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IN THE COURT OF THE ADDL. SR. CIVIL JUDGE & J.M.F.C., AT: MAGADI.

OS.No. 322/2023

Present: Sri. Sandeep S. Reddy, B.A., LL.B.,
Addl. Sr. Civil Judge & JMFC., Magadi.

DATED: THIS THE 3rd DAY OF APRIL 2024

Plaintiffs	:	1.	Sri. Harish Kumar B. M., S/o. B. M. Muniraju, Aged about 37 years, R/at: No.598, Manjunatha Cable Networks, 17th Cross, Bagalagunte, Bangalore - 560 073.
		2.	Smt. Shilpa N., S/o. V. D. Narayanappa, Aged about 33 years, R/at: Doddahosahalli Village & Post, Puravara Hobli, Madhugiri Taluk, Tumkur District - 572 175.

(By **Sri. H.R**., Advocate)

V/s

Defendant	:	Sri. Nandish Kumar A., S/o. Appaji, Aged about 42 years, R/at: No.11/196, 1st Main Road, Kirlosker Colony, Basaveshwara Nagar, Bangalore - 560 079.

(By **Sri. C.S.S.**, Advocate)

ORDER ON IA NO.5 & 6

The plaintiff has filed the aforesaid suit seeking for the relief of recovery of amount of Rs.55 lakhs with interest at 12% p.a. and other consequential reliefs.

2. The I.A.No.5 is filed by the plaintiff U/O.38 R.5 of C.P.C., praying for attachment of the schedule property before judgement with respect to defendants' right, title & interest.

3. The I.A.No.6 is filed by the plaintiff praying for the order of temporary injunction restraining the defendants from selling or creating third party interest with respect to any portion of the schedule property by way of residential sites.

4. The plaintiff in the accompanying affidavit to the aforesaid applications has stated that, he had invested a sum of Rs.55 lakhs for development of land standing in the name of one Smt. Usha R. That, the land was converted and defendant and plaintiff together agreed to purchase the said land for forming residential layout.

That, the plaintiff due to inconvenience could not developed the residential layout, due to which the defendant agreed to pay back Rs.55 lakhs from the profits of the sale proceeds. Based on the said assurance the agreement of sale dated: 13.03.2023 was canceled. That, MOU dated: 29.04.2023 was entered and cheques bearing Nos.899, 968 dated: 01.05.2023 and cheques bearing Nos. 899, 969 dated: 01.05.2023 drawn on Axis Bank, Basaveshwaranagar was issued in favour of plaintiff's sister-in-law Smt. Shilpa W/o. V. D. Narayanappa on the request of plaintiff. That, the said cheques were bounced. That, the defendant had not responded to the request of plaintiff for return of plaint. That, the defendant is creating the sale deeds and selling the same to third parties with respect to the layout formed in the schedule property. That, the defendant is the owner having 1/3rd right in the schedule property and if the said schedule property is sold, then the defendant has no other source for repaying the amount due to the plaintiff. The plaintiff has further stated that, the earlier application filed by the plaintiff U/O.38 R.8 of C.P.C., was dismissed by this Court on the ground that, the plaintiff had not produced any evidence with respect to the defeated creating third party interest. That, the plaintiff has now filed the aforesaid application after collecting the information that, defendants have sold six sites with respect to suit schedule property. Hence, the plaintiff prays for the relief as aforementioned.

5. The defendants have filed objections stating that, the plaintiff has not chosen to challenge the order dated: 10.01.2024 passed by this Court on the same application filed U/O.38 R.8 of C.P.C. That, the present application is not maintainable. That, the plaintiff has not made out a prima-facie case. That, the suit schedule property is not individual and absolute property of defendants. That, the documents produced by the plaintiffs i.e., the sale deed dated: 13.03.2023 and his two partners have jointly purchased the schedule property. That, there is no partition of the schedule property between the defendants and joint purchasers. That, the cheque was not issued by the defendant. That, there is a material alteration in memorandum of understanding and there was no transaction between the plaintiff and defendants. That, the

plaintiff has not made out a prima-facie case and hence the relief claimed by the plaintiffs in I.A.No.5 & 6 cannot be allowed.

6. Heard learned Advocate for plaintiffs and defendant.

7. The following points arise for my consideration.

1. Whether the plaintiffs have made out a case for attachment of the application schedule property before judgement?

2. Whether plaintiffs have made out prima-facie case for grant of temporary injunction?

3. Whether balance of convenience is in favour of the plaintiffs?

4. Whether plaintiffs will suffer irreparable injury if temporary injunction is not granted?

5. What orders ?

8. My answer to the aforesaid points are as follows:

Point No.1: In the Negative
Point No.2: In the Negative
Point No.3: In the Negative
Point No.4: In the Negative
Point No.5: As per final orders, for the following :

REASONS

9. **Point No.1:**- The plaintiffs have filed I.A.No.1 U/O.38 R.8 of C.P.C., praying for order of attachment of defendants' undivided right, title & interest in the suit schedule property till disposal of the suit. The said application filed by the plaintiffs was dismissed by this Court on various grounds.

10. The present application is filed by the plaintiffs U/O.38 R.5 of C.P.C., praying for an order of attachment before judgment with respect to defendants' right, title & interest in the suit schedule property.

11. The guiding principles as to how the attachment of property has to be made U/O.38 has been discussed in ***Premraj Mundra v. Md. Maneck Gazi*, 1951 SCC OnLine Cal 20 : AIR 1951 Cal 156 at page 160**

> ***"................18. From a perusal of all the authorities, I think that the following guiding principles can be deduced:***

(1) That an order under O. 38, Rr. 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 defts. would not be prejudiced.

(4) That the affidavits in support of the contentions of the applicant, must not be vague, & 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 pltf's. claim.

(8) That the mere fact of transfer is not enough, since nobody can be prevented from dealing with his properties simply of cause a suit has been filed: There must be additional circumstances to show that the transfer is with an intention to delay or defeat the pltf.'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 deft, starts disposing of his properties one by one, immediately upon getting a notice of the pltf.'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 pltfs'. claim.

(12) Mere removal of properties outside jurisdiction, is not enough, but where the deft, with notice of the pltfs'. 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 deft, 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 O. 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 pltfs. claim. The Court must however be very cautious about the evidence on these points & not rely on vague allegations............”

12. Keeping in mind the guiding principles regarding attachment of property in Premraj Mundraz’s case I proceed to discuss the facts of the case.

13. It is the case of the plaintiff there was an agreement for development of land belonging to Smt. Usha R., and advance sale consideration amount of Rs.55 lakhs was paid by way of cheque to the vendor Smt. Usha R., under the registered agreement of sale on 02.06.2022. That, the plaintiff No.1 and defendant had entered into another agreement of sale with one Ramesh. That, the plaintiff No.1 and defendant had invested huge amount of money for

development of the land by forming layout. That, the plaintiff No.1 due to his busy schedule could not concentrate on the development of land. That, the plaintiff No.1 and defendant agreed for cancellation of the agreement and accordingly agreement for cancellation of agreement was signed with Smt. Usha R., on 13.03.2023 and accordingly the defendant agreed to pay Rs.55 lakhs to the plaintiffs. That, a MOU was entered on 29.04.2023 and two cheques were issued on 01.05.2023 in the name of plaintiff No.2 on the request of plaintiff No.1. That, the said cheques had bounced. That despite the demand, the defendant had not repaid the amount due.

14. From the facts of the case, it is clear that, the cheques were issued in the name of plaintiff No.2, though plaintiff No.2 was not a party to the aforesaid transaction. It is the case of the plaintiff that, despite issuance of legal notice, the defendant had not repaid the money due to the plaintiff. The plaintiff further apprehends that, apart from the schedule property the plaintiff does not have any other property and hence apprehends that the property if sold

the plaintiff would not be able to recover the money due.

15. The plaintiff has produced the copy of the legal notice, reply notice, registered agreement of sale in support of his case. The defendant has taken the contention that, the plaintiff has materially altered the memorandum of understanding and has misused the cheques given for the sake of security. That, the plaintiff is not entitled for recovery of money.

16. The Hon'ble Supreme Court of India in Premraj's case has stated that, the contentions raised by the applicant must not be vague and must be properly verified. In the present case the plaintiff has not pleaded the contentions in the pleadings and the contentions raised by the plaintiff is very vague. The plaintiff has not given the reason as to why he had received the cheque in the name of his sister-in-law when she was not involved in the said transaction.

17. The plaintiff has further not shown the reason as to why only a portion of the undivided property was sought to be attached and how the attachment would not effect the rights of the joint owners of the said property. The plaintiff has further not given the details of the property exclusively owned by defendant in his individual capacity.

18. The earlier application filed by the plaintiff was disposed off by discussing all the aforesaid points. The Hon'ble Supreme court of India has further stated that, if small portion of property belongs to defendant and the said property is being disposed off, no inference can be drawn in the absence of other circumstances

19. The defendant has relied upon the judgement of **Hon'ble Supreme Court of India in Raman Tech V/s. Solanki Traders (2008) 2 SCC 302**, wherein the Hon'ble Supreme Court of India has stated as follows.

> ***".......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 that the plaintiff has a prima-facie case. If the averments in the plaint and the documents produced in support of it, do not satisfy the court about the existence of a prima facie case, the court will not go to the next stage of examining whether the interest of the plaintiff should be protected by exercising power under Order 38 Rule 5 CPC. It is well settled that merely having a just or valid claim or a prima-facie case, will not entitle the plaintiff to an order of attachment before judgment, unless he also

establishes that the defendant is attempting to remove or dispose of his assets with the intention of defeating the decree that may be passed. Equally well settled is the position that even where the defendant is removing or disposing his assets, an attachment before judgment will not be issued, if the plaintiff is not able to satisfy that he has a prima facie case.

5. The power under Order 38 Rule 5 CPC is a drastic and extraordinary power. Such power should not be exercised mechanically or merely for the asking. It should be used sparingly and strictly in accordance with the Rule. The purpose of Order 38 Rule 5 is not to convert an unsecured debt into a secured debt. Any attempt by a plaintiff to utilize the provisions of Order 38 Rule 5 as a leverage for coercing the defendant to settle the suit claim should be discouraged. Instances are not wanting where bloated and doubtful claims are realised by unscrupulous plaintiffs by obtaining orders of attachment before judgment and forcing the defendants for out-of-court settlements under threat of attachment.

6. A defendant is not debarred from dealing with his property merely because a suit is filed or about

to be filed against him. Shifting of business from one premises to another premises or removal of machinery to another premises by itself is not a ground for granting attachment before judgment. A plaintiff should show, prima facie, that his claim is bona fide and valid and also satisfy the court that the defendant is about to remove or dispose of the whole or part of his property, with the intention of obstructing or delaying the execution of any decree that may be passed against him, before power is exercised under Order 38 Rule 5 CPC. Courts should also keep in view the principles relating to grant of attachment before judgment. (See Premraj Mundra v. Md. Manech Gazi [AIR 1951 Cal 156] for a clear summary of the principles.)"

20. Thus, it can be seen that, the Hon'ble Supreme Court of India has clearly stated that, defendant should not be debarred from dealing with his property merely because a suit is filed. That, the plaintiff should show prima-facie case that, his claim is bonafide and valid and should also satisfy that defendant is about to remove or dispose off the property with an intention to delay the execution of any decree.

21. Thus it can be seen that, the plaintiff has not made out a prima-facie case or reasonable possibility of the decree being passed and has also not made out a case of defendant trying to alienate the schedule properties with an intent to obstruct or delay the execution of the decree. Hence, I am of the view that, plaintiff has not made out a case for attachment of property. Accordingly, I answer Point no.1 in the Negative.

22. **Point No.2:**- The plaintiff has not made out a prima-facie case for attachment of property. The plaintiff has not pleaded regarding his complete claim over the aforesaid transaction. The plaintiff has not made out a prima-facie case to show that, he has a valid claim for recovery of the amount claimed by him.

23. The plaintiff has only stated that, the defendant has sold the property by forming the sites. The plaintiff has not given the details as to how the defendant is liable to pay the money to the plaintiff. The plaintiff has not given the reason as to why the cheque was taken in the name of plaintiff No.2 when she was not

party to the transaction. The plaintiff No.2 is the sister-in-law of plaintiff No.1 and as per the plaint averments she was not party to the aforesaid transaction. If the cheque was given to a person not involved in the said transaction than the burden would be cast on the plaintiff No.1 to show the role of plaintiff No.2 and to explain the reason for issuance of such cheque. The plaintiff No.1 has not shown any reasons in the pleadings and affidavit. Hence, the plaintiff No.1 has not shown the connection of the cheque with the said transaction. Presumption U/Sec.118 of Negotiable Instruments Act would not help the plaintiff No.1 as no presumption can be raised with respect to involvement of plaintiff No.2 in the said transaction in view of the pleadings by the plaintiff No.1. Hence, I answer Point No.2 in the Negative.

24. **Point No.3 & 4:**- The plaintiff has not made out the prima-facie case. The plaintiff has not shown as to how he is entitled for recovery of the amount claimed. The balance of convenience does not lie in favour of plaintiff.

25. The hardship also does not lie in favour of plaintiff. If interim order is granted, the defendant would suffer more than plaintiffs. The plaintiff has prima-facie not proved his entitlement for recovery of amount. Hence, I answer point No.3 & 4 in the negative.

26. **Point no.3:** For the aforesaid reasons I pass the following orders.

ORDERS

The IA No.5 filed by plaintiffs U/O.38 R.5 of C.P.C., r/w. Sec.151 of CPC is hereby rejected.

I.A.No.6 filed by the plaintiff U/O.39 R.1 & 2 of C.P.C., praying for restraining defendants from selling or creating third party interest by way of sale of residential sites is hereby rejected.

The parties should bear their own cost.

Call on for issues by 27.04.2024.

(Dictated to the Typist directly on the computer, typed by her corrected by me and then pronounced in the open court on this the **3rd day of April, 2024.)**

(Sandeep S. Reddy)
Addl. Sr. Civil Judge & JMFC.,
Magadi.