



2024:JKLHC-JMU:644

Serial No. 104

**HIGH COURT OF JAMMU & KASHMIR AND LADAKH  
AT JAMMU**

Case:- CM(M) No. 35/2022  
CM No. 2474/2022

**The Jammu and Kashmir Bank Ltd : A Banking Company incorporated under the J & K Companies Act, 1977 (Svt - Era) having its Registered Office Corporate Headquarters, M.A. Road, Srinagar and has its one of Zonal Office at Jammu and having its Branches throughout India and one of its Branch at Shalamar Raod Jammu, Through Drub Raj Sharma, Executive (Code No. 11014) posted at Law Department, J&K Bank Ltd. Zonal Office (Central-1) Jammu and also Attorney Holder of J&K Bank Ltd.**

.....Appellant(s)/Petitioner(s)

Through: Mr. Abhinav Sharma, Sr. Advocate with  
Mr. Abhirash Sharma, Advocate.

**Vs**

- 1. Golden Globe Impex Private Limited  
Registered Office 18-A, Sector 7, Trikuta Nagar, Jammu-180020  
Through its Managing Director/Director.**
- 2. Sh. Sudershan Singh Wazir  
S/o Late Sh. Rajinder Singh  
R/o H. No. 18-A, Sector 7, Trikuta Nagar, Jammu-180020.**
- 3. Mrs. Harmeet Kour  
W/o Sh. Sudershan Singh Wazir  
R/o H. No. 18-A, Sector 7, Trikuta Nagar, Jammu-180020**

..... Respondent(s)

Through: Mr. Sunil Sethi, Sr. Advocate with  
Ms. Zoya Bhardwaj, Advocate.

**Coram: HON'BLE MR. JUSTICE JAVED IQBAL WANI, JUDGE**

**ORDER**  
**(13.03.2024)**

**(ORAL)**

- 01.** Supervisory Jurisdiction of this Court is being invoked by the Jammu & Kashmir Bank the petitioner herein (for short "**the Bank**") seeking quashment of order dated 03.03.2022



passed by the court of Additional District Judge (Commercial Court), Jammu (for short "**the trial court**").

**02.** Facts emerging from the record would reveal that the petitioner herein being plaintiff filed a suit against the respondents herein for recovery of an amount of Rs. 21,23,99,541.48/- on the premise that the defendant 1 being a Company and defendants 2 and 3 its Directors being respondents herein availed a loan/cash credit facility from the Bank and in furtherance thereof executed multiple documents including personal guarantee for repayment of the loan as also hypothecated the Company's assets including the plant and machinery (present and future), stocks and book debts with the bank as well as mortgaged the immovable properties standing in the name of defendant 2 as a security for the payment of the said loan amount.

It also came to be stated in the plaint by the bank that the defendants-respondents herein availed the loan/cash credit facility as per the terms and conditions jointly and severally liable for repayment of the loan amount alongwith the interest.

It also came to be stated in the plaint that the defendants-respondents herein, however, did not abide by the terms and conditions set out for repayment of loan/cash credit facility and defaulted therein and after being advised, asked



and reminded number of times to liquidate their outstanding amount, the defendants-respondents herein failed necessitating the filing of the suit.

- 03.** Written statement to the suit came to be filed by the defendants-respondents herein after the defendants were summoned by the trial court, wherein the claim raised and lodged in the suit came to be opposed and resisted by the defendants-respondents herein.
- 04.** During the pendency of this suit, the plaintiff-petitioner herein preferred an application under **Order 38 Rule 5 read with Section 151 of the Code of Civil Procedure** for attachment before judgment *qua* the sale of immovable property comprising of a residential flat bearing No. 402 located in Pocket D-6, Block G-6 situated at Vasant Kunj, New Delhi (for short "***the property***") standing in the name of defendants 2 and 3 – respondents herein. In response to which application filed by the plaintiff-petitioner herein, objections came to be filed by the defendants-respondents herein opposing the said application.
- 05.** The trial court after considering the said application, in terms of the impugned order, *dismissed* the same.
- 06.** The impugned order whereby the aforesaid application of the plaintiff-petitioner herein came to be *dismissed* is being assailed in the instant petition by the petitioner.



**Heard learned counsel for the parties and perused the record.**

**07.** Before proceeding to test the legality or otherwise of the impugned order, it would be pertinent, significant and advantageous to refer to the contents of the application *supra* filed by the plaintiff-petitioner herein before the trial court as also the affidavit accompanied therewith and, same accordingly, are extracted and reproduced in extenso hereunder:-

1. That the above titled Civil Original Suit for the recovery of Rs. 21,23,99,541.48 (Rupees Twenty One Crore Twenty Three Lacs Ninety Nine Thousand Five Hundred Forty One and Forty Eight Poise only) has been filed against the non applicants / defendants and prima facie the averments made in the plaint demand the grant of decree in favour of the applicant / plaintiff Bank and against the non-applicant / defendants.
2. That today the application filed on behalf of plaintiff Bank under Section 136, Order 38 Rule 5 read with section 151 Civil Procedure Code has been listed.
3. That the plaintiff Bank humbly seeks the kind indulgence of Learned Court to place on record the copies of following documents:
  - (a) *Valuation Report dated 29-09-2020 of Land measuring 21 Kanals 13 Marias comprising in Khasra No. 07 min, Khewat No. 03 (19 Kanals 02 Mari=la) and land measuring 02 Kanal 11 Marla comprising in Khasra No. 07 min Khewat No. 5 together with all construction inclusive of four storey college building of Baba Farid College of Education situated at Chak Lacchman Tehsil A District Kathua.*
  - (b) *Valuation Report dated 20.03.2017 of Land measuring 03 Kanal 15 Marlas comprising under Khasra No. 501/08 min, Khata No. 294 min & Khewat No. 25 situated at Village Babliana (Dharp) Tehsil Jammu South.*
  - (c) *Valuation Report dated 20.03.2017 of Land measuring 03 Kanal 15 Marlas comprising in Khasra*



*No. 501/08 min, Khata No. 294 min & Khewat No. 25 situated at Vilalge Babliana Tehsil Jammu South.*

*(d) Valuation Report dated 20.03.2017 of Land measuring 03 Kanal 15 Marlas comprising in Khasra No. 501/08 min, Khata No. 294 min & Khewat No. 25 situated at Vilalge Babliana Tehsil Jammu South.*

*(e) Valuation Report dated 03-01-2017 of Land measuring 04 Kanals comprising in Khasra No. 1132/min/1, Khata No. 323, Khewat No. 46 together with constructions built there on situated at Village Deeli Tehsil Jammu South.*

*(f) Valuation Report doted 18-12-2016 of Land measuring 04 Kanals comprising under Khasra No. 1132 min/01, Khata No. 323 and Khewat No. 46 situated at Village Deeli Tehsil Jammu South.*

4. That it is pertinent to mention here that all these properties mentiohed hereinabove whose valuation reports are annexed herewith has been mortgaged by defendant No. 2 in favour of plaintiff Bank in the Loan /Account of defendant No. 1 and the defendant No. 2 mortgaged the above said properties by way of equitable mortgaged vide Memorandum of deposit of title deeds with intention to create equitable mortgage Dated 03-01-2019 and original of same has already been annexed with the plaint.

5. That it is humbly submitted that Guninderjeet Singh Wazir (Student as Borrower) and Sudershan Singh Wazir (Father as Co-Borrower) {i.e. defendant No. 2 in the above titled suit) has availed Education Loon from plaintiff Bank to the tune of Rs. 20.00 Lacs (Rupees Twenty Lacs only)vide Sanction doted 04-05-2018 and the said Sudershan Singh Wazir has extended the Charge over already mortgaged properties in Loon Account of Golden Globe Impex Pvt. Ltd. (defendant No. 1 hereinabove) as specified hereinabove vide Re-Confirmation Letter of Deposit of Title Deed dated 18-02-2020 in this Education Loan.

6. That in order to arrive at the bottom of controversy between the parties the applicant/plaintiff Bank humbly prays that these documents may kindly be taken on record.

7. That otherwise also in order to meet the ends of justice and to do complete justice between the parties as well as in the interest of justice the applicant/plaintiff Bank seeks the kind indulgence of the Learned Court to allow the present application and take on record these documents as has specified herein above which are very vital one in order to adjudicate upon the matter properly.”



**“Before the Learned Additional District Judge  
(Bank Cases) Jammu**

The Jammu & Kashmir Bank Ltd

Vs.

Golden Globe Impex Private Limited and ors.

**An affidavit in support accompanying application.**

**Affidavit**

I, Chander Shekhar Executive (Code 11828) posted at Law Department, J&K Bank Ltd. Zonal office Central-I Jammu and also Attorney Holder of J&K Bank Ltd do hereby solemnly affirm and declare as under:

That I have gone through the contents of the accompanying application which has been drawn and drafted by my counsel on the basis of information and material supplied to him by the deponent and I admit the same to be true and correct to the best of my knowledge derived from official record and belief.

Deponent

**Verification:**

Verified at Jammu today the 2<sup>nd</sup> day of November 2020 that the averments made in this affidavit are true and correct and nothing has been concealed therein.

Deponent”

- 08.** Before proceeding further in the matter, a reference to the provisions of Order 38 Rule 5 CPC invoked by the plaintiff-petitioner herein for maintaining the application *supra* as also the position of law laid down by the Apex Court in this regard also becomes imperative hereunder:-

**“Order 38 Rule 5. Where defendant may be called upon to furnish security for production of property**

**(1) Where, at any stage of 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.”**

A bare perusal of the aforesaid provisions of Order 38 Rule 5 reveals that same enumerates the circumstances in which a defendant may be called upon to furnish security, while sub rule (1) provides that where the Court is satisfied that a defendant with intent to obstruct or delay the execution of any decree that may be passed against him is about to dispose of the whole or any part of his property or 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 him to furnish security, Sub rule (2) allows the plaintiff to specify the property required to be attached and Sub rule (3) permits the Court to order conditional attachment of the said property and Sub rule (4) declares if an order of attachment is made without



complying with Rule 5 sub rule (1), the attachment would be void.

Thus, the primary object of the Order 38 Rule 5 seemingly is to prevent any attempt on the part of the defendant to defeat the realization of a decree that may be passed against him.

The Apex Court in case titled as **“Sardar Govindrao Mahadik & Anr. Vs Devi Sahai & Ors.”** reported in **1982 (1) SCC 237**, has held that an order of attachment before judgment prevents unholy attempt by the defendant to defeat fruits of a decree passed in favour of the plaintiff, and that the sole object behind the order levying attachment before judgment is to give an assurance to the plaintiff that his decree, if made, would be satisfied and that it is a sort of a guarantee against decree becoming infructuous for want of property available from which the plaintiff can satisfy the decree.

The aforesaid principle laid down by the Apex Court also came to be reiterated in case titled as **“Raman Tech & Process Engg. Co. & Anr. Vs Solanki Traders”** reported in **2008 (2) SCC 302**, besides laying down that Order 38 Rule 5 is indeed a stringent provision requiring to be construed strictly and not to be used as a lever for the plaintiff to coerce the defendant to come to terms or to convert an unsecured debt into a secured debt or to be used as a tool





or mechanism for an easy execution of a decree and that the remedy as provided under Order 38 Rule 5 is an extraordinary remedy required to be exercised sparingly and strictly in accordance with law with utmost care, caution and circumspection making it obligatory for the Court to ensure that the action does not become an engine of oppression.

- 09.** Keeping in mind the aforesaid principles and position of law and coming back to the case in hand, the plaintiff-petitioner herein in the application (*supra*) in order to seek enforcement of the provisions of Order 38 Rule 5 pleaded that the defendants 2 & 3 - respondents herein have had purchased the property in question after obtaining Housing Loan from the State Bank of India and consequently, the said property came to be taken over by the plaintiff-petitioner herein to the extent of Rs. 75,00,000/- by way of mortgage by having the title deeds of property in question deposited with the Bank vide letter of deposit dated 18.01.2019 and that a suit against the defendants-respondents herein has been instituted by the plaintiff-petitioner herein for recovery of an amount of Rs. 21,23,99,541.48/- and that the averments made in the suit *prima facie* demand the grant of the decree in favour of the plaintiff-petitioner herein against the defendants-respondents herein and that a demand had been made by



the plaintiff-petitioner herein to the defendants-respondents herein for payment of the aforesaid outstanding amount in terms of legal notice dated 25.09.2020 as the defendants-respondents herein have had to repay the amount of loan availed by them in 84 EMIs, but the defendants-respondents herein on receipt of the legal notice from the plaintiff-petitioner herein and in order to frustrate the decree that may be ultimately be passed against them deposited a total sum of Rs. 61,49,000/- with the plaintiff-petitioner herein against the said Housing Loan on 28.10.2020 making the property in question lien free., and that the defendants-respondents herein on one hand did not liquidate the outstanding loan amount for which the suit (*supra*) came to be instituted and on the other hand prematurely paid the whole of the housing loan amount pertaining to the property in question with a design to dispose of the said property aimed to frustrate the decree that may be passed in its favour in the suit *supra*.

- 10.** Insofar as objections filed to the application by the defendants-respondents herein are concerned, they have stated in the said objections that the application is reflective of *mala fide* having been filed without any basis to link the Housing Loan facility availed by the defendants-respondents herein qua the property in question with the subject matter of the recovery suit and that the plaintiff-



petitioner herein filed the application on assumption and conjectures with a mechanical mindset.

- 11.** As has been noticed in the preceding paras, the Court considering an application under Order 38 Rule 5 of the CPC is required to form a “*prima facie*” opinion/satisfaction at the stage without going into the correctness or otherwise of all the contentions raised by the parties. The “*prima facie*” opinion/satisfaction to be drawn by the Court has to be based on the facts and circumstances of the case in general and having regard to the averments made in the application as also the accompanying affidavit. A deeper and closer examination of the application as also the affidavit annexed thereto would *prima facie* show that the application has been speculative based on a mere suspicion without there being any substantial credible material to support the said suspicion that the defendants-respondents herein are contemplating to dispose of the property in question even overlooking the fact that even amount in question stands secured by it from the defendants-respondents in already mortgaged properties, besides other collateral security/ies.
- 12.** As has been observed in the preceding paras and risking repetition, the provisions of Order 38 Rule 5 being stringent in nature are to be construed strictly without being used as a lever for a plaintiff to coerce a defendant to come to terms



or to convert unsecured debt into a secured debt or to be used as a tool or mechanism for easy execution of a decree.

- 13.** Perusal of the impugned order passed by the trial court tends to show that it had been alive to the facts and circumstances of the case, inasmuch as, the object underlying the provisions of Order 38 Rule 5, inasmuch as, the principles of law laid down by the Apex Court in this regard in particular in case titled as “**Raman Tech & Process Engg. Co. & Anr.**” (*supra*) and has rightly held the application devoid of any merit.
- 14.** Viewed thus, the trial court cannot be said to have faulted in the matter, as such, the order impugned does not call for any interference, more so, in exercise of Supervisory Jurisdiction which in law is required to be exercised sparingly and not on mere asking of a party.
- 15.** Resultantly, the petition fails and is, accordingly, ***dismissed.***

**(JAVED IQBAL WANI)**  
**JUDGE**

**JAMMU**  
**13.03.2024**  
*Bunty*

Whether the order is speaking: **Yes**

Whether the order is reportable: **Yes**