

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 9182 OF 2014

Shri Kishor Prakash Lunawat ..Petitioner

vs.

Shri Ratanlal Chunilal Bafna & Ors. ..Respondents

Mr. R. B. Kulkarni i/b. Mr. S. S. Kanetkar for Petitioner.

Mr. H. E. Palwe for Respondent Nos. 1 and 3.

Ms Jui A. Nerurkar for Respondent No. 2.

WITH

WRIT PETITION NO. 2223 OF 2015

Sohanlal Shankarlal Vishnoi ..Petitioner

vs.

Shri Kishor Prakash Lunawat & Ors. ..Respondents

Ms Jui A. Nerurkar for Petitioner.

Mr. S. S. Kanetkar for Respondent No. 1.

Mr. H. E. Palwe for Respondent Nos. 2 and 3.

CORAM : M. S. SONAK, J.

DATE: 23 DECEMBER 2016

P.C :

1] Rule in both the petitions.

2] With the consent and at the request of learned counsel for the parties, Rule is made returnable forthwith.

3] Mr. Kulkarni appears for the petitioner in WP 9182 of 2014.

Mr. Palwe appears for respondent nos. 1 and 3 and Ms Nerurkar appears for respondent no. 2.

4] Ms Nerurkar appears for the petitioner in WP 2223 of 2015.

Mr. Kanetkar appears for respondent no. 1 and Mr. Palwe appears for respondent nos. 2 and 3.

5] Both these petitions challenge the order dated 16 January 2014 made by the 7th Joint Civil Judge, Senior Division, Pune, in Special Civil Suit No. 399 of 2012, which shall hereinafter referred to as the 'impugned order'.

6] In Special Civil Suit No. 399 of 2012, Mr. Kishor Lunawat (petitioner in WP 9182 of 2014 and respondent no.1 in WP 2223 of 2015) is the plaintiff. Mr. Sohanlal Shankarlal Vishnoi, (the petitioner in WP 2223 of 2015 and respondent no. 2 in WP 9182 of 2014) is the defendant no.2. For sake of convenience, both these parties will be referred to as 'Lunawat' and 'Vishnoi' respectively.

7] It is the case of Lunawat in the Civil Suit that he had advanced certain amounts to Vishnoi and such amounts were to be utilised for incorporating the company to undertake business in real estate and development. It is also the case of the Lunawat that Vishnoi breached such promise and instead, has joint hands with the remaining defendants in the suit to undertake the business of real estate and development. It is also the case of Lunawat that Vishnoi, with the monies advanced by Lunawat has purchased the suit property and now, there is an apprehension that Vishnoi might alienate such suit property with the intention of defeating any

decree which Lunawat might obtain in the suit ultimately.

8] Lunawat, pending the suit, applied for attachment before judgment invoking the provisions of Order XXXVIII Rule 5 of the CPC. Such application was marked as Exhibit '34' in the suit.

9] By the impugned order, the learned trial Judge has held that the apprehension of Lunawat that the defendants in the suit might alienate the suit property to defeat the proposed decree are well founded. Therefore, the impugned order, operative portion of which reads thus :

“ORDER

- 1] *The application at Ext. no. 34 is allowed partly.*
- 2] *Issue notice to the defendant no. 2 that he should furnish security in the form of one solvent surety for satisfying the decree if passed in future.*
- 3] *The application against defendants no. 1 & 3 is rejected.”*

10] Mr. Kulkarni, learned counsel who appears in WP 9182 of 2014 has submitted that the material on record was quite sufficient to make an order against defendant nos. 1 and 3 and the learned trial Judge has erred, in not making an order, similar to the one made against Vishnoi. He submits that the total claim of Lunawat in the suit is Rs.4.30 crores or thereabouts and looking to the transactions as enumerated in the plaint, involvement of the

defendant nos. 1 and 3 stands established. Therefore, he submits that the application made by Lunawat ought to have been allowed in its entirety.

11] Mr. Kanetkar, who also appears for Lunawat, in WP 2223 of 2015, further submits that the material on record very clearly establishes that Lunawat has paid substantial amounts to Vishnoi. He refers to Annexure 'A' to the plaint, which details payment of almost Rs.93 lacs by way of cheques itself. Mr. Kanetkar submits that from the various false and contradictory defences raised by the defendants in the suit, it is quite clear that the apprehensions expressed by Lunawat that the defendants will sell and dispose of their properties in order to defeat any eventual decree stand established. Mr. Kanetkar submits that Vishnoi has in fact admitted receipt of amounts to the extent of Rs.78 lacs from Lunawat. In so far as the alleged repayments are concerned, Mr. Kanetkar submits that there is no clarity whatsoever. Whatever amounts have been repaid, Lunawat has offered necessary credit for the same, which is quite evident from the averments in the plaint. Mr. Kanetkar submits that the learned trial Judge has exercised discretion based upon the material on record and there is really no case made out to interfere with such discretion except perhaps to the extent that no similar order was made against the remaining defendants.

12] Ms Nerurkar, learned counsel for Vishnoi, at the outset, has placed reliance upon the decision of the Hon'ble Apex Court in the case of ***Raman Tech & Process Engg. Co. & Anr. vs. Solanki Traders***¹, which explains the object, nature and scope of powers under Order XXXVIII Rule 5 of CPC. She submits that none of the parameters necessary for an order of this nature can be said to have been fulfilled in the present case. The apprehension with regard to alienation is totally vague and there was absolutely no material produced in support of the same.

13] Ms Nerurkar submits that matter is yet to go to trial and the claims, counter claims and denials made by the parties are yet to be ascertained. At this stage therefore, the application was required to be decided by strict reference to the provisions of Order XXXVIII Rule 5 of the CPC, which the learned trial Judge has failed to do. She submits that proceedings under Order XXXVIII Rule 5 are not intended to convert unsecured into a secured debt nor are such proceedings to be utilised to coerce the defendants to a suit to settle the suit claim. Ms Nerurkar also submitted that the demand made by Lunawat was in fact, withdrawn in writing by Lunawat. This circumstance has not even been considered by the learned trial Judge in making the impugned order. For all these reasons, she

1 (2008) 2 SCC 302

submits that the impugned order warrants interference and is liable to be set aside.

14] Mr. Palwe, learned counsel for original defendant nos. 1 and 3 submits that there is absolutely no material on record to link these defendants with the transaction alleged to have taken place between Lunawat and Vishnoi. He submits that the suit property is not even owned by defendant nos. 1 and 3 and therefore, there is no question of any alienation or apprehension of alienation. He submits that Lunawat himself, has described that these defendants are rich jewellers. He submits that there is absolutely no possibility of the suit being decreed against these defendants and if the description of Lunawat is true then, Lunawat need not have any apprehension about the capacity of these defendants to satisfy such decree, if, eventually made. For all these reasons, Mr. Palwe submits that there is no case made out to interfere with the impugned order. However, he supports Ms Nerurkar to say that such an order need not have been made even against Vishnoi.

15] Having considered the rival submissions and perused the material on record, it needs to be noted that this is a case where the trial Judge, has basically exercised discretion. This exercise of discretion in the facts and circumstances of the present case,

cannot be said to be vitiated by either perversity or non consideration of parameters of Order XXXVIII Rule 5 of the CPC. Though, Ms Nerurkar is right to some extent in her contention that the impugned order, does not clarify the extent of security that is expected from Vishnoi.

16] The material on record at least *prima facie* indicates that there were certain transactions between Lunawat and Vishnoi. In fact, this position is not even denied by Vishnoi. The record also indicates that at least Rs.93 lacs was paid by way of cheques by Lunawat to Vishnoi in the years 2005-2006. No doubt, it is pointed out by Ms Nerurkar that certain amounts have been repaid by Vishnoi to Lunawat. From the multifarious defences raised, it cannot be said that the apprehension expressed by Lunawat that the suit property might be alienated is totally fanciful. Ultimately, from the nature of pleadings as well as the material put forth by the parties in support of the same, it does appear that the parties are in the business of lending money as also in the business of real estate and development. If Lunawat, succeeds in obtaining a decree, it cannot be that such decree is only some paper decree and thereafter lengthy proceedings are necessary to execute such decree. Taking into consideration the cheque payments as also the admission on the part of Vishnoi that he had obtained a hand loan

of Rs.78 lacs from Lunawat, it cannot be said that there is absolutely no material on record to support the impugned order, when it upholds the apprehension expressed by Lunawat. This material on record is also sufficient to hold that there are reasonable chances of some decree being passed in the suit.

17] Accordingly, this is not a case where the discretion can be said to have been exercised by the trial Judge either perversely or by totally ignoring the parameters of Order XXXVIII Rule 5 of CPC. However, as observed earlier, the impugned order, simply issues notice to Vishnoi requiring him to furnish security in form of one solvent surety for satisfying decree if passed in future. A claim in the suit is for Rs.4.30 crores or thereabouts. In the facts and circumstances of the present case, requiring Vishnoi to furnish security or solvent surety for the entire amount appears to be totally disproportionate. Accordingly, it is necessary to modify the impugned order and require Vishnoi to furnish security in the form of one solvent surety in an amount of Rs.1,00,00,000/- (Rupees One Crore) for satisfying the decree, if made in the suit in future. Such security in the form of solvent surety shall be offered / produced by Vishnoi within a period of twelve weeks from today. The same shall be to the satisfaction of the learned trial Judge. Save and except such modification, which is hereby ordered, there

is no case made out to interfere with the impugned order.

18] Further, this is not a case where the learned trial Court can be faulted for not making any order against defendant nos. 1 and 3 in the suit. There is nothing on record to indicate that Lunawat has actually made payments to these defendants. Besides, these defendants have stated that they do not own the suit property and therefore, there is no question of them alienating the same.

19] Accordingly, Rule is disposed of in both these writ petitions in the manner and to the extent indicated. The impugned order stands modified and shall be complied by Vishnoi within a period of twelve weeks from today.

20] In the facts and circumstances of the present case, there shall be no order as to costs.

21] All concerned to act on authenticated copy of this order.

(M. S. SONAK, J.)