

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

WRIT PETITION NO. 836 OF 2019

Anurag Jagdish Poddar

..VS..

Sau. Sumandevi Balkisan Tibdewal and ors.

Office Notes, Office Memoranda of Coram,
appearances, Court's orders of directions
and Registrar's orders

Court's or Judge's orders

Shri P.S. Chavhan, Advocate for the petitioner.

Shri Aadil Anwar J. Mirza, Advocate for respondent nos. 1 to 5.

CORAM : MANISH PITALE, J.

DATED : 25/03/2022.

By this petition, the petitioner (original plaintiff) has challenged order dated 05.12.2018, passed by the Court of Joint Civil Judge, Senior Division, Wardha, whereby an application filed under Order 38, Rules 5 & 6 of the Code of Civil Procedure, for attaching property before judgment, has been rejected.

2. The petitioner filed a suit for recovery of an amount of Rs.13,22,437/- along with 15% interest against the respondents. It was contended in the application moved under Order 38, Rule 5 of the Code of Civil Procedure that there was genuine apprehension that the respondents would dispose of their properties, as a consequence of which, even if the suit filed by the petitioner was to be decreed, it would be reduced to a paper decree.

3. In order to support the aforesaid contention, the petitioner had placed on the record an agreement to sale pertaining to one of the properties of the respondents. Details of other two properties were placed before the Court below, stating that the application could be allowed in the context of those properties, considering that the apprehension expressed

on behalf of the petitioner, was genuine.

4. The Court below disagreed that the contention raised on behalf of the petitioner, holding that in respect of the two properties specifically referred to by the petitioner, there were no documents placed on the record like an agreement to sale to indicate that the respondents intended to dispose of such properties. The application filed by the petitioner, was rejected.

5. This Court issued notice in the present writ petition challenging the said order and the respondent entered appearance through learned Counsel.

6. This petition was adjourned to give an opportunity to the parties to apprise this Court, as to the stage of the proceedings before the Court below.

7. A Pursis dated 22.03.2022, was filed on behalf of the respondents, stating that evidence of the petitioner was already recorded by the Court below. It is an admitted position that, as on today, the evidence of the respondents i.e. original defendants, is being recorded. This does indicate that the suit has progressed considerably.

8. Mr. Chavhan, learned Counsel appearing for the petitioner submitted that the impugned order deserves to be set aside for the reason that during the pendency of the suit one property was already disposed of by the respondents and that there was apprehension that the other properties may also be disposed of. He fairly conceded that the valuation of the other properties was about Rs.50 lakhs each and in that backdrop he relied on the judgment of the Hon'ble Supreme Court in the case of *Rajendran and ors. vs. Shankar Sundaram and ors. (2008) 2 SCC 724* , to contend that even

if, an order of attachment before judgment was not to be granted, in the facts of the present case under Order 38, Rule 5 of the Code of procedure, the direction to the respondents to furnish security was clearly warranted.

9. Mr. Adil Mirza, learned Counsel appearing for the respondents, opposed the contentions raised on behalf of the petitioner. It was submitted that there was no *prima facie* case made out, much-less a strong *prima facie* case by the petitioner for the Court below to invoke power under Order 38 Rule 5 of the Code of Civil Procedure.

10. This Court has considered the material on the record. It appears that one of the properties was disposed of by the respondents in the year 2019, during the pendency of the suit. There is no dispute about the fact that the proceedings in the suit, have progressed substantially, and at this point in time, the evidence of the respondents i.e. original defendants is being recorded. From the year 2019 till today, there is nothing brought on record on behalf of the petitioner to show that the respondents intended to deal with the other two properties specifically mentioned in the application moved on behalf of the petitioner, under Order 38 Rule 5 of the Code of Civil Procedure, before the Court below.

11. A perusal of the impugned orders shows that the Court below has come to a considered conclusion that the petitioner has failed to place on record any material to indicate even *prima facie* that there is likelihood of the respondents disposing of their properties, warranting an order under Order 38 Rule 5 of the Code of Civil Procedure. Even in the judgment upon which the learned Counsel for the petitioner has placed reliance in the case of *Rajendran (supra)*, the Hon'ble Supreme Court has reiterated that a

strong *prima facie* opinion ought to be formed by the Court regarding the genuineness of the apprehension expressed on behalf of the plaintiff before exercising power under Order 38, Rule 5 of the Code of Civil Procedure.

12. This Court is of the opinion that the petitioner, in the facts and circumstances of the present case, has failed to make out such a strong *prima facie* case. Therefore, no fault can be found with the impugned order passed by the Court below.

13. Insofar as, the direction to furnish security is concerned, this Court finds that there is absence of material to support the apprehension expressed on behalf of the petitioner that even if, the suit was to be decreed, it would be reduced to make a paper decree. Considering the fact that the evidence of the respondents is being recorded, this Court is of the opinion that the proceedings before the Court below, have progressed considerably and they would culminate in a decree in the near future. In view of the above, Writ Petition is dismissed.

14. The Court below is directed to expeditiously dispose of the suit filed by the petitioner and to make an endeavour to complete the proceedings, within three months from today.

JUDGE

Trupti