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

**BEFORE
HON'BLE SHRI JUSTICE PRANAY VERMA**

ON THE 6th OF JULY, 2023

MISC. PETITION No. 4361 of 2022

BETWEEN:-

1. **KIRTI GUPTA W/O LATE PRAKASH GUPTA, AGED ABOUT 45 YEARS, 19 A.B. ASHOK NAGAR, PREEGANJ, UJJAIN (MADHYA PRADESH)**
2. **DECEASED PRAKASH GUPTA THROUGH LRS. DIXITA GUPTA D/O LATE PRAKASH GUPTA, AGED ABOUT 24 YEARS, OCCUPATION: ADVOCATE 19 A.B. ASHOK NAGAR, FREEGANJ, UJJAIN (MADHYA PRADESH)**
3. **DECEASED PRAKASH GUPTA THROUGH LRS. MEGHA GUPTA MINOR THROUGH NATURAL GUARDIAN AND MOTHER KIRTI GUPTA W/O LATE PRAKASH GUPTA, AGED ABOUT 45 YEARS, OCCUPATION: NIL 19 A.B. ASHOK NAGAR, FREEGANJ, UJJAIN (MADHYA PRADESH)**
4. **DECEASED PRAKASH GUPTA THROUGH LRS. ANGEL GUPTA MINOR THROUGH NATURAL GUARDIAN AND MOTHER KIRTI GUPTA W/O LATE PRAKASH GUPTA, AGED ABOUT 45 YEARS, OCCUPATION: NIL 19 A.B. ASHOK NAGAR, FREEGANJ, UJJAIN (MADHYA PRADESH)**
5. **DECEASED PRAKASH GUPTA THROUGH LRS. IVAN GUPTA MINOR THROUGH NATURAL GUARDIAN MOTHER KIRTI GUPTA W/O LATE PRAKASH GUPTA, AGED ABOUT 45 YEARS, OCCUPATION: NIL 19 A.B ASHOK NAGAR, FREEGANJ, UJJAIN (MADHYA PRADESH)**

.....PETITIONERS

(BY SHRI VISHAL BAHETI - ADVOCATE FOR THE PETITIONERS)

AND

AKASH POTBHARE S/O DILIPKUMAR POTBHARE, AGED ABOUT 24 YEARS, OCCUPATION: SERVICE MIG 12/17 LP BHARGAV NAGAR, UJJAIN (MADHYA PRADESH)

.....RESPONDENTS

(BY SHRI RISHI TIWARI - ADVOCATE FOR THE RESPONDENT NO.1),
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This petition coming on for order this day, the court passed the following:

ORDER

1. By this petition preferred under Article 227 of the Constitution of India the petitioners/defendants have challenged the order dated 03.08.2022 passed by the trial Court in so far as while rejecting an application under Order 38 Rule 5 of the CPC filed by plaintiff/respondent they have been directed to furnish solvent surety in the sum of Rs. 3,00,000/-.

2. The claim has been instituted by plaintiff under Order 37 Rule 1 and 2 of the CPC for recovery of a sum of Rs. 2,09,000/- from the defendants. During pendency of the suit the plaintiff filed an application under Order 38 Rule 5 of the CPC for attachment before judgment of immovable properties of the defendants. The application was contested by the defendants. By the impugned order the trial Court while rejecting the application has directed the defendants to furnish solvent surety in sum of Rs. 3,00,000/-.

3. Learned counsel for the defendants has submitted that the trial Court has itself recorded finding to the effect that plaintiff has not produced sufficient documents to prove that defendants are attempting to sell the property for the purpose of avoiding satisfaction of the decree hence merely on the basis of apprehension an order for attachment before judgment could not have been passed. Plaintiff's application has been rejected by the trial Court, however, by merely observing that it would be appropriate to direct the defendants to furnish solvent surety, the said direction has been issued which is illegal and deserves to be set-aside.

4. Per contra learned counsel for plaintiff has submitted that in terms of Order 38 Rule 5 (1) of the CPC the Court very much has the jurisdiction to direct the defendants not to dispose off the whole or any part of the property. It is the discretion of the Court to issue such directions as may be necessary for securing the execution of the decree. The impugned order passed by the trial Court being a discretionary order is not liable to be interfered with in exercise of jurisdiction under Article 227 of the Constitution of India. Reliance has been placed by him on the decision of the Supreme Court in **IDBI Trusteeship Services Ltd., Vs. Hubtown Ltd., (2017) 1 SCC 568** to contend that even if the defendant raises a triable issue and if any doubt is left with the trial Judge about his good faith, he may impose conditions, as may be deemed fit. The trial Court has felt it necessary to direct the defendants to furnish surety hence it cannot be said that the order has been passed without jurisdiction.

5. I have heard the learned counsel for the parties at length.

6. The provision of Order 38 Rule 5 (1) of the CPC being material is as under :-

"Order XXXVIII Rule 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."

7. A perusal of the aforesaid provision reveals that the Court is very much empowered to direct the defendants to furnish surety in the sum as may be specified to produce and place at the disposal of the Court when required the property or the value of the same. However, the pre-requisite for exercise of such power is that the Court should first arrive at a satisfaction that the defendant with an intention to obstruct or delay execution of any decree that may be passed against him is about to dispose of his property or to remove the same from local limits of the jurisdiction of the Court. It is only upon reaching to such satisfaction that the Court acquires jurisdiction to issue directions as may issued under the Rule. Until and unless such satisfaction is recorded by the trial Court, no directions as contemplated can be passed merely on the basis of apprehension in the mind of the Court.

8. In the present case, the trial Court has itself recorded a categorical finding to the effect that plaintiff has not proved that the defendants with intent to obstruct or delay the execution of the decree that may be passed against them are attempting to sell their property. It has further observed that only on the basis of apprehension attachment before judgment cannot be directed and has thereafter gone on to reject the application filed by the plaintiff. It hence had no jurisdiction whatsoever to pass any order under the provisions of Order 38 Rule 5 (1) of the CPC.

9. The judgment relied upon by learned counsel for plaintiff is hence not applicable to the facts of the case. The impugned order passed by the trial

Court is illegal and wholly without jurisdiction. The same cannot be sustained and is hereby set-aside, in so far as it has directed the defendants to furnish solvent surety.

Petition is accordingly allowed and disposed off.

No order as to costs.

(PRANAY VERMA)
JUDGE

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