secures his claim with an order of ABJ, it se-

<sup>3</sup> (1980)2 SCC 360



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cures not only the claim for which the plaintiff has paid the court fee, but also the future interest accruable on the principal sum. With the order of ABJ preventing private alienation of the property by the defendant, it forecloses him of an option to raise funds on his property to discharge his debt-dues early, but the future interest that he may have to pay on the original debt will be crawling up, rather unnoticingly. In the ultimate analysis, the procedural law and its working silently operate to add to the liability of the defendant, and ends up positioning the defendant between a growing liability and a nothing-he-could do with it-property. It may be an unwitting consequence, still it is the reality. It may imply that the legal system has come to believe that all the defendants in suits for money-claim deserve anything more than a fair opportunity of hearing. This idea may be obnoxious, but it is largely concealed within the semantics of ABJ. A defendant in a civil litigation is entitled to as much right as an accused in criminal cases to have his right to dignified life protected, of which his freedom from litigation is one. Hence, the Courts need to play a more pro-active role to enthrone justice – justice for both the



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parties and not for one at the expense of the other. It should now explore circumstances to encourage private sale of defendant's properties still retaining control over them (not in the manner it takes control of it as in ABJ), to enable settlement of money-disputes. And, in the process Courts may also help themselves in reducing pendency at least in one class of litigations.

### **The Alternative:**

13. It is time the legal system contrives a technique not as an alternative to ABJ, but as an additional option which possesses the efficacy of balancing the anxiety of the plaintiff to protect his interest with the right to life of the defendant with a minimal procedural compliance, and with minimal judicial interference or participation. Towards achieving this end, the courts are granted the legitimate procedural space to engineer an alternative within the residuary authority provided in Sec.94(e). It reads: to "*make such other interlocutory orders as may appear to the Courts to be just and convenient*". The bottom line here is that unless Courts' powers are either barred or regulated



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specifically, there is no bar on the Courts to fashion an interim remedy of its choice, as long as it is in aid of the substantial justice in the cause, and that does not create any substantial imbalance in the rights of the parties intermly.

In **Narsingh Das Vs Mangal Dubey**<sup>4</sup>, Mahmood J states:

*"Courts are not to act upon the principle that every procedure is to be taken as prohibited unless it is expressly provided for by the Code, but on the converse principle that every procedure is to be understood as permissible till it is shown to be prohibited by the law. As a matter of general principle prohibition cannot be presumed."*

This was quoted with approval by the Supreme Court in **Rajendra Prasad Gupta v Prakash Chandra Mishra**<sup>5</sup>, and added:

*"Rules of procedure are handmaids of justice. Section 151 of the Code of Civil Procedure gives inherent powers to the court to do justice. That provision has to be interpreted to mean that every procedure is permitted to the court for doing justice unless expressly prohibited, and not that every procedure is prohibited unless expressly permitted."*

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<sup>4</sup> [ILR 5 ALL 163 (FB) (1882)]

<sup>5</sup> (2011)2 SCC 705



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It may be added that the residuary power under Sec.94(e) CPC is but an aspect of the inherent powers, intended for its use in supplementary proceedings that are incidental to the adjudicatory process.

14. Viewed thus, an option that may be contrived within this open space provided by Sec.94(e) CPC is to create an interim charge over the property of the defendant for the value of the suit claim (including the claim of future interest, if any sought) by following the substantially same procedure provided for under Order XXXVIII Rule 5 CPC. Indeed it may even be a combination-order of a charge and an interim injunction, for the residuary power envisaged under Sec.94(d) CPC grants the Courts unlimited procedural space to fashion a remedy to the extent its imagination and creativity may drive them.

In *Mahesh Prasad v. Musammat Mundar*,<sup>6</sup> a Full Bench of the Allahabad High Court has recognised the inherent power of the Court to create a charge as a security for money. The Court observed thus:

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<sup>6</sup> (2011)2 SCC 705



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*“A charge created by a decree of a court does not come into existence merely because of the operation of a rule of law but because of the conscious exercise of its judicial discretion by a court of law. When the court creates a charge on specific immovable property, in a case like the present, it does so under its inherent jurisdiction, acting according to the rules of equity, justice and good conscience.”*

15. Having advocated a case for change, it may still have to be stated that that dehors Sec.64 an order of ABJ, or an order creating a charge (or is it a judicial lien) would share a common denominator, for they will not operate on the power of alienation. And, it may have to be reiterated in support of the utility and efficacy of ABJ, that it need not be decried as anti-defendant. It is essentially in working the ABJ in an ambience where time-limit for disposal of cases defies any assurance, it appears increasingly irrelevant even as the Constitution searches for newer dimensions of human rights and fundamental rights to live with dignity. Courts will then be under a Constitutional duty to rework the equation balancing the plaintiff's right to the suit-claim with his procedural right to secure it with an order of ABJ by factoring in the right of



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the defendant to have a dignified and meaningful existence under the Constitution. The defendant would not be an inconsequential constant, but a functional variable, whose rights can no more be treated as lifeless. Hence, ABJ need not go, but its persistence beyond a reasonable period alone may have to.

16. Turning to the creation of charges by the Court as an additional option to the Court, alongside or in lieu of ABJ, the advantage it has over an order of ABJ can be explained:

- Since a charge runs with the land, no matter how many hands the property is transferred, the charge created will continue to be enforceable. It thus does not freeze the power of alienation of the defendant, but still can protect the interest of the plaintiff over his claim, and thus establishes a fair and ideal balance between rival rights and interests. Most significantly the defendant's right to live with dignity as protected by Article 21 of the Constitution with the aid of his property will remain protected.



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- The Courts are more likely to be less burdened as procedural compliances and consequences they produce hardly requires to be agitated over and over again. It not only likely to save judicial time, but may even save time in appeals or any allied proceedings.
- It may now enable the defendant or such of his purchasers to settle the suit claim earlier, since the power of alienation allows for raising funds on the property by the defendant. The defendant or his purchaser may now deposit the suit claim in the Court and free the property of the charge created over it.

17. As has been made evident above, ABJ may commence as a perfectly reasonable order, but it is when it stays beyond a reasonable period its legitimacy becomes suspect as it may then become under the scanner of Art. 21 of the Constitution. It may be difficult to define what this reasonable period could be, as it is essentially case-specific. Therefore, in every case where the defendant appears and shows cause, it is not mandatory for the Courts to direct



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him to offer security and to proceed to pass an order for ABJ, but instead may opt for the alternative course of creating a charge. And in all cases where the defendant seeks modification of an order of ABJ, or seeks that it be raised, Court shall have to evaluate the circumstances and should modify the order of ABJ into one creating a judicial-charge. If procedural law is appreciated as an adjective law for aiding the regulation of the adjudicatory process, then it ought to be given the requisite flexibility to make it ideally suitable for the case at hand. Towards this end, an order creating charge may be accompanied by suitable conditions in the nature of injunction. This may be necessary to compensate the absence of a procedural backing that Sec.64 CPC provides to an order of ABJ.

### **Fashioning the Order:**

18.1 Reverting to the case at hand, and given the fact that the order of ABJ has been in force for more than four years now. The order of attachment of



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ABJ was passed on 06.10.2017. The counsel for the defendants/applicants

seek that the ABJ over 0.95 acres in Sy.No: 79/4 be raised. He stated that the

entire Sy.No:79 has been attached, that Sy.No:79 has been sub-divided into

Sy.No:79/1 to 79/4. Of them Sy.No:79/1 belongs to a third party.

Sy.No:79/2 and 3 were outstanding on a statutory charge in relation to certain

Provident Fund issue and the same has been raised in October, 2021. So far

as the 95 cents in Sy.No:79/4 is concerned there is no other encumbrance over

it, and hence prayed that attachment over it may be raised to enable the de-

fendants to raise funds. And, the plaintiff seeks future interest on the principal

sum of Rs.1,11,62,661 at 21% p.a. In the eventuality this claim of future in-

terest at the rate claimed, or even at a lower rate during final adjudication be-

ing allowed, it is sure to add to the liability of the defendants/applicants. It is

therefore just and necessary the Court raises an order of attachment as below:

The order of ABJ dated 06-10-2017, over Sy.No:79/4 Thekkalur

village, Avinashi Taluk, Tiruppur District, is hereby raised. Now

a charge is created over the said property in Sy.No:79/4 for the



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value of the suit claim, subject to following conditions which will be in the nature of interim injunction:

- (a) That the applicants/defendants shall not enter into any sale agreement for the sale of the property, or raise any funds on the security of this property, below the value of the suit claim without the leave of the Court.
- (b) Any agreement for sale or other class of documents of conveyance which the applicants/defendants propose must disclose the charge created by this Court now. Once an agreement of sale is reduced to writing, it shall be placed before the Court for obtaining its approval.
- (c) No documents of conveyance shall be registered by the concerned Sub Registry, without satisfying itself that the defendants have obtained the approval of the Court for going ahead with the sale or other modes of conveyance.



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- (d) Funds raised either by way of sale consideration or otherwise on the strength of the property in S.No.79/4 shall be deposited in the Court to the extent it may satisfy the decree that may be passed against the plaintiffs.
- (e) The disbursement of the amounts shall be based on the outcome of the suit.
- (f) Once the amounts are deposited in the Court, the Registry is required to invest the same in any Nationalised Bank.

18.2 The Registry is required to intimate this Order to the concerned Sub Registry which is directed to enter the same in Book-I, the same way it notifies it an order of ABJ based on an intimation given under Order XXXVIII Rule 11-B CPC. The plaintiff may register this Order with the concerned Sub Registry.



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18.3 Since the order of attachment has already come into force in A.No.2152 of 2015, there is no need for persisting with the order of interim injunction passed in O.A.No.304 of 2015, and the same is hereby vacated.

18.4 No costs.

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Index : Yes / No

Internet : Yes / No

Speaking order / Non-speaking order



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N.SESHASAYEE.J.,

ds

Pre-delivery order in  
A.No.2217 of 2021 & O.A.No.304 of 2015  
in C.S.No.224 of 2015

04.02.2022