

MHKO050014302019



Order below Exh.5 in Special Civil Suit No.26/2019

[CNR:MHKO050014302019]

Sohani Textiles

Vs.

Rohit Kumar Yalrute

The present application is filed under Order XXXVIII Rule 5 of Code of Civil Procedure for attachment of property of defendant before Judgment.

2. Defendant has filed say to the present application vide Exh.12.

3. Plaintiff has filed counter affidavit in support of the application (Exh.5) at Exh.22.

4. It is the contention of plaintiff that, defendant purchased cotton goods from him and amount of Rs.6,78,895/- is due from defendant. Therefore, the present suit is filed for recovery of amount of Rs.6,78,895/-, and in the said suit the present application is filed for attachment of property of defendant.

5. It is the contention of plaintiff that, defendant by taking disadvantage of the situation is about to leave jurisdiction of this Court by selling suit property. It is the contention of

plaintiff that, defendant is having 1/5th share in the suit property, which is ancestral in nature. Further, according to plaintiff, defendant is trying to dispose of the suit property. Hence, according to plaintiff, if the suit property is sold out by the defendant without his consent, then, if the decree is passed, there will be obstruction or delay in execution. Hence, it is prayed that during the pendency of the suit, the suit property be attached as per the provisions of Order XXXVIII Rule 5 of Code of Civil Procedure.

6. Defendant vide his say denied the contents of the application. He denied the alleged transaction and he denied that amount of Rs.6,78,895 /- is due from him. It is the contention of defendant that, he has paid the due amount by cheques described in the say. Further, according to him, by taking disadvantage plaintiff has filed false cases under Section 138 of Negotiable Instruments Act. According to defendant, the suit property is ancestral property of his father and he has no right to dispose of the suit property. According to him, they are residing in the suit property and they are carrying out business in the suit property. Hence, it is prayed that application be rejected with costs.

7. Perused application and say. Heard Learned Advocate of both sides. Perused the documents filed on record by the both parties.

8. In the present suit, plaintiff has made Rohit Yalrute as

sole defendant in his personal capacity. The 7x12 extract of the suit property filed at Exh.3/18 shows that, it stands in the name of Kumar Dadu Yalrute alias Kurundwade. He is not made party to the present suit. Only on the basis of pleading of plaintiff and defendant property of stranger to the suit i.e. Kumar Dadu Yalrute alias Kurundwade cannot be attached. It is the contention of plaintiff that, defendant is having 1/5th share in the suit property. But, said aspect cannot be decided at this stage. No material is brought on record at this stage to show that defendant is having 1/5th share in the suit property.

9. As regards to the reason for attaching the suit property before the Judgment in para 4 of the present application, it is only stated that, there is possibility that defendant is trying to sell the suit property. In support of this contention, no other material is brought on record by the plaintiff. On the other hand, defendant in his reply has specifically stated that, he is residing in the suit property and further he is carrying on business in the said suit property, and therefore, there is no possibility that he will leave the jurisdiction of this Court by selling of the suit property.

10. The power under Order XXXVIII Rule 5 of Civil Procedure Code is drastic and extraordinary power. Such power cannot be exercised mechanically or merely for the asking. It is to be used sparingly and strictly in accordance with the rule. The provision cannot be utilized as a leverage for coercing the

defendant to settle the suit claim.

11. In view of above discussion, plaintiff has not made out case for attaching the suit property before the Judgment. Therefore, the present application is liable to be rejected. The defendant has sought costs of Rs.10,000/- from the plaintiff for filing the present application which he claimed to be frivolous. However, considering the over all circumstances and the fact that suit is at initial stage, I do not found it just and proper to impose costs upon plaintiff. Therefore, I proceed to pass following order -

Order

- 1) Application (Exh.5) is rejected.

Date : 17-12-2019.

(Amit P. Kokare)
Civil Judge Senior Division,
Ichalkaranji, District Kolhapur

“I affirm that the contents of this P.D.F. file Judgment/Order are same word to word, as per the original Judgment/Order”.

Name of Stenographer	R.R. Patil
Name of Court	Shri. Amit P. Kokare, Civil Judge Senior Division, Ichalkaranji, District Kolhapur
Date of Dictation	17-12-2019
Order signed by the P.O.on	17-12-2019
Order uploaded on	17-12-2019