

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 9104 OF 2021

Prowiz Mansystems Pvt.Ltd	.. Petitioner
Versus	
Ganesh Raut	.. Respondent

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Mr. Vishal Kanade i/b Sagar Rane for the petitioner.
Mr.Nitin V. Gangal with Ashok Kadam for the respondent.

CORAM: BHARATI DANGRE, J.
DATED : 17th DECEMBER 2021

P.C:-

1 Rule. Rule returnable forthwith. Heard by consent

2 The Writ Petition is filed by the defendant, being aggrieved by an order dated 24/11/2021 passed by the Civil Judge, Sr. Division, Thane under Order 38 Rule 5 (1)(b) and its sub-section (2) and (3) of the Code of Civil Procedure, by which the defendant is directed to furnish the security of the amounts claimed by the plaintiff till further order or till hearing of Exhibit-5, whichever is earlier. The order also contemplate a contingency of the defendant failing to furnish the security, then the Suit property is directed to be attached for recovery of the whole amount claimed by the plaintiff.

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3 Heard learned Advocate Mr.Vishal Kanade for the petitioner and Mr.Gangal for the respondent.

4 The bare minimum facts would reveal that Special Civil Suit is filed by the plaintiff for recovery of money allegedly due from the respondent which is a Company registered under the Companies Act. The plaintiff claimed a decree to recover an amount of Rs.1,29,12,953/-. An application under Order 38 Rule 5 of the Code of Civil Procedure, seeking a permanent injunction was also instituted.

5 The respondent (present petitioner) received the summons on 18/11/2021. On 24/11/2021, the learned Judge proceeded with the application filed by the plaintiff under Order 38 Rule 5 (Exhibit-12). The roznama dated 24/11/2021 record as under :-

O – O.S. to say

O – No say filed hence without say

D-13 – Application filed by plaint. Adv.for interim injunction against the defendant.

O- O.S. to say

O – No say hence without say

O – Def. Shall not create any interest in the suit property by himself or any other person action on behalf of him, till the hearing of Exh.5 or till further order which is earlier.

D – 14 List of docs filed by plntff.adv.

)-filed

D-15 – VP filed by adv.for def.

O-filed

C-16 – Memo of address of def.
O-filed.
D-17 – Application filed by def.adv.for seeking time to file WS
O-Granted.
Adj.for H.5
Case Adjourn for Hearing.

6 From the reading of the above roznama it is evident that the application filed by the plaintiff for Attachment before Judgment under Order 38 Rule 5 was taken up for consideration. Simultaneously, the learned Judge restrained the defendant from creating any third party interest in the suit property by himself or any other person till the hearing of Exhibit-5 or till further order whichever is earlier. On the same day, the list of documents filed by the plaintiff is taken on record and appearance of the defendant is marked, on receipt of summons. An application is filed by the defendant seeking time to file written statement. The matter is rescheduled for hearing on Exhibit-5.

On this very day, the impugned order dated 24/11/2021 is passed.

The provision in form of attachment before judgment contained in Order 38 Rule 5 of the CPC is a harsh provision which exist in the Code in form of supplementary proceedings and when carefully read, the power which is expected to be exercised sparingly, justify its exercise, when the Court is satisfied about existence of two possibilities; (a) the defendant is about to dispose of the whole or any part of his property, or (b) the

defendant is about to remove the whole or any part of his property from the local limits of the jurisdiction of the Court. It is only upon existence of either of the aforesaid, 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 or 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, which deem to satisfy the decree. The Court may also in the order direct the conditional attachment of the whole or any portion of the property so specified.

7 The scope of the provision of attachment before judgment being to prevent the defendant from defeating the realization of the decree that may be ultimately passed in favour of the plaintiff, either by way of any attempt to dispose off the property or to remove the same from the jurisdiction of the Court, the paramount consideration for a Court, while invoking the said power, is the satisfaction that there is a reasonable chance of a decree being passed in the suit against the defendant and that the defendant is likely to take steps which would result in defeating the decree either by removing or disposing off his assets.

The said provision being a drastic and couched as an extra ordinary power, its scope has been elucidated by the Apex Court in Raman Tech. & Process Engg. Co. & Anr Vs Solanki Traders (2008) 2 SCC 302, in the following words :

“4 The object of supplemental proceedings (applications for arrest or attachment before judgment, grant of temporary injunctions and appointment of receivers) is to prevent the ends of justice being defeated. The object of order 38 rule 5 CPC in particular, is to prevent any defendant from defeating the realization of the decree that may ultimately be passed in favour of the plaintiff, either by attempting to dispose of, or remove from the jurisdiction of the court, his movables. The Scheme of Order 38 and the use of 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 power under the said Rule, the court should be satisfied that there is a reasonable chance of a decree being passed in the suit against the defendant. This would mean that the court should be satisfied the plaintiff has a *prima facie* case. If the averments in the plaint and the documents produced in support of it, do not satisfy the court about the existence of a *prima facie* case, the court will not go to the next stage of examining whether the interest of the plaintiff should be protected by exercising power under Order 38 Rule 5CPC. It is well-settled that merely having a just or valid claim or a *prima facie* case, will not entitle the plaintiff to an order of attachment before judgment, unless he also establishes that the defendant is attempting to remove or dispose of his assets with the intention of defeating the decree that may be passed. Equally well settled is the position that even where the defendant is removing or disposing his assets, an attachment before judgment will not be issued, if the plaintiff is not able to satisfy that he has a *prima facie* case.

5 *The power under Order 38 Rule 5 CPC is drastic and extraordinary power. Such power should not be exercised mechanically or merely for the asking. It Should be used sparingly and strictly in accordance with the Rule. The purpose of Order 38 Rule 5 is not to convert an unsecured debt into a secured debt. Any attempt by a plaintiff to utilize the provisions of Order 38 Rule 5 as a leverage for coercing the defendant to settle the suit claim should be discouraged. Instances are not wanting where bloated and doubtful claims are realised by unscrupulous plaintiffs by obtaining orders of attachment before judgment and forcing the defendants for out of court settlement, under threat of attachment.*

8 Applying the aforesaid test, if the claim in the plaint and the exercise of power by the learned Judge is perused, it is manifest that the apprehension expressed by the plaintiff about the property being disposed off or any third party interest being created, was taken care of by passing an order on the very same day, restraining the defendant from creating any interest in the suit property till the hearing of Exhibit-5.

9 On perusal of the impugned order, no such satisfaction which is contemplated by the Apex Court in *Raman Tech* (supra) before exercise of the power under Order 38 Rule 5 is found in the order impugned, but an observation based on the contention of the plaintiff, that the defendant on his appearance did not show any willingness to furnish the security as per Order

38 Rule 5 of the Code of Civil Procedure. It is further recorded that the plaintiff is having a *prima facie* case against the defendant as claimed. On what basis the satisfaction is reached is, however, amiss. The impugned order fail to meet both the necessary ingredients of Order 38 Rule 5 being satisfaction about existence of *prima facie* case and the satisfaction being recorded, to the effect that the defendant is intended to obstruct or delay the execution of the decree by disposing off the property or removing the same from the jurisdiction of the Court.

In absentia, the impugned order which has been hurriedly passed in utter violation of the principles of natural justice, cannot be sustained. In the backdrop of the settled principles of law that justice should not only be done, but it should be manifestly be seen to be done. On the very first date of hearing on 24/11/2021, the learned Judge has attempted multiple tasks and though on one hand, he passed an order granting the injunction, on other hand, he passed an order of directing the defendant to furnish the security of the amount claimed by the plaintiff, till further order or till hearing of Exhibit-5 without the necessary ingredients of ordering attachment before judgment, being established.

10 In the aforesaid circumstances, I am constrained to set aside the impugned order without referring to the merits of the matter. It is made clear that the petitioner (defendant) shall no

longer prolong the proceedings, since the written statement ought to have been filed within a period of 30 days and summons which have been received on 18/11/2021, but for interjection of the order on 24/11/2021, it ought to have been filed on or before 18/12/2021.

The written statement shall therefore be permitted to be filed within a period of eight days from today, upon which the learned Judge shall decide the Application filed by the plaintiff under Order 38 Rule 5, afresh, uninfluenced by his earlier observation.

11 Writ Petition is allowed in the aforesaid terms by quashing and setting aside the impugned order.

SMT. BHARATI DANGRE, J