

ODC-2

IA NO. GA/1/2022

IN

CS/223/2022

IN THE HIGH COURT AT CALCUTTA

ORDINARY ORIGINAL CIVIL JURISDICTION

ORIGINAL SIDE

[COMMERCIAL DIVISION]

RAJGARIA TIMBER PRIVATE LIMITED

Vs.

BHOLA NATH SHAW

BEFORE :

The Hon'ble JUSTICE KRISHNA RAO

Date 22<sup>nd</sup> September, 2022

Appearance:  
Ms. Sananda Ganguly, Adv.  
...For the petitioner.

ORDER

The petitioner has filed the instant application for grant of Ad-interim injunction for attachment of bank account of the respondent maintained in the State Bank of India Salkia Branch Howrah being Current Account No. 1086968309 and Savings Bank Account No. 401610100023977 and an order of Ad - interim injunction restraining the respondent from withdrawing any sums from the said banks.

The petitioner had filed the suit against the respondent for recovery of an amount of Rs. 83,25,512/- along with interest @ 18% per annum. Petitioner is engaged in the business of wholesale of timber and allied products to diverse entities in the state of West Bengal. The respondent is dealing with manufacturing of furniture and sale of finished products. The respondent had given offer to the respondent for purchase of timber from the petitioner and both the parties have agreed that the petitioner will supply diverse quantity and quality of timber for an agreed price by the respondent and upon delivery of timber and presentation of tax invoices, the respondent shall pay the bill amount to the petitioner. It was further agreed by and between the parties that in the event of delay in payment, the respondent would be liable to pay interest @18% per annum to the petitioner.

In between 7<sup>th</sup> April, 2017 till 16<sup>th</sup> February, 2018, the petitioner had supplied timber to the respondent for an aggregate amount of Rs. 98,85,512/-. The respondent had promised the petitioner that he will pay the said amount to the petitioner but the respondent failed to pay the same and in the month of October, 2017 till March, 2018, the respondent had paid only 14,00,000/- out to the total amount of Rs. 98,85,512/-.

The petitioner had made several demands for payment of the said sums but the respondent has not paid the said amount. As the respondent has not paid the amount as claimed by the petitioner, the petitioner had made a police

complaint and accordingly the police has initiated case against the respondent and the respondent had obtained anticipatory bail.

Learned Counsel representing the petitioner submits that the respondent has admitted his liability to make the payment of dues by several correspondences. Ld. Counsel further submits that the respondent has filed an application for grant of anticipatory bail and in the said application, the petitioner has admitted the amount payable to the petitioner.

Ld. Counsel for the petitioner further submits that the petitioner apprehends that the respondent is seeking to surreptitiously remove and dealing with his assets and properties. He further submits that the petitioner came to know from the reliable sources that the respondent is attempting to dissipate his assets with the motive to defraud the petitioner.

Ld. Counsel for the petitioner further submits that the respondent is trying to defeat the legitimate claim of the petitioner. He further submits that in the absence of security being furnished, the plaintiff would be left with a paper decree with little or no assets to proceed against in execution.

Heard, the Learned Counsel for the petitioner, considered the pleadings and documents available on record. The case of the petitioner is that the petitioner and the respondent were having a business relationship and the petitioner had supplied timber to the respondent for a total amount of Rs.98,85,512/- out of which the respondent had only paid Rs. 14,00,000/- and even on admission, the respondent had not paid the balance amount to the

petitioner. It is the specific case of the petitioner that the respondent had admitted the claim of the petitioner and the said fact also admitted in the anticipatory bail application.

As per record, the respondent had sent reply to the notice of the petitioner in which the respondent has stated that respondent had surprised after going through the claim amount of the petitioner. The respondent in his reply as well as in the anticipatory bail application had admitted only an amount of Rs. 10,05,898/- not an amount of Rs. 83,25,512/-.

As regard the apprehension of the petitioner that the respondent is attempting to dissipate his assets with the motive to defraud the petitioner, the petitioner has made mere allegation and there is no materials on record to substantiate the allegation of the petitioner.

In the case reported in (2009) SCC Online Cal 1638 (Sunil Kakraina & Ors. -versus – M/s Saltee Infrastructure Ltd. & Ors.), the Division Bench of this Court held that :

**“24.** *In the case of PremrajMundra v. Md. ManechGazi reported in AIR 1951 Cal 156, approved by the Apex Court in the aforesaid decision, Sinha, J. (as His Lordship then was) laid down the following principles required to be followed by a Court before invoking the jurisdiction under Order 38, Rule 5:*

*“(10) 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, and 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 pltfs. claim.

(8) 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 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, and if so, with what intention. The Court is entitled to consider the nature of the claim and 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 and/or where he had transferred the major portion of his properties shortly prior to the institution of the suit, and 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 pltfsapos;. claim, suddenly begins removal of his properties outside the jurisdiction of the appropriate Court, and 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 0.38 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 pltf's. calim. The Court must however be very cautious about the evidence on these points and not rely on vague allegations."*

**25.** *Applying the aforesaid principles to the facts of the present case, we find that the statement that has been made in the application for attachment before judgment was that the defendant is in ruinous condition and that if the decree was passed in the suit, the plaintiff would not be in a position to execute the decree if the defendant was able to transfer or alienate the property mentioned. On the basis of such vague allegation, in our view, no order or direction to give security or attachment can be passed as held above. There is even no allegation that the defendant is trying to remove or dispose of its properties in order to obstruct or delay the execution of the decree that may be passed against it."*

In the instant case also the petitioner has not satisfied with any of the conditions of Order 38, Rule 5 of the Code of Civil Procedure and thus the prayer for grant of Ad-interim as prayed for by the petitioner is rejected.

Let affidavit in opposition be filed within two (2) weeks after puja vacation reply, if any, there to be filed within a week thereafter. List the matter on 24<sup>th</sup> November, 2022.

(KRISHNA RAO, J.)

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