

(2017) 02 MP CK 0157
In the Madhya Pradesh High Court
Case No : 4896 of 2015

Keshav Singh Tomar & ors.

APPELLANT

Vs

The State Of Madhya Pradesh & anr.

RESPONDENT

Date of Decision : 01-02-2017

Acts Referred:

Constitution of India, Article 227 -
Power of superintendence over all courts by the High Court
Code of Civil Procedure, 1908, <a href=3859 — Order 38Rule
5>Order 38Rule 5

Citation : (2017) 02 MP CK 0157

Hon'ble Judges : Vandana Kasrekar

Bench : Single Bench

Advocate : Atul Choudhari, S.P. Pandey

Judgement

1. The petitioners have filed the present petition under Article 227 of the Constitution of India challenging the order dated 11.12.2014 passed by 1s t Additional District Judge, Satna in Civil Suit No.01-B/2014.

2. The respondent/plaintiff has filed the suit for recovery of amount and legal expenses against the petitioners. The respondent in the plaint has alleged that the petitioners have taken personal loan from the respondent to the tune of Rs.2,21,89,000/-. After taking loan from the respondent, the petitioners have issued a cheque for repayment of loan. During pendency of the said civil suit, the respondent has filed an application under Order 38 Rule 5 of the Code of Civil Procedure (hereinafter in short referred to as "the Code") to attach the property before judgment. The respondent/plaintiff has stated in the application that the land which he requested for attachment is already mortgaged with the Bank and the loan is granted by Punjab and Sind Bank. The respondent has alleged that the petitioners are trying to sell the property and leave Satna city. The respondent has further stated that the petitioners have engaged brokers and are selling the property. The petitioners have filed a detailed reply to the said application and denied that they are selling the property. It is further denied that

they are planing to leave Satna city. It is further stated that the respondent is a small trader and has no money to give to the petitioners. The trial Court after hearing both the parties has allowed the application vide order dated 11.12.2014. Being aggrieved by the aforesaid order, the petitioners have filed the present petition.

3. Learned counsel for the petitioners submits that the trial Court has erred in allowing the application filed under Order 38 Rule 5 of the Code. It is submitted that there is no concrete evidence to establish the fact that the petitioners are intending to sell the property. It is further submitted that the application submitted by the respondent does not fulfill the requirement of Order 38 Rule 5 of the Code. In support of his submission, learned counsel for the petitioners relied on the decision rendered by the Apex Court in the case of Raman Tech. & Process Engg. Co. and another Vs. Solanki Traders, (2008) 2 SCC 302. It is submitted that in the said case, the Hon"ble Supreme Court has laid down that merely having a just and valid claim or a prima-facie case, will not entitle the respondent/plaintiff to an order of attachment before the judgment, unless he also establishes that the defendants/petitioners are attempting to remove or dispose of their assets with the intention of defeating the decree that may be passed. The powers under Order 38 Rule 5 of the Code has to be exercised sparingly and rarely by the Court, because it amounts to restrain the right of the person to enjoy the property. Learned counsel for the petitioners further relied on the judgments passed in the cases of Renox Commercials Ltd. Vs. Inventa Technologies Pvt. Ltd. , AIR 2000 Mad 213 and Herald Engineers Vs. Wonderpack Industries Pvt. Ltd ., 2013 (4) Mh.L.J. 217.

4. In the light of aforesaid decisions, learned counsel for the petitioners submits that the order passed by the trial Court is illegal. It is further submitted that the respondent has not filed any document to show that the petitioners" are intending to dispose of the property. In the said application, the respondent has not given details of the property, which the petitioners are intending to sell during pendency of the said civil suit.

5. On the other hand, learned counsel for the respondent supports the order passed by the trial Court and submits that the trial Court has not committed any error in passing the impugned order.

6. I have heard learned counsel for the parties and perused the record. Order 38 Rule 5 of the Code of Civil Procedure deals with Attachment before judgment, which 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 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."

7. Bare reading of the aforesaid provision would make it clear that there are essential requirements, which must be proved to the satisfaction of the Court. They are as follows :

(1) The defendant is about to dispose of the whole or any part of his property, or.

(2) The defendant is about to remove the whole or any part of his property from the local limits of the jurisdiction of the Court.

(3) That, the defendant is intending to do so to cause obstruction or delay in the execution of any decree that may be passed against him. Vague and general allegations that the Defendant is about to dispose of the property or remove it beyond the jurisdiction of the Court, unsupported by particulars, would not be sufficient compliance with the rule.

(4) It is incumbent upon the plaintiff to state the grounds on which he entertains the belief or apprehension that the Defendant would dispose of or remove the property, or, to give the source of his information and belief in the matter through an Affidavit.

8. Thus, the jurisdiction of the Court to order attachment before judgment arises only when it is satisfied by the Affidavit, supported by the particulars that the defendant is about to dispose of the whole or any part of his property with the intention to obstruct or delay the execution of the decree that may be passed against him. Therefore, the essential requirement for an Order of Attachment before Judgment is the mala fide intention and the conduct of the defendant in disposing of the property with the dishonest intention of defeating or delaying the decree that may be passed in the Suit.

9. Thus, as per Order 38 Rule 5 of the Code of Civil Procedure, the specific particulars or details of the property, which the defendant is intending to sell has

to be given in the application. In present case, no specific particulars supported by material evidence are available. The trial Court in paragraph-7 of the impugned judgment has given a finding that the petitioners have entered into an agreement to sale as well as to register a sale-deed in respect of the said property and the same has been published in daily news-paper namely "Dainik Bhaskar". Learned counsel for the petitioners argued that the property, which is mentioned in paragraph-7 of the judgment has already been sold by the petitioners before filing of the suit by the respondent in pursuance of the action taken by the Bank under The Securitisation & Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002. The Apex Court in the case of Raman Tech. (supra) in paragraph-5 has held as under :

"5. The power under Order 38 Rule 5 Code of Civil Procedure is a drastic and extraordinary power. Such power should not be sparingly and strictly in accordance with 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 utilise the provisions of Order 38 Rule 5 as a leverage for coercing the defendant to settle the suit claim should be discouraged. Instances are not wanting where bloated and doubtful claims are realised by unscrupulous plaintiffs by obtaining orders of attachment before judgment and forcing the defendants for out-of-court settlements under threat of attachment."

In the case of Renox Commercials Ltd. (supra) in paragraph-26 has held as under :

"26. Before dealing with the said question as to whether those specific allegations supported by materials in the present case, let us refer to the guiding principles that can be deduced from the perusal of all the authorities cited by the Counsel on either side as mentioned above. The following are the guiding principles :-

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

(2) 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 defendants would not be prejudiced.

(3) That the affidavit in support of the contentions of the applicant, should not be vague and 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.

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

(5) 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.

(6) 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.

(7) 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 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. Hence utmost caution and circumspection should guide the Court."

Similarly, in the case of Herald Engineers (supra) in paragraph-10 has held as under :

"10. The Apex Court in the case of Raman Tech and Process Engg Co. (supra) has in unequivocal terms held that power under Order 38, Rule 5, Civil Procedure Code is a drastic and extraordinary power. Such power should not be exercised mechanically or merely for the asking. It has been further held that it should be used sparingly and strictly in accordance with the Rule. It has been further held that the instances are not wanting where bloated and doubtful claims are realized by unscrupulous plaintiffs by obtaining orders of attachment before judgment and forcing the defendants for out-of-court settlements under threat of attachment. It has been further held that a defendant is not debarred from dealing with his property merely because a suit is filed or about to be filed against him. It has been held that 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."

10. Thus, as per above cited cases, the powers given under Order 38 Rule 5 of the Code is drastic and extraordinary and the same must be used sparingly and not in a mechanical manner. In the present case, the Court below has not assigned any reasons for taking drastic step in passing the said order and has passed the impugned order in a mechanical manner. Thus, in the light of aforesaid reasons, the writ petition stands allowed. The impugned order 11.12.2014 passed by the trial Court is set aside and consequently the application filed by the respondent under Order 38 Rule 5 of the Code is hereby dismissed.