

Order Below Exh. No.27 in S.C.S. NO. 11/2018**Unimax India****V/s****Sitaram Maharaj Sakhar Karkhana (Kharadi) Ltd.,**

Present application filed by plaintiff as per Order 38, Rule 5 of C.P.C. for attachment before judgment of the immovable properties of defendant bearing gat No.25/2, 780/2/A/2, 785/1, 793/1, 793/2, 794/1, 794/2, 795/2, 797/2/B, 797/3, 798/1, 798/2, 779/1, 780/2/A/1, 890/1, 890/2 and 911/2 situated at village Khardi, Tal.Pandharpur.

2. As per contents of the application this suit is filed as Summary suit for recovery of amount of Rs.87,51,433/-. Defendant was granted permission to file written statement subject to deposit of amount of Rs.6,50,000/-. Accordingly, defendant company deposited the said amount and filed written statement. In the said written statement defendant has admitted about issuance of work order by it to the plaintiff. It also contended that, it has repaid the amount to the plaintiff firm in cash. However, defendant being company is require to pay any amount by way of cheque only. All this being the position, the amount claimed by plaintiff is huge one. Similarly, plaintiff firm came to know that, the immovable properties mentioned in para No.1 above are being offered for sale by defendant company of which notice in newspaper has been published. Therefore, plaintiff firm apprehends that, in case defendant company sell out these properties then certainly, it would become difficult for plaintiff firm to realise decretal amount if finally plaintiff succeeds in the case. Accordingly, it is prayed to direct the defendant to either deposit the security amount or to attach before judgment the above mentioned properties.

3. Despite grant of sufficient opportunity, defendant company failed to file say to the present application.

4. Perused the application. Perused the record. Heard learned counsel for the plaintiff. Learned counsel for the plaintiff argued in line with their contents of the application. Defendant failed to arg

5. Following points arise for my determination. I record my findings thereon for the reasons to follow them.

Sr.No.	Points for determination	Reasons
1.	Whether plaintiff has made out case for attachment of property or for direction to the defendant to furnish security as per Order 38, Rule 5 of C.P.C.?	No.
2	What order ?	Application is rejected.

Reason as to Point No.1

6. On going through relevant provisions of Order 38 Rule 5 of C.P.C. following preconditions requires to be satisfied by the party for the purpose of invoking the said provision -

a) The party seeking assistance firstly requires to prima facie show that he has made out case for decree of the suit.

b) There is intention of defendant to obstruct or delay the execution of the decree that may be passed against him.

c) The above said intention of defendant reflects from certain facts. The said certain facts are that, the defendant is either about the dispose off the whole or any part of this property or is about to remove the whole or any

part of his property from the local limits of jurisdiction of the Court.

7. As far as first condition (a) is concerned, it is to be noted that, by way of order passed below Exh.14 this court has granted conditional leave to defend to the defendant on deposit of amount of Rs.6,50,000/- or furnishing bank guarantee for the said amount. Accordingly, the defendant has deposited said amount vide C No.6 dated 08.04.2019. It is important to note that, for granting conditional leave to defend it is necessary for the defendant to show that he has probable defence in the matter and further he has raised triable issues. Therefore, in the case in hand, it is clear that, defendant has shown his probable defence and raised some triable issues. Therefore, if plaintiff does not establish condition No.(b) and (c) as noted above then it cannot be held at this stage that, plaintiff has satisfied condition No. (a) as noted above. As regard condition No.(b) is concerned, on going through entire application of the plaintiff there is no single word mentioned in the application that, there is intention of the defendant to obstruct or delay execution of decree that may be passed against him. On the other hand, contents of the application are only to the effect that, the defendant has offered to sale various gat numbers through advertisement in newspaper and in case it succeeds in doing so then it would become difficult for the plaintiff to execute the decree. So, mere inability to execute the probable decree is no ground to order attachment before judgment. On the other hand, the basis of attachment before judgment is the intention of the defendant to delay execution of probable decree. In short, the plaintiff must show that, with view to avoid execution of decree the defendant is in process of disposing off his immovable property. Therefore, I have no hesitation to hold that, the plaintiff has failed to establish said intention of the defendant. As regard condition No.(c) as noted above is concerned, the plaintiff has not filed any documentary proof in support of its contention to

show that, defendant is in process of disposing off its immovable properties. This is so because the plaintiff in the present application has clearly averted that, various gat numbers are being offered for sale by defendant by way of advertisement in the local newspaper. However, plaintiff has not filed on record newspaper cutting to reflect this position. It was not difficult for the plaintiff to file on record newspaper advertisement in support of contents of present application. Therefore, when documentary proof in support of contents of the application can be easily available then it is expected to file the same on record. Therefore, on this count also I held that, plaintiff has failed to satisfy condition No.(c) as noted above. Apart from this, it is basic thing that, for seeking exceptional remedy of attachment before judgment it is necessary for the party to at least bring on record some documents to prima facie establish that, properties in respect of which order seeking attachment before judgment is prayed are recorded in the name of other party. However, in case in hand, though plaintiff has mentioned various gat numbers but he has not filed on record 7/12 extracts or any other document to prima facie show the title or right of the defendant over those properties. Therefore, merely on the basis of contents of the application without there being any prima facie documentary proof to establish title of defendant over the properties in respect of which order of Attachment before judgment is contemplated, it would be very much casual approach to order said attachment in such situation. Therefore, on the basis of all this discussion, I have come to the conclusion that the plaintiff has failed to make out case for attachment before judgment or for direction to defendant to furnish security as per Order 38 Rule 5 of C.P.C. Accordingly, I record my finding to the point No.1 in negative and as answer to the point No.2 I pass the following order.

Order

1. Application is rejected.
2. Plaintiff to bear cost of this application.

Date :- 27/10/2021

Place :- Karad

(A.P. Kulkarni)
4th Jt. Civil Judge Sr. Div., Karad