

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 1849 OF 2023

Vasavdtta Vinod Parle

...Petitioner.

Versus

Satish Sakharam Pharne & Ors.

..Respondents.

*Mr. Vikrant Desai i/b Mr. Suresh Kamble for the petitioner.
Ms. Srushti Chalke i/b Mr. Drupad S. Patil for respondent No.1.*

Coram : Sharmila U. Deshmukh, J.

Date : August 10, 2023.

P. C. :

1. Heard.
2. The challenge in the petition is to the order dated 12th December 2022 allowing plaintiff's application under Order-XXXVIII Rule-5 of the Code of Civil Procedure, 1908 and directing defendant no.1 to furnish bank guarantee of Rs.50 lakh and attaching the suit land temporarily till furnishing of bank guarantee.
3. Learned counsel appearing for the petitioner submits that the suit has been filed seeking specific performance of an agreement of sale dated 9th December 2017 executed by the plaintiff with defendant no.1. He would further submit that in these proceedings,

an application came to be filed on 1st December 2022 under Order-XXXVIII Rule-5 of the Code of Civil Procedure, 1908. He would further submit without the ingredients of Order-XXXVIII Rule-5 of the Code of Civil Procedure, 1908 being satisfied the impugned order has been passed. He would further submit that the appropriate course of action was to file an application for injunction in event there was an apprehension of the suit property being alienated.

4. *Per contra*, learned counsel appearing for the respondent submits that there was an agreement of sale executed in respect of the suit property between the plaintiff and defendant no.1. She would further submit that paragraph 8 of the application for attachment before judgment discloses that the defendants had informed the plaintiff that after the encumbrances of the banks over the suit property are removed, the same will be sold.

5. Considered the submissions.

6. The admitted position is that the suit is for specific performance of the contract which has been executed between the plaintiff and defendant no.1. In this suit, instead of seeking temporary restraining orders against the defendants from alienating

the suit property, an application has been filed under the provisions of Order-XXXVIII Rule-5 of the Code of Civil Procedure, 1908. The provisions of Order-XXXVIII Rule-5 of the Code of Civil Procedure, 1908 read thus :

"5. Where defendant may be called upon to furnish security for production of property.—(1) Where, at any stage of a suit, the Court is satisfied, by affidavit or otherwise, that the defendant, with intent to obstruct or delay the execution of any decree that may be passed against him,—

(a) is about to dispose of the whole or any part of his property, or

(b) is about to remove the whole or any part of his property from the local limits of the jurisdiction of the Court,

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, 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 as may be sufficient to satisfy the decree, or to appear and show cause why he should not furnish security.

(2) The plaintiff shall, unless the Court otherwise directs, specify the property required to be attached and the estimated value thereof.

(3) The Court may also in the order direct the conditional attachment of the whole or any portion of the property so specified.

(4) If an order of attachment is made without complying with the provisions of sub-rule (1) of this rule, such attachment shall be void."

7. Perusal of the above provisions would indicate that it is only upon satisfaction of the Court that the defendant with intent to obstruct or delay the execution of any decree that may be passed against him is about to dispose of the property, the Court may direct the defendant, within the time fixed by it, either to furnish the security as may be sufficient to satisfy the decree or to appear and show cause why he should not furnish the security. In the present case, upon perusal of the application preferred under Order-XXXVIII Rule-5 of CPC, there is no such apprehension which has been expressed by the plaintiff apart from stating that the defendants had informed them that they are about to alienate the suit property. The trial Court without recording any satisfaction as contemplated under Order-XXXVIII Rule-5 of CPC, has allowed the application and directed defendant no.1 to furnish the bank guarantee of Rs. 50 lakh pending which the suit land is temporarily attached.

8. From the perusal of impugned order it appears that the same has been passed in a mechanical manner without applying its mind as to whether ingredients of Order-XXXVIII Rule-5 of CPC are satisfied. It cannot be debated that the process of attachment before judgment is a drastic order and unless there is sufficient material on record to

indicate that there is danger of the property being disposed of, in my view, such a drastic order ought not to have been passed.

9. In view of the above, the impugned order dated 12th December 2022 is hereby quashed and set aside. Writ petition stands allowed.

[Sharmila U. Deshmukh, J.]