

IN THE HIGH COURT OF SINDH AT KARACHI

Present:

Muhammad Junaid Ghaffar &
Sana Akram Minhas JJ

High Court Appeal No.62 of 2023

(Ghulamali P. Allana v. Louis Dreyfus Commodities Suisse SA & Others)

Appellant: Ghulamali P. Allana
Through Mr. Amel Khan Kanshi, Advocate

Respondents No.1 to 5: (1) Louis Dreyfus Commodities Suisse SA (2) Louis
Dreyfus Commodities Suisse Asia PTE. Ltd (3)
Louis Dreyfus Commodities Suisse MEA Trading
DMCC (4) Anza Trade (Pvt) Limited
Through Mr. Salman Hamid, Advocate

Date(s) of hearing: 26.9.2023

Date of Decision: 05.1.2024

ORDER

Sana Akram Minhas, J: The present High Court Appeal (“HCA”) challenges a learned Single Judge’s dismissal of the Appellant’s interlocutory application for attachment before judgment (bearing CMA No. 3351/2013) (“Attachment Application”) filed under Order 38 rule 5 of the *Code of Civil Procedure 1908* (“CPC”) by order dated 4.3.2023 (“Impugned Order”) passed in Suit No.360/2013 (“Suit 360”).

Factual Background

2. The Suit 360 has been instituted by the Appellant (Plaintiff in Suit 360) against the Respondents No.1 to 4 (Defendants No.1 to 4 in Suit 360) for recovery of money and damages arising from contracts for the sale of rice. The Appellant (seller) and the Respondents No.1 to 3 (buyers) are engaged in a dispute, with the Respondent No.4 acting as the

latter's local agent. The Suit 360 involves three contracts, with the Appellant claiming outstanding dispatch charges, loss on goods not lifted and general damages. The Respondents deny the dispatch charges under the first and second contract, dispute the quantity of goods under the third contract and counter-claim for losses due to the stoppage caused by the Appellant obtaining the interim order. The Appellant filed the Attachment Application seeking to attach goods then being loaded at Karachi Port aboard the vessel "GMT PHEONIX," alleging that the Respondents No.1 to 3 had no other assets in Pakistan and that unless the said goods were attached, the Appellant would not be able to execute any decree that may be passed.

3. Initially, by an ad interim order dated 28.3.2013, the KPT officials (who were originally arrayed as Defendants No.5 to 7 in Suit 360 but were later struck off as parties by consent order dated 13.5.2013) were restrained from loading the rice on the vessel in the following terms:

28-3-2013

“ Let notice be issued to the defendants for 01.04.2013. Till next date of hearing defendants No.5, 6 & 7 after confirming the ownership of the rice which is being loaded on ‘GMT PHOENIX’ at berth No.21 & 22 of the West Wharf and if same is found in the name of defendants No.1 to 3 shall stop loading till next date of hearing. The plaintiff shall tentatively deposit a sum of Rs.1.000 (M) (Rupees One Million) with the Nazir of this Court to meet the claim if any. Amount so deposited by the plaintiff shall be invested in government profit bearing scheme.”

4. On 2.4.2013, the Respondents No.1 to 4 entered appearance and moved an application (viz. CMA No.3504/2013) praying that since stoppage of goods at Port is causing losses, the order dated 28.3.2013 may be modified to substitute the goods with security. Therefore, on 3.4.2013 the earlier order was modified allowing the Respondents to continue loading the goods upon furnishing bank guarantees (which were submitted on behalf of the Respondents No.1 to 3 on 6.4.2013) in the following terms:

3-4-2013

“ By consent of learned Counsel for the parties present in Court, order passed on 28.03.2013 is modified to the following terms:

1. *That Defendant No.4 will furnish two bank guarantees, one amounting to US\$ 215,004.21/- and second amounting to US\$ 250,000/- with the Nazir of this Court. Both guarantees will be retained by the Nazir **till further order of this Court.** [Emphasis added]*
2. *After furnishing the bank guarantees to the satisfaction of the Nazir of this Court restriction of loading of cargo of "GMT PHEONIX" docked at Berth No.21 and 22 of West Wharf stand lifted.*

Adjourned to 18.04.2013 at 12:00 Noon."

The Impugned Order

5. The Impugned Order holds that the order dated 3.4.2013 was proposed by the Respondents to temporarily modify the interim order and did not dispose of the Attachment Application. The learned Single Judge rejected the argument of the Appellant that the purpose of the Attachment Application was fulfilled once security was furnished and held that the order on 3.4.2013 did not conclude or make a final determination on the Attachment Application. The Single Judge then proceeded to dismiss the Attachment Application after considering its merits.

Respective Arguments

6. The Appellant argued that the order dated 3.4.2013 effectively constituted consent for the grant of Attachment Application, as the Respondents No.1 to 3 had deposited security to secure the Appellant's claim, and there was nothing left for further hearing or orders on this Application. The Counsel contended that once goods were released in lieu of security, the Respondents should at least be prevented from seeking the release of security until a final judgment is reached for the reason that the Respondents No.1 to 3 are foreign companies with no other assets in Pakistan, and the Appellant might have nothing left to enforce a potential decree.
7. In contrast, the learned Counsel representing the Respondents No.1 to 4 asserted that the order dated 3.4.2013 indicated it was only an interim/temporary arrangement until the Attachment Application was fully decided. Additionally, the Counsel averred that even if the

Respondents No.1 to 3 were foreign companies without assets in Pakistan, the Appellant did not satisfy the requirements of Order 38 rule 5 CPC, which involves demonstrating that the Respondents were shipping the goods with the purpose and objective to evade the Appellant's claim.

8. We have heard the arguments of the respective sides and have also considered the record. The primary point for determination herein is whether any infirmity has been identified in the Impugned Order under consideration that warrants intervention by this Appellate Court.

Implication Of The Phrase "Till Further Order Of This Court" In Order Dated 3-4-2013

9. It falls upon this Court to analyse the wording of the order dated 3.4.2013 to ascertain if it was intended to be a final disposition of the Attachment Application or was merely a temporary modification pending further orders.
10. In Pakistan v. Hikmat Hussain (PLD 1959 SC 107 [108]), which was a service matter, it was held that when an officer is expressly appointed in an officiating capacity and until further orders, the Government could at any time terminate his officiating appointment and revert him to his original position, even if such revision may amount to a review of the earlier order. Thus, the Supreme Court's decision underscored that the inclusion of the expression "until further orders" in the appointment signified its provisional and revocable nature.
11. The Supreme Court's aforesaid opinion in Hikmat Hussain case was followed by a Division Bench of this Court in Muhammad Mustafa v. Government of Pakistan (1984 PLC (CS) 353).
12. The usage of the expression "*till further order of this court*" is widely employed and its meaning and application are so commonplace and unambiguous that it has not stirred any significant legal controversy or debate. It signifies that a particular decision or directive issued by the court will remain in effect until the court issues a subsequent order altering or terminating the previous one and ensures that the court retains control over the ongoing proceedings. In essence, the phrase

reflects the temporary nature of the order and indicates that it is subject to change based on the court's ongoing assessment of the case.

13. The Impugned Order, therefore, correctly holds that the subsequent order dated 3.4.2013 (which modified the earlier interim order of 28.3.2013) was proposed by the Respondents No.1 to 4 to avoid losses caused by the stoppage of goods and that the order did not dispose of the Attachment Application but was intended as a modification until the hearing of the Attachment Application. Even the Respondents in paragraph 4 of their application (on which application the order of 3.4.2013 was passed), categorically seek modification of earlier order dated 28.3.2013 till the hearing of Attachment Application.

Attachment Before Judgment under Order 38 rule 5 CPC¹

14. The nature and limitations of the court's power granted under Order 38 rule 5 CPC have been the subject of many a legal discourse. The object of the attachment before judgment is to prevent an attempt on the part of the defendant of defeating the realization of the decree, which may ultimately be passed against him. It functions as a protective measure rather than meting out punishment i.e. it is a preventive and not a punitive course of action. The superior courts have underscored the need for a cautious, restrained and well-justified exercise of the court's power to attach a defendant's property before a judgment is reached in a legal case. The evolved jurisprudence stresses upon the need for

¹ Order 38 rule 5 CPC:

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 limits 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.

clear proof of the existence of the mischief targeted by the rule before utilizing the power to attach a defendant's property. Mere allegations to that effect in a generic manner are not considered sufficient. So also, simply because a plaintiff would have no means of realising the fruit of the decree which he hopes to obtain in the suit is not a sufficient ground for invoking the provisions of rule 5 unless he places on record the material for the Court's satisfaction for making such order that the defendant is about to dispose of his property with a view to frustrate or delay execution of decree that may be passed against him. Various legal pronouncements warn against assuming that selling property during legal proceedings is sufficient ground to presume an intent to defraud the plaintiff. The provision is not intended to guarantee the plaintiff availability of an asset to satisfy a potential future decree which might be passed one day but it is to ensure non-abusing of process of court by the defendant. Attachment can be ordered if the court is satisfied that the defendant is about to dispose of the whole or any part of his property with intent to obstruct or delay the execution of the decree with or without application as the court has to examine the substance of the case to administer justice.

15. Legal precedents for the aforementioned legal propositions are reflected in Associated Drillers Ltd v. Dirk Verstoop BV (PLD 1979 Kar 734), DHL International v. NTC Ltd (1982 CLC 1360), Mohammad Arif Effendi v. Egypt Air (1983 SCMR 238), Muhammad Ather Hafeez Khan v. Ssangyong & Usmani JV (PLD 2011 Kar 605), Anwar Mangi v. Pak Commodities International (PLD 2018 Sindh 339), Kasb Corporation v. Bank Islami (2019 YLR 345), Abdul Razzak (Deceased) v. Faysal Bank (2020 CLD 238) and Sui Southern Gas Company v. Karachi Electric Supply Company (PLD 2020 Sindh 385).
16. Keeping in view the principles outlined above, we have carefully scrutinised the contents of both the Plaint and the Attachment Application. Before an order of attachment before judgment can be granted, the court must be convinced, through affidavit or other means, that a defendant is intending to obstruct or delay the execution of any potential future decree by disposing of its property. A person is not prohibited from dealing with his property simply because a lawsuit has been filed against him.

17. The power to attach is only justified when the court is convinced not only that the defendant is disposing of or removing their property but also that the intent is to obstruct or delay the execution of a potential future decree. It is open to the Court to look to the conduct of the parties immediately before the suit and to examine the surrounding circumstances and to draw an inference as to whether the defendant is about to dispose of the property and if so, with what intention. The Court can take into account the nature of the claim and the defence put forward. Applying the above yardstick to the Appellant's pleadings in Suit 360, neither the Plaintiff nor the Attachment Application allege that the goods being shipped by the Respondents No.1 to 4 were with the intent to obstruct or delay the execution of a decree that might be passed in Suit 360. Nor indeed such an intent could have been ascribed to the Respondents when the shipment had been arranged/scheduled prior to the institution of Suit 360 and without notice of any impending legal action. Rather, the contents of paragraph 32 of the Plaintiff convey that the shipment of the goods was part of the Respondents' business operations and not specifically undertaken in response to the lawsuit i.e. Suit 360.

Conclusion

18. After a close examination of the pleadings and arguments presented by the parties, for reasons discussed above, no infirmity or illegality has been found in the Impugned Order and nor has the Appellant been able to point out any. The learned Single Judge while passing the impugned order has appreciated all the facts involved in the case. Consequently, we uphold the said Impugned Order. The present Appeal and pending application being devoid of any merits are hereby ***dismissed***.

JUDGE

JUDGE

Karachi
Dated: 05th January, 2024