

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 11TH DAY OF FEBRUARY, 2021

PRESENT

THE HON'BLE MR.ABHAY S. OKA, CHIEF JUSTICE



AND

THE HON'BLE MR.JUSTICE SACHIN SHANKAR MAGADUM

COMAP NO.33 OF 2020

BETWEEN:

ASHISH KRISHNASWAMY
AGED ABOUT 48 YEARS
SON OF K.N.KRISHNASWAMY
MANAGING DIRECTOR OF
THE 1ST DEFENDANT COMPANY
No.93, 34TH 'B' CROSS
11 MAIN, 4TH 'T' BLOCK
JAYANAGAR, BANGALORE – 560 041
REPRESENTED BY HIS
GENERAL POWER OF ATTORNEY
MS.DEEPA KRISHNASWAMY

... APPELLANT

(BY SHRI SRINIVAS RAGHAVAN, SENIOR ADVOCATE FOR
SHRI RITHIKA RAVIKUMAR, ADVOCATE)

AND:

1. MONEY FOCUS INFRASTRUCTURE
PRODUCTS PRIVATE LIMITED
REGISTERED OFFICE AT No.63
DOMLUR, 2ND STAGE, 1ST CROSS
4TH MAIN, BANGALORE – 560 071
REPRESENTED BY ITS DIRECTOR
MR. SACHIN AGGARWAL
SON OF NIRANJAN KUMAR AGGARWAL
AGED ABOUT 40 YEARS
R/AT 2ND FLOOR, #63, DOMLUR
2ND STAGE, 1ST CROSS, 4TH MAIN
BANGALORE – 560 071

2. KNK CONSTRUCTIONS PRIVATE LIMITED
No.359, 7TH CROSS, 10TH MAIN
ASHOKA PILLAR ROAD
I BLOCK JAYANAGAR
BANGALORE – 560 041

REPRESENTED BY ITS
MANAGING DIRECTOR
MR. ASHISH KRISHNASWAMY
(PRESENTLY REPRESENTED NOW BY
MR.PRASHANTH RAJU
THE INSOLVENCY RESOLUTION
PROFESSIONAL AS APPOINTMENT
BY THE ORDER OF NCLT
BENGALURU ON 11.12.2019)

3. MR. KIKKERI NARAYAN KRISHNASWAMY
SON OF K.V.NARAYAN
AGED ABOUT 83 YEARS OLD
ADDITIONAL DIRECTOR OF THE
1ST DEFENDANT COMPANY
R/AT No.93, 34TH B CROSS
11TH MAIN, 4TH 'T' BLOCK
JAYANAGAR
BANGALORE – 560 041

... RESPONDENTS

(SHRI SAMEER S.N., ADVOCATE FOR RESPONDENT No.1
SHRI PAVAN R.JAVALI, ADVOCATE FOR RESPONDENT No.2)

THIS COMAP IS FILED UNDER SECTION 13(1) OF THE
COMMERCIAL COURTS, COMMERCIAL DIVISION AND
COMMERCIAL APPEALATE DIVISION OF HIGH COURTS ACT,
2015 READ WITH ORDER 43 RULE 1(q) OF THE CODE OF CIVIL
PROCEDURE CODE, 1908 PRAYING TO SET ASIDE THE
IMPUGNED ORDER DATED 23.10.2019 PASSED BY THE
HON'BLE COURT OF THE LXXXII ADDL. CITY CIVIL AND
SESSIONS JUDGE AT BENGALURU (COMMERCIAL COURT)
(CCH 83) IN COMMERCIAL O.A. No.225/2019 (ANNEXURE-A)
AND ETC.

THIS COMAP COMING ON FOR DICTATING JUDGMENT
THIS DAY, **CHIEF JUSTICE** MADE THE FOLLOWING:

JUDGMENT

The submissions were concluded yesterday. Today, the appeal is listed for dictating the judgment.

2. This is an appeal under sub-section (1) of Section 13 of the Commercial Courts Act, 2015 read with clause (q) of Rule 1 of Order XLIII of the Code of Civil Procedure, 1908 (for short, "CPC").

3. With a view to appreciate the controversy, a brief reference to the facts of the case will be necessary. The appellant is the second defendant. The first respondent is the original plaintiff. The second respondent is the first defendant and the third respondent is the third defendant. For the sake of convenience, we are referring to the parties in the appeal with reference to their status before the Trial Court.

4. The suit is filed for recovery of a sum of Rs.69,37,968/- with interest at the rate of 24% per annum from the date of filing of the suit till realization. The case made out in the plaint is that the first defendant is a builder and developer and the second defendant is claiming to be the Managing Director of the first defendant. The allegation is that the first defendant used to purchase building materials from the plaintiff on credit basis.

Reliance is placed on the invoices and delivery challans, the details of which have been set out in paragraph 6 of the plaint. The allegation is that the total amount payable by the first defendant under the invoices was Rs.1,31,51,247/-, out of which a sum of Rs.62,20,279/- has been paid. The suit is filed for the recovery of the balance amount.

5. In paragraph 8 of the plaint, there is a specific allegation that the first defendant is the owner of the residential flat/apartment described therein. It is alleged that the first defendant is also the owner of two commercial buildings described in the plaint.

6. An application for attachment before judgment was filed by the plaintiff, being I.A No.1. The application was allowed by the order dated 23rd October 2019. The said order which grants attachment before judgment notes that the defendants are placed *ex parte*. An application was made by the second defendant (appellant) invoking sub-rule (4) of Rule 5 of Order XXXVIII of CPC, being I.A No.6. The prayer in the said application was for setting aside the said order of attachment dated 23rd October 2019. The said I.A was opposed by the plaintiff by filing a statement of objections. By the impugned

order, the learned Trial Judge has dismissed the said I.A No.6 filed by the second defendant.

7. The learned Senior Counsel appearing for the appellant has taken us through the relevant portion of the pleadings and the impugned order. We must note here that the challenge in this appeal is to both the orders dated 23rd October 2019 and 30th June 2020. The learned Senior Counsel appearing for the appellant firstly submitted that though compliance with sub-rule (1) of Rule 5 of Order XXXVIII of CPC was a condition precedent for passing an order of attachment before judgment, the same is not made. Therefore, by virtue of sub-rule (4) of Rule 5 of Order XXXVIII of CPC the attachment is void. He also pointed out that no satisfaction is recorded by the learned Trial Judge before passing the order of attachment as required by sub-rule (1) of Rule 5 of Order XXXVIII of CPC. He submitted that the Trial Court did not consider the fact that the property subject matter of Schedules - 'B' to 'G' was owned by the second defendant and there was no pleadings in the plaint as to how the second defendant was liable to pay any amount to the plaintiff. He pointed out that it is pleaded in the written statement filed by the second defendant that Schedule - 'B' property has been sold by a sale deed and in respect of the

properties at Schedules – ‘C’ to ‘G’, mortgage has been created by the second defendant.

8. Inviting our attention to paragraphs 13 and 14 of the impugned order dated 30th June 2020, the learned Senior Counsel appearing for the appellant submitted that the learned Trial Judge has completely misread the decision which is referred in paragraph 13. He pointed out that the learned Trial Judge ignored the fact that the order of moratorium was against the first defendant which is a corporate debtor. He submitted that the order of moratorium will not apply to the assets of the second and third defendants. He pointed out that the decision of the High Court of Calcutta, Commercial Division, Original Side in G.A No.942 of 2018 and C.S No.73 of 2018 dated 30th January 2019 in the case of **UNILEVER INDUSTRIES PRIVATE LIMITED vs. KWALITY LIMITED** relied upon by the learned Trial Judge in paragraph 13 arose out of a trademark dispute. He submitted that the order of attachment before judgment was void and therefore, the subsequent I.A filed by the appellant ought to have been allowed.

9. The learned counsel appearing for the plaintiff on a query made by the Court stated that though the attached

properties may be not standing in the name of the first defendant, the second and third defendants may dispose of the property. Moreover, he submitted that the plaintiff has already applied for amendment of the plaint and the application is pending before the Trial Court. He submitted that if the order of attachment before judgment is vacated, there will not be any security for the claim made by the plaintiff in the suit as the valuable properties will be immediately disposed of.

10. We have given careful consideration to the submissions. For the sake of convenience, we are reproducing Rule 5 of Order XXXVIII of CPC which reads thus:

"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.*

(underline supplied)

11. Sub-rule (1) of Rule 5 of Order XXXVIII of CPC lays down the procedure for attachment of property. By virtue of Act No.104 of 1976, sub-rule (4) of Rule 5 of CPC was substituted and now the substituted rule lays down that if an order of attachment is made without complying with the provisions of sub-rule (1), such attachment shall be void. Sub-rule (1) of Rule 5 of Order XXXVIII of CPC lays down that if the Court is satisfied that the defendant with the intent to obstruct or delay the execution of any decree that may be passed against him is about to dispose of the whole or any part of his property or is about to remove the whole or any part of his property from the local limits of the jurisdiction of the Court, it may direct the defendant, within the 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.

Sub-rule (2) of Rule 5 requires the plaintiff to specify the property required to be attached and the estimated value thereof. In this case, admittedly, an order in accordance with sub-rule (1) of Rule 5 of Order XXXVIII of CPC was not passed by the Trial Court.

12. As far as the remedy of attachment before judgment under Rule 5 of Order XXXVIII of CPC is concerned, the law is fairly well settled. We are referring only to one decision of the Apex Court which reiterates the said law. The said decision is in the case **RAMAN TECH. & PROCESS ENGG. CO. AND ANOTHER vs. SOLANKI TRADERS**¹. Paragraphs 4 and 5 of the said decision are relevant which read thus:

“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 realisation 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

¹ (2008) 2 SCC 302

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.

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 settlements under threat of attachment."

(underline supplied)

13. As noted earlier, the satisfaction required to be recorded as per sub-rule (1) of Rule 5 of Order XXXVIII of CPC is that the defendant with an intent to obstruct or delay the execution of any decree that may be passed against him is about to

dispose of the whole or any part of his property. Thus, the Court must be satisfied that there is a reasonable chance of a decree being passed in the suit and that is how there is a legal requirement of the Court being satisfied about the existence of a *prima facie* case.

14. In paragraph 5 of the aforesaid decision, the Apex Court has reiterated that the power under Rule 5 of Order XXXVIII of CPC is a drastic and extraordinary power which should not be exercised mechanically and merely for the asking. It should be used sparingly and strictly in accordance with Rule and the purpose of Rule 5 of Order XXXVIII of CPC is not to convert an unsecured debt into a secured debt. Further, it is held that 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 the ingredients of sub-rule (1) of Rule 5 are established.

15. Coming back to the facts of the case, the order of attachment dated 23rd October 2019 was not preceded by any order passed in accordance with sub-rule (1) of Rule 5 of Order XXXVIII of CPC. The order merely refers to an affidavit of the plaintiff stating that the defendants are trying to sell the

schedule properties. There is no finding recorded about the existence of a *prima facie* case or a reasonable possibility of a decree being passed in favour of the plaintiff against the second defendant and for that matter even against the first defendant. There is no satisfaction recorded that the second defendant with an intent to obstruct or delay the execution of the decree which may be passed against him is about to dispose of the whole or part of his property. Thus, the said order of attachment which has been made without complying with the provisions of sub-rule (1) of Rule 5 of the Order XXXVIII will be rendered void.

16. We have carefully perused the plaint. Paragraph 8 of the plaint proceeds on the footing that the first defendant is the owner of the schedule properties. Going by the averments in the plaint, the transaction of the sale of building material was between the plaintiff and the first defendant which is a private limited company. There is not even an averment in the plaint that the second and third defendants are jointly and severally liable along with the first defendant to pay the amount claimed in the suit. In fact, taking the averments made in the plaint as correct, it is impossible to record even a *prima facie* finding

that there is a possibility of a decree being passed against the second defendant.

17. In paragraph 14 of the second impugned order dated 30th June 2020, it is observed that even if the properties subject matter of attachment are not related to the first defendant and the same are the properties of the second and third defendants, the order of attachment cannot be vacated during the pendency of the proceedings before the National Company Law Tribunal especially when the order of moratorium is still in force. However, he has ignored that the order of moratorium is in respect of the first defendant company. The learned Trial Judge has ignored that the second defendant had invoked sub-rule (4) of Rule 5 of Order XXXVIII of CPC by contending that the attachment was void. In fact, in paragraph 16 of the order, it is observed that the second defendant has not furnished any surety, though he was never called upon to do so.

18. From the impugned order dated 30th June 2020, it appears that the Court has not considered the legal effect of the property subject matter of the suit not standing in the name

of the first defendant, as the entire claim in the suit was against the first defendant.

19. For the foregoing reasons, there is no *prima facie* case. Going by the averments made in the plaint, it is impossible to come to a conclusion that there is a reasonable possibility of a money decree being passed against the second defendant. Therefore, the second impugned order dated 30th June 2020 cannot be sustained and the application, being I.A No.6 will have to be allowed by holding that the attachment is void apart from the fact that even otherwise, it is illegal.

20. The learned counsel appearing for the plaintiff submitted that an application for amendment of the plaint has been filed by the appellant. If the application is allowed, this judgment will not prevent the appellant from making a fresh application for grant of appropriate interim relief in accordance with law.

21. Accordingly, we pass the following order:

- (i) The impugned order dated 30th June 2020 is hereby quashed and set aside. I.A No.6 in Commercial O.S No.225 of 2019 is hereby allowed and the order of attachment before judgment dated 23rd October 2019 is hereby set aside;

- (ii) We make it clear that the observations and findings recorded in the judgment are only for the limited purpose of considering the controversy regarding validity of the order of attachment before judgment;
- (iii) The appeal is allowed on the above terms;
- (iv) The pending interlocutory application does not survive for consideration and stands disposed of.

**Sd/-
CHIEF JUSTICE**

**Sd/-
JUDGE**

AHB