

(2014) 03 BOM CK 0122

In the Bombay High Court

Case No : Notice of Motion No. 2402 of 2012 in Suit No. 2460 of 2012

Remedial Resolutions Advisors Pvt. Ltd. and Others APPELLANT
Vs

Capri UK Investments Ltd. and Others and N.H. Construction RESPONDENT
Pvt. Ltd. and Others

Date of Decision : 14-03-2014

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 38 Rule 38, Order 38 Rule 5, Order 38 Rule 5(1)

Citation : (2014) 4 BomCR 658

Hon'ble Judges : S.C. Gupte, J

Bench : Single Bench

Advocate : Virag Tulzapurkar, Mr. Sameer Pandit, Ms. Shanelle Irani instructed by and Wadia Gandhi and Co, for the Appellant; D.D. Madon, Mr. Cyrus Ardershir, C.D. Mehta, Hasmit Trivedi instructed by and M/s. Dhruve Liladhar and Co., for the Respondent

Final Decision : Dismissed

Judgement

S.C. Gupte, J.—The Notice of Motion is taken out by the Plaintiffs for reliefs in the nature of attachment before judgment in a money Suit. The Suit claim arises out of what is described as a Commitment Agreement executed by the parties. The Plaintiffs' case in the Suit may be briefly set out as follows:

Plaintiff No. 1 (a company registered under the Companies Act, 1956) is set up by Plaintiff No. 2 (a company incorporated under the laws of the State of Delaware, USA) and Plaintiff No. 3 (promotee/director of Plaintiff No. 2 and Director & Executive Chairman of Plaintiff No. 1). The business of Plaintiff No. 1 consists of acquisition and dealing in portfolios of non-performing retail loans from financial institutions. Plaintiff No. 1 and Defendant No. 1 (an investment company incorporated in UK) entered into a Commitment Agreement on 23 December 2009. The agreement envisaged setting up of an entity in India (referred to therein as "RCIL") with an initial common equity capital of Rs. 10 Lacs, to be held equally by each of Plaintiff No. 1 and Defendant No. 1 through

its nominee investor. Defendant No. 1 committed to provide a revolving line of credit to RCIL of \$ 10 Million carrying an interest rate of 10% p.a. The Board of RCIL was to comprise of 50% of members nominated by each of Plaintiff No. 1 and the nominee investor of Defendant No. 1. It is the case of Plaintiffs that Defendant No. 1 brought in through its investor nominee/s a sum of \$3.9 million by way of a first tranche out of the promised \$ 10 million into Plaintiff No. 1 company. The amount was brought in by way of subscription of compulsorily convertible debentures ("CCDs") of Plaintiff No. 1 issued by it to the investor nominee/s of Defendant No. 1. The Plaintiffs, in turn, caused Defendant No. 5, a nominee of Defendant No. 1, to be appointed as an additional director of Plaintiff No. 1. Out of the funds of \$ 3.9 millions so brought in, Plaintiff No. 1 acquired a retail loan portfolio from Standard Chartered Bank ("SCB portfolio") through a Special Purpose Vehicle, namely, a Non-Banking Financial Company called "Shaha Finlease Pvt. Ltd." ("Nominated NBFC"). Plaintiff No. 1 entered into various agreements with the Nominated NBFC towards management of portfolios including the SCB portfolio. Simultaneously with the acquisition of the SCB portfolio, Plaintiff No. 1 and the investment nominee of Defendant No. 1 entered into arrangements for the latter to hold 50% of the issued share capital of Plaintiff No. 1. (The share capital, however, was not actually transferred to the investment nominee of Defendant No. 1 as pointed out hereinbelow.) It is the Plaintiffs' case that Defendant No. 1 went back on its commitments under the Agreement, sought an alteration of the Agreement (including enhancement of the rate of interest to 20% from the agreed rate of 10% p.a.), and refused to bring in further funds so as to complete the promised investment of \$ 10 million. The Plaintiffs, in the premises, filed the present Suit seeking performance of the Commitment Agreement from the Defendants by bringing in a subscription amount of \$ 6.1 million.

2. The Notice of Motion is taken out for reliefs under Order 38 Rule 5 on the basis that the Plaintiffs have an excellent prima facie case on merits; that the Defendants are residents outside India and have limited funds and assets in India; that a majority of the Defendants' assets are held through a complex structure of off-shore companies and trusts; that the entire issued and paid up share capital of Defendant No. 1 is GBP 1000 ponds and enforcement proceedings of a decree even in UK is unlikely to yield any satisfaction of the decree; and that the Plaintiffs have information and apprehend that the Defendants are likely to sell, transfer and dispose of their assets in India and elsewhere with the object of obstructing/delaying/defeating enforcement of any decree that may be passed against the Defendants in the present Suit.

3. The Defendants submit in reply that the Commitment Agreement was a mere expression of interest and not a final and binding contract between the parties. The Defendants submit that the amount of \$ 3.9 million was brought in by way of a bridge loan by the Defendants and not in performance of the Commitment Agreement. Alternatively, the Defendants submit that there are breaches of the Commitment Agreement by Plaintiff No. 1 and the latter is neither ready nor

willing to perform the Agreement. The Defendants submit that there are irregularities in the transaction of acquisition of SCB portfolio. The Defendants also submit that there is no privity between the Plaintiffs and Defendant Nos. 2, 3 and 4.

4. Mr. Tulzapurkar, the learned Senior Counsel for the Plaintiffs submits that the Commitment Agreement was a concluded contract between the parties. He submits that the contract was partly performed and the Plaintiffs are ready and willing to perform the balance contract. The learned Counsel submits that the contract is breached by the Defendants and in the premises, the Defendants may be directed to specifically perform the contract and bring in the funds as promised. He submits that in the facts of the case, a clear case for reliefs in the nature of attachment before judgment is made out.

5. Mr. Madon, the learned Senior Counsel appearing for the Defendants, submits that the Suit can never be decreed by ordering specific performance. He submits, firstly, that the performance is not sought of the agreement as pleaded. Secondly, the agreement is merely to bring in money, which cannot be ordered to be specifically performed. It is submitted further that even assuming that it is a fit case for granting of specific performance, there is no case for granting the interim relief claimed in the Notice of Motion.

6. At the outset, it must be noted that the alleged agreement of which performance is sought by the Plaintiffs is different from the agreement set out in the plaint. The agreement between the parties as set out in the plaint is contained in the Commitment Agreement dated 23 December 2009 (Exhibit "E" to the plaint). The Commitment Agreement requires Defendant No. 1 to extend a loan of \$10 million to a newly formed entity "RCIL" to be held jointly by Plaintiff No. 1 and the investment nominee of Defendant No. 1. On the other hand, what the Plaintiffs pray for in the Suit is payment of subscription amount for 130,318 fully and compulsorily convertible debentures in Plaintiff No. 1 company. The Plaintiffs have neither pleaded any variation of the Commitment Agreement of 23 December 2009 nor explained how their prayers in the Suit, referred above, amount to performance of the Commitment Agreement of 23 December 2009.

7. The entity "RCIL" as required by the Commitment Agreement, which was to have an equal participation of Plaintiff No. 1 and the investment nominee of Defendant No. 1, has not been established. The amount of \$3.9 million brought in by the Defendants by way of subscription of CCDs of Plaintiff No. 1 cannot be said to be in compliance of the Commitment Agreement pleaded by the Plaintiffs. The agreement to transfer 50 per cent shareholding of Plaintiff No. 1 to the nominee of Defendant No. 1, as pleaded by the Plaintiffs, which in any event is not performed as admitted in the plaint, also cannot be said to be in performance of the Commitment Agreement. There is nothing to show that the Plaintiffs actually performed or are ready and willing to perform the Commitment Agreement.

8. Prima facie there is no case, thus, for claiming performance of the Commitment Agreement against Defendant No. 1. As for the other Defendants, there is no privity of contract that can be shown to exist between Plaintiff No. 1 and them. The Plaintiffs have thus failed to establish that they are prima facie entitled to the main reliefs claimed in the Suit against any of the Defendants.

9. As for the Plaintiffs' case made Order 38 Rule 5, there is absolutely no material before the Court to show that the Defendants, either with intent to obstruct or delay the execution of any decree or otherwise, are about to dispose of any property or remove the same from the local limits of the jurisdiction of the Court. The facts that the Defendants are residents of another country or have limited funds and assets in India are not, without anything more, sufficient to sustain any order of attachment before judgment. Apart from these allegations, all that the Plaintiffs aver in support of their application under Order 38 Rule 5 is that they have information and apprehend that the Defendants are likely to dispose of their assets in India and elsewhere with the object of obstructing/delaying/defeating the decree that may be passed. A bare assertion, without any material in support of it, is not sufficient to make out a case for attachment before judgment. Our Court in the case of *Saraswat Co-operative Bank Ltd., Mumbai Vs. Chandrakant Maganlal Shah and Others*, observed as follows:

In our view, an order of attachment before judgment has serious consequences to a debtor. It is not an order to be made lightly nor based on bald averments reiterating the statutory provisions. There has to be some prima facie material on the basis of which the Court could satisfy itself that the conditions requisite for making an order of attachment before judgment enumerated in Order 38 of the Civil Procedure exist. Otherwise, every Plaintiff would rush in with a bald averment like the one made by the Bank and obtain an attachment before judgment.

The observations would squarely apply to the present case. There is nothing besides a bald averment of likelihood of disposal of the property by the Defendants in the present case.

10. The learned Counsel for the Plaintiffs relied on the decision in *Rajendran and Others Vs. Shankar Sundaram and Others*, , where the Supreme Court held that the Court while exercising its jurisdiction under Order 38 Rule 5 is required to form only a prima facie opinion and need not at that stage go into the correctness or otherwise of all contentions raised by the parties. As I have indicated above, there is no material whatsoever to form any prima facie opinion on the existence of circumstances justifying exercise of the jurisdiction under Order 38 Rule 5. in the case of *Marine Container Services (I) Pvt. Ltd. Vs. Rajesh Dhirajlal Vora*, , relied upon by the Plaintiffs, our Court held that it was permissible to a plaintiff to make an application for attachment before judgment without specifying the property of which attachment is sought. Relying on this judgment, the learned Counsel for the Plaintiffs submitted that if that is so, even particulars of attempts of disposal etc. cannot be furnished and should not be

insisted upon by the court. Whether the plaintiff knows the particulars of the properties sought to be attached or not, he still must make out a case that the Defendant is about to dispose of or remove his property in terms of clause (a) or (b) of Rule 5(1) of Order 38. Such a case ought to be established on some prima facie material on which the court can base its satisfaction about the existence of the conditions in clause (a) and/or (b).

11. The Supreme Court in the case of Raman Tech. and Process Engg. Co. and Another Vs. Solanki Traders, held 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. 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. 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 utilize 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 for a clear summary of the principles.)

12. In the present case, as indicated above, I am not satisfied that the Plaintiffs have a prima facie case on merits. In the circumstances, as explained by the Supreme Court, there is no necessity to go to the next stage of examination of any case under Order 38 Rule 5. But I have still proceeded to consider the Plaintiffs' contentions for claiming an attachment before judgment. As discussed above, no case is made out by the Plaintiffs under Order 38 Rule 5 either.

13. For these reasons, there is no merit in the Plaintiffs' application. The Notice of Motion is, accordingly, dismissed. There shall be no order as to costs. On the application of the learned Counsel for the Plaintiffs, the ad-interim stay operating till today is extended by two weeks from today.