

GAHC010140592024



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THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : CRP(IO)/234/2024

NITU JALAN AND ANR
W/O- NATWAR KUMAR JALAN, R/O- JALAN KUNJ, OPP. RED CROSS, 2ND
FLOOR, KEDAR ROAD, FANCY BAZAR, P.S. BHARALUMUKH, GUWAHATI,
DIST. KAMRUP(M), ASSAM, PIN- 781001.

2: NATWAR KUMAR JALAN
S/O- SHYAM SUNDAR JALAN
R/O- JALAN KUNJ
OPP. RED CROSS
2ND FLOOR
KEDAR ROAD
FANCY BAZAR
P.S. BHARALUMUKH
GUWAHATI
DIST. KAMRUP(M)
ASSAM
PIN- 781001

VERSUS

M/S ABCI INFRASTRUCTURES PVT LTD
REGISTERED OFFICE AT 1/3 MC DONALD TOWER, 1ST FLOOR,
BHANGAGHAR, GHY-781005, KAMRUP(M), ASSAM AND IS REPRESENTED
BY ITS AUTHORIZED REPRESENTATIVE.

Advocate for the Petitioner : MR. S CHAMARIA, MR A N SARMAH, MR M M ZAMAN

Advocate for the Respondent : MR A K RAI, FOR CAVEATOR, MR B YADAV

**BEFORE
HONOURABLE MR. JUSTICE ROBIN PHUKAN
ORDER**

13.11.2024

Heard Mr. S. Chamaria, learned counsel for the petitioners and Mr. A.K. Roy, learned counsel for the respondent.

2. In this petition, under Article 227 of the Constitution of India, the petitioners have put to challenge the correctness or otherwise of the Order dated 26.04.2024, passed by the learned Civil Judge (Senior Division), Kamrup, Amingaon, in Misc. (J) Case No. 158/2024, arising out of Title Suit No. 87/2024.

3. It is to be noted here that vide impugned order dated 26.04.2024, the learned Civil Judge (Senior Division), Kamrup, Amingaon has directed to attach Schedule – B property, standing in the name of the petitioner No. 1, conditionally and further issued show cause notice to him as to why he should not furnish security for the sum of money as prayed for by the respondent in the Title Suit.

4. Mr. Chamaria, learned counsel for the petitioners submits that the petitioners are the defendants in the Title suit No. 87/2024, instituted by the respondent/opposite party, as plaintiff. Wherein, the present petitioners entered into an agreement for selling a plot of land measuring 25 bighas 3 kathas & 18 lechas, covered by Dag No. 186 of Patta No. 3 situated at Sila Senduri revenue village, Ghopa Mouza, Kamrup, on 30.03.2017, with the respondent/plaintiff, fixing the sale consideration of Rs. 2 Cr. and they received an amount of Rs. 1 Cr. 91 Lakhs. Thereafter, the respondent/plaintiff instituted a title suit, being Title Suit No. 87/2024, before the learned Civil Judge (Senior Division), Kamrup, Amingaon and in the said title suit, the present petitioners had filed a petition that the present

petitioner is the owner and possessor of another plot of land measuring 4 kathas, covered by Dag No. 1738 of Kheraj Patta No. 1600, situated at Revenue Village Niz Sila Senduri, Ghopa Mouza, Kamrup, described in the Schedule – B of the petition, which is worth Rs. 1 Cr. 80 Lakhs, as per the zonal evaluation done by the office of the Deputy Commissioner, Kamrup and the same requires to be attached before the judgment as per the provisions of Order 38 Rule 5 of the C.P.C., in order to prevent the property from being alienated by the opposite party/respondent No. 1. Upon the said petition, the learned trial court has registered a Misc. (J) Case No. 158/2024 and thereafter, vide impugned order dated 26.04.2024, the learned trial court has directed to attach Schedule – B property, standing in the name of the petitioner No. 1, conditionally and further issued show cause notice to him as to why he should not furnish security for the sum of money as prayed for by the respondent in the Title Suit. Mr. Chamaria further submits that the impugned order so passed by the learned trial court suffers from manifest illegality. Mr. Chamaria has pointed out that the affidavit submitted by the plaintiff/respondent is defective, wherein the source of information has not been divulged and there is no whisper in the impugned order regarding deriving satisfaction by the learned trial court. Mr. Chamaria further submits that only in extraordinary circumstances, the power under Order 38 Rule 8 of the C.P.C. can be invoked and no such extraordinary situation has been shown to have arisen by the plaintiff/respondent and as such, the impugned order is illegal and arbitrary and therefore, the same requires to be set aside.

4.1. Mr. Chamaria has referred following case laws in support of his submission:-

- (i) **Vandana Verma vs. Roop Singh and Others**, reported in **2022 LiveLaw (Del) 252**;

- (ii) **Premraj Mundra vs. Md. Maneck Gazi**, reported in **1951 9 Supreme (CAL) 33**;
- (iii) **W. Pappammal vs. I. Chidambaram**, reported in **MANU/TN/0191/1984**;
- (iv) **Bhusan Stil and Strips Limited vs. Prem H. Lalwani**, reported in **2000 0 Supreme (DEL) 106**; and
- (v) **Raman Tech and Process Engg. Co. Others vs. Solanki Traders**, reported in **MANU/SC 8117/2007**.

5. On the other hand, Mr. Roy, learned counsel for the respondent submits that the order so passed by the learned trial court is an interim conditional order and if the petitioners are aggrieved by the said order they could have file a petition under Order 38 Rule 6 of the C.P.C. But, instead of resorting to the same the petitioners have chosen to approach this court by filing the present petition and as the alternative remedy is available to the petitioners, this petition under Article 227 of the Constitution of India is not at all maintainable. Mr. Roy further submits that the petitioners have shown the respondent a Government land and mislead him that he is the owner of the said plot and thereafter, entered into an agreement with the respondent for selling the said Government land at a price of Rs. 2 Cr. and out of which, the respondent had already paid a sum of Rs. 1 Cr. 91 Lakhs. Mr. Roy also submits that the petitioners are the ill-reputed persons and they may alienate the property shown in the Schedule – B of the petition so as to frustrate the decree that may be passed in the Title Suit No. 87/2024, in favour of the plaintiff, the respondent herein. Therefore, Mr. Roy has contended to dismiss the petition.

5.1. Mr. Roy has referred one case law of Hon'ble Supreme Court in the case of **Rajendran and Others vs. Shankar Sundaram and Others**, reported in **(2008) 2 SCC 724**, in support of his submission.

6. Having heard the submissions of learned counsel for both the parties, I have carefully gone through the petition as well as the documents placed on record and also perused the impugned order dated 26.04.2024, passed by the learned Civil Judge (Senior Division), Kamrup, Amingaon, in Misc. (J) Case No. 158/2024, arising out of Title Suit No. 87/2024 and also perused the case laws referred by learned counsel for both the parties.

7. It is to be noted here that Order 38 Rule 5 of the C.P.C. read as under :-

“5. Where defendant may be called upon to furnish security for production 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.

¹[(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.]”

8. It is also to be noted here that in the decision of **Premraj Mundra (Supra)**, the High Court of Calcutta having discussed several authorities deduced the principles of obtaining an order for attachment before judgment under Order 38 Rules 5 & 6 of the C.P.C. held as under :-

“From a perusal of all the authorities, I think that the following guiding principles can be deduced:-

- (1) That an order under Order 38. Rules 5 and 6, can only be issued, if circumstances exist as are stated therein.
- (2) Whether such circumstances exist is a question of fact that must be proved to the satisfaction of the Court.
- (3) 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 debts. would not be prejudiced.
- (4) That the affidavits in support of the contentions

of the applicant, must not be vague, and 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, and the grounds for belief should be stated.

- (5) That a mere allegation that the defendant was selling off and his properties is not sufficient Particulars must be stated.
- (6) 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.
- (7) Where only a small portion of the property belonging to the defendant 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 plaintiff's Claim.
- (8) That the mere fact of transfer is not enough, since nobody 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 plaintiff's claim it is open to the Court to look to the conduct of the parties immediately before suit, and to examine the surrounding circumstances, and to draw an inference as to whether the defendant is about to

dispose of the property, and if so, with what intention. The Court is entitled to consider the nature of the claim and the defence put forward.

- (9) The fact that the defendant is in insolvent circumstances or in acute financial embarrassment, is a relevant circumstance, but not by itself sufficient.
- (10) That in the Case of running businesses, the strictest caution is necessary and the mere fact that a business has been closed, or that its turnover has diminished, is not enough.
- (11) Where however the defendant starts disposing of his properties one by one, immediately upon getting a notice of the pltf's claim, and/or where he had transferred the major portion of us properties shortly prior to the institution of the suit and 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 pltf's claim.
- (12) Mere removal of properties outside jurisdiction, is not enough, but where the defendant with notice of the pltf's claim, suddenly begins removal of his properties outside the jurisdiction of the appropriate Court, and 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.

- (13) 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.
- (14) The sale of properties at a gross under-value or benami transfers, are always good indications of an intention to defeat the pltf's claim. The Court must however be very cautious about the evidence on these points and not rely on vague allegations.”

9. It appears that the learned trial court in the impugned order dated 26.04.2024, has recorded the satisfaction before passing the conditional order and held that if the Schedule – B land is disposed of by the present petitioners, the chances of recovery of amount of Rs. 1 Cr. 91 Lakhs, paid by the respondent to the petitioners would be difficult and there is every likelihood of disposing of the property by the present petitioners. Thereafter, the learned trial court had passed the conditional order and issued show cause notice to the present petitioners as to why he should not furnish security for the sum of money paid by the plaintiff in the Title Suit. Thus, it appears that the learned trial court had formed a prima-facie opinion at that stage and same is the requirement of law, as held in the case of **Rajendran (Supra)**. Therefore, it is incorrect to state that the learned trial court has not recorded its satisfaction.

10. It also appears that the impugned order is a conditional interim order,

passed without hearing the present petitioners, for which notice was issued to them and the matter was fixed on 09.07.2024. It also appears that alternative remedy is available to the petitioners under Order 38 Rule 6(2) of the C.P.C. and instead of doing the same they had preferred this present petition on some grounds which appear to be not worth believing. At this stage, the decision of Hon'ble Supreme Court, in the case of **Virudhunagar Hindu Nadargal Dharma Paribalana Sabai vs. Tuticorin Educational Society**, reported in **(2019) 9 SCC 538**, is required to be referred to. In the said decision, it is observed and held by Hon'ble Supreme Court that wherever the proceedings are under C.P.C. and the forum is the civil court, the availability of a remedy under C.P.C., will deter the High Court and therefore, the High Court shall not entertain the revision under Article 227 of the Constitution of India, especially in case where a specific remedy of appeal is provided under the C.P.C. itself. This present petition is not maintainable on this court also.

11. Thus, having examined the impugned order in the light of the aforementioned discussion, this court is of the view that no illegality is committed by the learned trial court while passing the impugned order.

12. Accordingly, this petition is dismissed, granting liberty to the petitioner to agitate their grievance in the Misc. (J) Case No. 158/2024, before the learned trial court. Interim order passed earlier, if any, stands vacated.

JUDGE

Comparing Assistant