

**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

**Civil Revision No.1857 of 2017 (O&M)
Date of Decision: 25.07.2018**

**M/S ARICENT TECHNOLOGIES (HOLDINGS) LIMITED
.....Petitioner**

Vs

**M/S BESTO ELECTRONICS PVT. LTD. AND OTHERS
.....Respondents**

CORAM: *HON'BLE MR. JUSTICE RAJ MOHAN SINGH*

Present: Mr. Ashok Aggarwal, Sr. Advocate with
Mr. Aashish Chopra, Advocate
Mr. Mukul Aggarwal, Advocate
Mr. Prateek Sodhi, Advocate
for the petitioner.

Mr. Anjum Ahmed, Advocate
for the respondents.

RAJ MOHAN SINGH, J.

[1]. This revision petition has been preferred by the petitioner against the order dated 02.02.2017 passed by the Addl. District Judge (Ist)-cum-Commercial Court, Gurugram whereby application filed by defendant No.1 (counter claimant) under Order 38 Rule 5 CPC was allowed and property bearing plot No.31, Electronic City, Sector 18, Gurugram was attached.

[2]. Learned Senior counsel appearing on behalf of the petitioner referred to the facts arising out of lease deed with

reference to different clauses, legal notice dated 17.08.2015, application filed by defendant No.1/respondent No.1 for dismissal of appeal before the Addl. District Judge, Gurugram (Annexure P-11 Colly), application filed by the plaintiff/petitioner for directing the defendant to accept physical possession of the suit property, statement dated 17.02.2016 made by Sanjeev Garg authorized person of the plaintiff, some paragraphs of the written statement and some paragraphs of the counter-claim filed by defendant No.1 with reference to the prayer clause.

[3]. Learned Senior Counsel vehemently submitted that the impugned order does not specify mandatory requirement of law in terms of Order 38 Rule 5 CPC as held in **M/s Raman Tech & Process Engg. Co. & Anr., vs. M/s Solanki Traders, 2008(1) R.C.R. (Civil) 195** and by relying upon the aforesaid precedent, learned Senior counsel submitted that the object of Order 38 Rule 5 CPC is to prevent any defendant from defeating the realisation of decree that may ultimately be passed in favour of the plaintiff either by attempting to dispose of or removing from the jurisdiction of the Court his immovables. The words “*to obstruct or delay the execution of any decree that may be passed against him*” in Rule 5 make it clear that before exercising the powers under the said Rule, the Court should be satisfied that there is a reasonable chance of a decree being

passed in a suit against the defendant. The Court has to be satisfied that the plaintiff in all probability would succeed on the basis of *prima facie* case. Having just or valid claim or *prima facie* case will not entitle the plaintiff the Order of attachment before judgment in terms of Order 38 Rule 5 CPC unless he also establishes that the defendant is attempting to remove or dispose of his assets with the intention to defeat the decree that may be passed. Even where the defendant is removing or disposing off his property, attachment before judgment cannot be passed, if the plaintiff is not in a position to satisfy that he has *prima facie* case.

[4]. Learned Senior counsel further submitted that the power under Order 38 Rule 5 CPC is a drastic and extraordinary power. The same can be sparingly exercised. Such powers cannot be exercised mechanically and merely on the asking of the parties. The purpose of Order 38 Rule 5 CPC is not to bring an unsecured debt under the category of secured debt. Such an intended effort to seek leverage of this kind has to be discarded. The provision can be resorted to on some defined legal parameters so as to secure ends of justice. The party invoking Order 38 Rule 5 CPC should show *prima facie* case and satisfy the Court that the defendant is about to remove or dispose of the whole or part of his property with an intention

to obstruct or delay the execution of any decree that may be passed against him. In the absence of mandatory requirement of Order 38 Rule 5 CPC, the order would be *void ab initio*. Perusal of the impugned order would show that the Court below has not recorded any satisfaction on the basis of defined parameters of Order 38 Rule 5 CPC, nor any sum has been specified in the order on evaluation of material. It is only on account of figure given by defendant No.1, the impugned order has been passed without satisfaction of the Court as required in the aforesaid provision. Even the Court has not recorded its satisfaction with regard to the evaluation of the property attached as attached property should correspond to the claim i.e. only so much of the property of the value can be attached which is sufficient for satisfaction of the decree. The satisfaction of the Court is also required on this aspect.

[5]. I have considered the submissions made by learned counsel for the parties.

[6]. At this stage detailed facts are not required to be recorded as per pleadings made in the revision petition. On consideration of controversy, this Court confines itself to see the legality and validity of the impugned order in terms of mandatory requirement of Order 38 Rule 5 CPC without making any reference to the assertion and denial of the parties to the facts

in issue, lest it may prejudice the case of either side.

[7]. Under Order 38 Rule 5 CPC, the defendant can be called upon to furnish security for production of the property at any stage of the suit, when the Court is satisfied that the defendant with intention 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 the 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 can direct the defendant either to furnish security in such sum as may be specified in the order, to produce and place at the disposal of the Court. The said property or value of the same or such portion as may be sufficient to satisfy the decree. The plaintiff shall, unless the Court otherwise directs, specify the property required to be attached and the estimated value thereof. The Court may also in the order direct the conditional attachment of the property so specified therein. If the order of attachment is made without compliance of the provision of sub-Rule(1) of Order 38 Rule 5 CPC, such attachment shall be void in law.

[8]. The Addl. District Judge (Ist)-cum-Commercial Court, Gurugram vide the impugned order has recorded the following observation in the para no.14 of its judgment:-

“14. Now, the application filed by defendant no.1 under

Order 38 Rule 5 CPC which clearly showing that it claimed recovery of ₹ 11,52,56,866/- on the following heads:

- (a) arrears of rent*
- (b) structural and other damages caused by plaintiff to the property and charges to restore it to bare shell form*
- (c) unpaid electricity charges and charges for restoration of electricity connection and,*
- (d) interest and cost etc.*

It is admitted fact that lease was expired on 31.05.2015 and till then the plaintiff had to pay rent as per agreed terms between the parties but the said lease was come to an end but the plaintiff has not paid the rent and is in arrears of crores of rupees as pleaded by defendant no.1 in its application. It is also alleged that plaintiff has damaged the property which is liable to be ascertained during the pendency of case for which the defendant no.1 has filed a separate application under Order 26 Rule 9 CPC. So the last rent of ₹ 20,80,684/- after deduction of ₹ 1,00,000/- is an admitted fact albeit the market rate of rent or mense profits after the period of expiration of lease deed is yet to be ascertained on record. In application, it is pleaded that plaintiff is a foreign based multi-national company and the plaintiff company is disposing of its assets in India and the plaintiff in its reply to application of the defendant no.1 has not denied the said fact. In fact, it was pleaded by plaintiff that plaintiff being full fledged lawful owner in physical possession of its property is entitled to alienate the same in any manner and transfer of the said property has got nothing to do with the present litigation. So the facts pleaded by defendant no.1 have not been denied by the plaintiff and moreover even the last rent which is admitted

fact in the plaint itself has not been paid by the plaintiff to defendant no.1 having in occupation and possession of the suit property. Therefore, the defendant no.1 satisfied this Court regarding apprehension of disposing of the assets by the plaintiff to avoid the genuine claim of the arrears of rent which are yet to be ascertained by proving the damages to the property which is in crores of rupees. Therefore, the application of defendant no.1 filed under Order 38 Rule 5 CPC is allowed accordingly. The plaintiff is directed not to create any third party interest in the property bearing plot no.31, Electronic City, Sector 18, Gurgaon in whatsoever manner and the said property will remain attached till the plaintiff furnish the security for the arrears of rent as per admitted rent in the last lease, concerned government authority be informed accordingly.”

[9]. While parting with the Order the Court found that the calculations of the amount is yet to be proved on record and the application under Order 38 Rule 5 CPC filed by the defendant No.1 was allowed as the same was filed on the ground mentioned in the counter claim. In the application, defendant No.1 claimed a sum of Rs.12,99,56,866/- along with interest @ 21% per annum as per counter-claim which included the arrears of rent on the basis of market rent, structural and other damages, unpaid electricity charges and charges for restoration of electricity connection with interest and costs. The Court also observed that the aforesaid facts are yet to be proved by defendant No.1 after framing of issues. Since the attachment

was done in the preceding para, therefore, the application under Order 38 Rule 10 was dismissed.

[10]. In view of aforesaid, perusal of the impugned order would show that the same is not legally sustainable as per the requirement of Order 38 Rule 5 CPC. Consequently, the impugned order dated 02.02.2017 passed by the Addl. District Judge (Ist)-cum-Commercial Court, Gurugram is hereby set aside. This revision petition is allowed. The Addl. District Judge (Ist)-cum-Commercial Court, Gurugram is directed to revisit the issue in terms of Order 38 Rule 5 CPC on the application filed by defendant No.1 under the aforesaid provision and decide the same in accordance with law without being influenced by any of the observation made by this Court in the preceding paras. Accordingly, the case is remanded to Court of Addl. District Judge (Ist)-cum-Commercial Court, Gurugram. Both the parties are directed to appear before the Court 06.08.2018.

July 25, 2018

Atik

**(RAJ MOHAN SINGH)
JUDGE**

Whether speaking/reasoned

Yes/No

Whether reportable

Yes/No