

IN THE HIGH COURT OF SINDH AT KARACHI

Suit No. 41 of 2013

Plaintiffs : Abdur Rauf and others, through
Mr. Hassan Khursheed Hashmi,
Advocate.

Defendant
Nos. 2 and 3 : Azhar Shafiq & another, through
Ms. Amna Usman, Advocate

Defendants
Nos. 4 to 6 : Habib-ur-Rahman & others,
through Mr. Ghulam Muhammad
Dars, Advocate.

Dates of hearing : 23.12.2019

ORDER

YOUSUF ALI SAYEED, J – The Suit has been filed by the Plaintiffs for recovery of an amount of Rs.206,869,180/- (Rupees Twenty Crore, Sixty Eight Lac, Sixty Nine Thousand, One Hundred and Eighty only) on the basis that the amount constitutes the receivables due from the Defendants on account of transactions carried out as between them on credit in relation to the supply of raw leather.

2. The Plaintiffs Nos.1 and 2 are father and the son, and Partners in a firm operating under the name and style of M/s. Imran Traders, which is itself arrayed as the Plaintiff No.3, whereas the the Defendants Nos.1 and 2 are apparently the sons of the Defendant No.3, who alongwith his brothers, namely, the Defendants Nos.4 and 5 were Partners of the firm operating under the name and style M/s. Shaikh Brothers, which has in turn been impleaded as the Defendant No.6.

3. Broadly stated, the case set up by the Plaintiffs against these Defendants proceeds on the assertion that the various transactions carried out so as to give rise to the accrued liability owed to the Plaintiffs were conducted as between the Plaintiffs and the Defendants Nos.1 and 2, which per the assertion of the Plaintiffs, was also for benefit of the other Defendants so as to make them liable for repayment.

4. It has been stated that in late November 2002, an excess amount of Rs.6.00 Crore had become due and payable by the Defendants, which at their request was treated by the Plaintiffs as an investment in their business, but instead of making repayment, further request for even more investment were made and acceded to from time to time, with the result that the total amount due swelled over time to Rs.296,649,964/-, and after certain adjustments as took place between the Parties thereafter, the amount claimed vide this Suit nonetheless remained due and payable, with the main prayer of the Plaintiffs in terms of the Plaint accordingly being for recovery, worded as follows:

“It is prayed that this Hon’ble Court may be pleased to decree the above suit for the amount of Rs.206,869,180/- with mark-up @ 14% per annum from the date of filing of the suit until realization of the total amount.

That this Hon’ble Court may be pleased to grant any other relief/s which this Hon’ble Court may deem fit, proper and necessary in the circumstances of this case.”

5. Be that as it may, in this framework, CMA Nos.348/2013 and 349/2013 have been filed, with the former eliciting injunctive relief so as to restrain the defendants from selling or disposing of two immovable properties *pendente lite*, being (a) Plot No.5 -C, 16th Commercial Street, Phase-II, Ext. DHA, Karachi, with building and structure standing thereon, and (b) Plot No.53, Sector 7/A, Korangi Industrial Area, Karachi, along with the structure and building standing thereon and furniture and fixtures and all moveable articles, goods etc., lying therein and all machines, engines lying and/or fixed therein, and the latter concurrently seeking the appointment of a receiver.

6. Proceeding on these Applications, learned counsel for the Plaintiffs submitted that such interim measures were just and necessary as the Plaintiffs apprehended that the Defendants were intending to transfer or dissipate their assets so as to frustrate the eventual decree in the Suit, which therefore ought to be secured through the measures sought. He submitted that such apprehensions were fortified by the blanket denial of liability on the part of the answering Defendants in the wake of the Defendant No.1's failure to enter appearance in the proceedings so as to answer the claim.

7. Conversely, learned counsel for the Defendants Nos. 2 to 6 denied the existence of any liability on the part of those defendants and assailed the maintainability of the applications, it being submitted that the properties in relation to which relief had been sought were not the corpus of the suit, and that a mere apprehension that the Defendants would divert their assets did not afford any basis for interim relief by way of even an injunction, let alone through the appointment of a receiver.

8. It was submitted that the Plaintiffs had failed to establish the existence of any obligation on the part of the Defendants Nos. 2 to 6, either contractual or otherwise, whereby they were bound to make payment of the amount claimed or any part thereof.

9. Having considered the submissions advanced at the bar, it merits consideration that the suit is one for recovery and accordingly seeks a money decree, with no prayer as against the immovable property at which the Application for temporary injunction is directed, which property is ergo obviously not the corpus of the suit. As such, the action is merely one for recovery of a sum alleged to be owed to the Plaintiffs, and the injunction is sought within that framework solely so as to restrain the Defendants from selling or disposing of a particular immovable property *pendente lite*. In this regard, reference may be made to the general principle laid down as far back as in the case of *Lister and Co v. Stubbs* (1890) 45 Ch D 1, which was one where it was alleged by the plaintiffs that their foreman had received secret commissions which he had invested in land and other investments. They sought interlocutory relief to prevent him dealing with the land and requiring him to bring the other investments into court, it being held that the injunction must be refused as the money was not that of the plaintiffs so as to make the defendant a trustee, but was money to which the plaintiffs would be entitled to claim in the action, i.e. 'a debt due from the Defendant to the Plaintiffs in consequence of the corrupt bargain which he entered into' but the money which he had received under that bargain could not be treated as being money of the Plaintiffs 'before any judgment or decree in the action had been made', and the court will

not grant an injunction to restrain a defendant from parting with his assets so that they may be preserved in case the plaintiff's claim succeeds. Be that as it may, in the matter at hand, learned counsel was even otherwise unable to even point out any document(s) recording the series of transactions said to underpin the claim or to any document that could be perceived as an acknowledgment of liability on the part of the Defendants Nos. 2 to 6 and from a perusal of the material on record, it cannot even be said at this stage that the Plaintiff's have established a prima facie case as regards the liability of the Defendants, let alone the inevitability of a decree as against them. Furthermore, apart from a bare allegation that the Defendants would divert their assets, no material to establish a prima facie intention to defraud has been placed on record. Even under the provision for pre-judgment attachment in the form of Order 38, Rule 5, C.P.C, 1908, whereby a Court can in a money suit grant an order of attachment of property before judgment, the plaintiff is to 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 such power is exercised. Order XXXIX, Rule 1(b) C.P.C is no less stringent, as under this provision the objective is to prevent a defendant from defrauding his creditors, and not to defeat or frustrate any decree that may be made against him. As such, the threat or intention on the part of the defendant must be established through definite information, and a case of fraud clearly spelt out through the pleadings and such material as may be presented, whereas no such sub-stratum is available through either the pleadings contained in the affidavits filed in support of the applications under consideration or as part of the record in the present case.

10. That being so, CMA Nos.348/2013 and 349/2013 are found to be without merit and stand dismissed accordingly.

JUDGE

Karachi
Dated _____