

**IN THE HIGH COURT OF MADHYA PRADESH  
AT INDORE**

**BEFORE**

**HON'BLE SHRI JUSTICE SUBODH ABHYANKAR**

**ON THE 20<sup>th</sup> OF APRIL, 2023**

**MISC. PETITION No. 3055 of 2022**

**BETWEEN:-**

1. PREM NARAYAN S/O DHULJI AWASTHI,  
AGED ABOUT 68 YEARS, OCCUPATION:  
FARMER GRAM TIGRIYA BADSHAH  
TEHSIL HATOD INDORE (MADHYA  
PRADESH)
2. RAMESHCHAND S/O DHULJI AWASTHI,  
AGED ABOUT 65 YEARS, OCCUPATION:  
FARMER R/O GRAM TIGRIYA  
BADSHAH (MADHYA PRADESH)

**.....PETITIONERS**

*(BY SHRI VINAY SARAF, SENIOR ADVOCATE WITH SHRI CHETAN  
AGRAWAL, ADVOCATE)*

**AND**

1. M/S GOLDEN HERITAGE DEVELOPERS  
INDORE THR ITS PARTNER DEV KUMAR  
TONGIA S/O PHULCHAND TONGIA,  
AGED ABOUT 72 YEARS, OCCUPATION:  
COLONIZER 237/261 M.T. CLOTH  
MARKET INDORE (MADHYA PRADESH)
2. AMIT KUMAR TONGIA S/O MOTILAL  
TONGIA, AGED ABOUT 51 YEARS,  
OCCUPATION: BUSINESS COLONIZER  
237/261 M.T. CLOTH MARKET INDORE  
(MADHYA PRADESH)

**.....RESPONDENTS**

*(BY SHRI V.K. JAIN, SENIOR ADVOCATE WITH SHRI VAIBHAV  
JAIN, ADVOCATE FOR THE RESPONDENT NO.1  
SHRI GAURAV KUMAR VERMA, ADVOCATE FOR THE RESPONDENT  
NO.2)*

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*This petition coming on for admission this day, the court passed the following:*

**ORDER**

1] This Miscellaneous Petition has been filed under Article 227 of the Constitution of India by the petitioners/defendants No.2&3 against the order dated 15.6.2022, passed by the Additional District Judge, Indore in Regular Civil Suit (B) No.191/2019, whereby, on an application filed under Order 38 Rule 5 of the C.P.C. the learned Judge of the trial has directed the petitioners to furnish solvent security to the tune of Rs.4,13,40,000/-.

2] In brief, the facts of the case are that the respondents. No. 1 & 2/plaintiffs have filed a suit for recovery of the aforesaid amount on the ground that out of the aforesaid amount, a sum of Rs.2,60,00,000/- was given in cash to the plaintiffs and the remaining amount is towards the interest. In this suit, although the issues have already been framed, but as the plaintiffs had filed an application under Order 38 Rule 5 of the CPC along with the plaint seeking a direction to the respondents for attachment of the property in question, which was promised to be sold by the defendants to the plaintiffs, the learned Judge of the trial Court, vide its order dated 5.5.2022 directed the plaintiffs to furnish the requisite information as per format prescribed and the defendant was also directed to file written statement and also submit as to why the security may not be directed to be furnished by the defendants. Subsequently, the plaintiffs have also filed the details

of the property on 13.5.2022, and the defendants were also issued show cause notice as to why the security may not be taken from them. Thereafter, the final order has been passed by the trial court on 15.6.2022, holding that under the facts and circumstances of the case, the security requires to be taken from the defendants No.2 & 3 and thus, the defendants have been directed to furnish the security to the tune of Rs.4,13,40,000/- so that the decree, if passed against them can be satisfied.

3] Learned Senior counsel Shri Vinay Saraf for the petitioners has submitted that the learned Judge of the trial court has erred in law in not properly following the procedure as prescribed under Rule 5 of Order 38 of the CPC, and prima-facie, no satisfaction has been recorded regarding the claim of the plaintiffs. It is also submitted that although the learned Judge of the trial Court has not applied his mind that whether the plaintiffs have got any prima-facie case, which requires the security to be furnished by the defendants.

In support of his submissions, Shri Saraf has also relied on the decision rendered by the Supreme Court in the case of ***Raman Tech. & Process Engg. Co. and another vs. Solanki Traders*** reported as ***(2008) 2 SCC 302***. Relevant paras 4, 5 & 6.

Thus, it is submitted that the impugned order be set aside as no security is required to be furnished by the plaintiffs for want of any prima-facie satisfaction recorded by the trial court.

4] On the other hand, learned senior counsel Shri V.K. Jain for the respondent No.1 has opposed the prayer and it is submitted the

learned Judge of the trial court has in his order dated 15.6.2022, clearly held that the petitioners/defendants No.2 & 3 have failed to file any reply to the show cause notice issued to them as to why the security amount may not be taken from them. Thus, it is submitted that it is for the defendants No.2 & 3 to satisfy the court as to why the security amount should not be taken from them, however, they have not shown any document on record. The learned Judge of the trial court has rightly allowed the application under Order 38 Rule 5 of the CPC.

In support of his submission, Shri Jain has also relied upon the decision rendered by the Supreme Court in the case of **Rahul S. Shah vs. Jinendra Kumar Gandhi and others** reported as **(2021) 6 SCC 418.**

5] Learned senior counsel for the respondent No.1 has also drawn attention of this Court to the latest amended M.P. Civil Courts Rule, in which, the procedure has been prescribed regarding security is to be furnished by the defendants for the satisfaction of the trial court. Thus, it is submitted that no interference is made out as the trial court has rightly applied the procedure under Order 38 Rule 5 of the CPC.

6] Heard the learned senior counsel for the parties and also perused the record, including the impugned order as also the decisions rendered by the Supreme Court as cited by the counsel for the parties.

7] So far as in the case of *Raman Tech. & Process Engg. Co. and another (supra)*, is concerned, the relevant paras 4, 5 & 6 of the same read as under :-

“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.

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 bonafide 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 - Prem Raj Mundra v. Md. Maneck Gazi, AIR (1951) Cal 156, for a clear summary of the principles.)”

*(emphasis supplied)*

8] So far as the decision cited by Shri Jain, learned Sr. counsel for the respondent is concerned, in the case of **Rahul S. Shah(supra)**, it has been held in paras 40 and 42.7 of the order as under:-

“40. In Ghan Shyam Das Gupta v. Anant Kumar Sinha<sup>16</sup>, this Court had observed that the provisions of the Code as regards execution are of superior judicial quality than what is generally available under the other statutes and the Judge, being entrusted exclusively with administration of justice, is expected to do better. With pragmatic approach and judicial interpretations, the Court must not allow the judgment debtor or any person instigated or AIR 1991 SC 2251 raising frivolous claim to delay the execution of the decree. For example, in suits relating to money claim, the Court, may on the application of the plaintiff or on its own motion using the inherent powers under Section 151, under the circumstances, direct the defendant to provide security before further progress of the suit. The consequences of non-compliance of any of these directions may be found in Order XVII Rule 3.

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42.7. In a suit for payment of money, before settlement of issues, the defendant may be required to disclose his assets on oath, to the extent that he is being made liable in a suit. The Court may further, at any stage, in appropriate cases during the pendency of suit, using powers under Section 151 CPC, demand security to ensure satisfaction of any decree.”

*(emphasis supplied)*

9] A conjoint perusal of both these decisions reveal that it is quintessential that the judge entertaining the application under Order 38 Rule 5 of CPC must decide the same after objectively perusing the plaint if the plaintiff has made out a *prima facie* case viz., that he has fair chances of succeeding in the suit. Thus, the primary onus is on the plaintiff only to establish that it has fair chances of succeeding in the suit and it is only after the said burden is discharged that the court is required to see the reply filed by the defendant to the application under Order 38 Rule 5 of CPC filed by the plaintiff.

10] So far as the impugned order dated 15.06.2022 is concerned, the learned Judge of the trial court has recorded its satisfaction in the following manner:-

“ प्रकरण दिनांक 21.06.2019 से लंबित होकर लगभग 3 वर्ष से अधिक समय व्यतीत हो चुका है, परंतु प्रतिवादीगण ने आज दिनांक तक लिखित कथन प्रस्तुत नहीं किये हैं। दिनांक 05.05.2022 को लिखित कथन प्रस्तुत करने हेतु अंतिम अवसर दिया गया था, इसके पश्चात दिनांक 13.05.2022 को रुपये 5000/- के परिव्यय पर अंतिम अवसर दिया गया था, परन्तु बावजूद इसके प्रतिवादीगण ने आज दिनांक तक लिखित कथन प्रस्तुत नहीं किये हैं, फिर भी न्यायहित में पुनः रुपये 5000/- के परिव्यय पर प्रतिवादीगण को लिखित कथन प्रस्तुति हेतु एक अंतिम अवसर प्रदान किया जाता है और यह भी निर्देशित किया

जाता है कि आगामी पेशी दिनांक को लिखित कथन प्रस्तुत नहीं करने पर लिखित कथन प्रस्तुति का अवसर स्वतः ही समाप्त हो जावेगा।

प्रकरण में प्रतिवादी क्रं. 02 व 03 की ओर से गत पेशी दिनांक को दिये गये निर्देशानुसार प्रतिभूति प्रस्तुत करने के संबंध में कोई कारण प्रस्तुत नहीं किया गया।

अभिलेख का अवलोकन करने से प्रकट होता है कि वादीगण ने रूपये 4,13,40000/- (चार करोड़ तेरह लाख चालीस हजार रूपये) की वसूली के लिये यह वाद प्रस्तुत किया है। प्रकरण के तथ्यों एवं परिस्थितियों के आलोक में उक्त राशि के संबंध में प्रतिवादी क्रं. 02 व 03 से प्रतिभूति लिया जाना आवश्यक प्रतीत होता है। अतः प्रतिवादी क्रं. 02 व 03 को निर्देशित किया जाता है कि वे प्रकरण में आगामी पेशी दिनांक को रूपये 4,13,40000/- (चार करोड़ तेरह लाख चालीस हजार रूपये) की प्रतिभूति इस आशय की प्रस्तुत करें कि उनके विरुद्ध यदि डिक्री पारित होती है तो वे डिक्री को तुष्ट करने के लिये तैयार व तत्पर रहेंगे।

यह भी निर्देशित किया जाता है कि यदि प्रतिवादी क्रं. 02 व 03 प्रतिभूति प्रस्तुत नहीं करते हैं तो उनका बचाव समाप्त किया जा सकता है।

प्रकरण प्रतिवादी क्रं. 02 व 03 की ओर से प्रतिभूति प्रस्तुति एवं प्रतिवादीगण की ओर से लिखित कथन प्रस्तुति हेतु दिनांक 24.06.2022 को पेश हो। ”

*(emphasis supplied)*

11] Thus, it is apparent that the learned judge of the trial court has decided the application under order 38 Rule 5 of the CPC holding that from the facts and circumstances of the case, furnishing of the guarantee appears necessary, and in the considered opinion of this court, such finding cannot be countenanced on the touchstone of the aforesaid dicta of the Supreme Court. Learned judge of the trial court has apparently erred in not assigning any reason behind its finding, and mere stating that under the facts and circumstances of the case, he deems it



appropriate to direct the defendant to furnish the security would not suffice, and thus, is liable to be set aside.

12] Resultantly, the impugned order dated 15.06.2022 is hereby *set aside* and the matter is remanded back to the trial court to decide the application filed under Order 38 Rule 5 of CPC afresh in the light of the observations made herein above and without being influenced by the impugned order.

13] Petition stands *allowed*.

( SUBHODH ABHYANKAR )  
JUDGE

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