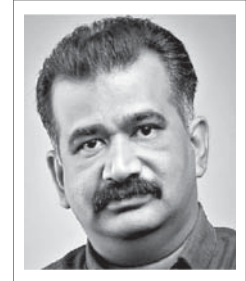


**Attachment.....purely legal; not sentimental**

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[Insight on CPC Series – 05]

The word 'attachment' means 'taking/putting property into the custody of Court, by an order prohibiting transfer, conversion, disposition or otherwise dealing with it by one to the detriment of the other, on his request'. Works as an order, seizing specified property either as a provisional remedy to prevent the defendant from liquidating them or transferring those assets beyond the jurisdiction of the Court or from creating third party interests to avoid or delay the performance of a decree that may be/has been passed in favour of the plaintiff. Thus, an attachment is a pre-decretal provisional remedy, a lever to enforce the final verdict, during execution, a post-decretal affair, which is always preventive in nature and not punitive. The purpose of attachment is to give confidence/assurance to the plaintiff that the decree to be passed in his favour will be satisfied.

Attachment creates no charge or lien upon the attached property, but merely prevents/avoids private alienations. It does not confer any title in favour of the attaching creditor. Nowhere in CPC, there is a provision which in terms makes the attaching creditor a secured creditor or creates any charge in his favour over the property so attached. But, an attaching creditor acquires, by virtue of the attachment, a right to have the attached property, kept in '*custodia legis*' for the satisfaction of his debt. An unlawful interference with that right would constitute an actionable wrong. Attachment only prevents alienation, but confers neither title nor preferential rights.

When a mortgage of property is created in terms of the provisions of TP Act, it amounts to an encumbrance whereas an order of attachment before judgement creates no charge. The quality of the mortgage as an encumbrance does not get watered down to be 'subservient to' by an order of attachment by the Civil Court under Order 38 Rule 5 CPC<sup>1</sup>.

Attachment order is a sort of assurance to the plaintiff that the decree, passed in his favour, would bring fruits. The provisions of Rule 5 of Order 38 CPC are to prevent a decree that may be passed being rendered infructuous and Rule 1(b) of Order 39 is applicable where the defendant threatens to dispose of

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1. *Rajalekshmi Amma v. E. A. Basheer and Others* [2013 KHC 3678 : 2013 (4) KLT 443].

his property to defraud creditors<sup>2</sup>. An order passed under Order 8 Rule 5 is thus for a limited purpose<sup>3</sup>.

a The object of supplemental proceedings provided in Section 94 CPC is to prevent the ends of justice being defeated. Order 38 Rule 5 CPC in particular, aims to prevent any defendant from defeating the realisation of the decree that may ultimately be passed in favour of the plaintiff, either by attempting to dispose of, or remove from the jurisdiction of the Court, his assets. However, 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. Further, he needs to establish that the defendant is attempting to remove or dispose of his assets with the intention of defeating the decree that may be passed. The power under Order 38 Rule 5 CPC is drastic and extraordinary. So, the exercise of such power should not be mechanically or merely for the asking, but sparingly and strictly in accordance with the Rule. Order 38 Rule 5 does not approve to translate an unsecured debt into a secured one. Any attempt by the plaintiff to utilise the provisions of Order 8 Rule 5 CPC, as leverage for coercing the defendant to settle the suit claim should be discouraged. Instances are not wanting where bloated and suspicious claims are realised by unscrupulous plaintiffs by obtaining orders of attachment before judgement and forcing the defendants for out-of-court settlement under the guise of attachment.

e 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 premise to another or removal of machinery to another premise by itself is not a ground for granting attachment before judgment<sup>4</sup>. Order 38 Rules 5 and 6 CPC stand for the circumstances wherein the Court may order attachment before judgement<sup>5</sup>.

f Court, while exercising its jurisdiction under Order 38 Rule 5 CPC, is required to form a *prima facie* estimation at that stage; but need not go into the correctness or otherwise of all the contentions raised by the parties<sup>6</sup>. The attachment before the judgement is a fetter preventing the owner of the property to create encumbrances, sale or cause a charge thereon. Attachment before judgement does not create any right, title or interest, but disables the judgment-debtor to create any encumbrances on the property. At the end of the day, when decree is passed, the property forms part of the decree so as to enable the decree-holder to proceed against the property to realise the decree debt. Even the properties which are not part of the Schedule mentioned in the suit

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2. *Padam Sen v. State of U.P.* [AIR 1961 SC 218 : (1961) 1 SCR 884 : 1961 KHC 491].

3. *KSFE Ltd. v. Official Liquidator* [(2006) 10 SCC 709 : AIR 2007 SC 63 : 2006 KHC 1880].

4. *Raman Tech. & Process Engg. Co. v. Solanki Traders* [(2008) 2 SCC 302 : 2008 KHC 4380].

h 5. *Mohan v. Anandi*, (1996) 7 SCC 734; *Rajendran v. Shankar Sundaram* [(2008) 2 SCC 724 : AIR 2008 SC 1170 : 2008 KHC 4260]; *Nahar Int. Enterprises Ltd. v. HSBC* [(2009) 8 SCC 646 : 2009 KHC 4915]; *John Impex (P) Ltd. Athul Kapoor* [(2009) 15 SCC 285 : 2009 KHC 6135].

6. *Rajendran v. Shankar Sundaram* [(2008) 2 SCC 724 : AIR 2008 SC 1170 : 2008 KHC 4260]; *GCDA v. Harrisons Malayalam Ltd.* [AIR 2002 Ker. 119 at 123 : 2002 KHC 206].

will nonetheless be the part of the decree. It is not mandatory that the property should be specifically mentioned; it is so only in a mortgage suit under relevant clauses of Order 34 CPC. The decree-holder is entitled to proceed against those items mentioned in the petition. Attached properties are also liable to be sold as an integral part of the decree<sup>7</sup>.

a

The matured principles regarding powers of the Court, exercisable under O.38 R.5 CPC have been laid down in a catena of decisions.

(a). An order under Order 38 Rule 5 CPC can be issued only if the circumstances exist, as are stated therein to the satisfaction of the Court; (b). An order of attachment before judgement or an order for furnishing security shall not be issued on the assumption that no harm would be done thereby to the defendant or that the defendant would not be prejudiced by issuing such a direction; and (c). The affidavit in support of the contentions of the applicant should not be vague. Where it is affirmed 'true to the knowledge or information', it must be stated as to which portion is true to the knowledge, the grounds for belief and the source of information should also be disclosed<sup>8</sup>.

b

c

A Calcutta decision, sets forth the course of action to be taken, while dealing with an attachment application, and says that,

a. an order under Order 38 Rule 5CPC can be issued only if the circumstances exist as are stated therein;

d

b. whether such circumstances exist is a question of fact which must be proved to the satisfaction of the Court;

c. 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 that the defendants would not be prejudiced;

e

d. the affidavits filed in support of the contentions of the applicant must not be vague, but must be properly verified. Where it is affirmed as true to the knowledge, or information or belief, it must be stated as to which portion is true to the knowledge, the source of information should be disclosed; and the grounds for belief should be stated;

f

e. a mere allegation that the defendant was selling off his properties is not sufficient; particulars must be stated;

f. there is no rule that the transaction before a suit cannot be taken into consideration, but the object of attachment before judgement must be to prevent future transfer or alienation;

g

g. where only a small portion of property belonging to the defendant is being disposed, no inference can be drawn in the absence of other circumstances that the alienation is necessarily to defraud or delay the plaintiff's claim;

h. the mere fact of transfer is not enough. Nobody can be prevented from dealing with his properties simply because a suit has been filed.

h

7. *S. Noordeen v. V. S. Thiru Venkita Reddiar* [(1996) 3 SCC 289 : AIR 1996 SC 1293 : 1996 KHC 150].

8. *Sadasivan K. v. Surendradas* [2020(5) KHC 461 : 2020 (6) KLT 1] ( 3 Judges).

a There must be additional circumstances to show that the transfer is with an intention to delay or defeat the plaintiff's claim. It is open to the Court to look at the conduct of the parties immediately before the suit and to examine the surroundings circumstances and to draw an inference as to whether the defendant is about to dispose of the property, and if so, with what intention. The Court is entitled to consider the nature of the claim and the defence put forward.

b i. the fact that the defendant is in insolvent circumstances or in acute financial embarrassment is a relevant circumstance, but not by itself sufficient.

j. in case of running business, the strictest caution is necessary and the mere fact that a business has been closed, or that its turn-over has diminished, is not enough.

c k. where the defendant starts disposing of his properties one by one, immediately upon getting notice of the plaintiff'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 legitimately be drawn that the object of the defendant was to delay and defeat the plaintiff's claim;

d l. mere removal of properties outside the jurisdiction of the court concerned is not enough, but where the defendant, with notice of the plaintiff's claim, suddenly begins removal of his properties, outside the jurisdiction of the appropriate Court, and without any satisfactory reason, an adverse inference may be drawn against the defendant. Where the removal is to a foreign country, the inference is greatly strengthened.

e m. the defendant 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. Mere neglect or suffering execution by other creditors is not a sufficient reason for an order under Order 38 Rule 5 CPC; and

f n. sale of the properties at a gross undervalue or benami transfers are always good indications of an intention to defeat the plaintiff's claim. The Court must however, be very cautious about the evidence on these points and not to rely on vague allegations<sup>9</sup>.

g In an application for attachment before judgement, order to issue notice is equivalent to the issuance of a direction under Rule 5(1) of Order 38 CPC. Without a direction under Rule 5(1), any order passed under Rule 5(3) shall be void. If a notice simplicitor alone was issued at the inception of the proceedings, without a direction under Rule 5(1), in an appropriate case, the Court will be obliged to issue a direction under Rule 5(1) again to the respondent/defendant after his appearance, if it eventually finds that passing an order of conditional attachment, by invoking Rule 5(3), before final disposal of the application is necessary. Issuing a direction under Rule 5(1) of Order 38 CPC, after his appearance is

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9. *Premraj v. Maneck Gazi*, AIR 1951 Cal. 156.

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a cumbersome process, but it is inevitable to make a conditional attachment order valid and legal<sup>10</sup>.

On the date of filing the attachment petition, where the defendant is not the title holder in possession of the attached property and attachment before judgement was based on an affidavit containing erroneous sworn statement in respect of the ownership of the property, order of attachment cannot be sustained, unless it is alleged that transfer was made fraudulently before filing the petition, to defeat the order of attachment<sup>11</sup>. In order to secure attachment of property before judgement in a money suit, it is not necessary to consider that whether the said property is the subject matter of the suit and it is within or beyond the jurisdiction of the Court<sup>12</sup>.

Though the sale of property by a judgement debtor to a third party during the subsistence of attachment is void according to Section 64 CPC, still, if such a contract for sale is entered into prior to the attachment of the property, in such a case, the alienation would prevail over attachment<sup>13</sup>.

Order 38 Rule 11 CPC, inserted by the Amendment Act 104 of 1976, says that the provisions applicable to an attachment made in execution of a decree shall, so far as may be, apply to an attachment made before judgement, which continues after the judgement by virtue of the provisions of Rule 11. The purport of Rule 11 of Order 38 CPC is that if the property is attached before judgement, it shall not be necessary to re-attach the property in execution of the decree<sup>14</sup>.

When the nature of the transaction is curious and when there are circumstances surrounding sale deeds which speak for themselves that the intention of the vendor was nothing but to defeat the interest of the creditor, transactions by way of sale deeds come within the mischief of Section 53 of the TP Act and attachment before judgement is valid<sup>15</sup>.

Once dismissal of the suit is set aside, plaintiff must be restored to the position in which he was situated when the Court dismissed the suit for default and therefore, interlocutory orders, which have been passed before the dismissal of the suit would stand revived along with the suit, unless the Court expressly or by necessary implications excludes the operation of such interlocutory orders<sup>16</sup>.

The agreement for sale creates an obligation attached to the ownership of property and since the attaching creditor is entitled to attach only the right, title and interest of the JD, the attachment cannot be free from the obligations incurred

10. *Sadasivan K v. Surendradas* [2020 (5) KHC 461 (FB) : 2020 (6) KLT 1 (FB)].

11. *Soniya v. Saranya and Others* [2020 (2) KLT 420 : 2020 (2) KHC 91].

12. *Muthoot Vehicle and Asset Finance Ltd. v. Gopalan Kuttappan* [2009 (4) KLT 123 : 2009 KHC 5086].

13. *Swamy HL v. Lakshamma and Others* [AIR 2018 Kar. 142 : 2018 KHC 4190].

14. *Mannil Abdul Gadhafi v. P.V Mohammed* [2023 (1) KLT 392 : 2023 (1) KHC 136].

15. *Mohammad P. V. v. Mannil Abdul Gadhafi and Others* [2022 (6) KLT 269 : 2022 (6) KHC 369]. But see *Santhosh Kumar Gupta v. Indu Singh* [AIR 2021 All. 6 : 2021 KHC 2009] also.

16. *Vareed Jacob v. Sosamma Geevarghese and Others* [(2004) 6 SCC 378 : 2004 KHC 639]; *Mohammed P. V. v. Mannil Abdul Gadhafi and Others* 2022 (6) KLT 269 : 2022 (6) KHC 369

a under the contract for sale<sup>17</sup>. Attachment takes effect only in regard to the right which judgement-debtor has in the property at the time of attachment. Any interest or right in property prior to the attachment is not affected by later attachment. In an agreement of sale, at the time of attachment, though title is vested in the executor of the agreement in effect and substance, his right is only to receive balance consideration amount and a duty to execute sale deed on receipt thereof. In effect, what was attached was only that right and not confers of property as such, attachment being effective only in regard to that right, attachment would not render subsequent sale void. Sale will stand with charge regarding purchase price remaining unpaid on the date of attachment<sup>18</sup>.

b The property was sold out before attachment, but the sale deed got registered after the order of attachment only. The purchaser's rights are protected under Order 38 Rule 10 CPC read along with Section 47 of the Registration Act, which will relate back to the date of execution of the sale deed<sup>19</sup>.

c Sale deed executed prior to attachment before judgment can be registered subsequently and will prevail over the attachment. Rule 5 of Order 38 CPC would not apply where the sale deed has already been executed by the defendant in favour of a third person. A transaction of sale having already taken place even prior to the institution of a suit cannot be said to have been made with the intention to obstruct or delay the execution of any decree. Rule 10 of Order 38 makes it clear that attachment before judgement shall not affect the rights, existing prior to the attachment, of persons not parties to the suit. It would, however, be a different case altogether, if a creditor wants to assail a pre-attachment transfer by sale under Section 53 of the Transfer of Property Act, 1882. Such a suit would be decided on totally different considerations in accordance with the provisions of Section 53 of the Act. Neither in Section 64 nor in the Form prescribed for attachment, there is any prohibition for submitting the sale deed for registration which has already been executed prior to an attachment. In view of Section 54 of the Transfer of Property Act, after the execution of the sale deed with consideration all the ingredients of sale are fulfilled except that in case of tangible immovable property of the value of Rs.100 and upwards, it can be made only by registered instrument. Section 47 of the Registration Act makes it clear that after the registration it will relate back to the date of execution of the sale deed. The act of registration is to be performed by the registering authority. Thus the vendee gets all rights which will be related back on registration from the date of the execution of the sale deed and such rights are protected under Order 38 Rule 10 CPC read along with Section 47 of the Registration Act. When the property belonged to the defendant /judgment debtor (vendor) and the sale deed had already been executed by him prior to the attachment before judgement and only its registration remains, then neither the attachment before judgement nor a subsequent attachment

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17. *Rajender Singh v. Ramdhar Singh* [(2001) 6 SCC 213 : 2001 KHC 1133].

18. *Rameshan v. Abdul Majeed* [1987 (1) KLT 864 : 1987 KHC 250 (DB)].

19. *Hamda Ammal v. Avadiappa Pathar* [(1991) 1 SCC 715 : JT (1990) 4 SC 391 : 1991 KHC 237].

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or court sale of the property would confer any title by preventing the relation back. The fact that the document of sale had not been registered until after the attachment makes no difference. Even an unregistered document can be received as evidence for purposes mentioned in the proviso to Section 49 of the Registration Act. The contention that till registration, the execution of the sale deed does not confer any rights whatsoever on the vendee cannot be accepted<sup>20</sup>.

Alienations and transfers by judicial directions during the pendency of the suit are considered by the statutes well. Unless a case of irreparable loss or damage is made out, court should not permit it. Otherwise, it would lead to loss or damage to the party who may ultimately succeed and multiple proceedings may have to be resorted to. Judicial discretion has to be disciplined by jurisprudential ethics and can by no means conduct itself as an unruly horse. All concerned, especially those entrusted with administering justice would not indulge in such misadventures lest credibility of legal process, which is bedrock of public confidence in the institutional system, stands undermined<sup>21</sup>.

Practice of passing two sets of orders simultaneously, one ordering temporary injunction against alienation of property and the other directing the party to furnish security to avert attachment of the property before judgement, is always deprecated<sup>22</sup>. Thus, in a suit, while deciding an application for the attachment of property before judgement, Court restrained the defendant from alienating the property as well. Court ought not to have simultaneously passed two sets of orders, one under Order 38 and the other under Order 39<sup>23</sup>. Provisions of Order 39 Rule 1 CPC contemplate temporary relief to a petitioner on an imminent risk to the property in dispute in the suit being wasted by certain acts of the respondent. Order 38 Rule 5 CPC, infact applies at a later stage in the suit where the petitioner seeks to execute the decree. While both provisions intend to give a protective cover to the petitioner, both at the time of institution of and during pendency of the suit, to preserve the property which would afford relief to the petitioner in real terms, there is ofcourse an important distinction in the nature of the property contemplated in both the provisions. Under Order 39 Rule 1, the property sought to be preserved is the 'property in dispute in a suit', whereas, it is the respondent's property under Order 38 Rule 5, the words used are 'his property' following specific reference to '...the respondent, with an intent to obstruct or delay...'. The distinction reinforces the need to preserve the property till final orders are passed in the former (Order 39 Rule 1), and to secure the petitioner for facilitating execution of a decree in the latter (Order 38 Rule 5). Though the terms 'order' and 'decree' can be interchangeably used depending on the nature of the application, the

20. *Hamda Ammal v. Avadiappa Pathar* [(1991) 1 SCC 715 : 1991 KHC 237]; *V. K. Sreedharan v. Chandramath Balakrishnan* [(1990) 3 SCC 291 : 1990 KHC 984].

21. *Dev Prakash v. Indira* [(2018) 14 SCC 292 : 2017 KHC 4452].

22. *V. G. Quenim v. Bandekar Bros. (P) Ltd.* [(2002) 10 SCC 513 : 2002 KHC 3933].

23. *Joseph P. T. v. Kabeer Husain Minanna and Others* [2020 (1) KLT 88 : 2020 (2) KLJ 436 : 2019 (5) KHC 969].

thrust of the two provisions, if read together, is saving the suit property till the right of the petitioner is established to proceed with the suit and to save the petitioner from the decree (or the possibility thereof), being frustrated once the suit nears culmination<sup>24</sup>.

a In a suit against the partnership firm and its partners, even the personal property of any of the partners can be attached before judgement, where the Court is satisfied that in the event of passing of a decree, there is apprehension that he who is a party to the suit is about to screen away the property or remove the same from the jurisdiction of the Court<sup>25</sup>. In a suit for recovery of money, b an application for attachment of the property before judgement was also filed. Defendant's property was admittedly, hypothecated to a bank. Attachment order must have stated that the attachment was subject to the first charge of the bank<sup>26</sup>.

c Order 38 Rule 5 is silent on sales to strangers prior to the order of attachment. A transaction took place earlier to the suit is beyond the scale of Section 64 CPC<sup>27</sup>.

d Passing an order on an application under Rule 5 of Order 38 CPC is a radical step with extreme promptness. Courts need pass a speaking order, satisfied with reasons traceable from the materials on record<sup>28</sup>. Where the property to be attached is lying beyond the jurisdiction of the Court, Section 136 CPC will apply and an omission in sending the Order directly to the subordinate Court, instead of the District Court is only an irregularity and will not vitiate the attachment<sup>29</sup>.

e The provisions of Rule 5(1) as to satisfaction of the court that the defendant intended to dispose or remove the property to obstruct or delay the execution of decree passed against him, must be complied with '*stricto sensu*'. Mere vague allegations that the defendant attempted to delay or obstruct the execution of the decree would be insufficient to hold that properties are liable for attachment before judgement<sup>30</sup>.

f Renox Commercials' case laid down the modus as to the exercise of jurisdiction under Order 38 Rule 5 CPC. The decision prescribed that,

(a). an order under Order 38 Rule 5 can be issued only if circumstances exist as are stated therein to the satisfaction of the Court.

g (b). the Court would not be justified in issuing an order for attachment before judgement, or for security merely because it thinks that no harm would be done thereby or that the defendants would not be prejudiced.

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24. *Prabha Surana v. Jaideep Halwasiya* [AIR 2021 Cal. 212 : 2021 KHC 4377].

25. *D. V. Krishna Murthy v. P. Vishwanath* [AIR 1994 AP 43 : 1994 KHC 1471].

26. *Syndicate Bank v. M/s. National Wire Products* [AIR 1994 Guj. 2 : 1994 KHC 1731].

h 27. *Abdul Jalal v. Mariya Financiers* [2002 (2) KLT 107 : 2002 (1) KLJ 482 : AIR 2002 Ker. 276 : 2002 KHC 392].

28. *GCDA v. Harrisons Malayalam Ltd.* [AIR 2002 Ker. 119 : 2002 KHC 206].

29. *Rajender Singh v. Ramdhar Singh* [(2001) 6 SCC 213 : AIR 2001 SC 2220 : 2001 KHC 1133].

30. *Ratnamma Pillai Deepa v. Govindan Pillai* 1995 AIHC 3534 (Ker.); *Renox Commercials Ltd. v. Inventa Technologies (P) Ltd.* [AIR 2000 Mad. 213 : 2000 KHC 3717].



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

a

(d) a mere allegation that the defendant is selling off his properties is not sufficient. Particulars must be stated.

(e) an order of attachment before judgment is a drastic remedy and the power has to be exercised with utmost care and caution, as it may be likely to ruin the reputation of the party against whom the power is exercised. As the Court must act with the utmost circumspection before issuing an order of attachment, the affidavit filed by the applicant should clearly establish that the defendant, with intent to obstruct or delay the execution of the decree that may be passed against him is about to dispose of the whole or any part of his property.

b

c

(f) a mere mechanical repetition of the provisions in the Code or the language therein without any basic strata of truth underlying the allegation or vague and general allegations that the defendant is about to dispose of the property or to remove it beyond the jurisdiction of the Court, totally unsupported by particulars, would not be sufficient compliance with Order 38 Rule 5 of CPC.

d

(g) an attachment before judgment is not a process to be adopted as a matter of course. The suit is yet to be tried and the defence of the defendant is yet to be tested. At the nebulous juncture, the relief which is extraordinary could be granted only if the conditions for its grant, as per the provisions of the Code, stand satisfied. This process is never meant as a lever for the plaintiff to coerce the defendant to come to terms. Utmost caution and circumspection should guide the Court while dealing with Order 38 Rule 5 CPC applications<sup>31</sup>.

e

An order passed under Order 38 Rule 5 CPC, without giving reasons would be an illegal order. Power to attach properties before judgement cannot be exercised in routine, casual manner<sup>32</sup>. A mechanical adoption of the language in the Statute will not serve the purpose. There must be positive and definite materials that the defendant is about to dispose of the whole or part of his property, and that such disposal is with the intention of obstructing or delaying the execution of any decree that may be passed against the defendant<sup>33</sup>.

f

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If a strong *prima facie* case is made out and a balance of convenience is in favour of granting an interim relief, Court exercising power (under Section 9 of Arbitration Act, 1996) should not withhold relief on the mere technicality

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31. *Renox Commercials Ltd. v. Inventa Technologies (P) Ltd.* [AIR 2000 Mad. 213 : 2000 KHC 3717].

32. *S. P. Valsakumar Pillai v. MACT* [AIR 2009 Ker. 36 : 2009 (1) KHC 750].

33. *T. Srinivasan and Anr. v. V. Srinivasan* [AIR 1985 Mad.269 : 1985 KHC 1882].

of absence of averments incorporating the grounds for attachment before judgement under Order 38 Rule 5 CPC<sup>34</sup>.

a An attachment before judgement shall not be dismissed simply on the reason that there is no disclosure of source of information in the affidavit filed in support of the application. In fact, it is a curable defect and if it is found to be *bonafide* omission and when there is evidence to show the existence of intention on the part of the defendant to part away with the property in order to delay or defeat the decree that may be passed in the suit, the court is not expected to dismiss the application simply on the reason of non-disclosure of source in the affidavit. There should be a pragmatic approach to have a judicial determination as to the intention, if any possessed by the defendant and its credibility in relation to the attending circumstances and the evidence, if any, available on the point. There may be cases in which the plaintiff has direct knowledge or notice regarding the attempt on the part of the defendant to part away with the property and it is otiose that in that situation also, he must take the responsibility of introducing the informer in his affidavit for maintaining an application for attachment before judgement. The requirement under Order 38 Rule 5 CPC is entirely different as is resting on the intention of the defendant to defeat and delay the execution of the decree that may be passed by transfer of his property or its removal. The guidelines issued by the Calcutta High Court in Premraj Mundra's case<sup>35</sup> which had taken approval in Raman Tech and Process Engg. Co.s<sup>36</sup> case should not be taken as an authority to substitute the guidelines in the place of a mandatory requirement or as an indivisible part of the provision<sup>37</sup>.

e A vague and general allegation regarding attempt or intention of the defendant is not sufficient and plaintiff has to state the grounds on which he entertains his belief or the apprehension that the defendant would dispose of or remove his property. The discussion made in *Skoda Auto India (P) Ltd., Maharashtra v. M/s. St. Antony's Trading Co. and Others*<sup>38</sup> must be viewed conjointly with the requirement of the provisions dealing with the attachment before judgement and the guidelines issued<sup>39</sup>.

f A judgement-debtor who had not objected to an attachment of immovable property made before judgement cannot raise objection to attachment in execution of the decree<sup>40</sup>.

g An order passed under Order 38 Rule 5 of the Code is neither a decree nor an order appealable under Order 43 Rule 1. But, an attachment order

34. *Essar House (P) Ltd. v. Arcelor Mittal Nippon Steel India Limited* [AIR 2022 SC 4294 : 2022 KHC 6950 : 2022 KHC 6950].

35. AIR 1951 Cal.156.

36. 2008 KHC 4380.

h 37. *Palakuzhiyan Moideen @Moitheenkutty v. James Pullanthanikkal* 2022 (5) KHC 581 : 2022 (6) KLT SN.19; Please see *Pareed Master v. Antony* [1987(2) KLT 649 : 1987 KHC 548 (DB)] also.

38. 2018 (1) KHC 574.

39. *Palakkuzhiyan Moitheen @ Moitheenkutty v. James Pullanthanikkal* [2022 (5) KHC 581 : 2022 (6) KLT SN.19].

40. *Sanjay Jacob v. Sakthan Kuries and Loans (P) Ltd.* [2010 (4) KLT 776 : 2010 KHC 1002].

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passed without issuing notice under Rule 5(1) of Order 38 can be deemed to be one passed under Rule 6 and is amenable for appeal<sup>41</sup>. Where the order passed comes under both Rules 5 and 6 of Order 38 CPC, appellate court has less scope to peep into the correctness or otherwise of that part of the order which falls under Rule 5<sup>42</sup>. No appeal is maintainable against an order dismissing an application under Order 38 Rule 5 as provided under Order 43 Rule 1(q) CPC<sup>43</sup>.

An order refuting the prayer for attachment before judgement can be a 'case decided' as per Section 115 CPC and revisable if otherwise maintainable<sup>44</sup>.

The High Court, in an application under Article 227, against an order under Order 38 Rule 5 seeking its visitatorial supervisory jurisdiction over subordinate Courts, if convinced on the non-exercise or mal-exercise of jurisdiction or otherwise in exceeding of exercise of its jurisdiction has committed an error of law apparent on the face of the record, may interfere with such flaws in the order<sup>45</sup>.

In a case of effecting attachment of property situated outside the local limits of a Civil Court, failure of the Civil Court to send the order of attachment to the District Court within whose jurisdiction the attached property is situated, does not invalidate the attachment<sup>46</sup>. If the order of attachment was obtained on insufficient grounds, the plaintiff will be visited with the liability to pay compensation under Sec. 95 CPC.

The attachment made after a contract for specific performance does not affect a prior agreement to sell and attachment could only fasten the debtor's right to the unpaid purchase money<sup>47</sup>.

An attachment before judgement prevents alienation of the property but does not confer any title by way of charge or otherwise on the attaching decree-holder. It prevents private alienations, but not involuntary alienations. So, when a property attached before judgement was sold subsequently in execution of a money decree, it could not be sold again at the instance of the attaching decree-holder before it was actually sold in Court auction. Once a judicial sale is taken place, all previous attachments effected on that property would fall to the ground<sup>48</sup>.

41. *Unni v. Vijayan* [AIR 1984 Ker. 32 : 1983 KHC 208]; *Saseendran v. Sadanandan* [2003 (3) KLT 680 : 2003 KHC 1172]; *Duraiswamy v. R. Ramachandran*, 2002 (3) MLJ 540.

42. *Vasu v. Narayanan Namboothirippad* [AIR 1962 Ker. 261 : 1961 KHC 261].

43. *Mathukkutty Mathew v. Sunny and Others* [2015 (1) KLT 620 : 2015 KHC 114].

44. *Mytheenkunju v. Azeekunju* [1992 (1) KLT 713 : 1992 KHC 138]; *S. Selvarathinam v. Rajasekharan Nair* [2000 (2) KLT 372 : AIR 2001 Ker. 1 : 2000 KHC 369]; *International Air Transport Assn. v. Hansa Travels (P) Ltd.* [1997 (2) KLT SN 52 : AIR 1998 Ker. 80 : 1997 KHC 54]; *Varghese v. Varghese*, 2001 (1) KLT 123.

45. *Surya Deva Rai v. Ram Chander Rai* [(2003) 6 SCC 675 : AIR 2003 SC 3044 : 2003 KHC 1144]; *Saseendran v. Sadanandan* [2003 (3) KLT 680 : 2003 KHC 1172]; *R. S. Pillai v. M. L. Piratchi* [AIR 2000 Mad. 483 : 2000 KHC 3776].

46. *Rajender Singh v. Ramdhar Singh* [(2001) 6 SCC 213 : AIR 2001 SC 2220 : 2001 KHC 1133] at 2224.

47. *Narayanan Nair Ramakrishnan Nair v. Zakaria Kuriakose* [AIR 1991 Ker. 152 : 1990 KHC 112].

48. *Thiru Venkita Reddiar v. Noordeen* [AIR 1978 Ker. 11 : 1977 KHC 302].

a An order of attachment before judgement under O.38 R.5 CPC will come to an end on the dismissal of the suit on merits. Even if the Appeal Court subsequently allows the appeal and reverses the decree of dismissal of suit passed by the trial Court, it will not result in the automatic revival of attachment passed by the trial Court<sup>49</sup>. Statutory duty is imposed on the Court at the time of dismissal of the suit wherein an order of attachment of the property of the defendant, before judgement, had already been passed and in force under Order 38 Rule 5 CPC, to pass an order withdrawing the attachment made before judgement, even without an application by the defendant for the same<sup>50</sup>.

b If an execution application is dismissed, the attachment ceases as Order 21 Rule 57 applies to an attachment before judgement. Rule 57 deals only with attachment made in execution proceedings. When an application to execute a decree by proceedings against a property attached at the pre-decretal stage under Order 38 is dismissed, even if the execution Court does not give any indication as to the continuance of the attachment, the attachment would not cease. Attachment under Order 38 ceases to exist only by the full satisfaction of the decree or when the attachment is otherwise lifted, with the only exception under Rule 11A of Order 38 CPC<sup>51</sup>.

d The validation in Order 38 Rule 5 CPC is not to convert an unsecured debt into a secured debt. Merely having a just or valid claim or a *prima facie* case will not entitle the plaintiff to an order of attachment before judgement, unless the ingredients of Order 38 Rule 5 CPC are established. The satisfaction required to be recorded as per Rule 5(1) is that the defendant with an intention 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. The Court must be satisfied that there is a reasonable chance of a decree being passed in the suit and that is how there is a legal requirement of the court being satisfied about the existence of a *prima facie* case. 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 Rule 5, 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 the next stage of examining whether the interest of the plaintiff should be protected by exercising power under Order 38 Rule 5 CPC. Merely having a just or valid claim or a *prima facie* case will not entitle the plaintiff to an order of attachment, unless he also establishes that the defendant is attempting to remove or dispose of his assets with the intention of defeating the decree that

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49. *Gopi v. Dr. Bhaskaran and Another* [2015 (3) KLT 835 : 2015 (4) KHC 360].

50. *Prakashan v. Clement @ James* [2015 (1) KLT 151 : 2014 KHC 835].

51. *Tony v. Navodaya Enterprises* [AIR 2004 Ker. 245 : 2004 KHC 350] at 247 (DB)

may be passed. Equally settled is the law that, even where the defendant is removing or disposing his assets, an attachment before judgement will not be issued, if the plaintiff is not able to satisfy the Court that he has a *prima facie* case. Any attempt by the plaintiff to utilize the provisions of Order 38 Rule 5 CPC, as leverage for coercing the defendant to settle the suit claim should be discouraged.

Attachment of property of one at the instance of the other is not simple. The mandate that no one should be deprived of his property, without due process of law, is both a safeguard and a caution as well. Courts are doubly cautious especially while exercising discretionary and equitable remedy to an aggrieved. The guiding and weighing factor is ofcourse the settled principles of law in tune with the statutes and not sentiments.

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## **A Comprehensive analysis of the Digital Personal Data Protection Act, 2023**

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### **Act Overview**

The Digital Personal Data Protection Act, 2023 marks a significant milestone in the evolution of data privacy and protection laws in India. Enacted on 11th August, 2023, this comprehensive legal framework is designed to address the complexities of data privacy in the digital age. Its primary purpose is to establish a balanced approach that respects the right of individuals to protect their personal data while recognizing the legitimate needs of entities to process such data for lawful purposes.

This Act reflects a growing global trend towards strengthening personal data protection in response to increasing digitalization and the vast amounts of personal data being generated and processed. In an era where data is often described as the new oil, the Act provides a robust legal structure to ensure that this valuable resource is handled responsibly and ethically.

The evolution of digital data protection globally has been driven by the rapid growth of digital data and technology's increasing role in daily life. Initially, data protection laws addressed specific privacy concerns, but with the internet's rise and the digital economy, comprehensive frameworks like the GDPR (General Data Protection Regulation) became the norm, influencing global legislation. Many countries, including India, have updated their data protection laws to balance personal data safeguarding with digital innovation and economic growth.