

RAMAN TECH. & PROCESS ENGG. CO. & ANR.

A

v.

SOLANKI TRADERS

NOVEMBER 20, 2007

[R.V. RAVEENDRAN AND P. SATHASIVAM, JJ.]

B

Code of Civil Procedure, 1908:

Or. 38 r.5—Direction to defendant to furnish security for suit claim—HELD: Power under Or.38 r.5 is a drastic and extraordinary power—Such power should not be exercised mechanically—It should be used sparingly and strictly in accordance with Rule—Purpose of Or. 38 r.5 is not to convert an unsecured debt into a secured debt—Any attempt by a plaintiff to utilize provisions of Or. 38 r. 5 as a leverage for coercing defendant to settle the suit claim should be discouraged—Before power is exercised under Or. 38 r.5, plaintiff should show, **prima facie**, that his claim is **bonafide** and valid and also satisfy the court that defendant is about to remove or dispose of whole or part of his property, with intention of obstructing or delaying execution of any decree that may be passed against him—Courts should also keep in view the principles relating to grant of attachment before judgment*—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 or removal of machinery to another premises by itself is not a ground for granting attachment before judgment—On facts, particulars of claim in the plaint were not specific—Trial court had rejected application on ground that plaintiff had failed to make out a **prime facie** case—It did not, therefore, examine the question whether defendant, by shifting his machinery, was attempting to defeat any decree that may be passed—High Court ignored absence of a **prima facie** case and ought not to have interfered with order rejecting application—Order of High Court is set aside and that of trial court restored.

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A **Prem Raj Mundra v. Md. Maneck Gazi, AIR 1951 Cal 156, referred to.*

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 6171 of 2001.

B From the final Judgment and Order dated 30.10.2000 of the High Court of Judicature, Andhra Pradesh at Hyderabad in C.R.P. No. 3377/2000.

D. Mahesh Babu for the Appellant.

C The following Order of the Court was delivered by

ORDER

1. The appellants are the defendants in O.S. No. 143/2000 on the file of the Civil Judge Junior Division, Medchal, filed by the respondent D for recovery of Rs.99200/- towards supply of material.

2. The plaintiff moved an application under Order 38 Rule 5 CPC praying for a direction to defendants to furnish security for the suit claim and if they failed to do so, for attachment before judgment. The Trial Court by its order dated 4.8.2000 dismissed the said application. It noted that though the plaintiff alleged that two post dated cheques given by the defendants towards payment of the bill amounts were dishonoured, it had neither disclosed the particulars of the said cheques, nor the dates of dishonour. It was of the view that merely making a bald statement that E Rs.99,200/- was due from the defendants was not sufficient to make out F *prima facie* case, when defendants had denied the suit claim.

3. The said order was challenged in revision by the plaintiff. Before the High Court, the plaintiff pointed out that the trial court had ignored its averment that defendants had removed their name board and were G removing their machinery from the jurisdiction of the court. The plaintiff also produced a copy of the writ petition (WP No. 11855/2000) filed by the defendants to restrain the police from interfering with the shifting of their assets from their business premises to another premises. The High Court allowed the revision petition by order dated 13.10.2000, being of H

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the view that the trial court ought to have taken note of the fact that defendants were trying to remove the machinery. It directed defendants to furnish security for the suit amount to the satisfaction of the court within four weeks. The said order is challenged in this appeal by special leave. A

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. B
The object of order 38 rule 5 CPC in particular, is to prevent any defendant from defeating the realization of the decree that may ultimately be passed in favour of the plaintiff, either by attempting to dispose of, or C
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 D
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 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 E
exercising power under Order 38 Rule 5CPC. 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 F
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 drastic and extraordinary power. Such power should not be exercised mechanically G
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 H

A 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 settlement, under threat of attachment.

B 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.)

D 7. In this case, the suit claim was Rs. 99200/- The notice issued before filing the suit related to dishonour of two cheques for Rs. 22487/-. The particulars of the claim in the plaint were not specific. The trial court had rejected the application on the ground that plaintiff had failed to make out a *prima facie* case. It did not, therefore, examine the question whether defendant was attempting to defeat any decree that may be passed by shifting his machinery. On the other hand, the High Court ignored the absence of *prima facie* case. It granted relief under Order E 38 rule 5, in exercise of revisional jurisdiction, swayed by the fact that F the defendants had shifted their assets to another premises.

G 8. On the facts and circumstances, the High Court ought not to have interfered with the order rejecting the application. We, therefore, allow this appeal and set aside the order of the High Court and restore the order of the trial court.

R.P.

Appeal allowed.