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IN THE HIGH COURT OF DELHI AT NEW DELHI
CORAM: HON'BLE MR. JUSTICE AMIT BANSAL
CS(OS) 437/2021; 24th March, 2022
VANDANA VERMA versus ROOP SINGH & ORS.

Code of Civil Procedure, 1908; Order XXXVIII Rule 5 - Suit Property can't be attached mechanically or merely for asking of plaintiff. (Para 23)

Summary: Provisions of Order XXXVIII Rule 5 of the CPC have to be used sparingly and that the plaintiff has to satisfy the Court that the defendant is seeking to remove or dispose of whole or part of his property with the intention of obstructing or delaying the execution of the decree that may be passed against him. Purpose of Order 38 Rule 5 is not to convert an unsecured debt into a secured debt. Any attempt by a plaintiff to utilise the provisions of Order 38 Rule 5 as a leverage for coercing the defendant to settle the suit claim should be discouraged. [Referred: Raman Tech. & Process Engg. Co. & Anr. Vs. Solanki Traders, (2008) 2 SCC 302]

Plaintiff through: Mr. Mahesh Singh, Advocate. Defendants through: Mr. Ajit Rajput, Advocate for D-1 to D-4 along with Defendants no.1 and 2 in person.

J U D G M E N T

I.A. No.14107/2021 (for urgent hearing of I.A. No.11830/2021)

1. For the reasons stated in the application, the same is allowed.

I.A. No.11830/2021 (u/O-XXXIX R-1 & 2 of CPC) & I.A. No.11829/2021 (u/O-XXXVIII R-5 of CPC)

2. I.A. No.11830/2021 has been filed on behalf of the applicant/plaintiff, seeking a direction that the defendants be restrained from carrying out construction work in the suit property and be restrained from selling, disposing or creating any third party interest in the suit property.

3. I.A. No.11829/2021 has been filed on behalf of the applicant/plaintiff under Order XXXVIII Rule 5 of the CPC for the defendants to be asked to show why the suit property should not be attached, unless the defendants deposit the claimed amount together with costs of the suit or furnish security for the same.

4. Notice was issued in both the applications on 14th September, 2021.

5. The non-applicants/defendants no.1 to 4 have filed replies opposing both applications.

6. Vide order dated 24th January, 2022, the defendant no.5 was proceeded *ex parte*.

7. Facts relevant for deciding the present applications are set out below:-

i. The plaintiff was the owner of the suit property bearing no. S-523, measuring area 200 sq. yard, (i.e. land plinth area 167.22 sq. mtrs. & constructed plinth area 334.44 sq. mtrs.), consisting of double storey built up, with the rights of upper storey construction upto the last storey, fitted with electricity and water tap connections with their meters, out of

Khasra No. 262, situated at abadi of School Block, Park-1, Near Jain Mandir, Shakarpur Khas, Illaqa Shahdara, Delhi-110092 (hereinafter referred to as the 'suit property').

ii. A shop, which forms part of the suit property admeasuring approx. 30 sq. yards on the ground floor of the suit property, was sold by the plaintiff to the defendant no.5 on 13th July, 2017 and the possession of the same was also handed over to the defendant no.5.

iii. Vide an Agreement dated 16th January, 2018, the defendant no.5 undertook that he would completely co-operate with the plaintiff if any proposal for reconstruction and re-development of the suit property was initiated with any other party, including his own shop and for which purpose, the defendant no. 5 shall hand over vacant peaceful possession of his shop by 10th to 15th of March, 2018. Further, it was agreed that after reconstruction of the said entire suit property, the defendant no. 5 would be handed back his shop.

iv. On 24th January, 2018, the plaintiff entered into an Agreement to Sell and Purchase with the defendants no.1 and 2 for a sum of Rs.4,25,00,000/-.

v. Upon the defendants no.1 and 2 failing to pay the amounts agreed to be paid to the plaintiff, a legal notice was sent on behalf of the plaintiff to the defendants no.1 and 2 on 29th May, 2019 for rescinding the Agreement to Sell and Purchase dated 24th January, 2018.

vi. A Mutual Agreement dated 8th June, 2019 was entered into between the plaintiff and defendants no.1 and 2, wherein it was specifically noted that in view of the failure of the plaintiff to get the defendant no.5 to vacate the portion sold to him and other reasons, the sale consideration was reduced from Rs.4,25,00,000/- to Rs.3,30,00,000/-.

vii. On the same date, an affidavit was also executed on behalf of the plaintiff, wherein it had specifically been affirmed by the plaintiff that due to some misunderstanding between the parties, the legal notice dated 29th May, 2019 was served by the plaintiff to the defendant no.2 and subsequently, the matter has been settled between the parties. It may be pertinent to note herein that the signed copy of this affidavit was not filed by the plaintiff along with the documents in the suit and has been filed by the defendants.

viii. Subsequently, a Sale Deed dated 9th March, 2020 was executed by the plaintiff in favour of the defendants no.1 to 4 in respect of the suit property, and the entire sale consideration of Rs.3,30,00,000/- has been received by the plaintiff.

ix. Thereafter, there was a prolonged silence on behalf the plaintiff and only on 1st July, 2021, a legal notice was issued by the plaintiff to defendants no.1 to 5 asking them to make good loss of Rs.95,00,000/- to the plaintiff.

x. Since defendants did not pay the aforesaid amount, the present suit was instituted by the plaintiff in September, 2021.

8. The counsel for the plaintiff has vehemently contended that fraud was played upon the plaintiff by the defendants no.1 to 4, who in collusion with defendant no.5, obtained the suit property. It is contended that the defendant no.5 in collusion with defendants no.1 to 4 did not vacate the property and therefore, it resulted in the defendants no.1 to 4 coercing the plaintiff to sell the suit property at a value, which was much less than what

was agreed upon.

9. The counsel for the defendants no.1 to 4 has denied that there was fraud played on the plaintiff and that there was collusion between the defendants no.1 to 4 and the defendant no.5.

10. I have gone through the Mutual Agreement dated 8th June, 2019 entered into between the plaintiff and defendants no.1 and 2, and the registered Sale Deed dated 9th March, 2020, in terms of which document, the possession and title of the property passed on to defendants no.1 to 4 from the plaintiff.

11. The relevant provisions of the Mutual Agreement dated 8th June, 2019 are set out below:-

“1. That now entire sell consideration of the above said property will be settled as Rs.3,30,00,000/- (Rs. Three Crore Thirty Lacs only), and out which a sum of Rs.53,00,000/- (Rs. Fifty Three lacs only) has been already received by the first party from the second party as detailed above.

2. That the final time for the execution of proper sell document and to give the balance amount of above said sell consideration as been settled 30/11/2019.

3. That now the balance amount of the above said property under sell is Rs. 2,77,00,000/- (Rs. Two Crore Seventy Seven lacs only) which will be paid by the second party to the first party on or before the 30/11/2019.”

12. This arrangement was reaffirmed by the plaintiff in the affidavit dated 8th June, 2019 executed by the plaintiff as follows:-

“I, SMT. VANDANA VERMA WIFE OF SHRI YOGENDER PAL SINGH, RESIDENT OF S-523, SCHOOL BLOCK, SHAKAR PUR, DELHI-110092, do hereby solemnly affirm and declare as under:-

1. That I sold my ONE BUILT UP PROPERTY BEARING NO. S-523, ALONGWITH WHO OF ITS STRUCTURE OF GROUND FLOOR, AREA MEASURING 200 SQ. YDS., (EXCEPT ONE SHOP AREA MEASURING 12FT. X 22.5FT., ON GROUND FLOOR, WHICH HAS BEEN ALREADY SOLD BY THE FIRST PARTY TO SHRI MANOJ KUAMR SON OF SHRI SIYA RAM), i.e. ON GROUND FLOOR AREA MEASURING 170 SQ. YDS. APPROX., AND AREA MEASURING ON FIRST FLOOR AND ABOVE IS 200 SQ. YDS., WITH THE RIGHTS OF UPPER CONSTRUCTION UPTO THE LAST STOREY, FITTED WITH ELECTRICITY AND WATER CONNECTION BOTH IN RUNNING CONDITIONS WITH THEIR METERS, SITUATED IN THE AREA OF VILLAGE SHAKAR PUR KHAS, IN THE ABADI OF SCHOOL BLOCK, SHAKAR PUR, ILLAQA SHAHDARA, DELHI-110092 :: TO :: (1) SHRI ROOP SINGH SON OF LATE SHRI BHAWANI SINGH,

RESIDENT OF S-81, SUNDER BLOCK, SHAKAR PUR, DELHI-110092, (2) SHRI TARSEM CHAND AGGARWAL SON OF SHRI AMAR NATH AGGARWAL, RESIDENT OF 489, SECOND FLOOR, SCHOOL BLOCK, NEAR DDA PARK, SHAKAR PUR, DELHI- 110092, as per Agreement to Sell and Purchase on Dt. 24/01/2018...”

13. The plaintiff has not denied the execution of any of the aforesaid documents. In fact,

the plaintiff admits that the entire sale consideration in respect of the Sale Deed dated 9th March, 2020 has been received by the plaintiff. Further, it is an admitted position that the plaintiff remained silent from the date of execution of the Sale Deed on 9th March, 2020 and only sent the legal notice on 1st July, 2021, after almost 16 months. Though, various allegations of fraud and collusion have been raised on behalf of the plaintiff but these are the subject matter of trial in the suit.

14. The counsel for defendants has placed reliance on the judgment of the Supreme Court in ***Dalpat Kumar and Anr. Vs. Prahlad Singh and Ors.***, (1992) 1 SCC 719, paragraphs 4 and 5 of which judgment are set out below:-

*“4. Order 39 Rule 1(c) provides that temporary injunction may be granted where, in any suit, it is proved by the affidavit or otherwise, that the defendant threatens to dispossess the plaintiff or otherwise cause injury to the plaintiff in relation to any property in dispute in the suit, the court may by order grant a temporary injunction to restrain such act or make such other order for the purpose of staying and preventing ... or dispossession of the plaintiff or otherwise causing injury to the plaintiff in relation to any property in dispute in the suit as the court thinks fit until the disposal of the suit or until further orders. Pursuant to the recommendation of the Law Commission clause (c) was brought on statute by Section 88(i)(c) of the Amending Act 104 of 1966 with effect from February 1, 1977. Earlier thereto there was no express power except the inherent power under Section 151 CPC to grant ad interim injunction against dispossession. Rule 1 primarily concerned with the preservation of the property in dispute till legal rights are adjudicated. Injunction is a judicial process by which a party is required to do or to refrain from doing any particular act. It is in the nature of preventive relief to a litigant to prevent future possible injury. **In other words, the court in exercise of the power of granting ad interim injunction, is to preserve the subject matter of the suit in the status quo for the time being. It is settled law that the grant of injunction is a discretionary relief. The exercise thereof is subject to the court satisfying that (1) there is a serious disputed question to be tried in the suit and that an act, on the facts before the court, there is probability of his being entitled to the relief asked for by the plaintiff/defendant; (2) the court’s interference is necessary to protect the party from the species of injury. In other words, irreparable injury or damage would ensue before the legal right would be established at trial; and (3) that the comparative hardship or mischief or inconvenience which is likely to occur from withholding the injunction will be greater than that would be likely to arise from granting it.***

5. Therefore, the burden is on the plaintiff by evidence aliunde by affidavit or otherwise that there is “a prima facie case” in his favour which needs adjudication at the trial. The existence of the prima facie right and infraction of the enjoyment of his property or the right is a condition for the grant of temporary injunction. Prima facie case is not to be confused with prima facie title which has to be established, on evidence at the trial. Only prima facie case is a substantial question raised, bona fide, which needs investigation and a decision on merits. Satisfaction that there is a prima facie case by itself is not sufficient to grant injunction. The Court further has to satisfy that non-interference by the Court

would result in “irreparable injury” to the party seeking relief and that there is no other remedy available to the party except one to grant injunction and he needs protection from the consequences of apprehended injury or dispossession. Irreparable injury, however, does not mean that there must be no physical possibility of repairing the injury, but means only that the injury must be a material one, namely one that cannot be adequately compensated by way of damages. The third condition also is that “the balance of convenience” must be in favour of granting injunction. The Court while granting or refusing to grant injunction should exercise sound judicial discretion to find the amount of substantial mischief or injury which is likely to be caused to the parties, if the injunction is refused and compare it with that which is likely to be caused to the other side if the injunction is granted. If on weighing competing possibilities or probabilities of likelihood of injury and if the Court considers that pending the suit, the subject matter should be maintained in status quo, an injunction would be issued. Thus the Court has to exercise its sound judicial discretion in granting or refusing the relief of ad interim injunction pending the suit.”

15. Reliance is also placed on ***Mandali Ranganna & Ors. Vs. T. Ramachandra & Ors.***, (2008) 11 SCC 1, by the counsel for defendants, and paragraphs 21 and 22 of which judgment are set out below:-

“21. While considering an application for grant of injunction, the court will not only take into consideration the basic elements in relation thereto viz. existence of a prima facie case, balance of convenience and irreparable injury, it must also take into consideration the conduct of the parties.

22. Grant of injunction is an equitable relief. A person who had kept quiet for a long time and allowed another to deal with the properties exclusively, ordinarily would not be entitled to an order of injunction. The court will not interfere only because the property is a very valuable one. We are not however, oblivious of the fact that grant or refusal of injunction has serious consequence depending upon the nature thereof. The courts dealing with such matters must make all endeavours to protect the interest of the parties. For the said purpose, application of mind on the part of the courts is imperative. Contentions raised by the parties must be determined objectively.”

16. Upon applying the principles laid down in the aforesaid judgments to the facts of the case, I am of the view that in the present case, the plaintiff has failed to make out a *prima facie* case for grant of temporary injunction, restraining the defendants from carrying out construction work in the suit property and from selling, disposing or creating any third party interest in the suit property. At best, the case of the plaintiff is with regard to the deficient amount of consideration of Rs.95,00,000/-, which is a monetary claim. If the plaintiff succeeds in the present suit she would be entitled to recover the aforesaid amount from the defendants. It is to be noted that that the plaintiff has preferred the present suit only in September, 2021, after almost 16 months of the Sale Deed dated 9th March, 2020, during which time period the defendants were free to deal with the properties exclusively.

17. Thus, in the opinion of this Court, the present case it is not one where irreparable

harm and injury would be caused to the plaintiff if the injunction is not granted.

18. On the other hand, if the defendants are restrained from dealing with the suit property, even after they have paid the full consideration in terms of the Sale Deed dated 9th March, 2020 and which Sale Deed has been duly executed in their favour, irreparable harm and injury would be caused to the defendants. In the opinion of this Court, the balance of convenience also lies in favour of the defendants.

19. In view of the above, no case for grant of interim injunction is made out. Accordingly, I.A. No.11830/2021 stands dismissed.

20. In so far as I.A. No.11829/2021 is concerned, the law with regard to the provisions of Order XXXVIII Rule 5 of the CPC has been settled by the Supreme Court judgment in **Raman Tech. & Process Engg. Co. & Anr. Vs. Solanki Traders**, (2008) 2 SCC 302, as below:-

“5. The power under Order 38 Rule 5 CPC is a 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 utilise 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 settlements 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 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.** Courts should also keep in view the principles relating to grant of attachment before judgment. (See *Premraj Mundra v. Md. Manech Gazi* [AIR 1951 Cal 156] for a clear summary of the principles.)”

21. The Supreme Court has observed as aforesaid that the provisions of Order XXXVIII Rule 5 of the CPC have to be used sparingly and that the plaintiff has to satisfy the Court that the defendant is seeking to remove or dispose of whole or part of his property with the intention of obstructing or delaying the execution of the decree that may be passed against him.

22. In **M/s. K. C. V. Airways Ltd. & Anr. Vs. Wg. Cor. R. K. Blaggana**, AIR 1998 Delhi 70, a Division Bench of this Court held that the power of the Court under Order XXXVIII Rule 5 of the CPC is an extraordinary remedy. Reference in this regard may be made to paragraph 8 of the judgment:

“8. Needless to say, that R. 5 of O. XXXVIII, CPC is an extra ordinary remedy and if the ingredients for invoking it are lacking in the application and the affidavit filed

in support thereto attachment before judgment order cannot be ordered claim for attachment before judgment on the averments has been mainly set out in paras 7 and 8 reproduced above of the application in question and a bare reading thereof reveals, that it was not pleaded therein that the appellants with intent to obstruct or delay the execution of the decree that may be passed against them (a) are about to dispose of the whole or any part of the property, or (b) are about to remove the whole or any part of the property from the local limits of the jurisdiction of this Court. Affidavit filed along with the application contains no statement except an assertion that the respondent has gone through the application and the facts stated therein are correct to the best of his knowledge and information received. That be so, on the basis of the averments as they stand made in the application and the affidavit in question the appellant could not have been legally asked to furnish security in the sum of Rs. 8,50 lacs.”

23. In light of the principles expounded in the judgments aforesaid, none of the aforesaid parameters for granting attachment of the suit property under Order XXXVIII Rule 5 of the CPC are fulfilled in the present case. As held above by me, the plaintiff has failed to make out a *prima facie* case for grant of interim injunction under the provisions of Order XXXIX Rules 1 and 2 of the CPC. Resultantly, no *prima facie* case is made out by the plaintiff for grant of attachment of the suit property under the provisions of Order XXXVIII Rule 5 of the CPC. Furthermore, the application filed on behalf of the plaintiff is bereft of any details as to how relief under Order XXXVIII Rule 5 of the CPC can be granted in her favour as there are no material particulars pleaded in this regard. Such power cannot not be exercised by this Court mechanically or merely for the asking of the plaintiff.

24. Accordingly, I.A. No.11829/2021 stands dismissed.

I.A. No.4563/2022 (of the defendants no.1 to 4 u/O-VII R-11 of CPC)

25. The counsel for the defendants no.1 to 4 seeks to withdraw the present application.

26. The application is dismissed as withdrawn.

I.A. No.15456/2021 (for bringing on record two Youtube videos) & I.A. 4564/2022 (for condonation of delay of 84 days in re-filing I.A. No.4563/2022)

27. In view of the orders passed above, no orders are required to be passed in the said applications.

28. Both the applications are dismissed.

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29. Pleadings are complete.

30. List for framing of issues on 4th May, 2022.

31. The counsels for the parties to file proposed list of issues atleast one week before the next date of hearing.