

Money Suit No. 05 of 2022
New Number Money Suit (Commercial) :- 30/2024
[CNR No. WBBD17-000009-2022]

COMMERCIAL COURT AT ASANSOL

**(FOR THE DISTRICTS OF MURSHIDABAD, BIRBHUM, PURBA
BARDHAMAN, PASCHIM BARDHAMAN, PURULIA AND
BANKURA)**

Present :- Shaikh Kamal Uddin.
Judge, Commercial Court at Asansol.

JO Code :- WB01311.

I.A No.08 of 2023

In

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M/s J.K Construction Plaintiff / Applicant.

-VERSUS-

M/s Global Construction and 5 others
..... Defendant (s) / Respondent (s).

Order No. 43

Dated 12/12/2024

1. The application under provision of Order XXXVIII Rule 5 of the Civil Procedure Code has been filed by the plaintiff for an order upon the defendant either to furnish security to the extent of Rs.3,63,31,280.94/- within the time allowed by the court or to produce and place at the disposal of the Ld. Court when required item No. (ii) & (iii) of the B schedule property.
2. The suit is for recovery of money and damages valued at Rs.3,42,74,793.34/-.
3. Facts emerging from the record would reveal that the plaintiff is a reputed Engineering concern and on the basis its past record and reputation as a builder, defendant No.1 offered the work of construction of MANASA DHAM APARTMENT Block-A & B to the plaintiff in terms of the agreement dated 04/12/2013. Work order was issued on 10/12/2013. The entire work was carried out as per

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specification fixed in the agreement and the plaintiff was able to complete the main construction work by January 2018 and thereafter started the extra works on the outside of the buildings, on the passage and in the boundary wall and completed such extra works in April 2021. Payments were, however, not made to the plaintiff in time and in fact according to the plaintiff the defendants have not paid after 17/11/2017. The plaintiff submitted final bill in respect of the construction project under cover of a letter dated 05/07/2021. The final bill was of Rs.7,19,82,901.04/- and out of the said amount the plaintiff had received Rs.4,29,36,466.00/- and as such the plaintiff is entitled to a sum of Rs.3,42,74,793.34/- which is inclusive of GST @ 18%. Demand notice was also served to the defendants but without any effect and accordingly the suit was filed.

4. The defendants did not file written statement within the period as stipulated under Order VIII Rule 1 of the CPC and accordingly the written statement filed by the defendants were not accepted and taken on record. Thereafter, the matter was fixed for evidence and during cross-examination of PW-2 the plaintiffs filed the present application under Order XXXVIII Rule 5 of the CPC. During the pendency of the said application an application under Order I Rule 10 was filed by the added defendant. The application was allowed vide order dated 09/01/2024 and the added defendant filed written statement on 12/03/2024. The original defendants had however filed written objection to the application under Order XXXVIII Rule 5 of CPC.
5. In the application under Order XXXVIII Rule 5 of CPC it is alleged by the plaintiff that apart from the 2 apartments being F-01, F-02 on the 4th floor of the multi storied building MANASHA DHAM, some other properties in the name of the defendants have already been mortgaged with the bank and the bank has already declared the mortgaged properties to be NPA and have taken steps for sale of the same by public auction for realization of the outstanding dues. It is further alleged that some portion of the 1st, 2nd and 3rd floor of Block-A of MANASHA DHAM have also been sold out and only 859.15 sqft. are

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lying vacant in the MANASHA DHAM Building. It is also alleged that the defendants have already sold out flat No.3 on 3rd floor in Block-A of MANASHA DHAM apartment by a registered deed of sale on 4th of May, 2023 with the sole motive of defeating and frustrating the expected decree that is likely to be passed against them in this suit with an intent to obstruct and or delay execution of such decree. A certified copy of the sale deed being deed No.3698 for the year 2023 registered at the Office of the ADSR, Asansol has been produced by the plaintiff. It is also alleged that the defendants will leave the locality for an undisclosed location as soon as they are able to sale / dispose of and/ or alienate the vacant areas of Block-A of MANASHA DHAM.

6. The defendants have filed written objection and in the written objection the defendants have taken the defence that they belong to a business family and their predecessors are century old renowned businessman of Asansol and that they also possess various properties and as such the apprehension of non-executive decree which is likely to be passed is a myth. The specific defence of the defendants is that they had already paid Rs.6,68,46,409/- to the plaintiff and apart from that the plaintiff has also taken loan of Rs.60,00,000/- from the defendants and to re-pay the said loan had issued 5 cheques which were also not honoured and accordingly appropriate criminal proceeding are pending against the plaintiff under the Negotiable Instruments Act. The defendants thus in the written objection contented that the plaintiff is not entitled to any money from the defendants. The bank statement has been annexed with the objection to substantiate the payment of Rs.6,68,46,409/-.
7. At the time of argument it has been submitted by the Ld. Advocate for the plaintiff / applicant that from the sale deed it is crystal clear that the defendants had sold the flat during the pendency of the suit with the sole motive of defeating and frustrating the expected decree that is likely to be passed against them and therefore the application of the plaintiff should be allowed for the interest of justice otherwise the plaintiff will be seriously prejudiced and will suffer irreparable loss and injuries and will also be left without any legal remedy. To buttress his

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submission the Ld. Advocate relied on the decision of *Prem Raj Mundra V/s. Md. Maneck Gazi and others, reported in AIR 1951 Cal 156* and *Raman Tech & Process Engg. Co. and another V/s. Solanki Traders, (2008) 2 SCC 302*.

8. *Per contra*, the Ld. Advocate for the defendant submitted that the purported building involved in the suit is for selling of flats and the defendants soon after the construction effected agreement of sale with the intending buyers on accepting payment on installments and therefore the defendants are obliged to execute the sale deeds in favour of the promised purchasers. He also submitted that about 8,000 sq. ft. of the building is yet to be completed and thus the claim of the plaintiff has to be ascertained and therefore the attachment of the property as has been prayed cannot be allowed. Drawing the attention of the court to annexure A, B & C as enclosed with the objection under Order XXXVIII Rule 5 of CPC the Ld. Advocate submitted that the defendants had already paid a sum of Rs.6,68,46,409/- and the said fact has not been denied by the plaintiff and therefore the claim of the plaintiff as stated in the plaint is not justified and is required to be ascertained. Referring to the judgment of Raman Tech (Supra) the Ld. Advocate submitted that an application under Order XXXVIII Rule 5 of CPC cannot be used to convert an unsecured debt into a secured debt. He also submitted that in the judgment of Prem Raj Mundra (Supra) relied upon by the plaintiff, the Hon' ble Court has laid down various criteria's but none of the criteria's have been fulfilled by the plaintiff and therefore the application under Order XXXVIII Rule 5 of CPC should be rejected with exemplary costs.
9. I have heard the Ld. Advocate for the parties and have considered their submissions.
10. In order to appreciate the submission of the Ld. Advocates, Order XXXVIII Rule 5 of the Civil Procedure Code is quoted below:

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ORDER XXXVIII

ATTACHMENT BEFORE JUDGMENT

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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.

(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.] ”

11. Thus, the provision of Order XXXVIII Rule 5 of CPC enumerates the circumstances in which a defendant may be called upon to furnish security. Sub-Rule 1 of Order XXXVIII Rule 5 of CPC provides that where the court is satisfied that a defendant with intent to obstruct or delay the execution of any decree that may be passed against him is about to dispose of the whole or any part of its property or 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 to furnish security. Sub-rule 2 allows the plaintiff to specify the property required to be attached. Thus, the primary object of Order XXXVIII Rule 5 of CPC is

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to prevent the ends of justice from being defeated by the defendants in a civil suit. However, the orders under Order XXXVIII Rule 5 of CPC can be passed by a court only on its satisfaction by an affidavit or otherwise that the defendants “with an intent to obstruct or delay the execution of any decree that may be passed against him” is either 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 jurisdiction of the court.

12. In the case of *Sardar Govind Row Mahadik and another V/s. Devi Sahai and others (1982) 1 SCC 237* the Hon’ ble Apex Court while dealing with the provision under Order XXXVIII Rule 5 of CPC held that :

“58. The sole object behind the order levying attachment before judgment is to give an assurance to the plaintiff that his decree if made would be satisfied. It is a sort of guarantee against decree become infructuous for want of property available from which the plaintiff can satisfied the decree.”

13. In the case of Prem Raj Mundra (supra) the Hon’ ble Calcutta High Court cautioned that affidavit in support of the contentions of the applicant must not be vague and must be properly verified. The Hon’ ble Court also observed that in order for the plaintiff to succeed in getting an order / direction under Order XXXVIII Rule 5 of CPC, mere averment and proof of the factum of transfer of property by defendant is insufficient. It was held that there must be additional circumstances to show that the transfer is with an intention to delay or defeat the plaintiffs claim. Prem Raj Mundra (Supra) has been approved by the Hon’ ble Apex Court in the case of Raman Tech (Supra). In the case of Raman Tech (Supra) besides laying down that Order XXXVIII Rule 5 of CPC is a stringent provision requiring to be construed strictly and not to be used as a lever for the plaintiff to coerce the defendant to come to terms or to convert unsecured debt into a secured debt or to be used as a tool or mechanism for an easy execution

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of a decree and that the remedy as provided under Order XXXVIII Rule 5 of CPC is an extraordinary remedy required to be exercised sparingly and strictly in accordance with law with utmost care, caution and circumspection making it obligatory for the court to ensure that the action does not become an engine of oppression.

14. Applying the principles as laid down in the aforesaid judgments I find that this is a suit for recovery of money. The claim of the plaintiff is that it has received a sum of Rs.4,29,36,466/- from the defendants out of the total value of work done amounting to sum of Rs.7,19,82,901.04/-. In the written objection to the application under Order XXXVIII Rule 5 of CPC the defendants have claimed that they have already paid Rs.6,68,46,409/- to the plaintiff and to substantiate such claim the defendants have annexed the bank statements. The claim of the defendants in the written objection has not been disputed and or denied by any counter affidavit by the plaintiff. Thus, the plaintiff's claim is disputed. The suit is yet to be tried and the defence of the defendants are yet to be tested. Therefore, in my considered view that this stage, the plaintiff's cannot be permitted to convert an unsecured debt into a secured debt. A defendant in a suit is not debarred from dealing with the property mainly because a suit is filed against him. In order to obtain an order for attachment before judgment under Order XXXVIII Rule 5 of CPC the plaintiff should prima facie show that his claim is bona fide and valid. The *prima facie* opinion to be drawn by the court has to be based on the facts and circumstances of the case. In the case on hand, as already observed that the claim of the plaintiff is disputed. I, therefore, do not find any merit in the application filed by the plaintiff. I.A No.08 of 2023 dated 27/04/2023 is accordingly rejected.

D/C by me.

Judge, Commercial Court
At Asansol

(Shaikh Kamal Uddin)
Judge, Commercial Court
At Asansol