

Present: Smt. Suparna Ray (JO Code:WB00711)
Judge, Commercial Court at Alipore
T.S. (Com) 15 of 2025
CNR No. WBSP18-000111-2025

Order No. 2

Date: 30.07.2025

In the matter of:

Suit for declaration, recovery of money perpetual injunction and other appropriate reliefs valued at Rs. 9,93,30,270/-.

AND

In the matter of:

Zoom Vanijya Private Limited.

Vs.

The Statesman Limited & Anr.

Appearance:

Mr. Samriddha Sen

Ms. Mala Pal (Basak)

.....Ld. Advocates.

Order

Today the record is put up by an instigation of the plaintiff whereby and whereunder plaintiff intends to move the interlocutory applications being I.A. No. 01 of 2025 and I.A. No. 02 of 2025.

Put up petition is allowed.

At this stage, Mr. Sen, Ld. Advocate moves the aforesaid two applications.

It appears from the record that the plaintiff filed the instant suit for money decree valued at Rs. 9,93,30,270/- along with the aforesaid applications.

Office notes there is no caveat.

I.A. No. 01 of 2025

Mr. Sen, Ld. Advocate appearing on behalf of the plaintiff moves the present application for seeking exemption from pre-institution mediation and

settlement by granting of leave under Section 12A of the Commercial Court Act, as amended from time to time, on the ground that some urgent relief is sought for in order to protect the interest of the plaintiff.

I have heard this present application being no. I.A. No. 01 of 2025 on great length and perused and considered.

On bare perusal of the plaint it appears that the suit contemplates an urgent relief by filing necessary application under Order XXXVIII Rule 5 read with Order XXXIX Rule 1 and 2 read with Section 151 of Code of Civil Procedure, 1908. Therefore, the leave as sought for by the plaintiff in this instant interlocutory application is granted.

Accordingly, the instant interlocutory application being registered as I.A. No. 01 of 2025 is hereby **disposed off**.

I.A. No. 02 of 2025

At this stage, Mr. Sen, Ld. Advocate appearing on behalf of plaintiff/petitioner moves the present interlocutory application filed Order XXXVIII Rule 5 read with Order XXXIX Rule 1 and 2 read with Section 151 of Code of Civil Procedure, 1908 (hereinafter referred to as the "CPC") in terms of prayers expounded on the said application.

It appears from the instant application that the respondent no. 1 approached the petitioner through the respondent no. 2 for a one time financial assistance and there were negotiations between the parties and consequent to that, the petitioner agreed to lend and advance a sum of Rs. 10 crores to the respondent for a period of six months with 20% simple interest per annum. As regards, the petitioner and the respondent no. 1 entered into an agreement dated 24.07.2019. It is further stated that the respondent no. 2 had assured the

petitioner that upon completion of development of 4, Chowringhee Square, Kolkata 700 001, the amounts due to the petitioner, would be repaid, from the sale proceeds, if not already done. Thereafter, two further documents both dated on 24.07.2019 were executed by the parties. One of the said documents is for reaffirming the loan transaction mentioned above and was to give effect to the intended mortgage and another is for guarantee made by the respondent no. 1 to effect of repayment of the amounts lent and advanced.

The case of the petitioner is that the respondent no. 1 failed to make payment of any interest within the said period of six months, which ended on 23.01.2020. Petitioner thereafter demanded repayment of the sums due by letter dated 29.06.2020.

As per the petitioner, the respondent no. 1 again approached the petitioner through the respondent no. 2 and requested for an accommodation loan of a further sum of Rs. 6 crores to tide over unforeseen financial difficulty. The respondent no. 1 had issued a letter dated 12.04.2021 containing its offer and the petitioner had issued a letter of acceptance dated 16.04.2021. Thereafter, it was agreed between the petitioner and the respondent no. 1 that, the petitioner would lend and advance a further sum of Rs. 6 crores to the respondent no. 1, the existing loan of the petitioner to the respondent no. 1 of a principal sum of Rs. 10 crores would be continued, but interest @ 20% per annum compoundable would be made applicable, the further sum of Rs. 6 crores which would be lent and advanced by the petitioner to the respondent no. 1 would also carry interest @ 20% per annum and the respondent no. 1 would make arrangements of repayment of the entire lent sums by assignment of its right of net sales revenue receivable under the development agreement dated 26.03.2019 entered into between the petitioner and the respondent no. 2 in respect of 4, Chowringhee Square, Kolkata 700 001.

The respondent no. 1 repaid a sum of Rs. 15 crores on 08.07.2021 to the petitioner. After adjustment against interest, a sum of Rs. 4,69,30,413/- towards principal to be paid. It is contended by the petitioner that despite such part payment, there remained further amounts due and payable to the petitioner by the respondent no. 1. Up to May 2024, the respondent no. 1 failed to make any further payment to the petitioner. Further a document dated 10.05.2024 was executed between the petitioner and the respondent no. 1. The said document records that a sum of Rs. 8,46,62,478/- would be repayable by the respondent no. 1 to the petitioner along with interest thereon by 15.07.2024. As per the petitioner, a total sum of Rs. 9,93,30,270/- is due and payable by the respondent no. 1 to the petitioner as on 30.06.2025.

Mr. Sen, Ld. Advocate appearing for the petitioner submits before this Court that the aforesaid sum is required to be repaid to the petitioner from the sale proceeds of premises no. 4, Chowringhee Square, Kolkata 700 001 as per the terms duly expounded in the agreement dated 10.05.2024. Besides that, Mr. Sen further refers to an email dated 10.07.2025 issued by the respondent no. 2 to the respondent no. 1 wherein the respondent no. 2 accepted the aforesaid scenario. Therefore, the petitioner has a special charge over the respondent no. 1's share of the sale proceeds of 4, Chowringhee Square, Kolkata 700 001 and the said special charge of the petitioner is its entitlement to have repayment of the outstanding from the respondent no. 1, out of the said sale proceeds. Inasmuch as the respondents by their aforesaid conduct are denying and/or intending to deny the same, the petitioner is entitled to a declaration to that effect.

Mr. Sen further contends that there is an express and/or implied negative covenant not to make over the sale proceeds of the said property to the respondent no. 1 without making payment of the petitioner's outstanding dues.

Now, as per the petitioner, the respondents are evading and/or threatening to invade into valuable rights of the petitioner by the respondent no. 1 not authorizing the respondent no. 2 to make payment of the said sum of Rs. 9,93,30,270/- to the petitioner from out of the respondent no.1's share of sale proceeds maintained with the respondent no. 2. Hence, petitioner came to knock the door of this Court by filing the present suit along with this instant application.

Mr. Sen then contends that it is learnt by the petitioner that there are several third parties who are claiming huge outstanding dues from the respondent no. 1. In addition to the same, the petitioner has come to learn that the Certificate Officer, 24-Parganas (South) has issued several coercive orders against the respondent no. 1, including for issuance of warrant of arrest. Despite this, there has been non-payment of large amounts due and owing by the respondent no. 1 to the workers. As far as the petitioner is aware, the workers of the respondent no. 1 have also commenced proceedings before the criminal courts. He further contends that the principal person in control of the respondent no. 1 is one Mr. R.P. Gupta, who lives in the United Kingdom for large lengths of time. As such, there is every likelihood that the said Mr. R.P. Gupta would remove himself permanently outside the jurisdiction of this Court, having regard to the claims which are pending against the respondent no. 1.

Therefore, in respect of above, Ld. Advocate of the petitioner prays for an ex parte ad interim order of injunction in respect of prayer (c) as enumerated in the instant application, at this stage.

However, Mr. Sen refers to a decision of the Hon'ble High Court at Calcutta reported in *2019 SCC Online Cal 2372* and submitted that the effect of the Order XXXIX Rule 10(b) is equivalent and/or in tantrum with the effect of Order XXXVIII Rule 5 of the CPC.

Before delving into the deep of factual matrix of the present case it is necessary to discuss about the scope of Order XXXVIII Rule 5 of the CPC. That is why at first, it is worthwhile to see the text of the legal provision contained in Order XXXVIII, Rule 5 of the Code of Civil Procedure, 1908. The provision is as follows:

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 limit 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) this rule such attachment shall be void.

On plain reading of Rule 5, it is very much clear that in any application under that Rule, the Plaintiff has to show:

- a) That he has a prima facie case and he is likely to get a favourable decree against the defendant;

- b) The defendant is either disposing of or about to dispose of his entire property or part of the same outside the jurisdiction of the court;
- c) That disposal of his properties or removal of properties is done with intent to defraud the execution of any decree which may be issued against him.
- d) The points may be proved either by way of affidavit or by any other means.

This Court as regards, relies on the epoch making decision of the Hon'ble High Court at Calcutta in the case of *Premraj Mundra v. Md. Maneck Gazi and Ors*¹. wherein the Hon'ble Court made a thorough review of the matter and set guiding principles for the civil courts in respect of Order 38 Rule 5 and 6.

According to the Hon'ble Court's view, two aspects have to be satisfied; one the factum of removal of properties from the jurisdiction of the Court and second the mental element i.e. with the intention to defraud the plaintiff.

Whether such circumstances exist is a question of fact that must be proved to the satisfaction of the Court. The proof may be made either by way of filing affidavits or by adducing proof in the regular hearing of the suit. 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 defendant would not be prejudiced. 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 stated*”. As such, a mere allegation that the defendant was selling off & his properties is not sufficient. “*Particulars must be stated*”.

¹ Reported in AIR 1951 Cal 156.

Of course, 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. In order to prove the intention part of the defendant, the normal rule of evidence is applicable. Where only a small portion of the property belonging to the defendant 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 plaintiff's claim. That the mere fact of transfer is not enough, since nobody can be prevented from dealing with his properties simply because a suit has been filed.

There must be additional circumstances to show that the transfer is with an intention to delay or defeat the plaintiffs' 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 defendant 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"*.

Further reliance is made on the decision of the Hon'ble Supreme Court of India in the case of *Raman Tech & Process Engg. Co. v. Solanki Traders*² wherein it is penned as:

"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 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 provision 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 realized by unscrupulous plaintiffs by obtaining orders of attachment before judgment and forcing the defendants for out of court settlements under threat of attachment.

² Reported in (2008) 2 SCC 302.

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 5 CPC. Courts should also keep in view the principles relating to grant of attachment before judgment (See - *Prem Raj Mundra v. Md. Maneck Gazi*, AIR (1951) Cal 156, for a clear summary of the principles.)”.

Explaining the indoctrination as stated above, it is to be stated herein that that in the present case petitioner has to show the *prima case*, that his claim is *bona fide* and valid so that this Court may be satisfied that the respondents (more particularly the respondent no. 1 herein) are about to remove the property with a sheer intention to invalidate the decree.

In the case of *Harleen Jairath v. Prabha Surana and Another*³ wherein in the Hon’ble High Court at Calcutta states as “*There cannot be an absolute proposition that in a money claim no order of injunction or attachment or receiver could be made. Order 38 to Order 40 of the Code of Civil Procedure does not restrict the power of the court to pass any order that a court is empowered to pass just because it is a money claim. We have already discussed the circumstances when the court can exercise any of such power. If there were doubts about exercising power under any of the aforesaid provision, it can be safely stated that the court has inherent power to pass an order of injunction or attachment upon an unimpeachable liquidated claim being demonstrated and upon it being established that the respondents are taking steps to improperly deny the realization of the claim*”.

Considering the discussion made in the foregoing paragraphs as well as the submissions advanced by Ld. Advocate on behalf of the petitioner, this

³ Reported in 2019 SCC Online Cal 2372.

Court is of the view that an order under Order 38 Rule 5 of the CPC can be issued only if circumstances exist as are stated therein to the protanto satisfaction of the Court and it would not be justified in issuing or for attachment before judgment, or for security merely because it thinks that no harm would be done thereby or that the Defendants would not be prejudiced.

Moreover, an order of attachment before judgment is drastic remedy and the power has to be exercised with utmost care and caution, as it may be likely to ruin the reputation of the parties against whom the power is exercised. It is also settled principle of law that the mere mechanical repetition of the provisions in the Code of Civil Procedure or the language therein without any basic strata of truth underlining the allegation or vague and general allegation that the respondents are about to dispossess of the property or to remove it beyond the jurisdiction of the Court, totally unsupported by particulars, would not be sufficient compliance with Order 38 Rule 5 of the CPC. Attachment before judgment is not a process to be adopted as matter of course. The suit is yet to be tried and the defence of the respondent yet to be tested. At the nebulous juncture, the relief which is extraordinary could be granted only if the conditions for it grant, as per the provision of the Code of Civil Procedure, stand satisfied. The process is never meant as lever for the petitioner to coerce the respondents to come to terms. Hence, utmost caution and circumspection should guide the Court.

So, considering the documents annexed with the application under Order 38 Rule 5 of the CPC filed by the petitioner, this Court is in the opinion that the petitioner has not a strong *prima facie* case to issue any *ad interim* order of attachment before judgment as contemplated under Order 38 Rule 5 read with Order 39 Rule 1 and 2 read with Section 151 of CPC without hearing of the respondents.

Hence, the prayer for *ex parte ad interim* order of injunction as prayed for by the petitioner is hereby considered and rejected at this stage.

Issue notice upon the respondents directing them to show cause within fifteen days (15) of the receipt of the notice as to why the order of temporary injunction as prayed for in the instant application shall not be granted in favour of the petitioner.

Petitioner is directed to serve the copy of this order along with the aforesaid application upon the respondents at once and to file affidavit of service within 48 hours (excluding holidays).

Issue summons at once.

Fix the matter on 18.08.2025 at 10:45 a.m. for S/R of the defendants/respondents.

Parties are to act forthwith on the basis of the downloaded copy of this Order.

Dictated and corrected by me

Sd/-

Judge, Commercial Court at Alipore,
For South 24 Parganas, Purba Midnapore,
Paschim Midnapore & Jhargram

Sd/-

Judge, Commercial Court at Alipore,
For South 24 Parganas, Purba Midnapore,
Paschim Midnapore & Jhargram