

M/s. Ratan Metals Through,)
Mr. Vinod Manilal Oswal) **Plaintiff**
Vs.

M/s. Yash Enterprises Through,)
Mrs. Rekha Hrudaynath Parte) **Defendants**

Order below Exh. 5

1. The plaintiff has filed this application under Order 38 Rule 5 of Civil Procedure Code and thereby prayed to attach the movable and immovable properties belonging to defendants as mentioned in this application and the plaintiff has also prayed to take bank guarantee along with two solvent sureties from the defendants if required.

2. According to plaintiff he is proprietor of M/s Ratan Metals and doing the business of Non Ferrace Scrap. The defendant No. 1 is manufacturer of Gun Metal Non Ferrace Metal casting. The defendant No. 1 Rekha Parte is the proprietor of defendant No. 1 M/s. Yash Enterprises and defendant No. 2 Hrudaynath Parte is husband of defendant No. 1.

3. The defendant No. 1 and 2 had approached the plaintiff at Karad and had admitted to supply raw materials like Brass honey armed, Cooper alloy ingot etc and accordingly given the purchase order in the name of defendant No. 1 Yash enterprises. The plaintiff has supplied the raw materials to the defendant No. 1 since from 20/12/2012 till 01/06/2013 which was total costing Rs. 81,86,203/-. The defendant No. 1 has paid only the amount of Rs. 39,82,868/- to the plaintiff and the defendant No. 1 is liable to pay the due amount of Rs. 42,03,335/- along with interest of 18% P. A. i.e. Rs. 6,23,667/-

total amount of Rs. 48,27,002/-.

4. The defendant No. 1 in spite of repeated demands made to her failed to pay this due amount and hence the plaintiff had issued the notice to the defendants to repay the said out standing amount but the defendants gave notice reply and denied to repay such out standing amount.

5. The plaintiff has expressed the fear that the defendants have sold their B. M. W. car and they are trying to sale their other movable and immovable properties. If the defendants sale these properties then the plaintiff would not get the justice so, on such grounds the plaintiff has prayed to allow this application.

6. The plaintiff has filed his affidavit in support of this application vide Exh. 6.

7. The defendants have filed their say vide exh. 14. According to defendants they had taken raw material from the plaintiff only in respect of the amount to the tune of Rs. 39,82,868/- the details of which are mentioned in Para 3/b of the plaint. The defendants have specifically denied that they had taken the raw material from the plaintiff to the tune of Rs. 81,86,203/- as specifically mentioned in Para 3/a of the plaint. The defendants have specifically denied that they are liable to pay the amount of Rs. 48,27,00/- to the plaintiff.

8. According to defendants, the defendant No. 1 prepare the casting and provide it to Kirlosker Brothers Pvt. Ld. Company at Kirloskarwadi. The casting prepared by the defendant No. 1 with the help of raw material provided by the plaintiff was sent by defendant No. 1 to the Kirloskar Brothers company and the said casting was rejected due to the fault in the raw material. Thus, it is contention of

the defendants that due to supply of faulty raw material by the plaintiff damages to the tune of Rs. 15,93,140/- along with other expenses of manufacturing to the tune of Rs. 5,00,000/- is caused to the defendant No. 1. The plaintiff is responsible for said loss of defendant No. 1.

9. According to defendants, defendant No. 1 and 2 had never signed tax invoices and delivery challans as alleged by plaintiff. The plaintiff had never sent the raw material as per these alleged tax invoices and delivery challans.

10. According to defendants, the defendant No. 1 is well reputed company in casting production. The said defendant No. 1 company provides the castings to the Kirloskar company at Kirloskarwadi and Premium Pvt. Ltd. Pune. The business of the defendant No. 1 company is well flourished and running smoothly and therefore, there is no question of closing the said business as alleged by the plaintiff. The defendants did not deceived anybody as alleged by the plaintiff. The defendants are never trying to alienate their movable and immovable properties. As the defendant No. 1 has stopped the purchase order to the plaintiff hence, due to such grudge the plaintiff has filed this false suit on the basis of blank cheque which were issued by the defendant No. 1 as security to the plaintiff while giving the purchase order of raw material to the plaintiff. There is nothing on record to show that the defendants are trying to dispose off their properties in order to delay the execution of the decree. The properties mentioned in this application are the ancestral properties of Shamrao Bhimaji Parte and defendant No. 1 has no right, title and interest in the said properties. Thus, on such grounds the defendants have prayed for rejection of this application.

11. Heard, Ld. Adv. Shri. P. V. Dhapare for plaintiff and Ld. Adv. Shri. N. V. Bhosale for defendants. I have also gone through the written arguments submitted by plaintiff vide Exh. 16 and by defendants vide exh. 19.

12. Considering the rival contentions of both the parties and oral as well as written arguments of both the counsel the following points arise for my determination. The points and their findings followed by reasons are as below.

Sr. No.	Points	Findings
1	Does the plaintiff prima-facie prove that defendant No. 1 with intend to obstruct or delay the execution of decree passed against her is about to dispose off the whole or any part of her property?	Negative
2	Is the plaintiff entitled for the relief of attachment before judgment as prayed for ?	Negative
3	What Order?	As per final order application is rejected .

Reasons

As to Point No. 1 & 2 :-

13. The Ld. Counsel for the plaintiff has relied upon the authority *Premraj Mundra Vs. Md. Maneek Gazi & Ors. AIR 1951 Calcutta 156.* The Hon'ble High Court in this authority at para 10 has given the following guiding principles to exercise the power under Order 38 Rule 5 of Civil Procedure Code.

i) That an order under Order 38, Rules 5 & 6, can only be issued, if circumstances exist as are stated therein.

ii) Whether such circumstances exist is a question of fact that must be proved to the satisfaction of the Court.

iii) 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 should not be prejudiced.

iv) That the affidavits in support of the contentions of the applicant, must not be vague, & must be properly verified. Where it is affirmed true to knowledge or information or belief, it must be stated as to which portion is true to knowledge, the source of information should be disclosed, & the grounds for belief should be stated,

(v) That a mere allegation that the deft. Was selling off and his properties is not sufficient. Particulars must be stated.

(vi) There is no rule that transactions before suit cannot be taken into consideration, but the object of attachment before judgment must be to prevent future transfer or alienation.

(vii) Where only a small portion of the property belonging to the deft. is being disposed of, no inference can be drawn in the absence of other circumstances that the alienation is necessarily to defraud or delay the plaintiffs claim.

viii) That the mere fact of transfer is not enough, since no body can be prevented from dealing with his properties simply because a suit has been filed : There must be additional circumstances to show that the transfer is with an intention to delay or defeat the plaintiffs claim. It is open to the Court to look to the conduct of the parties immediately before suit & to examine the surrounding

circumstances, & to draw an inference as to whether the defendant is about to dispose of the property, & if so, with what intention. The court is entitled to consider the nature of the claim and the defence put forward.

ix) The fact that the defendant is in insolvent circumstances or in acute financial embarrassment, is a relevant circumstance, but not by itself sufficient.

x) That in the case of running businesses, the strictest caution is necessary & the mere fact that a business has been closed, or that its turnover has diminished, is not enough.

xi) Where however the defendant starts disposing of his properties one by one, immediately upon getting a notice of the plaintiff claim, &/or where he had transferred the major portion of his properties shortly prior to the institution of the suit & was in an embarrassed financial condition, these were grounds from which an inference could be legitimately drawn that the object of the defendant was to delay and defeat the plaintiffs claim.

xii) Mere removal of properties outside jurisdiction, is not enough, but where the defendant with notice of the plaintiffs claim, suddenly begins removal of his properties outside the jurisdiction of the appropriate Court, & without any other satisfactory reason, an adverse inference may be drawn against the defendant Where the removal is to a foreign country, the inference is greatly strengthened.

xiii) The defendant in a suit is under no liability to take any special care in administering his affairs, simply because there is a claim pending against him. Mere neglect, or suffering execution by other creditors, is not a sufficient reason for an order under Order 38

of the Code.

xiv) The sale of properties at a gross undervalue, or benami transfers, are always good indications of an intention to defeat the plaintiff claim. The Court must however be vary cautious about the evidence on these points & not rely on vague allegations.

Relying upon the above mentioned guiding principles the Ld. Counsel for the plaintiff put forth that the defendants are in due of the huge amount of Rs. 48,23,002/- and the defendant are about to sell the properties with intend to obstruct or delay the execution of decree. He also put forth that the defendants have already sold the B. M. W. car and Bullet which bears huge price. The defendant has become bankrupt and he owes the hand loans to many private parties. Therefore, the defendants were about to sell the properties and therefore, they had contacted the broker Amrut Devichand Pawar whose affidavit is filed on record. Thus, he put forth that if the said properties are not attached the defendants may alienate all these properties due to which the decree obtained by plaintiff would only be paper decree.

14. Considering such arguments of the Ld. Counsel for the plaintiff I have given thoughtful consideration to the contents of this application as well as documents on record. The plaintiff in this application has disclosed that recently the defendants have sold their expensive B. M. W. car. He has also further disclosed that he has learnt that the defendants are liable to pay hand loan and dues of many persons. The plaintiff has not produced any documentary evidence on record to show that the defendants were the owners of B. M. W. car as well as bullet and they have sold it after institution of this suit. More

over the plaintiff has not produced on record any document to show that the defendants are liable to pay the dues of many persons. Except the bare statements of the plaintiff there is nothing on record to show that the defendants are liable to pay the dues of many persons. Hence, in such circumstances the statement made by the plaintiff in absence of cogent evidence on record cannot be held to be reliable and satisfactory to this effect.

15. The plaintiff in his application has also expressed the fear that the defendants are about to sell all the immovable and movable properties and abscond from the jurisdiction of this Court due to which the plaintiff may be kept away from their legal rights. In this application the plaintiff has nowhere specifically stated that the defendants are with the intention to obstruct or delay the execution of the decree trying to alienate the movable and immovable properties. This shows that the plaintiff has only made the vague statement in his application. The plaintiff to support his contention that the defendants are trying to sell the immovable properties have filed the affidavit of one broker Amrut Devichand Parmar at Exh. 7. This broker in his affidavit has disclosed that defendant No. 2 had approached him and inquired with him the rates which would be fetched by his properties situated at Kodoli, Yevteshwar and the flat situated at Pune. He has also further disclosed that the defendant No. 2 had asked him to see the purchasers for the said properties. He has also further disclosed that he had disclosed such facts to the plaintiff. The plaintiff in this application as well as in his affidavit at Exh. 6 nowhere disclosed that he had got such information from broker Amrut Devichand Parmar that the defendant No. 2 is about to sell the properties situated at Kodoli, Yevteshwar and flat at Pune. Hence, in absence of facts

disclosed by the plaintiff in his application and in his affidavit the affidavit filed by the broker Amrut Devichand Parmar cannot be held to be reliable at this stage. More over, the said broker is from Karad and the properties of the defendant No. 2 as disclosed by him are situated in Kodoli, Yevteshwar and Pune. All these properties are not at all situated near by Karad. More over this witness Amrut Devichand Parmar has not filed any document on record to show that he deals with the business of the sale of properties situated at Satara, Pune, Karad and Mumbai as disclosed by him in his affidavit so, the affidavit of the said witness does not appears to be reliable and satisfactory.

16. Now, the question remains when the plaintiff has not satisfied by way of affidavit or otherwise that the defendants are about to dispose off their immovable and movable properties then whether the powers under Order 38 Rule 5 of Civil Procedure Code can be invoked. To this question the answer would be definitely negative because as per Order 38 Rule 5 Sub Clause 4 no order can be made of attachment without complying the conditions led down in Sub Rule 1 of Rule 5 of Order 38 and if such order made without such compliance the said order is held to be void. Therefore, this legal position makes it clear that the plaintiff is not entitled to relief of attachment as prayed for.

17. The Ld. Counsel for the defendants also in his arguments had put forth that the defendants are having the business of Yash Enterprises which is well reputed company and the defendants are not going to close that business. To this effect the defendants in their say and affidavit have disclosed this fact that they are not going to close their business. The defendants have also in their say and affidavit

disclosed the fact that they are not going to alienate their movable and immovable properties. They have also stated in their say that they are not intending to dispose of their properties to cause obstruction or delay to the execution of the decree. Thus, such contention disclosed by the defendants itself shows that they have assured that they are not going to sell the immovable and movable properties which itself satisfies that the plaintiff has not successfully and satisfactorily brought on record to rebut this fact that the defendants are intending to dispose of their properties.

18. The Ld. Counsel for the defendants have relief upon the authority *M/s K. C. V. Airways Ltd & Ors. Vs. Wg. Cor. R. K. Blaggana, AIR 1998 Delhi 70.* It is observed by Hon'ble High Court in this authority that

the order passed without recording satisfaction as to existence of condition laid down in Order 38 Rule 5 (1) is not valid.

19. As discussed earlier in the case in hand also I have already arrived at the conclusion that the plaintiff has not satisfied the conditions laid down in Order 38 Rule 5 (1) of Civil Procedure Code. So, relying upon the observations made by the Hon'ble High Court in the above authority it can be held that the said applications lacks in respect of essential conditions laid down in Order 38 Rule 5 of Civil Procedure Code and the said application therefore cannot be allowed on the bald statements of the plaintiff.

20. The Ld. Counsel for the plaintiff has also relied upon the authority *Bommanasaree Mandir Vs. Manisha Sarees, AIR 2002 AP 66.* It is observed in this authority that

while considering application for attachment before judgment

under Order 38 Rule 5 of Civil Procedure Code the Court are expected to look into the object of the provision also. When the Court feels that the interest of the plaintiff has to be safeguarded, then necessarily in such circumstances, it is always better to call upon the opposite party to give the necessary safeguard by furnishing security or any other form of bank guarantee for the purpose of complying with the terms of the decree which he ultimately suffer at the time of disposal of the suit.

The facts and the circumstances of the above cited supra are different then that of the facts and circumstances in the case in hand. In this cited supra there was satisfactory evidence on record to comply the provisions of Order 38 Rule 5 and therefore, the Hon'ble High Court had made such observations but in the case in hand there is no such satisfactory evidence on record to comply with the provisions of Order 38 Rule 5 so, observations made by the Hon'ble High Court in the above cited supra cannot be applied.

21. The Ld. Counsel for the plaintiff had also in his argument put forth that the various cheques given by the defendants are dishonoured but in spite of that the plaintiff had not filed criminal complaint against them in order to avoid harrassment of the defendants and with bonafide intention the plaintiff has filed this suit for recovery. He had also put forth that the dishonoure of cheque can also be a ground to exercise the power under Order 38 Rule 5 of Civil Procedure Code. But the plaintiff has not produced on record the memo of concerned banks to show that the cheques issued by the defendants are dishonoured. Hence, in absence of such evidence on record the arguments of Ld. Counsel for the plaintiff cannot be given much weightage.

22. No doubt, the plaintiff has filed this suit for recovery of huge amount of Rs. 48,30,002/- but the huge amount cannot be a criteria to allow this application. As per observations made by the Hon'ble Supreme Court in the authority *Raman Tech. And Process Engg. Co. & Ors. Vs. Solanki Traders, 2008 (3) Mh. L. J. 6 (S. C.)*

the power under order 38 Rule 5 of Civil Procedure Code is drastic and extraordinary power-such power should not be exercised mechanically or merely for the asking- it should be used sparingly and strictly in accordance with the Rule.

23. The Hon'ble High Court relying upon this view of Hon'ble Apex Court in the authority *Herald Engineers Vs. Wonderpack Industries Pvt. Ltd. 2013 (4) Mh. L. J. 217* has observed that

If the party makes any fanciful or moonshine claim but that cannot be the ground to pass an order of attachment.

24. Thus, considering such observations made by Hon'ble Supreme Court and Hon'ble High Court it is clear that the circumstances in the case in hand which are arrived on record are not sufficient and satisfactory to use the power under Order 38 Rule 5 of Civil Procedure Code. Therefore, without going into the other merits of the case regarding the dispute of amount which is payable by the defendants to the plaintiff as alleged by the plaintiff the said application in view of Order 38 Rule 5 of Civil Procedure Code devoids of merit. So, I have answered point under consideration in **negative**.

As to point No. 3. :-

25. In view of all these findings the application is liable to be rejected with cost. As a result the following order.

:: Order. ::

- 1) The application is rejected with cost..

(Dictated and pronounced in open Court)

Karad
Dt. 30/09/2014

(D. R. Shetty)
Civil Judge Sr. Dn. Karad.

G. D. Jadhav,
Stenographer (L.G.)