IN THE HIGH COURT OF SINDH AT KARACHI

Suit No. 1641 of 2012

Plaintiff:	**Sui Southern Gas Company Limited, Through M/s. Asim Mansoor Khan, Asim Iqbal and Muhammad Ali Talpur, Advocates.**
Defendant:	**Karachi Electric Supply Company Limited, Through M/s. Abid S. Zuberi and Ayan Mustafa Memon, Advocates.**

1. For hearing of CMA No.12798/2012. (U/O 39 Rule 1 & 2 CPC)
2. For hearing of CMA No.12799/2012. (U/O 38 Rule 5 CPC)

Dates of hearing: **22.08.2019, 04.09.2019 & 25.09.2019**

Date of Order: **07.10.2019**

O R D E R

Muhammad Junaid Ghaffar J. This is a Suit for recovery and Damages valued at Rs. 55,705,000,000/-, and application at Serial No.1 has been filed under Order 39 Rule 1 & 2 CPC for restraining defendant from selling or disposing of the properties so mentioned in the application, whereas, application at Serial No.2 has been filed under Order 38 Rule 5 CPC for attachment of the movable and immovable properties of defendant No.1, as mentioned in the application. Both these applications have been heard and are being decided through this order.

2. The precise facts, as stated in the plaint are, that pursuant to certain agreements entered into between the predecessor-in-interests of Plaintiff and Defendant gas has been supplied by the Plaintiff to Defendant and it is the case of the Plaintiff that despite supply of natural gas for a very long period; the defendant has defaulted in payment of its dues and as of 21.11.2012, an amount of Rs.45,705,000,000/- is outstanding against monthly gas bills

and markup thereon. The Plaintiff has filed instant suit for recovery of the same along with these two applications.

3. Learned Counsel for the Plaintiff has contended that initially two separate Agreements both dated 09.11.1978 were entered into between the predecessor-in-interests of the parties, and as per the Agreements, if the outstanding bill was not paid within time, then an interest at the rate prescribed by State Bank of Pakistan plus 3% is to be paid and in default thereof, even the supply can be disconnected. According to him thereafter another Agreement was entered into on 5.10.2007, wherein, various clauses provided for payment of the bill and levy of surcharge, whereas, an amount of Rs.7.80 Billion was outstanding; but has not been paid. He has further submitted that a third Agreement was entered into by the parties on 30.06.2009 in which the previous amounts were acknowledged as outstanding and an arrangement for payment in installments was agreed. Per learned Counsel, it is the case of the Plaintiff that till 30.06.2012, 37.66 Billion in principal and along with interest, an amount of Rs.41.934 Billion was outstanding and despite making admissions in their response and several correspondence, the defendant has failed to pay this amount. According to him as and when the supply was disconnected, the defendant has approached the Federal Government as well as the Sindh Government and has set up a defence that huge amount is outstanding against Karachi Water and Sewerage Board ("KWSB"), which should be adjusted against the dues of the Plaintiff. He, however, submits that Plaintiff has got nothing to do with this kind of settlement between the Provincial and the Federal Government. He has further contended that the owners and management of defendant have gone into liquidation abroad and despite ad-interim orders passed on 03.12.2012, the defendant is maintaining and withdrawing money from its accounts; hence the listed applications be granted. He has further contended that though the Plaintiff is a Public Limited Company with government majority share; but it is still an independent company and not a Federal Government entity; hence there is no question of any adjustment of the dues of the government department or for that matter the

circular debt; hence this objection of the defendant is misconceived. In support of his contention he has relied upon the cases of ***Messrs Tuwairqi Steel Mills Ltd. through Authorized Representative v. IIIrd Senior Civil Judge (South), Karachi and another*** reported as **2017 CLC 1322** and ***Dr. (Mrs.) Anwar Mangi v. Messrs Pak Commodities International and 2 others*** reported as **PLD 2018 Sindh 339**.

4. Mr. Abid S. Zuberi, appearing on behalf of the defendant, has firstly contended that the present applications as well as the case of the Plaintiff does not fall within the contemplation of either under Order 39 Rule 1 & 2 CPC or Order 38 Rule 5 CPC. Per learned Counsel there are various other litigation(s) pending against the Plaintiff including defendant's Suit No. 91/2013 and C.P No.D-1088/2011, as time and again the Plaintiff has threatened disconnection and / or less pressure of gas supply, whereas, ad-interim orders in favour of the defendant are operating in these matters, therefore, the present applications cannot be decided in favour of the Plaintiff. According to him since now the defendant has been privatized and at the time of its privatization, an agreement was entered into between the Federal Government and the defendant, whereas, time and again the Government has failed in implementation of the said agreement, therefore, Plaintiff has no case. According to him it is a case of circular debt as well as adjustment of dues of K-Electric against various government departments and pursuant to the agreement in question such matter has to be referred to and decided by the Federal Adjuster but the Federal Government has failed to come up with any acceptable solution. He has further argued that certain meetings were conducted and it was agreed that terms of reference would be settled for this issue and the Plaintiff is also a party to such settlement of the terms of reference, but once again they defaulted in this, compelling the defendant to file C.P No.D-4615/2018, which is also pending and various orders have been passed. According to him once on the directives of the Federal Government, the Plaintiff has entered into a settlement of terms of reference for this amount, then they cannot simultaneously proceed with this

matter and seek orders for attachment and / or restraining the defendant in any manner. Per learned Counsel pursuant to the orders in these petitions, the defendant is regularly paying the current bills and the Plaintiff has been restrained from any disconnection of gas supply. Learned Counsel has then referred to some correspondence between the parties in respect of the outstanding dues of the defendant against KWSB and has contended that the willingness of the Federal Government to settle this issue goes against the case of the Plaintiff. Learned Counsel has referred to the correspondence entered into between Plaintiff and defendant and the dispute in respect of various clauses of Terms of Reference, which were initially consented and then deleted, and on this basis he has argued that at least no case for any interim injunction or attachment is made out. He has further argued that amount in question cannot be paid to the Plaintiff in absence of any settlement of the outstanding dues of the defendant, which are also admitted and are not in dispute. Per learned Counsel in a similar fashion earlier an application under Order 38 Rule 5 CPC filed by the Plaintiff stands dismissed vide Order dated 16.11.2016, wherein, the Plaintiff had alleged that the defendant is involved in selling of its shares, which order of dismissal has since attained finality and was never challenged; therefore, no case for any attachment at the present moment is made out. According to him, it is merely a Suit for Recovery, which requires evidence as to the fact that whether defendant would ultimately be liable to make any payment, whereas, the attachment application is also vague in nature and no specific property has been specified; nor it has been brought on record that the defendant has made any attempt to sell out such property in order to avoid enforcement and / or any execution of a future decree in favour of the Plaintiff, which may be passed by the Court. Per learned Counsel neither prima-facie case is made out nor balance of convenience lies in favour of the Plaintiff, whereas, no irreparable loss is being caused and on the other hand, it is the defendant who would be caused irreparable loss, if such an application is granted. He has further argued that in fact the application under Order 39 Rule 1 & 2 CPC is also seeking the

same relief as sought in Order 38 Rule 5 application, whereas, the ingredients of an application under Order 39 Rule 1 & 2 CPC are completely lacking in this case, as it is not a case related to any property and / or its right being claimed and it is simply a money claim, wherein, the provisions of Order 39 Rule 1 & 2 are not attracted. In support of his contention he has relied upon the cases of ***KASB Corporation Limited through Chief Executive Officer and another v. Bank Islami Pakistan Limited through President*** reported as **2019 YLR 345**, ***Al-Tamash Medical Society through Secretary v. Dr. Anwar Ye Bin Ju and 9 others*** reported as **2019 CLC 1**, ***Muhammad Saad and another v. Amna and 27 others*** reported as **2015 YLR 1**, ***Shahzada Muhammad Umar Beg v. Sultan Mahmood Khan and another*** reported as **PLD 1970 Supreme Court 139.**

5. While exercising his right of rebuttal, learned Counsel for the Plaintiff has contended that the Plaintiff has no concern with any adjustment and / or the settlement of dues of defendants against the Federal Government as there are various shareholders of the Plaintiff, therefore, this argument is misconceived. According to him though reliance has been placed on the agreement entered into at the time of privatization of the defendant; however, no steps have ever been initiated by the defendant in furtherance of the said agreement, therefore, reliance on the same is of no help to the defendant's case. He has further argued that the transaction between Plaintiff and Defendant is of a commercial nature based on an agreement and once the outstanding amount is not denied; then there is nothing left for the defendant not to pay the said amount and make an attempt to seek shelter under some negotiations with the Federal Government. He has further argued that even if some settlement is reached between Federal Government and the defendant, the same would not, in any manner, be binding on the Plaintiff; hence this defence is of no use for their case. According to him, the amount which is outstanding is increasing day by day as admittedly the interest and mark up is adding up and as of June 2019 approximately the outstanding amount is Rs.100 Billion. He has also referred to the financial

accounts of the defendant and has argued that the debt owed to the Plaintiff is acknowledged in these financial statements, therefore, a prima facie case is made out by the Plaintiff for the grant of these applications. Per learned Counsel the Plaintiff apprehends that since the parent company of the Plaintiff has gone into liquidation, the amount and money will go out of the country leaving nothing of the Plaintiff to seek execution of its judgment and decree; hence both these applications merit consideration and be allowed as prayed.

6. I have heard both the learned Counsel and perused the record. As noted hereinabove, on the basis of the facts, so stated, this appears to be primarily a Suit for Recovery and Damages. It is case of the Plaintiff that huge amount is outstanding against the defendant, which according to the Plaintiff has not been specifically denied, whereas, the Plaintiff apprehends that the defendant in order to avoid the ultimate execution of the decree, which may be passed in this matter is disposing of and / or removing the properties from the territorial jurisdiction of this Court. It appears that when this Suit was filed on the very first date i.e. 03.12.2012, an exparte ad-interim order was passed, whereby, the defendant was restrained from selling their properties. The defendant being aggrieved immediately impugned the said ad-interim order through HCA No.158/2012, which was decided on 26.02.2013. The operating para thereof reads as under:-

> "In the first instance et this matter be fixed on 08.03.2013 at 11:00 am, on which date the learned Single Judge shall fix the date and time as recorded above. The order dated 08.12.2012 in Suit shall continue subject to any order as may be passed by the learned Single Judge after hearing the parties. It is expected that all the senior counsel shall appear before the learned Single Judge on said date and adjourned date, and in case any of the learned counsel is unable to attend the Court on date so fixed, he shall ensure that the matter may be proceeded by their associates or some alternate arrangement may be made. Any adjournment may be visited by substantial cost.
>
> In view of the foregoing, appeal along with all pending applications stand disposed off."

7. Despite such clear directions, as above, thereafter no serious effort appears to have been made by any of the parties to follow the spirit of the order passed by the Appellate Court. It further appears that the Plaintiff instead of pursing these applications, subsequently filed CMA No. 15884/16 again under Order 38 Rule 5 CPC and sought the following relief:-

> "To attach all receivable of the Defendant including but not limited to the payments made by and all dues/receivables from the Karachi Water & Sewerage Board, the Provincial Government, and the Federal Government, and/or direct that all amounts received by the Defendant from the aforesaid Governments/Government entities shall be deposited with the Nazir of this Court."

8. This application, without issuance of any notice, was dismissed by a learned Single Judge of this Court on 16.11.2016 in the following terms:-

> "2. This is an application for attachment before judgment. Learned Counsel has gone through the contents of the affidavit and has relied upon para-4 which relates to private shareholding of the defendant as they are being offered to sale. Without prejudice such sale of private shares will not materially affect the claim of the plaintiff.
>
> The grounds for Order XXXVIII Rule 5 CPC are such that the defendant with an intent to obstruct the decree that may possibly be passed is inclined to dispose of all such shares, which is neither the intention of the defendant nor to such extent the case is made out by the plaintiff. Accordingly the application is dismissed."

9. It appears that the Plaintiff on its own choice and volition never assisted the Court to first decide the earlier application under Order 38 Rule 5 CPC, as directed by the Appellate Court and instead filed a fresh application on the apprehension as noted hereinabove and the Court was pleased to dismiss such application in limine by observing that the Plaintiff has failed to spell out any intention of the defendant that the sale of shares was intended to obstruct the decree that may possibly be passed by the Court. It is not clear and understandable as to how the Plaintiff without getting its first application under Order 38 Rule 5 CPC decided as directed by the Appellant Court, could have filed a second application under the same provisions and keep it maintainable and even after its dismissal and no further challenge,

can, at the same time, press upon the first application of a similar nature, which in fact had a very wide scope of attachment, as noted from the contents of the application. It would be advantageous to reproduce the contents of the first application under Order 38 Rule 5 CPC i.e. CMA No. 12799/2012:-

> "For the facts and circumstances mentioned in the accompanying affidavit, it is most respectfully prayed on behalf of the Plaintiff above named that this Hon'ble Court may be pleased to attach the moveable and immovable properties mentioned here-in-blow before passing the judgment and decree in the captioned suit, as there is reasonable apprehension that the Defendants will going day by day to the worst position as huge amount are outstanding against the Defendant No.1 of the Plaintiff as well as the other financial institution and government departments.
>
> i. Aimai House located at Abdullah Haroon Road, Karachi.
> ii. Defendant No.1 Head Office situated at (U/O 39 Rule 1 & 2 CPC)B, Sunset Boulevard, Phase-II, Defence Housing Authority, Karachi, 75500.
> iii. Other immovable properties of the Defendant No.1 situated at different areas in Karachi.
> iv. All moveable and immovable properties of the Defendant No.1 which will be pointed out by the representative of the Plaintiff at the time of attachment.
> v. Bank Accounts of the Defendant No.1 maintained in different banks in Karachi.
> vi. Power generation units, machineries, transformers, poles, wires, vehicles etc.
>
> In view of the aforesaid facts and circumstances, it is therefore, prayed that this Hon'ble Court may please be appoint the learned Official Assignee may kindly be appointed as a Commissioner to prepare inventory and attaché the properties/accounts of the Defendant No.1 in this request."

10. If the argument of the Plaintiff in maintaining both the applications is on the ground that the second application was filed on the basis of some subsequent and emergent cause of action as reflected from the contents of the separate affidavit to that application, whereby, it was pleaded that *defendant is in the process of selling the controlling shares in the defendant company to some other foreign investor and this would have significant impact on the outstanding dues and this is being done with an intent to obstruct the execution of the decree, which could ultimately be passed in their favour*, then apparently the first application is not on any better footing than the second application under Order 38 Rule 5 CPC, which stands dismissed and has attained

finality. As is reflected from the contents of the affidavit, the Plaintiff had rushed to the Court with a fresh application that shares are being sold; hence the said ground falls within order 38 Rule 5 CPC and an attachment order be passed. When such a ground has not been appreciated by the Court, (notwithstanding the fact that apparently shares were and are in the process of being sold to some other investors) then now this Court fails to understand and to agree, as to how the application filed in 2012 and that too in a very generic form can be sustained. It would be advantageous to refer to the provisions of Order 38 Rule 5 which reads as under:-

> **Order XXXVIII**
>
> ARREST AND ATTACHMENT BEFORE JUDGMENT.
>
> 1. ----------
> 2. ----------
> 3. ----------
> 4. ----------
> 5. Where a defendant may be called upon to furnish security for production of property.—(1) Where, at any stage of 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 form 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.

11. From perusal of the above, it appears that where, at any stage of 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 it *is about to dispose of the whole or any part of his property, or is about to remove the whole or any part of his*

property from the local limits of the jurisdiction of the Court, then the Court may direct the defendant 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. The provision further provides in Sub Rule (2) that the plaintiff shall, unless the Court otherwise directs, *specify the property required to be attached and the estimated value thereof* and finally Sub Rule (3) provides that the Court may also in the order direct the conditional attachment of the whole or any portion of the property so specified. When the application in question filed under Order 38 Rule 5 CPC is examined in juxtaposition, it appears that the same is not within the terms of this provision. It is in an unspecified manner and is too generic as to the attachment of all properties of the defendant without being specified, except one property. As of today, after passing of the ad-interim order, the defendant has not shown any intent to sell out this property so specified in this application. In fact, if that would have been the position then the defendant would have come forward seeking recalling of the said order. This establishes that for the present purposes the defendant is not the one, who falls within the above provisions, whereby, it could be inferred that the defendant with the intent to obstruct or delay the execution of any decree is selling or alienating the property in question. Insofar as the other properties are concerned they are unspecified, and therefore, they are not covered under Sub Rule (2) of Rule 5 of Order 38, which firstly requires to specify the property which is to be attached, and secondly, its estimated value thereof; hence on the face of it, the contents of the application are vague and do not fall within the contemplation / parameters as provided under Order 38 Rule 5 CPC.

12. It is settled law that a relief under Order 38 for attachment otherwise is definitely a very harsh order to be made against the

defendant. In granting such relief the Court has to be satisfied that plaintiff's cause if of a prima facie nature, based on an unimpeachable averment / claim in the plaint, and Court must have reasons to believe on the basis of material before it, that unless jurisdiction is exercised and orders as solicited are not passed, there is a real danger that defendant may remove itself from the territorial jurisdiction of the Court and an intent to avoid passing of a decree must be clearly shown with reasonable clarity. In fact the provisions of Order 38 Rule 1 & 5 as well as Section 94 and 151 CPC as relied upon on behalf of the plaintiff in a case like this are not to guarantee the plaintiff availability of an asset to satisfy the decree which ultimately be passed, but to ensure non abusing of process of Court by a defendant. Moreover, it is not the case of the plaintiff that the defendant in order to frustrate the decree which may ultimately be passed in this Suit, is running away or for that matter, is selling its assets. In fact there appears to be no such real danger in hand in this case. And these ingredients I am afraid are completely lacking in the plaintiffs case as placed before this Court. It is also a settled law that order of this nature definitely burdens the defendant for a variety of reasons, and if there is any ambiguity or doubt in the case of the plaintiff, then such benefit of doubt must go in favor of the said defendant[1].

13. As to the facts of this case, there is one point, which needs to be appreciated for deciding this application inasmuch as though the learned Counsel has contended that the Plaintiff has no concern with the Federal Government and or its directions, but at the same length while confronted as to why coercive measures for disconnection of supply were never taken, he candidly conceded that firstly, it would create an issue of great difficulty for the citizens of Karachi, and secondly, the Federal Government from time to time has been intervening in this respect. This aspect of the matter for the present purposes is crucial, as the stance of the Plaintiff is contradictory. This is further substantiated from the decision of the Cabinet Committee of Energy dated 23.04.2018, which reads as under:-

[1] KASB Corporation Limited v Bank Islami Pakistan Limited (2019 YLR 345)

"Case No. CCE-9/3/2018 ISSUE RELATING TO K-ELECTRIC
Dated: 23rd April, 2018

DECISION

The Cabinet Committee on Energy (CCE) directed as follows:

i) Sui Southern Gas Company Limited (SSGC) to supply of gas to K-Electric immediately.

ii) SSGCL and K-electric will initiate process for signing Gas Sales Agreement for natural Gas as well as LNG within 15 days.

iii) ToRs for reconciliation / settlement of dues between SSGCL, K-Electric and Karachi Water & Sewerage Board (KWSB) to be finalized and signed within 15 days. Advisor to the Prime Minister on Finance to ensure that required action are completed within stipulated time

iv) NEPRA to expedite its decision on review petition for revision of multi-year tariff for K-Electric, submitted by the Power Division, in order to give a realistic tariff for the utility.

v) K-Electric to immediately approach NEPRA for determination of provisional tariff for conversion of its power plans to LNG, and Power Division to support K-Electric in this regard."

14. Perusal of the above clearly reflects that the Cabinet Committee of Energy of the Federal Government has directed the Plaintiff to resume supply of gas to defendant immediately and then initiate process of signing of Gas Sales Agreement for Natural Gas within 15 days with further directions for making terms of reference for settlement of dues between plaintiff and defendant and KWSB, which needs to be finalized and signed within 15 days. Now if a meeting is convened at the level of the Cabinet of the Federal Government, and certain directions are issued, whereas, the dues of Defendant against KWSB are also made part of the said directions, then the Plaintiff cannot come to the Court and say that they have no concern with these issues. This at least for deciding of the listed applications is crucial. The Plaintiff cannot have the cake and eat it too. Either they enter into negotiations and or settlement as the case may be; or proceed with their case in the Court. But once they enter into negotiations, be it on the directive of the Federal Government, then, this Court while considering grant or otherwise of the listed applications filed in terms of Order 39 Rule 1 and 2 CPC, as well as under Order 38 Rule 5 CPC, cannot simply throw out the Defendant and pass an order which in fact is an order having harsh consequences of attachment of

properties. These clear directions reflect that the stance of the Plaintiff while arguing these applications is incorrect. There may be a situation when Plaintiff claims to be an independent public company and having a commercial contract with the defendant; however, it cannot be denied that the controlling shares to the extent of around 75% as admitted by the learned Counsel for the Plaintiff vests in the Federal Government, therefore, since the supply of gas is regulated by the Government and is not assigned to the private sector, then the Plaintiff cannot take any contrary stance as against that of the Federal Government. It is the case of the Defendant that a bonafide issue has been raised in respect of their outstanding dues against KWSB and Cabinet Committee of the Federal Government on Energy has issued directions in this regard; hence the Plaintiff cannot have any alternative stance to press upon these applications as against the directions of the Federal Government.

15. It is also a settled proposition that an order under Rule 5 of Order 38 should not be passed by the Court until the preconditions as mentioned therein are fulfilled; that is the Court should be satisfied that the Defendant with intent to obstruct or delay the execution of a decree which may be passed by the Court, is selling or disposing of the property and mere allegations to that effect in a generic manner are not sufficient. Otherwise, this could be true in each case as the Plaintiff will always be looking to have any prospective decree fully secured by such attachment. In fact the intention of the legislature is more stringent as is being advanced on behalf of the Plaintiff. In fact it is the other way round and the onus for all such satisfaction of this provision is on the Plaintiff. Once this onus is discharged or shifted, then the Court can pass any appropriate order. The question that whether requirements as mentioned in Order 38 Rule 5 Sub-Rule (2) CPC are to be followed and the entire description and value of the property of which the attachment is being sought has to be specified in the attachment application, came for consideration before erstwhile Division Bench of this Court in the case of ***Emperor v Ghanshamdas Lokumal Accused*** (**AIR 1946 Sindh 166**).

> 2. There is nothing so far in the rule or order which justifies seizure of property even in the possession of the judgment-debtor, far less on his person. Then sub-r. (2) of R. 5 of O. 38, Civil P.C. requires that the "plaintiff shall unless the Court otherwise directs, specify the property required to be attached and the estimated value thereof." ***We cannot see that this sub-section is satisfied by a mere application that money or any other movable property on the person of the defendant or in his power or possession be pointed out or justifies the grant of an application which asks for the attachment of "money or any other movable property on the person of the defendant or in his power or possession which money or other property is to be pointed out by the bailiff.***" Order 38, R. 5 (2), Civil P.C. requires the petitioning creditor, unless the Court otherwise directs to specify the property required to be attached and the estimated value thereof. Sub-rule (s) of R. 5 of O. 38, Civil P.C., says that "the Court may also in the order direct the conditional attachment of the whole or any portion of the property so specified." Conditional attachment means, I think attachment on failure to give security.....

16. In the case reported as ***Girdharilal Kanji & Others v Kunvarji Keshavlal & Co*** (**AIR 1952 Saurashtra 125**) it has been observed the mere fact that a case under Order 38 Rule 5 has been made out does not justify issuance of an omnibus order of attachment of all the moveable and immoveable properties of the defendants, as the Court has to exercise the discretion as very often the intention of the litigant is to disgrace the opponent.

17. In the case reported as ***Encyclopedia Britannica Inc. V Pak American Commercial (Pvt) Limited*** (**1997 CLC 2003**) a learned Single Judge of this Court has been pleased to hold that *"as a general rule, while it is true that the Court has inherent power to pass an order of attachment of property, such order cannot be passed unless strong circumstances are shown to exist warranting such order"*. It has been further held that *"the object of power conferred by Order XXXVIII, rule5, C.P.C., is to 'secure' performance of decree likely to be passed and not to 'coerce' its performance before judgment."*

18. In the case of ***Asif S Sajan and another v Rehan Associates*** (**PLD 2011 Karachi 542**) a learned Single Judge of this

Court was pleased to dismiss an application in somewhat identical facts and the relevant findings are as under;

> 7. The provisions of Order XXXVIII, C.P.C. are penal in nature, therefore while exercising powers there-under, the courts are always required to see that the order so passed therein does not affect the party against whom such severe 'order is sought. The Courts still have to be more vigil and alive of the situation when attachment order is prayed for merely because of some distant apprehension without any substance in shape of an evidence brought forth. An order under Rule 5 of Order XXXVIII is preventive in nature; not punitive. **It would be seen that the plaintiff has come up with a mere apprehension and/or allegation that the defendants Nos.1 to 3 are secretly negotiating to dispose of the immovable properties, without disclosing the source of information or an iota Of evidence as to whom the immovable properties the defendants No.1, 2 and 3 are secretly selling. Since the date of filing of the Suit and the C.M.A., almost five years have gone-by. These defendants are still doing their business. Not only this, a suit for damages was filed by these defendants which is being followed by them vigorously**. Under the circumstances, selling of the immovable properties, in respect whereof these defendants Nos. 1, 2 and 3 not once but on couple of occasions have stated that they have no concern and against which restraining orders are in field, passed by this court, is not even remote. The C.M.A. is fry cry. **(Emphasis supplied)**

19. Another learned Single Judge of this Court in the case of ***Muhammad Ather Hafeez Khan v Ssangyong & Usmani JV*** (**PLD 2011 Karachi 605**) has been pleased to observe as under;

> 9. Inextricably linked to the issue treated in the last paragraph is of course, the requirement that the defendant must also have the necessary "intent", i.e., to obstruct or delay execution of any decree against him. No hard and fast rule can be laid down as to what would constitute the necessary "intent" or how it would be determined, nor would it be desirable to do so. Much would depend on the facts and circumstances of the case. In some cases, the very facts constituting the removal (or proposed or attempted removal) may be such as lead irresistibly to such a conclusion-res ipsa loquitur, as it were. In others, something additional may need to be adduced by the plaintiff. However, one point is clear. An order of attachment before judgment obviously curtails the undoubted right of a person to deal with his property as he deems appropriate. The object of such an order is preventive and not punitive. The plaintiff must therefore make out a clear case that the ingredients of Rule 5 are applicable. If there is a doubt or ambiguity, then the benefit must go to the defendant. Thus, unless the necessary "intent" can be made out with reasonable clarity from the relevant facts objectively considered, an order of attachment ought ordinarily to be regarded as inappropriate.

20. A learned Single Judge of this Court in the case of ***Associated Drillers Ltd., v Dirk Verstoop BV*** (**PLD 1979 Karachi 734**) has been pleased to observe as under;

> "Even if it is to be conceded that Rule 5 of Order XXXVIII, C.P.C. is not exhaustive and the Court is competent to order attachment even in a case which does not strictly fall within the purview of the above, provision of law, but the question which remains to be considered is as to whether the basic requirement of the above provision, namely, that the Court should be satisfied that the defendant with intent to obstruct or to delay the execution of any decree which may be passed, has taken or is about to take any of the steps specified in clauses (a) and (b) of the aforesaid rule of the aforesaid order. In my view simpliciter the fact that the plaintiff will not be able to execute their decree if any passed in their favour is not sufficient to invoke the provisions of Order XXXVIII, Rule 5, C.P.C. If the above ground is to be accepted as a sufficient ground to order attachment before judgment, it will cause hardship to the foreign companies/organizations operating in Pakistan, as it will be open to any person to file a suit against a foreign contractor for an alleged claim on the eve of the winding of affairs in Pakistan on completion of the work, which was entrusted to him in Pakistan, and also to invoke the provisions of the Order XXXVIII, Rule 5, C.P.C. on the ground that there would be no asset of the aforesaid foreign contractor to satisfy the decree if any passed in his favour after several years." (pg. 737, para 8)

21. A learned Division Bench of this Court in the case of ***Mrs. Farhat Imrana v Etimad (Pvt.) Limited*** (**2015 YLR 2674**) has been pleased to hold as under;

> 9. It is the consistent view of the High Courts in the cases of Messrs STFA C. & Co. v. Naeem Khan (2005 CLC 1270), Associated Drillers Ltd. Karachi v. Messrs Dirk Verstoop B.V. Karachi (PLD 1979 734) and Messrs H. Nizamuddin and Sons Ltd. v. M.V. Oroomee and 4 others (PLD 1977 Karachi 722) that attachment before judgment is a very exceptional remedy under exceptional circumstances which must be established through some cogent evidence. In the instant case, the only apprehension of the respondent is that it will not be able to execute the decree which apparently would be in terms of money, therefore, merely establishing the prima facie good case is no ground for invoking the provisions of Order XXXVIII, Rule 5, C.P.C. without first complying with Sub-Rule 1 of Rule 5. In our opinion, the attachment of property will create hardship for the appellant, therefore, order on C.M.A. No. 3266/14 is set aside, however, the trial court will be at liberty to pass appropriate order if at any stage of trial any substantial evidence is brought on record justifying attachment before judgment.

22. In view of hereinabove facts and circumstances of the case I am of the view that the Plaintiff has failed to make out a case for grant of any of the two listed applications filed under Order 39 Rule 1 & 2 and Order 38 Rule 5 CPC. Accordingly both listed applications are hereby dismissed.

Dated: 07.10.2019

J U D G E