

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE A.HARIPRASAD

THURSDAY, THE 18TH DAY OF JUNE 2015/28TH JYAISHTA, 1937

OP(C).No. 131 of 2015 (O)

**AGAINST THE ORDER DATED 7-1-2015 IN O.S NO.236 OF 2014 ON THE FILE OF IST
ADDITIONAL SUB COURT, ERNAKULAM.**

PETITIONER(S)/DEFENDANTS :

- 1. LE-MARS MARKETING PVT. LTD,
A COMPANY INCORPORATED UNDER THE COMPANIES ACT
1956 WITH REGISTERED OFFICE AT CIVIL LANE ROAD,
NEAR BSNL BHAVAN, PALARIVATTOM,
KOCHI - 682 025 REPRESENTED BY ITS
MANAGING DIRECTOR MR.SREEKUMAR R. MENON.**
- 2. SREEKUMAR R. MENON, AGED 43 YEARS,
I.C.W A & A.C.S, S/O. RAJAN MENON,
RESIDING AT PUNDARIDEVI HOUSE, DOOR NO. 49/69D,
VIVEKANANDA NAGAR, ELAMAKKARA, KOCHI 26
WHO IS NOW WORKING AS THE MANAGING DIRECTOR,
M/S. LE-MARS MARKETING PVT. LTD, CIVIL LANE ROAD,
NEAR BSNL BHAVAN, PALARIVATTOM, KOCHI - 682 025.**
- 3. INDU SREEKUMAR, AGED 38 YEARS,
W/O. SREEKUMAR, DIRECTOR,
M/S. LE-MARS MARKETING PVT. LTD, CIVIL LANE ROAD,
NEAR BSNL BHAVAN, PALARIVATTOM, KOCHI - 682 025.**

**BY ADVS.SRI.G.SREEKUMAR (CHELUR).
SRI.ALEX.M.SCARIA.
SMT.SARITHA THOMAS.**

RESPONDENT/PLAINTIFF :

**M/S. FIFA METALS, TRIKKAKKARA P.O., UNICHIRA,
ERNAKULAM DISTRICT REPRESENTED BY ITS
PROPRIETOR NISHAD, S/O IBRAHIM M.K, BUSINESS,
AGED 30, MUNDETH HOUSE, MUDIKKAL POST,
PERUMBAVOOR, ERNAKULAM - 683 547.**

BY ADV. SRI.SHIJU VARGHEESE.

**THIS OP (CIVIL) HAVING BEEN FINALLY HEARD ON 18-06-2015, THE COURT
ON THE SAME DAY DELIVERED THE FOLLOWING:**

APPENDIX

PETITIONER(S)' EXHIBITS :

- P1 - TRUE COPY OF THE PLAINT IN OS NO. 236/2014 BEFORE THE HON'BLE SUB COURT, ERNAKULAM.
- P2 - TRUE COPY OF THE WRITTE STATEMENT DT. 07.11.14 FILED BY THE DEFENDANTS BEFORE THE HON'BLE SUB COURT, ERNAKULAM.
- P3 - TRUE COPY OF THE APPLICATION IN IA 3987/2014 FILED BY THE DEFENDANT BEFORE THE HON'BLE SUB COURT, ERNAKULAM.
- P4 - TRUE COPY OF THE COUNTER AFFIDAVIT FILED BY THE 2ND PETITIONER.
- P5 - TRUE COPY OF THE REVIEW PETITION AS IA NO. 4884/14 FILED BY THE PETITIONERS.
- P6 - TRUE COPY OF THE IA 4883/14 FILED BY THE PETITIONERS BEFORE THE HON'BLE SUB COURT, ERNAKULAM.
- P7 - TRUE COPY OF THE APPLICATION AS IA 4575/14 FILED BY PLAINTIFF.
- P8 - TRUE COPY OF THE PLAINT IN OS NO. 1654/14 IN THE MUNSIF COURT, ERNAKULAM ON 18.12.14 FILED BY THE RESPONDENT.
- P9 - TRUE COPY OF THE PETITION DATED FILED BY THE RESPONDENT.
- P10 - TRUE COPY OF THE IA NO. 5144/14 FILED BY THE RESPONDENT.
- P11 - TRUE CARBON COPY OF THE ORDER DT. 07.1.15 IN IA 5144/14 IN OS 236/14 OF THE HON'BLE SUB JUDGE'S COURT, ERNAKULAM.

RESPONDENT(S)' EXHIBITS :

- EXT.R(a) : TRUE COPY OF THE REPORT OF THE ADVOCATE COMMISSIONER IN IA NO.3989/2014 IN O.S NO.236/2014 DATED 26-09-2014.
- EXT.R(b) : TRUE COPY OF the REPORT OF the ADVOCATE COMMISSIONER IN I.A NO.3989/2014 IN O.S NO.236/2014 DATED 26-09-2014.

//True copy//

P.A to Judge

A.HARIPRASAD, J.

O.P (C) No.131 of 2015

Dated this the 18th day of June, 2015.

J U D G M E N T

Petition under Article 227 of the Constitution of India. Challenge in this proceedings is against Ext.P11 order passed by the trial court by invoking power under Order 38 Rules 1 and 2 C.P.C. The suit is one for recovery of a sum of Rs.19,71, 244/- from the defendants. Petitioners are the defendants in the suit.

2. Heard the learned counsel for the petitioners and the learned counsel for the plaintiff/respondent.

3. Learned counsel for the petitioners submitted that the impugned order is legally unsustainable for the reason that none of the criteria mentioned in Order 38 Rule 1 C.P.C was satisfied for passing the order. It is further submitted by the learned counsel for the petitioners that the court below did not properly comply with the procedure under Order 38 Rule 5 C.P.C when the stock in trade was attached. It is the case of the petitioners that the stock attached from the shop belonging to the petitioners

were neither removed to the court nor entrusted to them in custody. In answer to this argument, learned counsel for the respondent contended that the petitioners refused to take the attached articles on kychit. Therefore, the Amin had to keep the articles there in the shop itself. It is the contention of the plaintiff/respondent that the articles so attached were sold by the petitioners on the next day at a reduced rate. I do not wish to make any comment on these contentious issues as it may affect the ultimate decision in the suit. But the question as to whether the impugned order is sustainable has to be determined in terms of Order 38 Rule 1 C.P.C. There are three conditions mentioned in the provision for passing an order of arrest before judgment :

- (i) The defendant has absconded or left the local limits of the jurisdiction of the court;*
or
- (ii) He is about to abscond or leave the local limits of the jurisdiction of the court; or*
- (iii) He has disposed of or removed from the*

local limits of the jurisdiction of the court

his property or any part thereof.

4. That apart, another condition required to invoke the power under the said provision is that the defendant is about to leave India making it impossible or to delay the execution of the decree that may be passed against him. However from the impugned order, I do not find any discussion regarding establishment of any of the conditions required to invoke power under Order 38 Rule 1 C.P.C except finding that the petitioners defied the orders of the court and sold away the stock in trade. It is also submitted by the learned counsel for the petitioners that the proceedings under Order 38 Rule 5 C.P.C was not seriously perused by the plaintiff after obtaining this order. This contention is also challenged by the learned counsel for the respondent. From a reading of the impugned order, I am of the view that the court below did not afford an opportunity to the petitioners to furnish security before passing an order of

arrest before judgment. Considering the entire facts and circumstances, I set aside the order and direct the court below to conduct an enquiry as contemplated under Order 38 Rule 1 C.P.C and if satisfied about the grounds mentioned therein, the court below is free to proceed in accordance with the law. The court below is directed to advance the hearing of the matter to 29th June, 2015 and dispose of the petition within a period of one month thereafter.

All pending interlocutory applications will stand dismissed.

Sd/-
A.HARIPRASAD,
JUDGE.

amk

//True copy//

P.A to Judge