HIGH COURT OF ANDHRA PRADESH

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CIVIL MISCELLANEOUS APPEAL No. 698 of 2024

Between:
Mohammed Vasee

.....APPELLANT

AND
M/s.Alakananda Townships Pvt. Ltd.
Rep.by its M.D.Vasupalli Rajashekar
Visakhapatnam

.....RESPONDENT

DATE OF JUDGMENT PRONOUNCED: **09.07.2025**

SUBMITTED FOR APPROVAL:

THE HON'BLE SRI JUSTICE RAVI NATH TILHARI
&
THE HON'BLE SRI JUSTICE CHALLA GUNARANJAN

1. Whether Reporters of Local newspapers may be allowed to see the Judgments? Yes/No
2. Whether the copies of judgment may be marked to Law Reporters/Journals Yes/No
3. Whether Your Lordships wish to see the fair copy of the Judgment? Yes/No

_____
RAVI NATH TILHARI, J

_____
CHALLA GUNARANJAN, J

*** THE HON'BLE SRI JUSTICE RAVI NATH TILHARI**
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! Counsel for the Appellant : Sri M. R. S. Srinivas

Counsel for the Respondent : Sri V. V. Saketh Roy

< Gist :

> Head Note:

? Cases Referred:

1. 2023 (2) ALD 47 (AP)
2. (2008) 2 SCC 302
3. 2003 SCC OnLine Cal 320
4. 2009 SCC OnLine AP 708
5. 1951 SCC OnLine Cal 20
6. 2024 SCC OnLine SC 3538
7. (1992) 1 SCC 719
8. (2024) 7 SCC 183
9. 1990 Supp SCC 727
10. (1960) SCC OnLine SC 62
11. (2013) 9 SCC 221

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CIVIL MISCELLANEOUS APPEAL No. 698 of 2024

JUDGMENT: (per Hon'ble Sri Justice Ravi Nath Tilhari)

Heard Sri M. R. S. Srinivas, learned counsel for the Appellant and Sri V. V. Saketh Roy, learned senior counsel for the Respondent.

2. The present appeal under Order 43 Rule 1 of Code of Civil Procedure (CPC) has been filed by the appellant/defendant in Commercial Original Suit (in short 'COS') No.14 of 2023, pending in the Court of the Special Judge for trail and disposal of Commercial Disputes, Visakhapatnam (in short 'Special Court'), being aggrieved from the Order dated 09.08.2024 passed in I.A.No.458 of 2023, whereby *inter alia* the attachment of the petition schedule land effected vide earlier Order dated 10.11.2023 in the said COS has been made absolute, also granting liberty to the defendant to seek modification of the attachment according to law, and providing that, which, if sought would be decided on its own merits.

I. FACTS:

i) Plaintiff's case:

3. The COS was filed by the plaintiff/respondent for recovery of amount of Rs.3,19,75,543/- (Rupees three crore nineteen lakh seventy five thousand five hundred and forty three only) said to be due and payable by the defendant

on the strength of a Memorandum of Understanding (in short 'MOU') dated 05.11.2020 and a consequent default thereof on its part.

4. The plaintiff/respondent's case, stated briefly, was that the plaintiff was a Company incorporated under the provisions of the Indian Companies Act, engaged in the business of real estate, construction, and other allied activities. In the course of its business, the plaintiff developed the property by purchasing lands and also entered into development agreements for developing lands into layouts by obtaining necessary permissions, creating infrastructure etc., on a profit sharing/project sharing basis. The plaintiff had also undertaken construction of residential houses/apartments/villas depending on the agreements with landowners, and apart from development of layouts, the plaintiff also undertook marketing and selling of properties developed by the third parties for profit. In pursuance of such business, the defendant who was the absolute owner of total extent of Ac.10.12½ cents situated in Kukalametta Lakshmipuram village, Vizianagaram district, had offered to get the project marketed by the plaintiff. The defendant had acquired the said property under various valid deeds of conveyance and the defendant had offered to develop the same into a residential community consisting of 200 duplex houses (villas) to be built by the defendant himself and to be marketed by the plaintiff. Accordingly, the parties entered into a Memorandum of Understanding dated 05.11.2020 under which they *inter alia* agreed to the following terms; (i) That the defendant shall obtain necessary permits and sanctions from all the authorities concerned by paying necessary fees/charges; (ii) To obtain the

necessary plans at the cost of the defendant from VMRDA/Local Panchayat. (iii) To construct 200 Duplex Houses in an area of 150 Sq.yards each. (iv) To create black top roads, drainages, lighting etc.

5. The plaintiff's further case was that in pursuance of the MOU on construction of the said houses, it had been agreed upon that the defendant shall be paid a sum of Rs.50,00,000/- towards refundable advance and in addition, a sum of Rs.56,99,999/- for each of the Villas built by the defendant and marketed by the plaintiff. The plaintiff was at liberty to sell each of the Villas at a price of its choice. It was also agreed that the defendant shall proceed with the construction of the Villas as per the plans approved and periodically the plaintiff shall be entitled to market the said units at a price of its choice, but pay Rs.56,99,999/- per each unit to the defendant. The plaintiff was thus engaged by the defendant as a marketing agent for the purposes of marketing and promoting the project being developed by the defendant and the price of each unit as fixed under the MOU.

6. The plaintiff's further case was that in pursuance of the MOU, the plaintiff had paid a sum of Rs.50,00,000/- under ten cheques bearing Nos.160115 to 160124, drawn on State Bank of India, Visakhapatnam in November 2020 itself and the defendant had realized the said amount. The defendant constructed some Villas and the plaintiff started marketing the same. The plaintiff had sold 22 Villas in total and midway the defendant unilaterally increased the price of each Villa to Rs.65,00,000/-, and in view of such act, the plaintiff lost all its business opportunities and sustained substantial loss. The

defendant also mismanaged the accounts and operations of the venture which caused difficulties to the defendant in the conduct of business. The plaintiff's further case was that out of 22 Villas that were booked by the plaintiff, the defendant had registered the deeds of conveyance for three of the Villas which were under construction and in respect of the remaining 19 Villas, the defendant started creating troubles due to his unilateral increase in price from Rs.56,99,999/- to Rs.65,00,000/-. The construction process being undertaken by the defendant was going at a slow pace and also because of confusions regarding the price created by the defendant, the intending purchasers who had booked the units by paying advances had cancelled their bookings and demanded the advance amount paid. The plaintiff pleaded that the plaintiff regularly remitted the advance amounts collected from third party purchasers to the defendant under his acknowledgment. He furnished a list of such payments made to the defendant, in the plaint and submitted that the defendant failed to adhere to the norms pertaining to the construction of residential villas and did not follow the procedure in forming the infrastructure including roads, open spaces etc., and also did not comply with the statutory provisions with the change of land use, permissions for construction of regular flats, and also failed to obtain approval of the layout which hindered for promotion and sale of the Villas, resulting into the prospective purchasers backed out and those who had already paid advances refused to pay amounts and started demanding for refund. The plaintiff submitted that he had paid to the defendant an amount of Rs.50,00,000/- as refundable advance as per the MOU dated 05.11.2020 and in

addition Rs.1,86,70,352/- as periodical advances, and further incurred marketing expenses to the tune of Rs.10,44,987/- for various purposes of marketing. He further submitted that the Managing Director of the plaintiff was consistently coordinating with the defendant for the purpose of resolving the disputes and to release the amounts due had also offered reasonable discounts in the event of the defendant settling the claims of the plaintiffs before approaching the Court of law, but the defendant had been avoiding the plaintiff and he had also started a separate brochure printed in his name, and instead of selling constructed villas as proposed under MOU, he started selling away the property in the form of vacant house plots. Consequently, the suit was filed for recovery of an amount of Rs.3,19,75,543/- with interest at the rate of 12% per annum from the date of the respective transactions till the date of recovery; for costs of the suit and for other ancillary reliefs.

ii) <u>Defendant/Appellant's case:</u>

7. The defendant/appellant filed written statement, and *inter alia,* denied the material allegations in the plaint. The defendant submitted that the suit agreement titled as MOU was not binding between the parties as it was an agreement for marketing and the terms of MOU could be invoked only when the plaintiff company paid initial booked amounts so as to confirm to go ahead with the construction of the Villas. The defendant was the sole proprietary on the land and had control over the construction activity. The plaintiff had offered to sell the entire project within a span of three months and the defendant had fallen to guile of the plaintiff and made huge investment in

constructions and construction related works, making the plots suitable for construction of the houses. The plaintiff failed to bring forth the assured business as promised. The defendant had communicated to the plaintiff that the MOU stood dissolved with effect from 31.05.2022. The defendant pleaded that in the presence of local elders and political leads, who had acted as arbitrators, on their advise the MOU was dissolved on mutual agreement in good faith orally, and consequent on such agreement for ending the MOU the defendant refunded the bookings as detailed in the written statement. The defendant pleaded that the refundable deposit of Rs.50,00,000/- which the plaintiff had paid to the defendant had been refunded to the plaintiff by way of adjustment made in registration of three villas in plot Nos.26, 67 and 74, to the extent of Rs.45,00,000/- and the rest amount of Rs.5,00,000/- was also adjusted in the manner as stated in the table drawn in the written statement. The defendant's case was that the refundable deposit had been completely closed. The defendant also gave a tabular description of the refundable advance and had also given a table submitting that the advance amount for 19 bookings had been refunded to source. He submitted that the defendant had fulfilled his liabilities of his terminated MOU, and the relief sought for the refund of the advance amount paid to the defendant was not maintainable as the said amount had already been refunded by way of adjustments etc. The expenditure claimed by the plaintiff's company for Rs.10,44,987/- was also denied. The suit claim was said to be without any basis. The defendant also raised the plea of jurisdiction, limitation and that the MOU being unregistered

was hit by Section 17 of the Registration Act. The suit was also said to be undervalued. The claim of interest was also contested, *inter alia,* on the ground that the suit agreement did not provide for payment of any interest.

iii) <u>I.A.No.458 of 2023 U/Or.38 Rule 5 CPC:</u>

8. In the COS, the plaintiff filed I.A.No.458 of 2023 under Order 38 Rule 5 CPC for attachment of the schedule land appended to the said I.A. on the same pleadings as in plaint. The plaintiff re-stated that for the purpose of resolving the dispute between the plaintiff and the defendant, the plaintiff offered reasonable discounts in the event of the defendant settling the claims but instead of promising a resolution, the defendant avoided the same and got separate brochure printed in his name and instead of constructing villas, sold away the properties in the form of vacant house plots, and in view thereof, there was compelling urgency for the plaintiff for seeking urgent interim remedies, failing which the defendant would get the property encumbered or alienated and thereby making a probable decree in favour of the plaintiff incapable of being executed. He prayed for attachment of the plaint schedule property and for direction to the defendant to furnish the security for the amount of claim in the suit until disposal of the suit.

iv) <u>Objections:</u>

9. The defendant/appellant filed counter to I.A.No.458 of 2023. The stand as taken in the written statement was reiterated and the application was said to be not maintainable and liable to be dismissed.

v) Rejoinder:

10. The plaintiff/respondent filed rejoinder affidavit and denied that the MOU was dissolved. It was submitted that the plaintiff never recovered the refundable advance of Rs.50,00,000/-. The amount of Rs.45,00,000/- which was said to have been adjusted by the defendant towards refundable advance was said to be the profit generated by the plaintiff by the successful sale of three villas.

II. Order of learned Special Court:

11. The learned Special Court framed the following point for consideration;

"*Whether attachment before judgment can be ordered or not*?"

12. The learned Special Court held that the parties filed certain documents including vouchers/receipts etc., in support of their respective contentions. The plaintiff's contention was that he was entitled for recovery of the amount claimed in the suit and the defendant's case was of denial by taking pleas, *inter alia,* that the refundable advance amount was refunded by way of adjustments and there was no provision for payment of interest under the MOU, as also that the amount as claimed towards alleged expenditure incurred by the plaintiff was not payable. The learned Special Judge recorded the finding that, the plaintiff had accounted for most of the documents relating to the payments received/paid/remitted/refunded and thus, had a *prima facie* claim towards the refundable advance and the amounts remitted to the defendant. With respect to the claim for interest, the learned Special Court

observed that it was a mixed question of fact and law to be dealt with after trial in the suit and whether MOU was cancelled or such cancellation was permissible, or the validity and bindingness of the MOU and its breach or otherwise and if so, by which party, plaintiff or defendant, were all matters to be decided later on i.e., in trial. With respect to the claim for expenditure of Rs.10,44,987/- also, the learned Special Court observed that it could only be adjudicated in the trial.

13. The learned Special Court recorded that it was satisfied that there was *prima facie* case in favour of the plaintiff that he had claims against the defendant and of the specified value and as the property was situated within the territorial jurisdiction of the learned Special Court, it had the jurisdiction. The learned Special Court also recorded that at this stage the plaintiff's contention that the defendant got a separate brochure in his own name and started selling vacant plots and instead of constructing and selling Villas as per MOU, was supported by the affidavit of the third party that the defendant had been printing brochures in his name without mentioning the name of the plaintiff and had been attempting to alienate parts of 10½ acres in the form of vacant plots. It found force in the case of the plaintiff that if the defendant was successful in selling the entire 10½ acres of land, the decree that might be passed in the COS for the suit subject may remain as a paper decree.

14. So, considered, the learned Special Court allowed I.A.No.458 of 2023 vide Order dated 09.08.2024.

15. Challenging the aforesaid Order, the present appeal has been filed.

16. From the judgment under challenge in appeal, it is evident that the defendant was directed earlier vide Order dated 10.11.2023 to furnish security for the suit claim nearly Rs.3,20,00,000/-, but he did not furnish any security. So, the attachment of the petition schedule land (2½ acres) was effected. By the Order under challenge the attachment was made absolute with liberty to the defendant to seek modification of the attachment, accordingly, providing further that if such modification was sought as per law, the application would be decided on merits.

III. Affidavits in this Appeal:

17. In the present appeal, the plaintiff/respondent filed the **counter affidavit** to bring on record the Order of the learned Special Court dated 10.11.2023 directing the defendant to furnish security in an amount of Rs.3,20,00,000/- within a period of three weeks from the date of service of that Order, providing that failing which, the petition schedule 2½ acres land shall be attached, in accordance with law. He has also brought on record the copy of the brochure printed by the defendant/appellant in his only name, without plaintiff's name to show that the defendant was making effort to sell the properties of his own in violation of MOU, so, there was a threat of alienation of the petition schedule property.

18. Memo of calculations dated 24.07.2024 which was filed by the plaintiff/respondent before the learned Special Court has also been brought on record along with the counter affidavit. The memo of calculations, contained the calculation table-1 which lists the total booking amounts received from the

parties, total amounts returned along with the documents filed by the petitioner/plaintiff. It also contained calculation table-2 which lists all the amounts paid to the defendant as periodical advance along with the mode of transactions and relevant documents as filed by the petitioner/plaintiff.

19. At this stage, it may be mentioned that considering that the parties had filed many documents, including vouchers, receipts etc., in respect of their respective contentions, the learned Special Court required a co-relation statement of the amounts received/paid/remitted/refunded vis-à-vis those documents and the pleadings. The plaintiff filed two such statements, i.e., calculation table-1 and calculation table-2 along with the memo dated 24.07.2024, which as stated above, has been brought on record in the present appeal along with the counter affidavit.

20. As per the calculation tables, the following was stated:

Calculation Tables – 1 & 2 are as under:-

CALCULATION TABLE – 1						
1	2	3	4	5	6	7
Sl. No.	Date of Booking	CUSTOMER NAME	TOTAL BOOKING AMOUNTS	Amounts Received by Defendant (Rs.)	Documents showing Receipt by Waris	Amounts received by Plaintiff (Rs.)
1	4.02.21	K. Nava Jyothi	600000	600000	Doc.14	
2	4.02.21	E. Janaki Ramayya	616059	616059	Doc.9	
3	4.02.21	E. Janaki Ramayya	616059	616059	Doc.10	
4	4.02.21	E. Janaki Ramayya	616059	616059	Doc.15	
5	4.02.21	E. Janaki Ramayya	616059	616059	Dco.16	
6	8.02.21	CH. Srinivasarao	416750	416750	Doc.17	
7	8.02.21	CH. Srinivasarao	416750	416750	Doc.17	
8	8.02.21	CH. Srinivasarao	416750	416750	Doc.17	
9	8.02.21	CH. Srinivasarao	416750	416750	Doc.17	

10	24.01.21	M. Sarita / M. Kiran Kumar	501116	501116	Docs.12, 18 & 22	
11	10.05.21	B. Srinivas / K. Sanyasi Rao	500000			500000
12	31.07.21	M. Anjani Kumar	1000000	500000	Docs.25&26	500000
13	22.08.21	Jogimahanthi Venkatesh	1000000	500000	Doc.36	500000
14	17.08.21	K. Naresh	500000			500000
15	28.08.21	P. Kanaka Rao	500000			500000
16	28.08.21	R. Dharma Rao	505000	500000	Doc.8	5000
17	10.09.21	Ch. Jaya Lakshmi	500000			500000
18	27.10.21	K. Srinivas Tagore	550000	500000	Doc.35	50000
19	18.01.22	Sattupalli Lalitabhai	500000			500000
20	31.01.2021	Sathivada Dhilliswari	1630000	1630000	Docs.5,27,28,30,31 & 39	
21	11.08.21	Akula Lalitha	1500000	1500000	Docs.4, 23 & 24	
22	10.09.21	Davala Raju	1500000	1500000	Docs.7 & 29	
23		Total Collection =	15417352		Total Amt. received by Plaintiff =	3555000
24		Total Amt.received by Defendant =		11862352		
25		Periodical Advances =		6808000		
26		MOU Advance =		5000000		
27		Marketing Expenses =		10,44,987		
28		Interest As on 06-10-23		72,60,204		
29		Total Claim Amt. as per suit =		3,19,75,543		

Table continue…..

CALCULATION TABLE – 1 (contd….)

8	9	10	11	12
AMOUNTS RETURN DATE	Amounts Returned by	Amounts Returned by Plaintiff (Rs.)	Doc.No.3 series	Amounts Returned by Defendant (Rs.)
22.03.22	PLAINTIFF	600000	3U	
13.04.22	PLAINTIFF	616059	3N	
13.04.22	PLAINTIFF	616059	3M	
13.04.22	PLAINTIFF	616059	3P	
13.04.22	PLAINTIFF	616059	3O	
22.03.22	DEFENDANT		3R	416750
22.03.22	DEFENDANT		3W	416750
22.03.22	DEFENDANT		3X	416750
22.03.22	PLAINTIFF	416750	3T	

14.06.22	DEFENDANT		3L	50116
26.04.22	PLAINTIFF	500000	3Q	
17.06.22 & 14.06.22	PLAINTIFF & DEFENDANT	500000	3D by plaintiff & 3C by defendant	500000
15.07.22 & 21.08.22	PLAINTIFF & DEFENDANT	500000	3E by defendant and 3G & 3H by plaintiff	500000
25.06.222	PLAINTIFF	500000	3S	
14.04.22	PLAINTIFF	500000	3F	
16.06.22 & 25.7.22	PLAINTIFF & DEFENDANT	5000	3A by Defendant	500000
20.06.22	PLAINTIFF	500000	3V	
14.06.22	PLAINTIFF & DEFENDANT	50000	3I by defendant & 3Y by plaintiff	500000
16.08.22	PLAINTIFF	500000	3B	
8.09.21	REGISTERED			
19.08.21	REGISTERED			
8.10.21	REGISTERED			
	Total Amt returned by plaintiff =	7035986	Total Amt. returned by defendant =	3751366

CALCULATION TABLE – 2

Sl.No.	Date of Payment	Amount (Rs.)	Mode of Payment	Document No.
1	5.01.2021	20,00,000	CASH	6
2	17.02.21	10,00,000	CASH	11
3	26.12.20	20,00,000	CASH	13
4	5.04.2021	24,000	ONLINE	19
5	5.04.2021	24,000	ONLINE	20
6	5.04.2021	4,00,000	CH: 970817	21
7	5.04.2021	2,00,000	ONLINE	22
8	6.04.2021/22.03.21	2,00,000	ONLINE	33
9	6.04.2021	1,00,000	ONLINE	34
10	6.04.2021	4,30,000	ONLINE	37
11	6.04.2021	4,30,000	ONLINE	38
	Total Advances paid by the plaintiff	68,08,000		

21. The appellant has filed the **reply affidavit**. In the said replay affidavit, in para-5, referring to the statement calculation table-1 and

calculation table-2 of the Memo dated 24.07.2024, the following contentions have been raised, which read as under:

"5. Without prejudice to the above contention, the documents relied upon by the parties were totally misread by the commercial court and thus, its finding are based on surmises and conjectures and contrary to the evidence on record. Being a final fact-finding court, I humbly request this Hon'ble Court to kindly consider whether the findings of the trial court are based on evidence or they run contrary to the evidence on record. The calculation memo filed by the respondent before the trial court during the course of hearing of the I.A.No.453 of 2023 is herewith filed. **Similarly, I also filed the rebuttal table in the written statement and the counter affidavit in the lower Court.** The following facts are clear from the perusal of the calculation memo filed by the respondent/plaintiff and the documents relied upon by him.

i) The amounts allegedly received by me are shown as Rs.1,18,62,352/- (Column 5 Sl.No.24) is not correct as Sl.No.6 to 9 is only one transaction as evident from document No.17, without admitting, Rs.1,06,12,102/- Column No.5, Sl.No.24, after deducting multiple entries in Sl.No.6 to 8, it ought to be Rs.1,06,12,102/-

ii) Document No.3 filed by the respondent is bunch of self serving vouchers which do not even bare revenue stamps except one or two, so the alleged refund of amounts allegedly made by the respondent/plaintiff to the others have not been established. No bank statement is filed to show those payments. Thus, the contract in respect of Sl.1 to 19 did not fructify.

iii) Admittedly column No.12 at Sl.No.13 shows the amounts refunded by me to others are totaled as Rs.37,51,366/-.

iv) In respect of Sl.No.20, 21 and 22, the amounts received is only Rs.46,30,000/- only (column 5, Sl.No.20, 21 and 22). In fact, I am entitled to receive as per MOU is Rs.56,99,999/- x 3 = Rs.1,76,99,997/-. Thus, the balance amount to be received by me is Rs.1,30,69,997/-.

v) The refundable advance amount of Rs.50,00,000/- shown at Column 5 Sl.No.26 payable to the respondent, if adjusted from this Rs.1,30,69,997 – 50,00,000 = Rs.80,69,997/-. Thus, I have to receive an amount of Rs.80,69,997/- from the respondent.

vi) The calculation shown in Table-2 is absolutely incorrect for a simple reason Sl.Nos.4 to 11 are the amounts which have received as hand loans from third parties and the respondent has nothing to do with those amounts. Thus, the claim in Table-2 to an extent of Rs.18,30,000/- is absolutely incorrect and misleading.

vii) Without admitting the correctness of items 1 to 3 shown at Sl.No.1 to 3 of Table-2, even if this amount is adjusted out of the balance amount payable to me Rs.30,69,997/-.

viii) The amounts received by me in respect of Sl.Nos.1 to 19 as per Column 5 of the calculation memo Table-1 are Rs.66,32,352/- after deducting multiple entries at Sl.No.68.

ix) As already submitted Column 12 of Table-1 at Sl.No.23 shows that I have refunded Rs.37,51,366/-. If the said amount is adjusted towards the amounts received by me in respect of Sl.Nos.1 to 19 the balance amount to be paid by me is Rs.28,80,366/-.

x) If the said amount payable by me is deducted from the amount to be paid by the respondent i.e., Rs.30,69,997/- The balance amount payable to me is Rs.1,89,631/-.

xi) In addition, I incurred Rs.15,50,000/- towards GST in respect of the concluded in respect of plots 26, 27 and 24 (Sl.No.20, 21 and 22).

xii) Additionally the respondent/plaintiff collected Rs.10,00,000/- towards extra work of the interiors. Thus, the respondent illegally retained Rs.25,50,000/-, which has not been adjusted.

xiii) Once Sl.No.24, 25 (at Column 5) are wrong whole calculation memo is wrong.

xiv) The marketing expenses allegedly incurred by the respondent has not been established. Thus, Column 5, at Sl.No.26 cannot be acceptable.

xv) In fact there is no such a clause in MOU of paying interest on amounts due and the respondent cannot make any claim in this respect. Thus, the claim for interest is totally misconceived and vitiated and column 28 cannot be considered at all and beyond the scope of MOU. Further, the said claim is totally vitiated, once the Sl.Nos.24 to 27, Column 5 are vitiated. In fact, I have to receive the amounts from the respondent and I need not pay any amounts to the respondent.

xvi) Thus, the claim for Rs.3,19,75,543/- is totally baseless and the suit claim itself is bad. Once suit claim is not establishes, the question of invoking Order 38 Rule 5 of CPC does not arise."

IV. Submissions of the learned counsels:

i) For the Appellant:

22. Learned counsel for the appellant submitted that the plaintiff failed to establish *prima facie* case for the Order of attachment before judgment. The

finding on *prima facie* case, as recorded by the learned Special Judge, was erroneous. He further submitted that the finding was not based on any evidence and no documents were marked. Learned counsel for the appellant further submitted that the impugned Order is a non-speaking Order.

23. Referring to para-5 of the reply affidavit, learned counsel for the appellant submitted that the calculation tables were not correct and in fact the plaintiff had to pay to the defendant/appellant. So, in consideration of those tables there could be no *prima facie* case to pass the Order of attachment.

24. Learned counsel for the appellant submitted that merely because the defendant did not furnish security pursuant to the initial Order, the Order of attachment could not be passed, as in his submission, no *prima facie* case for the claim was made out based on the incorrect calculation/tabulation charts.

25. Learned counsel for the appellant placed reliance in the following cases:

1) ***Sk.Ameer Basha v. Manthana Vani and another***[1]

2) ***Raman Tech. & Process Engg.Co. v. Solanki Traders***[2]

3) ***R. B. M. Pati Joint Venture v. Bengal Builders***[3]

4) ***Mandala Suryanarayana @ Babji v. Barla Babu Rao***[4]

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[1] 2023 (2) ALD 47 (AP)
[2] (2008) 2 SCC 302
[3] 2003 SCC OnLine Cal 320
[4] 2009 SCC OnLine AP 708

ii) <u>For the Respondent:</u>

26. Learned counsel for the respondent submitted that there was no illegality in the Order under challenge. He submitted that *prima facie* case for the claim was made out. The learned Special Court rightly recorded that *prima facie* a claim towards refundable advance and the amounts remitted to the defendant had been made out by the plaintiff who had accounted for most of the documents, payments received/paid/remitted/refunded.

27. He submitted that the co-relation calculation tables filed with memo before the learned Special Court were correct and disputed the submission of the learned counsel for the appellant based on para-5 of the appellant's reply affidavit, submitting *inter alia* that there were no double entries. The alleged double entries were different transactions of the same date vide same document number.

28. Learned counsel for the respondent further submitted that there was threat of alienation of the petition schedule property by the defendant in trying to alienate the property in his own name which was evidenced by the copy of the brochure filed before the Special Court and the affidavit of the third party. So, there was no illegality in passing the Order of attachment and particularly, when the defendant failed to furnish the security in an amount of Rs.3,20,00,000/- of the plaintiff's claim pursuant to the Order dated 10.11.2023 passed by the learned Special Court.

29. Learned counsel for the respondent placed reliance in the following cases.

1) ***Premraj Mundra v. Md. Maneck Gazi***[5]***,*** and

2) ***Ramakant Ambalal Choksi v. Harish Ambalal Choksi***[6]

V. Point for determination:

30. In view of the submissions advanced, the following point arises for our consideration and determination:

"Whether the impugned Order dated 09.08.2024 of attachment before judgment passed under Order 38 Rules 5 & 6 CPC suffers from any illegality and calls for any interference by this Court in the exercise of appellate jurisdiction?"

VI. Analysis:

31. We have considered the aforesaid submissions and perused the material on record.

i) Attachment before judgment:

32. Order 38 Rules 5 and 6 CPC reads as under:

"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

[5] 1951 SCC OnLine Cal 20
[6] 2024 SCC OnLine SC 3538

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.

(4) If an order of attachment is made without complying with the provisions of sub-rule (1) of this rule such attachment shall be void.

6. Attachment where cause not shown or security not furnished.

(1) Where the defendant fails to show cause why he should not furnish security, or fails to furnish the security required, within the time fixed by the Court, the Court may order that the property specified, or such portion thereof as appears sufficient to satisfy any decree which may be passed in the suit, be attached.

(2) Where the defendant shows such cause of furnishes the required security, and the property specified or any portion of it has been attached, the Court shall order the attachment to be withdrawn, or make such other order as it thinks fit."

33. From perusal of Order 38 Rules 5 and 6 CPC, it is evident that 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, 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, 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. When the defendant fails to show cause why he

should not furnish security or fails to furnish security required within the time fixed by the Court, the Court may order that the property specified or such portion thereof as appears sufficient to satisfy the decree that may be passed in the suit, may be attached. Where the defendant shows such cause of furnishing the required security, and the property specified or any portion of it has been attached, the Court shall order the attachment to be withdrawn or make such other order as it thinks it.

34. In ***Raman Tech. & Process Engg. Co.*** (supra) the Hon'ble Apex Court held that the object of supplemental proceedings (applications for arrest or attachment before judgment, grant of temporary injunctions and appointment of receivers) was to prevent the ends of justice being defeated. The object of Order 38 Rule 5 CPC in particular, was 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 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.

35. The Hon'ble Apex Court further observed in ***Raman Tech. & Process Engg. Co.*** (supra) that 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. The Hon'ble Apex Court further observed that 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.

36. In ***Premraj Mundra*** (supra), upon which, the learned counsel for the respondent placed reliance, the Calcutta High Court observed and laid down the guiding principles for an Order, under Order 38 Rules 5 and 6 as to under what circumstances and on consideration of, what factors, an Order of attachment before judgment should be passed. ***Premraj Mundra*** (supra) was followed by another judgment of the Calcutta High Court by the Division Bench in ***R. B. M. Pati Joint Venture*** (supra) upon which learned counsel for the appellant also placed reliance.

37. We shall reproduce para-15 of the ***R. B. M. Pati Joint Venture*** (supra), in which para-10 of ***Premraj Mundra*** (supra) has been cited.

> "**15.** The said Rule 5 is under the heading Attachment before judgment. It appears from the said provision that Court was entitled to exercise the power for attachment before judgment only when the defendant with intent to obstruct or delay the execution of any decree that may be passed against him, is about to dispose of the whole or any part of his property from the local limits of the jurisdiction of the Court. It appears from the impugned order that the said aspects were not at all taken into consideration and no satisfaction in that respect was recorded by the trial Court as appears from the impugned order. Law in this regard as settled in the case of *Premraj Mundra* (supra) is relevant and in paragraph 10 of the said judgment, guiding principles have been noted as follows:—
>
> "10. From a perusal of all the authorities, I think that the following guiding principles to be deduced:
>
> (1) That an order under O. 38 Rr. 5 & 6, can only be issued, if circumstances, exist as are stated therein.

(2) Whether such circumstances exist is a question of fact that must be proved to the satisfaction of the Court.

(3) That the Court would not be justified in issuing an order for attachment before judgment, or for security, merely because it thinks that no harm would be done thereby or that the defts, would not be prejudiced.

(4) That the affidavits in support of the contention of the applicant, must not be vague, & must be properly verified. Where it is affirmed true to knowledge or information or belief, it must be stated as to which portion is true to knowledge the source of information should be disclosed, and the grounds for belief should be stated.

(5) That a mere allegation that the deft. was selling off his properties is not sufficient. Particulars must be stated.

(6) There is no rule that transaction before suit cannot be taken into consideration, but the subject of attachment before judgment must be to prevent future transfer or alienation.

(7) Where only a small portion of the property belonging to the deft. is being disposed of, no inference can be drawn in the absence of other circumstances that the alienation is necessarily to defraud or delay the pltf.'s claim.

(8) That the mere fact of transfer is not enough, since nobody can be prevented from dealing with his properties simply because a suit has been filed; There must be additional circumstances to show that the transferrer is with an intention to delay or defeat the plft.'s claim. It is open to the Court to look to the conduct of the parties immediately before suit, and to examine the surrounding circumstances, and to draw an inference as to whether the deft. is about to dispose of the property, and if so, with what intention. The Court is entitled to consider the nature of the claim and the defence put forward.

(9) The fact that the deft. is in insolvent circumstances or in acute financial embarrassment, is a relevant circumstance, but not by itself sufficient.

(10) That in the case of running businesses, the strictest caution is necessary and the mere fact that a business has been closed, or that its turnover had diminished, is not enough.

(11) Where however the deft. starts disposing of his properties one by one, immediately upon getting a notice of the plft.'s claim, and/or where he had transferred the major portion of his properties shortly prior to the institution of the suit, and was in an embarrassed financial condition, these were grounds from which an inference could be legitimately drawn that the object of the deft. was to delay and defeat the plft.'s claim.

(12) Mere removal of properties outside jurisdiction, is not enough, but where the deft. with notice of the plft.'s claim, suddenly begins removal of his properties outside the jurisdiction of the appropriate Court, and without any other satisfactory reason, an adverse inference may be drawn against the deft. where the removal is to a foreign country, the inference is greatly strengthened.

(13) The deft. in a suit is under no liability to take any special care in administering his affairs, simply because there is a claim pending against him. Here neglect, or suffering execution by other creditors, is not a sufficient reason for an order under O. 38 of the Code.

(14) The sale of properties at a gross undervalue, or benami transfers, are always good indications of an intention to defeat the plft.'s claim. The Court must however be very cautious about the evidence on these points and not rely on vague allegations."

38. In ***Raman Tech. & Process Engg. Co.*** (supra) the Hon'ble Apex Court observed that Courts should also keep in view the principles relating to grant of attachment before judgment, referring to the judgment of the Calcutta High Court in ***Premraj Mundra*** (supra), for a clear summary of the principles.

39. We find that the learned trial Court has clearly recorded a finding that *prima facie* case has been made out. The documents and the calculation sheets submitted by the respondent *prima facie* supported the claim of the plaintiff. It also recorded the finding that in view of the brochure and the affidavit of the third party, the defendant was trying to alienate the plaint

schedule property which might defeat the very decree that might be passed in the suit. This is based on material before it. So, we are of the view that the reasons have been assigned in the Order and on consideration of the relevant facts and on being satisfied with the pre-conditions as under Rule 5 of Order 38 CPC, recording the findings, *prima facie,* the Order of attachment has been passed with due opportunity to the defendant/appellant.

40. In ***Dalpat Kumar v. Prahlad Singh***[7] the Hon'ble Apex Court observed that *prima facie* case is not to be confused with *prima facie* title which has to be established on evidence at the trial. Only *prima facie* case is substantial question raised, *bona fide,* which needs investigation and a decision on merits.

41. Recently, in ***State of Kerala v. Union of India (UOI)***[8] the Hon'ble Apex Court observed that generally speaking, the phrase 'prima facie case' is not a term of art and it simply signifies that at first sight the plaintiff has a strong case.

42. We find that the learned Special Court considered the calculation charts 1 and 2 filed by the respondent/plaintiff vide Memo dated 04.12.2024. The learned Special Court has observed that any objection to that memo was not filed by the defendant/appellant and he also did not file any separate co-relate calculation memo and both the sides argued based on co-relation calculation memo filed by the plaintiff.

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[7] (1992) 1 SCC 719
[8] (2024) 7 SCC 183

43. The learned Special Court in para-12 of its judgment, clearly recorded and noted that "*…….Learned counsel for the plaintiff filed two such statements which were not disputed and to which no counter statements or objections were filed, however, both learned counsels submitted on those statements*".

44. The learned Special Judge recorded the finding of *prima facie* case in plaintiff's favour to pass the Order of attachment before judgment on perusal of those statement, as is clearly observed in para-13 of the judgment.

45. It has not been submitted before us and any such ground has not been raised before us that the defendant also filed any co-relation statement of amounts received/paid/remitted/refunded nor that the defendant filed any objection to the co-relation statement of the amounts filed by the plaintiff. The statement of fact in para-12 of the judgment of the learned Special Court to that effect and as reproduced, as also to the effect that "*both the learned counsels submitted on those statements"*, has not been disputed before us.

46. From para-5 of the reply affidavit filed in this appeal, it is evident that in this appeal, the appellant is in fact raising objections with respect to the calculation tables filed by the respondent/plaintiff and is disputing the same with respect to certain entries, and based thereon is denying the claim of the plaintiff as totally baseless and also showing that the defendant is entitled for some amount from the plaintiff by submitting that there was illegal retention by the plaintiff and there was no adjustment made, and also that some entries

could not be considered at all being beyond the scope of MOU. Based on such argument, the existence of *prima facie* case is being disputed.

47. Though as submitted in para-5 of the reply affidavit, the defendant had filed the written statement disputing the claim of the plaintiff by giving the tables as also in the objections to the application, but, we are of the view that once the learned Special Court, might be because of or in consideration of various documents and various details of particulars as reflected from the plaint as also the written statement, application for attachment and objections thereto, had called for a co-relation memo/tables and the same was filed by the plaintiff, along with the memo, if there was something according to the defendant not correct, it ought to have pointed out the same to the learned Special Court, by filing the objections to the co-relation memo containing the tables 1 and 2 or he ought to have filed his own tables for clarity and for the sake of convenience of the learned Special Court to appreciate the factual position with respect to the accounts, which was not done. The learned Special Court in consideration of those tables filed along with the memo, upon which the defendant's counsel also argued, passed the Order. No fault can be found with the Order of the learned Special Court on the ground that statement contained in those tables was not correct, which is being raised for the first time in this appeal vide the reply affidavit.

48. We are not inclined to interfere with the impugned Order of the learned Special Court on the aforesaid submission. The learned Special Court has to finally decide that aspect during trial, and at this stage, considering *inter*

alia the memo and co-relation tables filed by the plaintiff, against which the defendant did not file any objection or co-relation table before the learned Special Court, which fact is reflected in the impugned Order, the appellant/defendant cannot be permitted to challenge the impugned Order on such ground, as the same is also disputed by the learned counsel for the respondent. In any case, we are of the view that if there is some truth in the contentions raised, as raised in para-5 of the reply affidavit in this appeal, the appellant is at liberty to file appropriate application before the learned Special Court. Learned Special Court in the operative part of the impugned Order has already granted liberty to the defendant/appellant to seek modification and providing further that the same if filed shall be considered and decided as per law.

49. Learned counsel for the appellant placed reliance in ***Mandala Suryanarayana @ Babji*** (supra), in which, a coordinate Bench of this Court held that the power to attach before judgment cannot be exercised in a routine manner. If the Court is satisfied *prima facie* with regard to conditions enumerated in Rule 5 of Order 38 CPC, those reasons should be found in the Order at least at the stage of ordering warrant of attachment. The non-furnishing of reasons while issuing an Order of attachment would render the remedy of appeal very ineffective as the appellate Court would not be in a position to know as to which are the grounds that weighed with the learned trial Court for arriving at satisfaction of Order of attachment before judgment. This judgment was cited to contend that the impugned Order is a non-reasoned

Order, raising the submission that the reason has not been assigned and consequently, the Order cannot be sustained in view of the judgment in ***Mandala Suryanarayana @ Babji*** (supra).

50. There is no dispute on the proposition of law as laid down in ***Mandala Suryanarayana @ Babji*** (supra) that the reasons should be recorded for the Order of attachment before judgment, so that the party may know as to why the attachment Order has been passed and it may be agitated in the appellate Court by taking appropriate grounds, so as to meet those reasons or to show that those are non-existent or even if existing, not furnishing the ground for order of attachment. It is also so necessary that the Order being appealable, the appellate Court must know about the reasons which persuaded the Court to pass the Order of attachment. The reasons are the backbone of every order and not only the Order of attachment. But, we are not in agreement with the submission advanced by the learned counsel for the appellant that in the present case the impugned Order is not a reasoned Order. Specific reasons have been assigned for passing the Order of attachment.

51. Learned counsel for the appellant by placing further reliance on the judgment in ***Sk. Ameer Basha*** (supra), submitted that in the said case also reasons were not recorded for the satisfaction of the Court and the Order of attachment before judgment was set aside.

52. We have already observed that in the present case, we are satisfied that the cogent reasons have been assigned in the Order of the learned Special Court. In ***Sk. Ameer Basha*** (supra), the Court had not assigned the reasons

for its satisfaction for ordering conditional attachment. Further, no time was fixed for furnishing security or to show cause as to why the defendant should not furnish security, which was contrary to Rule 5 of Order 38 CPC. So, finding that there was non-compliance with the pre-conditions for granting an Order of attachment before judgment under Order 38 Rule 5 CPC, the Order in ***Sk. Ameer Basha*** (supra) was set aside. The present case is not the case of the nature as in ***Sk. Ameer Basha*** (supra). Additionally, the present case is a case of an Order under Rule 6. It is not a case at the stage of Rule 5, nor it has been contended before us that the Order passed under Rule 5 did not specify the time for furnishing security or to show cause. In fact, vide Order dated 10.11.2023 under Rule 5 time was fixed for the defendant to furnish security in an amount of Rs.3,20,00,000/- or to show cause. The appellant/defendant did not furnish security but filed objections, and considering the objections, the Order has been passed. So, in our view, the appellant cannot derive any benefit of the judgment in ***Sk. Ameer Basha*** (supra) to support his contention.

ii) <u>Appellate jurisdiction under Order 43 Rule 1 CPC:</u>

53. Learned counsel for the respondent placed reliance in ***Ramakant Ambalal Choksi*** (supra) with respect to the appellate jurisdiction under Order 43 of the Code of Civil Procedure in relation to the grant or non-grant of interim injunction, that is Order in interlocutory application, in which, the Hon'ble Apex Court, referring to its judgment, *inter alia,* in ***Wander Ltd. V. Antox India P.***

Ltd.[9] and ***Printers (Mysore) v. Pothan Joseph***[10], as also ***Mohd. Mehtab Khan v. Khushnuma Ibrahim Khan***[11] and other cases observed and held that the appellate Court should not assume unlimited jurisdiction and should guide its powers within the contours laid down in ***Wander*** (supra) case. In ***Wander*** (supra), the Hon'ble Apex Court observed and held that the appellate Court ordinarily should not substitute its own discretion in an appeal preferred against a discretionary order, except where the discretion has been shown to have been exercised arbitrarily or capriciously or perversely, or where the Court has ignored the settled principles of law, also that, the appellate Court will not reassess the material and seek to reach a conclusion different from the one reached by the trial Court. If the discretion has been exercised by the trial Court reasonably and in a judicial manner, the fact that the appellate Court would have taken a different view may not justify interference with the trial Court's exercise of discretion.

54. It is apt to refer the discussion in ***Ramakant Ambalal Choksi*** (supra) under the head 'Appellate Jurisdiction under Order 43 of the CPC' as under:

> "**APPELLATE JURISDICTION UNDER ORDER 43 OF THE CPC**
>
> **20.** Order 43 of the CPC specifies the orders against which an appeal lies. Sub-Rule (r) of Rule 1 of the said order provides that an appeal would lie against an order made under Rules 1, 2, 2A, 4 and 10 of Order 39 of the CPC respectively.

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[9] 1990 Supp SCC 727
[10] (1960) SCC OnLine SC 62
[11] (2013) 9 SCC 221

21. The law in relation to the scope of an appeal against grant or non-grant of interim injunction was laid down by this Court in *Wander Ltd.* v. *Antox India P. Ltd.*, 1990 Supp SCC 727. Antox brought an action of passing off against Wander with respect to the mark Cal-De-Ce. The trial court declined Antox's plea for an interim injunction, however, on appeal the High Court reversed the findings of the trial judge. This Court, upon due consideration of the matter, took notice of two egregious errors said to have been committed by the High Court:

a. *First*, as regards the scope and nature of the appeals before it and the limitations on the powers of the appellate court to substitute its own discretion in an appeal preferred against a discretionary order; and

b. *Secondly*, the weakness in ratiocination as to the quality of Antox's alleged user of the trademark on which the passing off action is founded.

22. With regards to (a), this Court held thus:

"In such appeals, the appellate court will not interfere with the exercise of discretion of the court of the first instance and substitute its own discretion, except where the discretion has been shown to have been exercised arbitrarily or capriciously or perversely, or where the court had ignored the settled principles of law regulating grant or refusal of interlocutory injunctions ... the appellate court will not reassess the material and seek to reach a conclusion different from the one reached by the court below ... If the discretion has been exercised by the trial court reasonably and in a judicial manner the fact that the appellate court would have taken a different view may not justify interference with the trial court's exercise of discretion."

23. This Court, while arriving at the above findings, relied on its earlier judgment in *Printers (Mysore)* v. *Pothan Joseph*, 1960 SCC OnLine SC 62 where it was held thus:

"[...] as has been observed by Viscount Simon LC in Charles Osenton & Co *v.* Johnston - *the law as to reversal by a court of appeal of an order made by a judge below in the exercise of his/her discretion is well established, and any*

difficulty that arises is due only to the application of well-settled principles in an individual case."

24. It is pertinent to note that in *Printers* (supra) this Court had held that ignoring relevant facts is also a ground for interfering with the discretion exercised by the trial court. Furthermore, Viscount Simon LC in *Charles Osenton & Co* v. *Johnston*, [1942] A.C. 130, after stating the above, went on to quote Lord Wright's decision in *Evans* v. *Bartlam*, [1937] A.C. 473:

"It is clear that the court of appeal should not interfere with the discretion of a judge acting within his jurisdiction unless the court is clearly satisfied that he was wrong. But the court is not entitled simply to say that if the judge had jurisdiction and had all the facts before him, the court of appeal cannot review his order unless he is shown to have applied a wrong principle. The court must, if necessary, examine anew the relevant facts and circumstances in order to exercise a discretion by way of review which may reverse or vary the order."

25. In *Evans* (supra) case, Lord Wright made it clear that while adjudicating upon the discretion exercised by the trial court, the appellate court is obliged to consider the case put forward by the appellant in favour of its argument that the trial court exercised its discretion arbitrarily or incorrectly in the circumstances.

26. What flows from a plain reading of the decisions in *Evans* (supra) and *Charles Osenton* (supra) is that an appellate court, even while deciding an appeal against a discretionary order granting an interim injunction, has to:

a. Examine whether the discretion has been properly exercised, i.e. examine whether the discretion exercised is not arbitrary, capricious or contrary to the principles of law; and

b. In addition to the above, an appellate court may in a given case have to adjudicate on facts even in such discretionary orders.

27. The principles of law explained by this Court in *Wander's* (supra) have been reiterated in a number of subsequent decisions of this Court. However, over a period of time the test laid down by this Court as regards the scope of interference has been made more stringent. The emphasis is now more on

perversity rather than a mere error of fact or law in the order granting injunction pending the final adjudication of the suit.

28. In *Neon Laboratories Ltd.* v. *Medical Technologies Ltd.*, (2016) 2 SCC 672 this Court held that the Appellate Court should not flimsily, whimsically or lightly interfere in the exercise of discretion by a subordinate court unless such exercise is palpably perverse. Perversity can pertain to the understanding of law or the appreciation of pleadings or evidence. In other words, the Court took the view that to interfere against an order granting or declining to grant a temporary injunction, perversity has to be demonstrated in the finding of the trial court.

29. In *Mohd. Mehtab Khan* v. *Khushnuma Ibrahim Khan*, (2013) 9 SCC 221 this Court emphasised on the principles laid down in *Wander* (supra) and observed that while the view taken by the appellate court may be an equally possible view, the mere possibility of taking such a view must not form the basis for setting aside the decision arrived at by the trial court in exercise of its discretion under Order 39 of the CPC. The basis for substituting the view of the trial court should be malafides, capriciousness, arbitrariness or perversity in the order of the trial court. The relevant observations are extracted below:

"20. In a situation where the learned trial court on a consideration of the respective cases of the parties and the documents laid before it was of the view that the entitlement of the plaintiffs to an order of interim mandatory injunction was in serious doubt, the Appellate Court could not have interfered with the exercise of discretion by the learned Trial Judge unless such exercise was found to be palpably incorrect or untenable. The reasons that weighed with the learned Trial Judge, as already noticed, according to us, do not indicate that the view taken is not a possible view. The Appellate Court, therefore, should not have substituted its views in the matter merely on the ground that in its opinion the facts of the case call for a different conclusion. Such an exercise is not the correct parameter for exercise of jurisdiction while hearing an appeal against a discretionary order. While we must not be understood to have said that the Appellate Court was wrong in its conclusions what is sought to be emphasized is that as long as the view of the trial court was a possible view the Appellate Court should not have interfered with the same following the virtually settled

principles of law in this regard as laid down by this Court in Wander Ltd. *v.* Antox India (P) Ltd.*"*

(Emphasis supplied)

30. This Court in *Shyam Sel & Power Ltd.* v. *Shyam Steel Industries Ltd.*, (2023) 1 SCC 634 observed that the hierarchy of the trial court and the appellate court exists so that the trial court exercises its discretion upon the settled principles of law. An appellate court, after the findings of the trial court are recorded, has an advantage of appreciating the view taken by the trial judge and examining the correctness or otherwise thereof within the limited area available. It further observed that if the appellate court itself decides the matters required to be decided by the trial court, there would be no necessity to have the hierarchy of courts.

31. This Court in *Monsanto Technology LLC* v. *Nuziveedu Seeds Ltd.*, (2019) 3 SCC 381, observed that the appellate court should not usurp the jurisdiction of the Single Judge to decide as to whether the tests of prima facie case, balance of convenience and irreparable injury are made out in the case or not.

32. The appellate court in an appeal from an interlocutory order granting or declining to grant interim injunction is only required to adjudicate the validity of such order applying the well settled principles governing the scope of jurisdiction of appellate court under Order 43 of the CPC which have been reiterated in various other decisions of this Court. The appellate court should not assume unlimited jurisdiction and should guide its powers within the contours laid down in the *Wander* (supra) case."

55. We are of the view that the learned trial Court has passed the Order of attachment before judgment specifically recording that *prima facie* case was made out on the material on record for the claim of the plaintiff, as also that the defendant appellant in order to defeat the claim of the plaintiff, for which the decree might have been passed in the suit, was trying to alienate the subject property or part thereof, has rightly passed the Order and with such

findings in the exercise of the appellate jurisdiction, this Court should not interfere as the trial Court has taken a reasonable view and in arriving at the findings recorded, it has taken into account the material before it and any settled principles of law have also not been violated.

56. We are of the further view that as the matter is pending before the learned Special Court for trial, we should not make appreciation of the material on record in the light of the objections raised in para-5 of the reply affidavit, in the exercise of the appellate jurisdiction under Order 43 Rule 1 CPC, as generally in the exercise of power of appellate jurisdiction under Order 43 Rule 1 CPC, this Court is not supposed to substitute its finding, unless a strong case for such substitution is made out and particularly, when we are satisfied that the finding on *prima facie* case as also the defendant trying to alienate the plaint schedule property as recorded by the learned Special Court, are based on consideration of the material on record placed before the learned Special Court, and also for the reason, that the learned Special Court has granted liberty to the appellant to apply for modification of its Order, in the operative part of the impugned Order.

VII. Conclusions:

57. Thus, considered. We do not find any illegality in the Order impugned, on the grounds of challenge. Point for determination is answered accordingly.

58. So far as the correctness of the calculation charts 1 and 2 filed by the plaintiff along with the memo before the learned Special Court is concerned,

which is now being disputed in the appeal vide reply affidavit, it shall be open to the appellant/defendant to file appropriate application, if so advised, in terms of the impugned Order itself, which has permitted to file application for modification of the Order and if any such application is so filed, the same would be decided, in accordance with law.

VIII. Result:

59. The Civil Miscellaneous Appeal is dismissed, with the observations made above in para-58 (supra).

60. No order as to costs.

Pending miscellaneous petitions, if any, shall stand closed in consequence.

RAVI NATH TILHARI, J

CHALLA GUNARANJAN, J

Date: 09.07.2025
Dsr

Note:
LR copy to be marked
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