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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ CS(OS) 338/2019 & I.A. 18000/2019, I.A. 3802/2021(Add. Document)

ADITI WASAN ..... Plaintiff

Through: Mr. Kotla Harshavardhan and Mr. Harshawardhan Thakur, Advs.

versus

SURINDER SINGH PAHWA ..... Defendant

Through: Mr. Arun Khosla, Adv.

CORAM:
HON'BLE MR. JUSTICE YASHWANT VARMA

O R D E R

% **08.12.2022**

I.A. 9099/2019

1. The present application has been made under Order XXXVIII Rule 5 of the Code of Civil Procedure, 1908 **[“CPC”]** for the Court attaching property bearing House No. No. S-449, Greater Kailash, Part II, New Delhi - 110048, before judgment. Further prayers are sought with respect to the share of the defendant in properties bearing House Nos. 124, Khatauni No. 154, situated in Tehsil Mauja Pavta, District Faridabad, Haryana and F - 29, Okhla Phase I, New Delhi – 110020.

2. The suit has been instituted for recovery of the sum of Rs.2,06,50,000/- along with interest with the sum claimed being described to be a personal loan which was extended by the plaintiff to the defendant. The plaintiff is stated to be part of the management of Wasan Overseas Pvt. Ltd. **[“WOPL”]**. The defendant is part of the management of M/s. Pahwa International**.** It is the case of the plaintiff that notwithstanding the close business relationship which existed between WOPL and M/s. Pahwa International, the sum for which

recovery is claimed was an amount which was paid by the plaintiff from her personal bank account and provided as a personal loan to the defendant. The application alleges that the aforesaid loan had been extended to the defendant on him conveying a dire need for financial assistance. It is alleged further that the defendant owes huge amounts of money to banks and financial institutions in respect of which various coercive steps have been adopted by those institutions. In view of the aforesaid, the plaintiff asserts that it is likely that the majority of the assets of the defendant would be disposed of. It is further alleged that M/s. Pahwa International set up a wholly fraudulent claim against WOPL by filing CS (COMM.) No. 1294/2018 alleging therein that the amount which forms subject matter of the instant suit was, in fact, a debt owed by WOPL. It is in the aforesaid backdrop that the plaintiff asserts that great prejudice shall be caused unless orders for attachment before judgment are made. Learned counsel for the plaintiff had further drawn the attention of the Court to the affidavit submitted by the defendant bringing on record a statement of assets and liabilities and submitted that under the head of liabilities the amount which is owed to the plaintiff personally was clearly shown as a liability. According to learned counsel, this clearly establishes that the plaintiff had a good prima facie case and bearing in mind the disclosures made in the instant application, orders as prayed for are liable to be granted.

3. Learned counsel appearing for the defendant on the other hand submitted that the amount which is claimed in the suit was in connection with the business transactions between WOPL and M/s. Pahwa International and arose out of export transactions which were undertaken. Learned counsel had taken the Court through the details of those transactions which are set forth in paragraph 5 of the written statement. It was further submitted that the transcript of WhatsApp

conversations which are stated to have taken place between the plaintiff and the defendant and brought on the record by the former herself would show that an agreement was drawn up between the parties and it was pursuant to the terms of that agreement that payments were made. In view of the aforesaid, learned counsel would contend that the entire suit is based on falsehood and the assertion that the amount claimed was a personal loan is wholly incorrect.

4. For the purposes of considering the prayer for an order of attachment before judgment, the Court would firstly have to bear in mind the basic principles which underlie Order XXXVIII Rule 5 of the CPC. It would be apposite to note at the outset that precedents have consistently held that the power conferred by Order XXXVIII Rule 5 of CPC is a drastic and extraordinary power which must be used sparingly and upon it being found that there is every possibility of the defendant dissipating his assets in order to defeat a judgment which may be ultimately rendered.

5. The basic principles which inform Order XXXVIII Rule 5 of the CPC were succinctly explained by the Supreme Court in **Raman Tech. & Process Engg. Co. v. Solanki Traders, [**(2008) 2 SCC 302**]** as follows:-

> "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. <u>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 that the plaintiff has a prima facie case.</u> 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 utilise 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.)"

6. As was underlined by the Supreme Court in **Raman Tech.**, the power of attachment before judgment is to be invoked only in a case where it is found that the defendant is likely to obstruct or delay the execution of a decree. It further went on to pertinently observe that merely because the plaintiff may be recognised to have a just or valid claim or a good prima facie case that in itself would not entitle the plaintiff to an order of attachment before judgment unless it is also established that the defendant is attempting to remove or dispose of his assets with the intention of defeating the decree which may

ultimately come to be rendered.

7. On a consideration of the rival contentions which have been addressed by learned counsels, it is evident that there is a serious dispute with respect to the issue of the defendant being personally liable to pay the amounts which are claimed by the plaintiff. The rival allegations which have been levelled and are evidenced from the pleas taken in the written statement and the evidence placed on the record would indicate that serious triable issues do arise.

8. The Court also notes that while the instant application sought orders of attachment in respect of the three properties and the various assets which are detailed in the prayer clause, learned counsel had restricted this prayer to the residential property details of which stand set out in prayer 'a'. The application does not detail or bring on record any material which may be viewed as constituting cogent evidence to establish that the defendant is in the process of disposing of his personal assets or there is likelihood of the assets being dissipated.

9. In view of the aforesaid, the prayers as made in the instant application are refused. It shall consequently stand dismissed.

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List on 26.04.2023.

YASHWANT VARMA, J.

DECEMBER 8, 2022

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