

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH AT NAGPUR

WRIT PETITION NO. 8208 OF 2019

Uddhao s/o Eknath Sabe,
Aged about : 52 years, Occ. Agriculturist,
R/o :Belad Khurkundi, Tah. Nandura,
District Buldhana

.... **PETITIONER**
(Ori. Defendant)

// **VERSUS** //

1. Ramesh s/o Tulshiram Sabe
Aged about : 52 years,
Occupation : Agriculturist
2. Kisan s/o Tulshiram Sabe
Aged about : 60 years,
Occupation : Agriculturist
3. Sumanbai Vishnu Sabe
Aged about : 55 years,
Occupation : Agriculturist
4. Purushottam Vishnu Sabe
Aged about : 28 years,
Occupation : Agriculturist
5. Suresh Vishnu Sabe
Aged about : 21 years,
Occupation : Agriculturist
6. Baliram Raibhan Sabe
Aged about : 75 years,
Occupation : Agriculturist
7. Bhagwan Parasram Sabe
Aged about : 45 years,
Occupation : Service & Agriculturist

No. 1 to 6 are R/o Belad Khurkundi,
Tah. Nandura, Distt. - Buldhana,
No. 7 R/o Belad Khurkundi, at Present
Surat, Tah. & Distt. Surat (Gujrat)

.... **RESPONDENTS**
(Ori. Plaintiffs)

Shri A.M. Tirukh, Advocate for petitioner
Shri P.A. Nemade, Advocate for respondents

CORAM : N.B. SURYAWANSHI, J.

RESERVED ON : 15/07/2021

PRONOUNCED ON : 17/08/2021

JUDGMENT

Rule. Rule made returnable forthwith. Heard finally with the consent of the learned Advocates for the parties.

2. This petition filed under Article 227 of the Constitution of India, challenges the order passed below Exh.16 in Special Civil Suit No. 07/2017, by the learned Civil Judge, Senior Division, Malkapur, thereby ordering attachment before judgment. The petitioner and respondents are family members. The petitioner is the original defendant and the respondents are the original plaintiffs.

3. The brief facts of the case as follows :

The plaintiffs filed Regular Civil Suit No. 07/2017 for recovery of money, claiming that they own and possess suit property gat No.9 admeasuring 2 H. 87 R. The defendant, though having no concern with the said land, by forging documents, has shown that he is the

owner of the suit property and has accepted a compensation amount of Rs.32,27,000/- towards acquisition of the suit property. The plaintiffs, therefore, claimed that the compensation amount be recovered from the defendant and the same be paid to plaintiff Nos. 1 to 5 along with interest.

4. Application Exh.16 was filed by the plaintiffs under Order 38 Rule 5 of the Code of Civil Procedure, seeking attachment of immovable property, gat No. 141, (for short 'the said property') owned by the defendant, before judgment, contending that out that 1 H. 48 R. was acquired by the Government and the defendant is likely to receive the compensation amount, any time. The defendant is trying to sell the remaining land of the said property and there is no other immovable property with the defendant. If suit of the plaintiffs is allowed and if the suit property is sold by the defendant, the decree would not be executable. It was therefore, prayed that till the decision of the suit, out of total area 8 H. 8 R., of the said property i.e. agricultural land gat No. 141, 4 H 46 R area towards South East portion be attached and the compensation amount be directed to be retained with the Land Acquisition Officer.

5. The application proceeded without the reply of the defendant. The defendant and his Advocate were not present when the application Exh.16 was heard. The Trial Court allowed the application by passing a conditional order, attaching the the said land, standing in the name of defendant excluding the acquired portion, till the defendant furnishes security to the extent of an amount of Rs.35,00,000/-. The amount of compensation receivable by the defendant towards acquired portion of the said property was also attached under Order 38, Rule 5 (3) of Code of Civil Procedure, till the defendant furnishes security. Being aggrieved by this order, the present petition is filed.

6. Heard the learned Advocate for the petitioner/defendant and the learned Advocate for the respondents/plaintiffs.

7. The learned Advocate for the petitioner submitted that the impugned order is unsustainable on the ground that the same was passed without giving an opportunity of hearing to the petitioner. He submitted that the object of Order 38 Rule 5 of the Code of Civil Procedure is to prevent the defendant from defeating the realization of decree that may ultimately be passed against him. But before exercising the powers the Court has to be satisfied that there is a reasonable

chance of a decree being passed in the suit against the defendant and that the defendant is attempting to remove or dispose of the assets, with an intention of defeating the decree that may be passed. By pointing out Village Extract 8-A, (Annexure – J), he submitted that the petitioner possesses four agricultural lands bearing gat Nos. 138, 139, 141 and gat No.9, total admeasuring 25 H. 98 R. He therefore, submitted that the impugned order is vitiated for non recording of the satisfaction by the Trial Court and hence, the same may be quashed and set aside. In support of his submissions he placed reliance on ***Raman Tech. & Process Engg. Co. and another Vs. Solanki Traders (2008) 2 Supreme Court Cases 302 and Premraj Mundra Vs. Md. Manook Gazi & others, AIR (38) 1951, Calcutta 156.***

8. The learned Advocate for the respondents on the other hand, supported the impugned order stating that a well reasoned order is passed and that the satisfaction of the Trial Court is reflected in the order. He further submitted that since it is a conditional order, in case the petitioner submits the security of Rs. 35,00,000/-, the attachment order would not take effect. He further argued that the petitioner, without any justifiable cause, has not filed any reply to the application and has remained absent at the time of hearing of the said application.

According to him, the petition has no merit and the same is liable to be dismissed.

9. Perusal of the impugned order reveals that the Trial Court has accepted the contention of the respondents/plaintiffs that the petitioner/defendant is attempting to sell his land to frustrate the object of the suit, only because the petitioner/defendant failed to appear which is clear from the following observation of the Trial Court:-

“Non appearance of the defendant shows that there is substance in the contention of the plaintiffs that the defendant intends to obstruct or delay the execution proceeding in future.”

10. Thus, it is clear that the Trial Court was influenced by the fact that the petitioner/defendant neither filed any reply to the application nor appeared at the time of hearing of the application. The impugned order nowhere reflects satisfaction of the Trial Court as contemplated by the Order 38 Rule 5 of the Code of Civil Procedure. It is therefore clear that the Trial Court has passed the impugned order merely for asking and has exercised the power mechanically. The respondent/plaintiffs have failed to show prima facie that their claim is bonafide and valid. They have failed to satisfy the Trial Court that the

petitioner/defendant is about to remove or dispose of whole or part of his property with intention of obstructing or delaying the execution of any decree that may be passed against him. No prima facie case was made out by the respondents/plaintiffs to warrant passing of the impugned order.

11. In *Raman Tech. and Process Engg. Co.* (supra) it is held:

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 utilise 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 relised by unscrupulous plaintiffs by obtaining orders of attachment before judgment and forcing the defendant for out-of-court settlements under threat of attachment.

6. A defendant is not debarred from dealing with his property merely because a suit is filed or about to be filed against him. Shifting of business from one premises to another premises or removal of machinery to another premises by itself is not a ground for granting attachment before judgment. A plaintiff should show, prima facie, that his claim is bona fide and valid and also satisfy the court that the defendant is about to remove or dispose of the whole or part of his property, with the intention of obstructing or delaying the execution of any decree that may be passed against him, before power is exercised under Order 38 Rule 5 CPC. Courts should also keep in view the principles

relating to grant of attachment before judgment.
(See *Premraj Mundra v. Md. Manech Gazi* for a clear summary of the principles.)

12. In the light of the above observations, and for the aforesaid reasons the impugned order is unsustainable in law and facts of the case. Hence the following order:

ORDER

1. The writ petition is allowed.
2. The impugned order (Annexure-A) passed by the learned Civil Judge, Senior Division, Malkapur below Exh.16 in Special Civil Suit No. 7/2017, is hereby quashed and set aside.
3. The Trial Court shall consider the application Exh.16 on its own merits, after giving an opportunity of hearing to the parties and decide the same, in accordance with law, within a period of two months from today.
4. Rule is made absolute in the above terms with a costs of Rs.5,000/- imposed on the petitioner-defendant to be deposited with Legal Services Authority, Malkapur, within a period of four weeks from today.

JUDGE