

:: ORDER BELOW EXHIBIT 5 :: SPECIAL CIVIL SUIT NO. 04/2024

- 1 I have heard the learned advocates for the parties. I have read this application and its reply filed at Exh. 13 by the defendant. I have gone through the material produced by the parties. I have taken the entire record of this case into my consideration while deciding this application.

- 2 The learned advocate for the plaintiff has argued that the factum of execution of the agreement to sale is not denied by the defendant. The removal of the charge from the revenue record of the suit property was very important condition in the agreement to sell. The charge was not removed by the defendant. The defendant has failed to obey the notice issued by the plaintiff. It was the duty of the defendant to obtain title clear certificate. In order to complete the transaction, the plaintiff has to see the original title deeds and the defendant had failed to produce the original title deeds. The defendant had created charge on the suit property is clearly established by the plaintiff by producing the bank statements. Thus, the receipt of the earnest money is not disputed by the defendant. There is no clause for forfeiture in the contract, therefore, present application should be allowed.

- 3 The learned advocate for the defendant has argued that the order under Order 38 Rule 5 can only be passed in rarest of the rare cases.

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The defendant is having the suit property from many years. **This suit is filed in the year of 2024 and even today, the defendant has not sold or not even created any further charge on the suit property which clearly proves that the defendant is not intending to create any charge and much less to sell the suit property.** The amount of charge on the suit property is very negligible compared to its value which was agreed upon between the parties. The plaintiff is now offering very low prices. Initially, the agreement to sale was executed at the price of Rs. 1 Crore 61 Lakhs and now, the plaintiff wants the suit property only at the price of Rs. 80 Lakhs. The intention of the plaintiff is only to create disputes about the suit properties and thereby compelled the defendant to sell the suit property to the plaintiff at very low price. This fact is clearly established by the defendants by producing the document of Mark 12/7 to 12/11. The document of Mark 12/10 clearly proves that the intention of the plaintiff is to pay very low price. Thus, present application should be rejected.

- 4 Present application is filed by the plaintiff under Order 38 Rule 5 of the Code of Civil Procedure, 1908 praying for an order of attachment before judgment. The provision of the above mentioned Rule 5 reads as under:

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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.

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(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.

5 Thus, on plain reading of the provisions of Rule 5, it appears that in order to get order of attachment before judgment, the plaintiff has to satisfy by affidavit or otherwise this Court that the defendant is about to dispose of whole or any part of his property or is about to remove whole or any part of his property from the local limits of the jurisdiction of this Court. The plaintiff should further satisfy the Court by affidavit or otherwise that the defendant is doing so with the intention to obstruct or delay the execution of decree that may be passed against him. Further, the Hon'ble Delhi High Court in case of Bank of India Vs. National Tile Work reported in AIR 1989 Delhi 60 has held as under:

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*(5) The object of entire Order xxxviii of the Code is to safeguard the interest of the plaintiff and thwart any possible attempt by the defendant to obstruct or delay the satisfaction of decree which might be passed against the defendant and to achieve this purpose, Rule 5 thereof enables the Court to issue attachment before judgment of the property of the defendant so that any attempt on the part of the defendant to delay or defeat the satisfaction of the decree is forestalled. In accordance with the provisions of Rule 5 of Order xxxviii of the Code, it is incumbent upon the plaintiff to satisfy the Court that the defendant has intention to obstruct or delay the execution of any decree that may be passed in this suit and for this purpose the defendant 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. It is only on the satisfaction of all these conditions that the plaintiff can be said to be entitled to an order of attachment before judgment in terms of Order xxxviii Rule 5 of the Code. Thus, before this Rule 5 can be invoked it must, inter alia, be shown by the plaintiff that defendant has acted or is about to act with intent to obstruct or delay the execution of any decree that may be passed against him. **The Court must be satisfied that all the***

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ingredients of the rule exist. Mere. fact that no harm would be caused to defendant or that defendant would not be prejudiced by such an order could be no ground to pass order under Order xxxviii Rule 5 of the. Code for attachment before judgment. It is in its very nature an extra-ordinary jurisdiction and has to be exercised sparingly and strictly in accordance with procedure prescribed by the Code. There must be some definite evidence on these points and not mere vague allegations. The plaintiff must also prove a prima facie case in his favor. The approach of this Court has essentially to be very cautious and not casual or routine like.

- 6 Thus, the order under the above Rule 5 is an extraordinary remedy and the jurisdiction to pass an order under the above Rule 5 has to be exercised very sparingly and strongly in accordance with the procedure prescribed by the Code and the plaintiff should produce some definite evidence to show that the defendant is about to dispose of his property or is about to remove the property from the jurisdiction of this Court. The requirement of the Order 38 Rule 5 cannot be said to be fulfilled unless the plaintiff produced atleast some definite evidence and mere vague allegations are not enough.

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7 In present case, the plaintiff has failed to show any material by which this Court can even doubt that the defendant is about to dispose of his property that too with intention to delay or defeat the proposed decree. In present case, the plaintiff has failed to show any material except the few words that have been uttered by the plaintiff in present application to establish the essential ingredients of the Rule 5. In present application, the plaintiff has written in Para 20 that "recently, the plaintiff has come to know that the defendants are siphoning all its funds and to transfer the suit property/properties so as to avoid his legality to the plaintiff". Except his bare words, nothing is shown by the plaintiff which may suggest that the defendant is about to dispose of his properties.

8 Moreover, the main objection raised by the plaintiff in this matter for not performing his part of the disputed agreement to sell was non-removal of the charge of banks by the defendant from the record of the suit property. But looking to the price of the suit property which was agreed upon between the parties and its comparison with the amount of charge that has been created by the defendant on suit property, it is my humble view that present application deserves to be rejected. Thus, in the view of the fact that the plaintiff has failed to satisfy this Court that the defendant is about to dispose of his properties and in the view of the amount of charge on the suit

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property, I am of the view that the present application deserves to be rejected. Therefore, I pass following final order below this application:

:: ORDER ::

- This application is hereby rejected.
- The cost of this application shall follow the cost of this suit.

Pronounced in open Court today.

Date:- 20.11.2025

Place: Kheralu, Mahesana

(Rakeshkumar Vasantlal Soni)

Principal Senior Civil Judge, Kheralu.

Judge Code: GJ01193