14.05.2025

Present: Sh. Akhand Pratap Singh Chauhan, Ld. counsel for plaintiff.
Ld. counsel for D-1 to D-3 through VC.
Ld. counsel for D-4 through VC.

O R D E R

1. Vide this order, I shall decide the following two applications:

   1. **Application no. 1:**

      Plaintiff's application u/O XXXVIII Rule 5 r/w sec. 151 CPC seeking a direction to the defendants to "*furnish an affidavit disclosing the value of assets and subsequently keep any property of the same value….. as security with court ….. until disposal of the case*".

   2. **Application no. 2 :**

      D-2 to D-4's joint application u/O I Rule 10 CPC seeking deletion of their names from the array of parties.

Application no. 1

2. It is Plaintiff's case before this court that an amount of 86,000 USD was inadvertently transferred by the plaintiff company into the bank account of the defendants. As per plaintiff, the said money is being illegally retained now and thus, plaintiff has sued the defendants seeking recovery of the said money with interest.

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3. Vide this application, plaintiff wants that defendants be called upon to furnish security, before judgment.

4. Application is opposed by the defendants who argued that they have a good case against the plaintiff in as much as, the aforesaid amount was retained by D-1 company as compensation for breach of contract between plaintiff company and D-1. They claim that before a direction u/O XXXVIII Rule 5 CPC can be passed by a court, it is necessary for the plaintiff to satisfy the court that **the defendant, with intent to obstruct or delay the execution of any decree that may be passed against him, is about to dispose off whole or any part of his property or is about to remove it from the local limits of the jurisdiction of the court.**

5. It was argued on behalf of the defendants that in the application, nothing has been pleaded by the plaintiff to meet either of the two conditions laid in Order XXXVIII Rule 5 CPC and therefore, the application is liable to be dismissed.

6. On the other hand, counsel for plaintiff argued that the defendants have illegally retained the money transferred to them due to over-sight and this conduct of defendants show that they would avoid a decree, if any, passed against them.

7. I have given thoughtful consideration to the rival arguments of the parties.

8. Under Order XXXVIII Rule 5 CPC, defendant can be called upon to furnish security, in case where court is satisfied that **the defendant, with intent to obstruct or delay the execution of any decree that may be passed against him, is about to dispose off whole or any part of his property or is about to remove it from the local limits of the jurisdiction**

<u>of the court.</u> Such an application can be made at any stage of the suit.

9. In the present application, nothing is stated by the plaintiff to even *prima facie* demonstrate that any act has been done by either of the defendants with intent to obstruct or delay the execution of any decree which may be passed in this case. Neither it is claimed in the application that the defendants are disposing off any of their property nor is it claimed that they are removing any such property beyond the local limits of this court. If that be the case, without the plaintiffs satisfying this court qua the aforesaid acts of the defendants, even if *prima facie*, no order u/O XXXVIII Rule 5 CPC can be made against the defendants.

10. Considering the above, in my humble opinion, the present application is without any merit. It is dismissed accordingly.

<u>Application no. 2</u>

11. D-2 to D-4 want deletion of their names from the array of parties on the premise that they are/were mere directors of D-1. D-1 is a separate legal entity and thus, can be sued in its own name. It is their argument that as per plaintiff's case, some money was inadvertently paid to D-1. They argued that if the same be taken on its face value, only D-1 shall be liable to return the said money to plaintiff and therefore, they are neither necessary nor property parties to the present suit.

12. On the other hand, plaintiff argued that the concept of separate legal entity is not an iron clad concept and in appropriate cases, court can always lift the corporate veil of a company and see the individuals who run the said corporation. They argued that in a catena of judgments, it

has been held that where the plea of corporate entity is employed to defraud creditors, commit illegality or to evade existing obligation or to circumvent a statute or justify a wrong, in such cases, corporate veil can be lifted.

13. It was argued on behalf of the plaintiff that in the present case, D-2 to D-4 were directors of D-1 and D-2 had written numerous e-mails, for and on behalf of D-1 (with D-3 and D-4 also tagged the said e-mails) when D-1 was having a contractual relationship with plaintiff. This, as per plaintiff, would show that D-1 was operating through D-2 to D-4 and now, D-1 to D-4 are together not returning the inadvertent payment made to D-1 by the plaintiff company at the behest of D-2 to D-4. This, as per plaintiff, is an illegal act being committed by the defendants to defraud the plaintiff company and therefore, D-2 to D-4 cannot be deleted from the array of parties.

14. I have given thoughtful consideration to the rival arguments of the parties and have gone through the entire record.

15. In this case, as noted above, plaintiff claims to have inadvertently paid 86,000 USD to defendants. During course of arguments, counsel for plaintiff submitted that the money was actually paid through banking channels into the account of D-1 only. Admittedly, D-1 is a private limited company and thus, a separate legal entity which is distinct from D-2 to D-4.

16. As per plaint, there was a contractual relationship between plaintiff and D-1 and during the subsistence of the said relationship, money was paid by plaintiff to D-1. Now, as per plaintiff, the said relationship came to an end and thereafter, due to inadvertence, the aforesaid amount was mistakenly paid by plaintiff to D-1.

17. D-1 has resisted the present suit claiming that the contractual relationship between plaintiff and D-1 was put to an end prematurely by plaintiff and as per the agreement between the parties, D-1 is entitled to be compensated for the same. It is D-1's case that the aforesaid amount has, in effect, been adjusted as compensation for the said breach and D-1 has reserved its right to seek further compensation by preferring a counter claim, if so advised, at a later stage.

18. Now, from the above, it transpires that while plaintiff claims that money was inadvertently paid to D-1 (which was never due to D-1); D-1 has set up a case that under the contract, it has a right to be compensated for premature termination of contract between plaintiff and D-1.

19. Obviously, D-1 being a corporate entity shall require its officials/directors to communicate. But, this shall not mean that any personal liability can be affixed on its directors/officials for the said acts. Nothing has been pleaded in the plaint to demonstrate how the principle of piercing of corporate veil is applicable in the present case. It is a case where D-1's defence stems from a contract. Whether the said defence is rightly or wrongly taken, the same shall have to be adjudicated during trial. Nothing is pleaded in the plaint to say that D-2 to D-4 have themselves with-held the money claimed by the plaintiff to "defeat public convenience or justified wrong or to protect fraud or to defend crime". A perusal of the plaint would show that the plaintiff's case is a simple case wherein, as per plaintiff, due to a mistake, money was wired to D-1's account. If that is true, D-1 shall be liable to return it. D-1 being a separate legal entity, shall suffer all consequences, as and when, such a decree is passed against it.

20. Now, D-1's defence that it is not liable to return the said money as it is entitled to recover under the contract between plaintiff and D-1 is a disputed question of fact for which trial has to take place.

21. D-2 to D-4 are sued by plaintiff in the capacity of directors of D-1. Only because they communicated for and on behalf of D-1 cannot make them personally liable for the acts attributable to D-1. As already noted, nothing is pleaded in the plaint to *prima facie* show that they are hiding behind the corporate veil to defraud their creditors or commit any illegality or to defend a crime etc. If that be the case, in my humble opinion, D-2 to D-4 are neither necessary nor property parties to the present suit and thus, they are liable to be deleted from the array of parties.

22. Accordingly, D-2 to D-4 are deleted from the array of parties.

23. Application stands disposed off.

24. Pleadings between the parties are complete. Parties i.e. plaintiff and D-1 are directed to file their respective affidavits of admission/denial within 15 days from today with advance copy to the other side.

25. List on 02.07.2025.

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