

ORDER BELOW EXH.45 IN Spl.C.S.No. 109 of 2021

(CNR No.MHSO06-0009622021)

1] This is an application for attachment under O-38, Rule 5 of the Code of Civil Procedure.

2] Perused the application and say vide Exh.49.

3] Heard both the learned advocates.

4] Perused the record.

5] In brief, it is submitted that the plaintiff has filed an application vide Exh.5 to attach the bill of sugarcane crop supplied to Pandurang Sahakari Sakhar Kharkhana from the suit property. It was claimed that instead of paying it to defendants Nos.1 and 2, the amount of bill should be deposited in the Court by attachment of the same. But before receipt of notice sugarcane factory paid the bill of 215 tonnes of sugarcane as per rate of 2200 Rs. per ton to the defendants.

6] In year 2021-22 for said sugarcane crop there would be final bill of Rs. 2600 per ton. Hence, difference bill of Rs.400 is yet to be paid to defendants. Hence, said amount be attached and it be directed to be deposited in the Court.

7] Defendants Nos.1 and 2 filed say vide Exh.49 and denied contentions in the application and submitted that the application itself is not maintainable. The said sugarcane factory is not party to the proceedings. Hence, no order can be passed against him. So also, already payment has been made, so the application is liable to be rejected.

8] Considering above said contentions, following points arise for determination and findings are recorded on them for reasons stated below it.

Sr.No.	<u>Points</u>	<u>Findings</u>
1.	Whether there is prima facie case in favour of the plaintiff to claim an attachment ?	No
2.	Whether the plaintiff is entitled for an attachment under O-38, Rule 5 of the Code of Civil Procedure, as prayed ?	No
3.	What order?	Application is rejected

= R E A S O N S =

As to Points No.1 to 3:-

9] The plaintiff has filed the suit for partition and separate possession. It is contended in the suit that suit properties are joint family properties and the plaintiff, the defendant No.1 have 1/2 share each. The suit properties are purchased out of joint family income and salary of the plaintiff. Defendants denied partition to the plaintiff. Hence, he has filed this suit. Hence, his contentions in the plaint are perused, prima facie it is the case that defendants are in possession and threatening the plaintiff so as to deny his share. Prima facie the crop of sugarcane appears to be cultivated by defendants from said pleadings. Hence, even if it is accepted for sake of an argument that it is joint family property, prima facie it is doubtful that such attachment order can be passed. It is settled law that in case of joint property, the possession of every co-parcener is on behalf of each and other. So also, there cannot be an injunction regarding possession in between co-parceners regarding joint property.

10] In this regard, the letter of sugarcane factory is most important document. The letter vide Exh.28 makes it clear that already there is payment of said bill to the defendants and advance money taken by defendants is also recovered from the bill. Therefore, prima facie this letter itself shows that there is no amount remaining to be attached. There is no mention that any such difference bill would be paid as alleged in the application. Hence, this application is itself prima facie infructuous.

11] In this suit, the plaintiff has not joined said sugarcane factory as the defendant. Hence, prima facie filing this application so as to attach the property is itself not maintainable. Prima facie in order to claim any such interim relief, the concerned person, or institution should be party to the suit. Therefore, on this count also, the application is not maintainable.

12] In order to claim the attachment the plaintiff should show strong prima facie case and strong equity in his favour. He should show that if attachment is not ordered, decree which might be passed would not be executed or delayed. The prayer under O-38, Rule 5 of the Code of Civil Procedure is not to be granted generally and merely for asking. The law regarding said application is laid down in **Raman Tech. and Process Engg. Co. and Anr. vs. Solanki Traders (2008 3 MhLJ 6).**

“... 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 bonafide 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 3 CPC. Courts should also keep in view the principles relating to grant of attachment before judgment (See -- Prem Raj Mundra v. Md. Maneck Gazi MANU/WB/0033/1951 : AIR1951Cal156 , for a clear summary of the principles.”

13] Therefore, in view of above said law and application of the plaintiff, the same deserves to be rejected. Hence, I answer points no.1 and 2 in negative and in answer to point No.3 following order is passed.

ORDER

The application is rejected.

Pandharpur
Date:-03.08.2022

Civil Judge Senior Division,
Pandharpur

CERTIFICATE

I affirm that, the contents of the this P.D.F file Order/Judgment are same word to word, as per the original order/ judgment

Name of Stenographer : B.R.Kondekar
Court Name : Civil Court Senior Division, Pandharpur
Date 03-08-2022

Order/Judgment signed
by the Presiding Officer on : 03-08-2022

Order uploaded on : 03-08-2022