

Order-191

Date- 10/08/2026

Today is fixed for Argument and hearing on the petition for attachment before judgment filed by Defendant No.3.

The plaintiff is present by filing hazira.

Defendant No.3 is also present by filing hazira and has submitted an additional written statement today.

The record is taken up for hearing of the petition filed by Defendant No.3 under **Order XXXVIII Rule 5 of the Code of Civil Procedure, 1908 read with Section 57 of the Artha Rin Adalat Ain, 2003**, praying for attachment before judgment of the scheduled Property No.1 and Property No.2 belonging to Defendant Nos.1 and 2 respectively.

Heard the learned Advocate for Defendant No.3/Petitioner. Perused the petition, affidavit, firisti, documents annexed thereto and the materials available on record.

It appears from the record that the instant suit has been instituted by the plaintiff for realization of a sum of Tk. 1,89,46,954/- (Taka One Crore Eighty-Nine Lakh Forty-Six Thousand Nine Hundred Fifty-Four) only as outstanding dues as on 31.03.2008 against the defendants.

The petitioner, Defendant No. 3, has contended that Defendant No. 1 and Defendant No. 2 are the principal borrowers of the impugned credit facility, whereas the petitioner stood as mortgagor and guarantor. It is further stated that the petitioner mortgaged his landed property together with a six-storied building standing thereon as security for the loan, while the principal borrowers did not mortgage any property of their own. The petitioner has further contended that under Section 6(5) of the Artha Rin Adalat Ain, 2003, if the decretal dues can be realized from the properties of the principal borrowers, there would be no necessity to proceed against the mortgaged property of the guarantor/mortgagor.

The petitioner has further alleged that Defendant No. 1 and Defendant No. 2 have been closing down their business operations and are disposing of, or attempting to dispose of, their movable and immovable properties with a view to defeating and delaying the execution of any decree that may ultimately be

passed in the suit. It has also been asserted that there is every likelihood that they might fly away to abroad after disposing of the scheduled properties and as such it necessitates to attached the scheduled properties before pronouncement of judgment.

Learned advocate for the petitioner further asserted that since no answer to the Show Cause has been provided by the defendant No. 1 and 2, the court has no other option but to grant the petition.

Upon careful consideration of the petition, the affidavit, the documents annexed thereto and the materials available on record, it appears that the instant suit has been instituted by the plaintiff-creditor for realization of its alleged outstanding loan dues. The petition under **Order XXXVIII Rule 5 CPC**, however, has not been filed by the plaintiff but by **Defendant No.3**, who himself claims to be the mortgagor and guarantor of the loan transaction. Thus, the petitioner is not the decree-holder or claimant seeking realization of the suit amount from the defendants; rather, he is a defendant in the suit seeking an order of attachment against the properties of his co-defendants.

The provisions of **Order XXXVIII Rule 5 CPC** are intended to protect the eventual execution of a decree and to prevent a defendant from obstructing or defeating such execution by disposing of or removing his property. The provision is, therefore, essentially protective of the interest of the plaintiff/decreed-holder. It is not ordinarily intended to enable one defendant, merely because he apprehends that he may ultimately be proceeded against as a guarantor or mortgagor, to obtain an attachment before judgment over the properties of another defendant.

In the present case, the petitioner has not been able to demonstrate any independent or legally enforceable claim against the properties of Defendant Nos.1 and 2 which could justify invocation of **Order XXXVIII Rule 5 CPC** in his favour. More importantly, the plaintiff, being the creditor and the party who has instituted the suit for realization of the loan dues, has itself not sought attachment before judgment of the properties of Defendant Nos.1 and 2.

Another significant aspect of the matter is that the loan transaction is already secured by the mortgage created by Defendant No.3. It is admitted from the petition itself that Defendant No.3 mortgaged his landed property together with a six-storied building standing thereon as security for the impugned credit facility. **Therefore, the creditor has already obtained substantial security against the loan transaction through the mortgaged property.** In such

circumstances, merely on the apprehension expressed by Defendant No.3 that the principal borrowers may dispose of their properties, this Court does not find sufficient legal basis to impose the extraordinary remedy of attachment before judgment over the properties of the other defendants.

The allegation that Defendant Nos.1 and 2 have been closing down their business operations and are attempting to dispose of their movable and immovable properties has remained substantially unsubstantiated. Mere apprehension, without supporting materials demonstrating an actual attempt to alienate or remove the properties with an intention to defeat the possible decree, cannot by itself justify the drastic remedy contemplated under Order XXXVIII Rule 5 CPC.

Furthermore, attachment before judgment is a discretionary and exceptional relief. The Court must exercise such jurisdiction cautiously, since an order of attachment may seriously affect the defendant's right to deal with his property even before adjudication of the suit. The Court must, therefore, be satisfied that the statutory requirements have been fulfilled before granting such relief.

In the instant case, the petitioner has failed to establish the necessary circumstances warranting attachment before judgment. Rather, the materials on record disclose that the loan is already secured by the mortgage created by Defendant No.3 himself. The petition has additionally been filed not by the plaintiff-creditor but by a co-defendant, and the petitioner has failed to demonstrate any independent legal basis upon which he can invoke Order XXXVIII Rule 5 CPC to secure the plaintiff's claim by attaching the properties of his co-defendants.

It may further be observed that the question as to whether and to what extent the plaintiff may proceed against the principal borrowers, guarantors and mortgagor, and the applicability of Section 6(5) of the Artha Rin Adalat Ain, 2003, are matters to be determined in accordance with the pleadings, evidence and applicable provisions of law. Such questions, however, do not furnish sufficient ground for granting an attachment before judgment at this stage.

Having regard to the totality of the circumstances, this Court is of the considered view that the essential requirements for exercise of jurisdiction under Order XXXVIII Rule 5 CPC have not been established by Defendant No.3/Petitioner. The petitioner has failed to show that Defendant Nos.1 and 2 are attempting to defeat or obstruct the execution of any decree that may ultimately be passed by disposing of or removing their properties. Moreover,

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the loan transaction is already secured by the mortgage furnished by Defendant No.3, and the plaintiff itself has not sought the relief of attachment before judgment.

Accordingly, the petition filed by Defendant No.3 under Order XXXVIII Rule 5 of the Code of Civil Procedure, 1908 read with Section 57 of the Artha Rin Adalat Ain, 2003 is hereby rejected.

The prayer for attachment before judgment of the properties described in Schedule-1 and Schedule-2 to the petition is accordingly **refused**.

The additional written statement filed by Defendant No.3 today is accepted and kept with the record.

To-----recording of evidence of the defendant's side.