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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Date of decision: August 22, 2023*

+ **FAO(OS) (COMM) 76/2022 & CM APPL.15192/2022**

BELA GOYAL PROPRIETOR OF ISPAT SANGRAH INDIA

..... Appellant

Through: Mr. Rajiv Bajaj, Adv.

versus

VIPL-MIPL JV (JAIPUR) & ORS. Respondents

Through: Ms. Geeta Luthra, Sr. Adv. with
Mr.Aadarsh Kothari, Adv. for
Respondent No.1.

CORAM:

HON'BLE MR. JUSTICE SURESH KUMAR KAIT

HON'BLE MS. JUSTICE NEENA BANSAL KRISHNA

J U D G M E N T (oral)

1. The present Appeal under Section 13(1A) of the Commercial Courts Act, 2015 read with Order XLIII Rule 1 & 3 Code of Civil Procedure, 1906 (*hereinafter referred to as "CPC", 1908*) has been filed on behalf of the appellant (plaintiff in the original suit) against the Order dated 03.03.2022 passed by the learned Single Judge of this Hon'ble Court in CS (COMM) 1217/2018 wherein the an I.A. No.15168/2018 under Order XXXVIII Rule 5 CPC seeking attachment of the claim amount, has been dismissed.

2. The plaintiff in the suit (*hereinafter referred to as the "appellant"*) is a supplier of iron material, TMT etc to defendant No. 1 (*hereinafter referred to as the "respondent No. 1"*) which is a Joint Venture of defendant Nos. 2

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Signing Date: 31.08.2023
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& 3 (*hereinafter referred to as the “respondent Nos. 2 & 3”*) that was created for the purpose of fulfilling a construction contract with defendant No. 4 (*hereinafter referred to as the “respondent No. 4”*) on 07.10.2014.

3. The appellant raised 37 Invoices in lieu of the Purchase Orders for which materials were delivered to respondent No. 1. A total sum of Rs. 6,00,00,000 was payable to the appellant under the said Invoices out of which a balance of Rs.2,70,82,437/- remained due which respondent No. 1 failed to pay despite having received all the goods. Respondent No. 1 had issued three undated cheques bearing numbers 445624, 445622 and 445623 in May, 2016 of Rs. 25,00,000 each, along with the assurance that the amount due to the appellant would be settled by respondent No. 1, 2 & 3 from the amount that they were entitled to recover from respondent No.4. The appellant treated these undated cheques as a written acknowledgement of the dues owed by respondent No. 1 and the cheques were not deposited by the appellant on the request of respondent Nos. 1 to 3.

4. In the interim, the contract between respondent No. 1 and respondent No. 4 got terminated and a Sole Arbitrator was appointed by this High Court vide Order dated 24.05.2016. An intervention application in O.M.P. (I) (Comm.) No.54 of 2015 which was registered as IA No.4832 of 2016 was also filed by the appellant before this Court. While this intervention Application was pending, an Award dated 14.09.2018 was passed by the Sole Arbitrator in favour of respondent No. 1. for aggregate sum of Rs 11,18,11,298 along with *pendente lite* and post award interest after subtracting the award amount of Rs 2,40,35,116/- for the counter claims.

5. The appellant thereafter, filed a suit for recovery on 31.10.2018 for a sum of Rs.2,70,82,437/- along with *pendente lite* and future interest @ 18%
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p.a as respondent No. 1 had failed to make payments for the dues and also dishonoured the three cheques which they had issued. It was claimed by the appellant that though these cheques were not deposited in the bank on the request made by respondent Nos. 1 to 3, the said cheques would have been dishonoured had they been deposited. Along with the said suit, the appellant also filed an Application under Order XXXVIII Rule 5 CPC for the deposit of the claim amount payable by respondent No. 4 to appellant under the Award in the present civil suit pending adjudication between the parties.

6. **The appellant submitted in the application** that an amount of Rs.2,70,82,437/- was recoverable from respondent No. 1 as per the statement of account maintained by them, which respondent No. 1 had no intention of paying. Therefore, respondent No. 1 should not be entitled to receive the award amount from respondent No. 4 vide Award dated 14.09.2018 and the suit amount in the hands of respondent No. 4, be attached.

7. It was further submitted that the malafide intention of respondent No. 1, not to pay, was apparent from the fact that it owed money to more than 16 other vendors. Also, the appellant was unable to trace respondent Nos. 1 to 3 for recovery of its dues. Further, much to the shock of the appellant, even the three cheques issued by respondent No. 1 had not been honoured. It was also pointed out that there were 13 other cases pending under Section 138 of the Negotiable Instruments Act, 1881 in which the representatives of respondent No. 1 have failed to appear.

8. The appellant had attempted several times to contact respondent no. 1, however, every postal receipt was returned with the endorsement that the office has left. Even appellant found the office to be closed when they
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visited the premises. Thus, respondent No. 1 is asserted to be untraceable.

9. The appellant submitted that if respondent No. 4 released the amount payable to respondent No. 1 under Award dated 14.09.2018, the latter would usurp the money and take it out of the local limits of the jurisdiction of this court after which it may become extremely difficult for the appellant to recover its dues and cause serious prejudice as the Suit even if decreed, would then remain a paper decree.

10. On the first date of hearing the counsel appearing on behalf of respondent No. 4 submitted that they would release the claimed Suit amount payment in terms of the Award dated 14.09.2018 payable to respondent Nos. 1 to 3 in favour of respondent No.1, despite the fact that respondent Nos. 1 to 3 had not appeared on this date of hearing. The learned Single Judge, passed an *ex parte* ad interim **Order dated 02.11.2018 in I.A. No. 15168/2018** directing respondent No. 4 to deposit a sum of Rs.2,70,00,000 out of the amount awarded in favour of respondent No. 1, before the Registrar General of this court. However, the application was not disposed of.

11. Following pursuit, 12 other vendors of respondent No. 1 filed recovery suits before the Commercial Courts, Patiala House Court and obtained such similar orders against respondent No. 4 for the deposit of the claim amount from the amount awarded vide Arbitration Award dated 14.09.2018.

12. As things stood thus, **IDBI Bank, a creditor of respondent No. 2**, (but not a party to the Suit) filed three applications in the present suit as follows: -

(i) I.A. No.2181/2019 under Order I Rule 10(2) of the CPC seeking **FAO(OS)(COMM) 76/2022**

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intervention/impleadment in the suit.

(ii) I.A. No.3649/2019 under Order XXXIX Rule 4 of the CPC seeking setting aside of the order dated 02.11.2018 to the extent that it directed the respondent no.4 to deposit a sum of ₹2,70,00,000/- before this Court.

(iii) I.A. No.3650/2019 under Section 151 of the CPC seeking release of money deposited by the respondent no.4 in terms of the order dated 02.11.2018.

13. Respondent No. 1 also filed an application in I.A. No.12937/2021 for the release of the amount deposited by respondent No. 4 before the Registrar General of this court in favour of IDBI Bank, by contending that the said bank was a secured creditor of the respondents. It was averred that Bank Guarantee issued by IDBI Bank at the behest of respondent No. 2, was illegally encashed by respondent No. 4 which the learned Sole Arbitrator has awarded in favour of respondent No. 1 *vide* Award dated 14.09.2018. It was also contented in the said application that IDBI Bank had filled applications before the DRT (II) for the recovery of Rs.14,87,69,853/- against respondent No. 2 and the Tribunal passed an Attachment Order on 12.04.2019 for the deposit of the recovery amount from the amount payable by respondent No. 4 in terms of the Arbitration Award dated 14.09.2018. The DRT (II) subsequently issued letters to the respective Commercial Courts for the release of the amounts stating that IDBI Bank being a secured creditor, would have a superior right over the other plaintiffs.

14. After considering the facts and circumstances narrated above, **the learned Single Judge, vide Order dated 03.03.2022 in IA No. 15168/2018** under Order XXXVIII Rule 5 CPC did not find any reason to believe that ***FAO(OS)(COMM) 76/2022***

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respondent No. 1 was attempting to remove the sum awarded in its favour in the Arbitration Award from the jurisdiction of this Court in order to delay or obstruct the execution of the decree. The applications filed by IDBI Bank were also disposed as infructuous vide this Order.

15. It was observed in the Order that sole reason for respondent No. 1 to seek the release of the amount deposited before this court is to transfer the aforesaid amount in favour of IDBI Bank, which is a secured creditor of respondent No. 2. On the other hand, the appellant was attempting to convert its unsecured debt into a secured one by seeking the deposit of its claim amount. The learned Single Judge held that the mere existence of a good case on merits, is not a sufficient ground for a remedy under Order XXXVIII Rule 5 CPC.

16. The learned Single Judge further held that the *ex parte* Order dated 02.11.2018 was passed only on the basis of the appearance made by the counsel for respondent No. 4 stating that it would release the amount to respondent No. 1 in accordance with the Award. The appellant and respondent No. 4 had clearly colluded with each other with a view of getting an Order behind the back of the respondent Nos. 1 to 3. This conclusion was drawn as respondent No. 4 was neither a proper nor necessary party to the suit filed by the appellant. It was apparent from the facts that respondent No. 4 had also appeared in the first hearing of 10 suits filed by other vendors. Pertinently, respondent No. 4 never appeared after the first date of hearing in the present suit.

17. The learned Single Judge further observed that under Order XXXVII Rule 5 of the CPC, an Order directing a defendant to furnish security is generally not passed without giving proper notice to the defendant.

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18. It was also observed that while the Arbitration Award in the present case was in favour of respondent No. 1, the application filed by IDBI Bank before the DRT II was against respondent No.2. Since respondent No. 1 is a joint venture of respondent nos. 2 & 3 which was created solely for the purpose of fulfilling the contract with respondent No. 4, it is not a separate entity but is merely an extension of the respondent nos. 2 & 3. In fact, most of the Invoices raised by the appellant were against respondent No. 2. Thus, even the Arbitration Award passed in favour of respondent No. 1 would accrue to the favour of respondent Nos. 2 & 3. Therefore, respondent Nos. 2 & 3 are free to utilize the amounts due to them under the Arbitration award to settle their dues with IDBI Bank, who is their secured creditor.

19. In view of the aforesaid reasons, the learned Single Judge dismissed the application under Order XXXVIII Rule 5 as devoid of merits.

20. Aggrieved by the Order dated 03.03.2022 dismissing the Application under Order XXXVIII Rule 5, the present appeal has been preferred by the appellant.

21. **It is submitted by the appellant** that the learned Single Judge has not pointed out a single change in circumstance which would warrant a vacation of the Order dated 02.11.2018 directing the deposit of the claim amount in this Court under Order XXXVIII Rule 5 CPC. Since the averments made in the plaint clearly depict that the respondent Nos. 1 to 3 have absconded, it is submitted that the appellant is entitled to an attachment under Order XXXVIII Rule 5 CPC, 1908.

22. It is further submitted that the ingredients of Order XXXVIII Rule 5 CPC, 1908 were satisfied as respondent Nos. 1 to 3 have not filed any reply to the Application. It is pointed out by the appellant that respondent Nos. 1
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to 3 filed I.A. 1790/2020 and I.A. 1791/2020 under Order VII Rule 10 CPC challenging the suit on the grounds of jurisdiction and limitation. *Vide* Order dated 03.01.2022 the learned Single Judge dismissed the said applications and gave detailed findings as to the absence of any authorized representatives on behalf of Respondents Nos. 1 to 3 as well as the fact that the promoters of Respondents Nos. 1 to 3, have absconded.

23. It is their case that the even if a decree is passed in favour of the appellant, the same would become inexecutable because of the lack of money with respondent Nos. 1 to 3 to satisfy it. It is averred that the learned Single Judge failed to appreciate the collusion between respondent Nos. 1 to 3 and IDBI as they have till date not placed on record the accounts of monies recovered by IDBI by liquidating the securities and properties mortgaged by the Respondents No. 1 to 3, on the premise of a prior charge against the deposit made before this Court. By way of this collusion, respondent Nos. 1 to 3 are attempting to escape their liabilities towards their vendors.

24. Moreover, the Arbitration Award dated 14.09.2018 was not assigned to IDBI Bank and it is not a secured creditor of respondent No. 2. Therefore, they should not be entitled to any special benefit.

25. **Respondent No.1 in its written submissions**, reiterated the collusion between the appellant and respondent No. 4 and submitted that respondent No. 4 was not a necessary or proper party to the suit despite which it was impleaded with the sole intent to somehow secure the money.

26. It is argued that no Notice was issued to them on the first date of hearing when the *ex parte* ad interim Order was passed on 02.11.2018. They entered into appearance only on 08.02.2019 after the Court Notice was ***FAO(OS)(COMM) 76/2022***



served. Hence, the learned Single Judge had rightly ordered for the release of the deposit amount *vide* **impugned Order dated 03.03.2022**.

27. Submissions Heard.

28. Before appreciating the merits of the case, it is pertinent to note that at the time of presentation of the Appeal, IDBI was added a respondent No. 5 by the appellant even though it was not a party to the Suit and its application under Order I Rule 10 of CPC, 1908 was also dismissed *vide* the impugned Order; however, they were deleted from the Memo of Parties *vide* Order dated 15.11.2022 with the concurrence of the appellant.

29. To understand the context of the present dispute, respondent Nos. 2 & 3 are registered companies under the Companies Act, 2013 who entered into a Joint Venture i.e. Respondent No. 1. The appellant had supplied iron material worth Rs. 6,00,00,000 which were claimed under various Invoices. Disputes arose qua the payment of the due amount of Rs.2,70,82,437/- and a Suit for recovery was filed by the appellant.

30. On the filing of the Suit on 02.11.2018, the respondent No. 4 appeared on advance notice, but none appeared on behalf of the respondent Nos. 1, 2 and 3. Accordingly, notices were directed to be issued to them. In addition, the learned Single Judge also directed the respondent No. 4, (which was liable to make payments to the respondent No. 1 to the tune of Rs 11,18,11,298 pursuant to the Arbitral Award dated 14.09.2018), to deposit a sum of Rs. 2,70,00,000/- (Rupees Two Crore Seventy Lakhs/-) before the Registrar General of this Court.

31. Thereafter, IDBI Bank, which was a creditor of respondent No. 2 (from whom respondent No. 2 had taken loans for its ventures against the Bank Guarantees), moved the Application bearing No. I.A. 2181/2019 under **FAO(OS)(COMM) 76/2022**



Order I Rule 10 of CPC, 1908 for its impleadment as a party.

32. Another Application bearing No. I.A. 3649/2019 was filed by the respondent No. 4 for setting aside the impugned Order dated 02.11.2018.

33. The Application bearing No. I.A. 3650/2019 was also filed by IDBI Bank for the release of amount so deposited with the Registrar General of this Court in its favour.

34. Soon after the filing of the present Suit before the learned Single Judge, twelve other vendors filed similar Suits before the Commercial Judge, Patiala House Courts, Delhi seeking similar recovery of their dues from respondent No. 1 along with applications for the attachment of their claim amounts from the monies payable by respondent No. 4 to respondent No.1 in light of the Arbitral Award dated 14.09.2018, which were allowed. IDBI Bank, in the interim, filed the petition before the Debts Recovery Tribunal-II, Delhi (DRT-II) and sought release of amounts being deposited by the respondent No. 4.

35. A petition had been filed by IDBI Bank before DRT(II) as respondent No. 2 had furnished bank guarantees drawn on IDBI Bank in favour of the respondent No. 4. Subsequently, these Bank Guarantees were illegally encashed by the respondent No. 4. Against this illegal encashment, the respondent No. 1 invoked the arbitration and the Arbitral Award dated 14.09.2018 was passed against the respondent No. 4 and in favour of the respondent No. 1. It was held by the learned Sole Arbitrator that the encashment of bank guarantees by respondent No. 4 was illegal and directed the respondent No. 4 to refund the amount of Bank Guarantees in favour of respondent No. 1.

36. The IDBI Bank *vide* Letter dated 15.12.2020 offered to settle the loan
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account of respondent No. 1 which was being maintained with IDBI as a One-Time Settlement (OTS). The IDBI then approached DRT-II *vide* O.A. No. 1080/2017 titled IDBI Bank Limited vs. M/s. Maxout Infrastructures Pvt. Ltd. & Ors. wherein the Tribunal allowed the application for the attachment of the Award Amount in Arbitration Award dated 14.09.2018. Thereafter, IDBI moved an Application in the same matter bearing No. I.A. 382/2011 seeking remittance/transfer of the amounts lying in the matters of eight vendors who had filed recovery suits before the Commercial Courts, which was allowed *vide* Order dated 26.02.2021 by DRT-II.

37. Pursuant thereto, the Commercial Judge, Patiala House Courts, Delhi *vide* Order dated 15.03.2021 directed the release of the amounts deposited in all eight matters in furtherance of order of the DRT-II dated 26.02.2021. Against this Order dated 26.02.2021 of DRT-II, some of the vendors out of eight vendors, filed the Writ Petition (Civil) No. 3987/2021 titled Saroj Devi & Ors. vs. IDBI Bank Limited & Ors. before this Court. The petitioners therein were permitted to withdraw the said Writ Petition with liberty to approach Debts Recovery Appellate Tribunal (DRAT) by way of Appeal.

38. The aforesaid vendors filed Misc. Appeal No. 91/2021 titled Saroj Devi & Ors. vs. IDBI Bank Limited & Ors. before the DRAT challenging the Order dated 26.02.2021 of the DRT-II which is pending adjudication.

39. Similar, Application bearing No. I.A. 677/2021 was filed by the IDBI Bank in the case of IDBI Bank Limited vs. M/s. Maxout Infrastructures Pvt. Ltd. & Ors. , and the said application was allowed by DRT-II *vide* Order dated 13.04.2021 for release of the amount lying deposited with the Patiala House Courts in respect of other four remaining vendors. These four vendors also filed Misc. Appeal bearing No. 112/2021 before DRAT which

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is also pending adjudication.

40. *Vide* Order dated 03.05.2021, the learned Commercial Judge-03, Patiala House Courts, Delhi directed the release of the amounts in the aforesaid four matters pursuant to Order dated 13.04.2021 passed by the DRT-II.

41. Thereafter, respondent No. 1 gave its acceptance to One-Time Settlement offer (OTS) as proposed by IDBI and the entire loan was agreed to be settled for an amount of Rs. 5,31,65,320/- (Rupees Five Crore Thirty One Lakh Sixty Five Thousand Three Hundred Twenty/-), subject to its payment on or before 31.07.2021 in accordance with the schedule of payments. The said date of payment was further extended till 24.08.2021.

42. In order to pay this OTS amount, respondent No. 1 *vide* Application bearing No. 12937/2021 in the present Suit challenged the *ex parte* Order dated 02.11.2018 of the learned Single Judge by asserting that the appellant who is an unsecured creditor, is abusing the provision of Order XXXIX Rule 5 of CPC, 1908 and trying to step into the shoes of a secured creditor which is against the principles of law. The respondent No. 1, therefore, sought vacation of the *ex parte* order.

43. The learned Single Judge dismissed the Application under Order XXXVII Rule 5 of CPC, 1908 of the appellant seeking attachment of the Award amount to the extent of Rs. 2,70,00,000/- (Rupees Two Crore Seventy Lakhs/-) and directed the attached money along with the accrued interest to be transferred to the DRT-II *vide* the impugned Order.

44. Thus, the appellant has challenged the Order dated 03.03.2022 of the learned Single Judge dismissing application under Order XXXVIII Rule 5 in CS(COMM) 1217/2018 as being prejudicial to its interests.

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45. To appreciate the grounds raised by the appellant, it is apposite to delineate the circumstances under which an extraordinary remedy under Order XXXVIII Rule 5 of CPC, 1908 can be granted. The relevant part of the provision reads as under: -

“Order XXXVIII:-

...

(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.]

46. From a reading of the aforesaid provision, it is apparent that an
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attempt by a defendant in suit to dispose his property or the intent to do the same is an indispensable requirement for the grant of an Order under this provision. We find that the application filed by respondent No. 1 for the release of the claim amount that was deposited before the Registrar General of this court in view of Order dated 02.11.2018 can in no way be construed as an act or attempt to siphon the funds in order to escape the decree as it was done only to settle their dues with IDBI Bank who is also a creditor of respondent No. 2. Rather, it is the appellant who is attempting to convert its unsecured debt into a secured one by resorting to an application under Order XXXVIII Rule 5 as rightly held by the learned Single Judge.

47. Conspicuously, the appellant has made no case to the effect that respondent Nos. 1 to 3 have either attempted or acted in a way to show an intent to siphon the funds awarded in the Arbitration Award or escape the liability that may accrue against them by way of a decree in CS(COMM) 1217/2018.

48. The learned Single Judge in this regard had rightly held that respondent No. 1 is a Joint Venture which owes its existence to Respondents Nos. 2 & 3 and is not a separate entity from them. Therefore, it is respondent Nos. 2 & 3 that would reap the Award amount. This entitles them to recover the Award amount deposited before this court to settle their dues with a secured creditor in terms of the Attachment Order dated 12.04.2019 issued by the DRT(II) in respect of the Award Amount.

49. The fear of the appellant qua a delay in the execution of the decree stems from their claim that the three undated cheques issued by respondent Nos. 1 to 3 in May, 2016 have been dishonoured. This contention is exceptionally dicey and capricious as it is the appellants own admission in *FAO(OS)(COMM) 76/2022*

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their plaint that they had not deposited the said cheques. The appellant further stated that these cheques would have been dishonoured had they been deposited. This was nothing but an attempt by the appellant to set up an urgency of securing their money, which as discussed above, the circumstances of this case do not warrant.

50. The other contention of the appellant in favour of the attachment of the Award amount is that respondent Nos. 1 to 3 have been absconding and have even failed to file a reply to IA No. 15168/2018 filed by the appellant. The appellant has also relied on the Order dated 03.01.2022 of the learned Single Judge to buttress the fact that the Directors of defendant Nos. 1 to 3 have been absconding. We have perused the said Order and are of the view that the Order merely records that the Directors had not been appearing and they failed to file their written statement. It only states that this could have been the reason behind the direction for the deposit of the claim amount made vide Order dated 02.11.2018. This speculation in no way amounts to the satisfaction of the ingredients under Order XXXVIII Rule 5 CPC.

51. In any case, the observations regarding the disappearance of the Directors of defendant Nos. 1 to 3 is of no aid to the appellant because clearly, the Order dated 02.11.2018 has been passed *ex parte* on the first date of hearing even before issuing any service of notice to respondent Nos. 1 to 3. We, therefore, concur with the observation made by the learned Single Judge that a relief under Order XXXVIII Rule 5 CPC cannot be granted without issuing a notice to the defendant in the suit. Since the Order dated 02.11.2018 was only an interim order, the same was vacated by way of Order dated 03.03.2022 after a careful examination of the facts and circumstances in line with the tenets of Order XXXVIII Rule 5 CPC.

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52. Further, the mere existence of several recovery suits and proceedings under Section 138 of the Negotiable Instruments Act, 1881 against respondent No. 1 does not pose a threat to execution for the appellant as contemplated under Order XXXVIII Rule 5 CPC.

53. The learned Single Judge had relied on a plethora of judgements in cases of Raman Tech. & Process Engg. Co. & Anr. v. Solanki Traders, (2008) 2 SCC 302; Premraj Mundra v. Md. Maneck Gazi & Ors., AIR 1951 Cal 156; M/s. K. C. V. Airways Ltd. & Anr. v. Wg. Cor. R. K. Blaggana, AIR 1998 Delhi 70 to observe that the remedy under Order XXXVIII Rule 5 is an extraordinary one which must be sparingly exercised by courts only in cases where a plaintiff is able to 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.

54. The appellant has also taken the plea that IDBI Bank is not a secured creditor and therefore must not be given any priority over the appellant. This plea is devoid of any merit as a decision under order XXXVIII Rule 5 has to be decided by a court purely based on the intent and acts of the defendant to a suit to obstruct the execution of the decree, which was found to be missing in the present case. The Award dated 14.09.2018 has been made against the wrongful encashment of Bank Guarantees furnished by respondent Nos. 2 to respondent No. 4 as part of joint venture. To claim that IDBI Bank is not a secured creditor, may not be correct. Further, money is not being siphoned off by respondent Nos. 1 to 3 but it is subject to the orders of DRT-II to satisfy the legitimate claims of IDBI Bank.

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55. Be that as it may, if the suit is decreed in favour of the appellant, it may become onerous for them to seek recovery; however, since the circumstances in this case do not fall with the ambit of Order XXXVIII Rule 5, we find no merit in the present appeal.

56. Accordingly, the present appeal is hereby dismissed. Consequently, the pending application is also dismissed.

(SURESH KUMAR KAIT)
JUDGE

(NEENA BANSAL KRISHNA)
JUDGE

AUGUST 22, 2023
S.Sharma/Ek