

MHKO050019492018



Order below Exh.5 in Special Civil Suit No.42/2018

[CNR:MHKO050019492018]

Jakhotiya Trading Company
Vs.
Shri. Ananda Gopal Ghunake

This is an application under Order 38 Rule 5 of CPC along with Order 39 Rule 1B of CPC for attachment before judgment.

2. The plaintiff averred in the application that, plaintiff has filed suit for recovery of amount of Rs.6,09,130/- against the defendant. The plaintiff further averred that the defendant is trying to sell out the properties in Gat No.310 and house properties in city survey No.62, 63, 64, 793, 795, 796 situated at Shiradwad, Tal. Shirol, Dist. Kolhapur. The plaintiff prayed that plaintiff has proved prima facie case and property should be attached or it is directed to the defendant to file bank guarantee for the suit amount.

3. The say filed by the defendant vide Exh.13 stating that, the family of the defendant was joint till the year 2015. There is no role of the defendant in the business. The defendant

has never accepted any amount from the plaintiff. There is no prima facie case proved by the plaintiff. The defendant has started business since 2016.

4. The advocate for plaintiff argued that the defendant has not denied the transaction with the plaintiff. The defendant is only responsible for the amount of the plaintiff. Hence, to secure the amount of the suit it is necessary to attach the properties of the defendant. The advocate for defendant argued that there are two conditions to allow the application under Order 38 Rule 5 of CPC. The first condition is prima facie case and the second condition about the satisfaction of the Court about the dispose of the properties by the defendant. Hence, both conditions have not fulfilled. Hence, prayed to reject the application.

5. In the present case, it is no doubt that on perusal of the Exh.5 it appears that plaintiff has just mentioned that the defendant is trying to abscond by selling the properties mentioned in the application. But there is no instances mentioned by the plaintiff. But in the present case on perusal of the WS of the defendant it appears that defendant has admitted at para 7 of WS that he know that some of the amount of the plaintiff is due towards the firm. It means, there is prima facie case about the alleged amount of plaintiff. But in the present case, there is no instances to pass the order Under Order 38 Rule 5 of CPC.

6. Before proceeding further, it would be apt to see the

law laid down by Hon'ble Bombay High Court by different pronouncement. In case of *Saraswat Co-operative Bank Ltd, Mumbai Vs. Chandrakant Mangalal Shah, 2002(1) Mh.L.J 581.*

“Civil Procedure Code O. 38 R. 5 – Attachment of property by interlocutory order. Scope of permissibility.

The only circumstances under which a court can attach property by a interlocutory order could be, either by way of appointment of a Receiver under Order 40 of the Civil Procedure Code or by attachment before judgment as envisaged under order 38 of the Civil Procedure Code. Where the land and factory premises were not offered as security in the Bank by the Company, there was no question of appointment of a Receiver, in respect of land and factory premises or the tenancy rights thereof. An order or attachment before judgment has serious consequences to debtor. It is not an order to be made lightly nor based on bald averments reiterating the statutory provisions. There has to be some prima facie material on the basis of which the court could satisfy itself that the conditions requisite for making an order of attachment before judgment enumerated in Order 38 of the Civil Procedure Code exist. Order 38 does not warrant attaching debtor's property merely because the debtor may be unable to pay the debt. It contemplates specific situations or specific acts of the debtor

which show an intention to put the property beyond the reach of execution of a decree”

At yet another instance, Hon'ble Bombay High Court in case of ***Murtuzakhan Mahabobkhan VS. Ballapur Industries Limited, 2002(3) Mh.L.J 399*** has observed that -

“Exercise of power under Order 38 Rule 6(1). Plaintiff is required to satisfy the Court that defendant is about to dispose of whole or part of property or to remove it from local limits of Court jurisdiction with intent to obstruct or delay execution of decree that may be passed.

7. The defendant is relying on ***Raman Tech. & Process Engg. Co. & Anr. Vs. Solanki Traders, Appeal (civil) 6171 of 2001, Supreme Court of India*** decided on 20/11/2007. But, the view of the Hon'ble Apex Court is also as above.

8. The plaintiff relied on ***Vidyut Corporation Vs. MCI Securities Pvt. Ltd. And others, reported in 2017(5) Mh.L.J. 400***. The Hon'ble Bombay High Court held that, interest of the parties to be protected till the disposal of the suit. The said order passed in Appeal before the Hon'ble High Court against the order under Order 39 Rule 1 of CPC. But in the present case, there is a specific provision for the attachment of the property under Order 38 Rule 5 of CPC. Hence, the said citation is not applicable considering the facts of the present case.

9. In the present case, it is no doubt that the admission of the defendant in the WS reveals that the amount is due towards the defendant or against the firm. But, the plaintiff has failed to file any incident which show that defendant is likely to dispose of the properties.

10. Hence, the application for attachment filed by plaintiff is too vague and there are no specific allegations that defendant is likely to dispose of the properties. No instances are quoted which show that the apprehensions of plaintiff is well founded. In the light of observations of Hon'ble Bombay High Court, no specific acts of debtor are pleaded to show that he is intending to dispose of the properties. Moreover, in the present case, the plaintiff just averred that the defendant is going to transfer the properties. But, there is no instances except averment. In such circumstances, plaintiff is not entitled for any attachment. Hence, there is no merit in the application. Hence, I pass the following order -

Order

1) The application is rejected.

Date : 03-01-2019.

Sd/-
(P.K. Kharate)
Civil Judge, Sr.Dn., Ichalkaranji

“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. P.K. Kharate, Civil Judge, Sr.Dn., Ichalkaranji
Date of Dictation	03-01-2019
Order signed by the P.O.on	03-01-2019
Order uploaded on	03-01-2019