

Rajnish Gupta & Anr vs Mukesh Garg & Anr on 27 January, 2022

Author: Amit Bansal

Bench: Amit Bansal

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IN THE HIGH COURT OF DELHI AT NEW DELHI

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CS(OS) 332/2021

RAJNISH GUPTA & ANR.

Through

.....
Mr. Mohit Chaudhary, Mr.
Sachdeva and Ms. Anubha
Advocates

versus

MUKESH GARG & ANR.

Through

.....
Mr. Amit Vohra, Advocate

CORAM:

HON'BLE MR. JUSTICE AMIT BANSAL

ORDER

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27.01.2022

[VIA VIDEO CONFERENCING]

I.A.8756/2021 (O XXXVIII R-5) & I.A.8757/2021 (O XXXIX R-1 & 2)

1. The plaintiffs have filed the present suit for recovery of Rs.4,00,00,000/- against the defendants along with interest as also for injunction against the defendants restraining them from selling/creating third party rights in their properties.

2. The aforesaid suit has been contested on behalf of the defendants by filing a written statement.

3. The present applications have been filed on behalf of the plaintiffs, being (i) I.A.8756/2021 under Order XXXVIII Rule 5 of the Code of Civil Procedure, 1908 (CPC) for, inter alia, attachment of two properties of the defendants; and, (ii) I.A.8757/2021 under Order XXXIX Rules 1 and 2 of the CPC for an ad interim injunction against the defendants, restraining them from selling/creating third party rights in their properties.

4. Notices on these applications were issued on 22nd July, 2021. Thereafter, vide order dated 13th September, 2021, this Court had directed the defendant no.1 to file an affidavit giving details of immovable and movable assets owned by him. Pursuant to the said order, affidavit of assets has been filed on behalf of the said defendant.

5. Case of the plaintiffs is premised on the fact that a loan of Rs.4,00,00,000/- was given by the plaintiffs to the defendant no.1. However, the defendant no.1 failed to return the said amount. Accordingly, the present suit for recovery has been filed on behalf of the plaintiffs. It is further submitted that in the written statement filed on behalf of the defendants, the factum of the defendant no.1 receiving the sum of Rs.4,00,00,000/- from the plaintiffs has been admitted. However, a case has been made out by the defendants that the said amount of Rs.4,00,00,000/- was in respect of some old ancestral jewellery transaction, which was given by the defendant no.1 to the plaintiff no.1 in the presence of one Mr.Aman Ghai. Counsel for the plaintiff submits that in view of this admission in the written statement, the plaintiff is entitled to relief as sought under the aforesaid two applications.

6. Counsel for the defendants submits that a substantial defence has been taken on behalf of the defendants in their written statement that the amount in question was received from the plaintiffs in respect of old ancestral jewellery and all the details of such jewellery has been given by the defendants in their written statement. It is further submitted that the plaint is at variance with the legal notice issued on behalf of the plaintiffs. The legal notice dated 10th March, 2021 was issued only to the defendant no.1 but subsequently, the defendant no.2, being the wife of the defendant no.1, has been roped in the plaint by making averments against her. Reliance has been placed by counsel for the defendants on the judgment of the Supreme Court in Raman Tech & Process Engg. Co. & Anr. Vs. Solanki Traders, 2008 (2) SCC 302 and the judgment of the Division Bench of this Court in M/s. K. C. V. Airways Ltd. & Anr. Vs. Wg. Cor. R. K. Blaggana, AIR 1998 Delhi 70. It is submitted that the plaintiffs have failed to plead the necessary ingredients for making out a case under Order XXXVIII Rule 5 of CPC, as has been elucidated in the aforesaid judgments.

7. In rejoinder, it is submitted on behalf of the plaintiffs that the necessary ingredients have been pleaded by the plaintiffs in his application under Order XXXVIII Rule 5 of the CPC. In any event, the ingredients for passing an order under XXXIX Rule 1(b) has been made out in I.A.8757/2021, as it has specifically been pleaded that defendants intend to dispose of the property to defraud his creditors.

8. I have considered the submissions on behalf of the parties. The law with regard to provisions of Order XXXVIII Rule 5 of the CPC has been elucidated by the Supreme Court in Raman Tech & Process Engg. Co. & Anr. (supra). The relevant paras are reproduced below:

"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 realisation 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 that 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 5 CPC. 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 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."

9. As per the aforesaid judgment of the Supreme Court, before passing an order of attachment under Order XXXVIII Rule 5 of the CPC, the court has to be satisfied that the plaintiff has a prima facie case. It is only when the court is satisfied that the plaintiff has a prima facie case that the court will proceed to examine whether the defendant is attempting to remove or dispose of his assets with the intention of defeating the decree.

10. In M/s. K. C. V. Airways Ltd. & Anr. (supra), the observations of the Division Bench of this Court are set out below:

"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."

11. When examined in the light of the aforesaid judgments, I am not satisfied that in the present case, the plaintiffs have made out a case for grant of orders of attachment in terms of Order XXXVIII Rule 5 of the CPC. The defendants have raised a defence in the written statement, which can only be tested in a trial.

12. At this stage, it may be relevant to see the averments made by the plaintiffs in the application filed under Order XXXVIII Rule 5 of the CPC, which are set out below:

"4. That it is pertinent to note, the Plaintiffs came to know from the reliable sources that Defendant No.1, while illegally retaining the hard-earned money of the Plaintiffs, has purchased properties of the same amount, in the name of his wife, DefendantNo.2, situated at:

- i. 31, Ground Floor, East Park Road, Karol Bagh, New Delhi-110005,
- ii. 31, Basement, East Park Road, Karol Bagh, New Delhi-11 0005

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6. That the Plaintiffs, in light of the above, apprehends that the Defendants will dispose of the whole or any part of his property, valued at approximately Rs. 4.50 crores, in order to frustrate the present proceedings and the subsequent decree that will be passed in favor of the Plaintiffs."

13. It has merely been stated that plaintiffs apprehend that the defendants will dispose of the whole or any part of their property valued at approximately Rs.4,50,00,000/- in order to frustrate the present proceedings and the subsequent decree that may be passed in favour of the plaintiffs. No basis whatsoever has been given for the said apprehension. Merely by making these averments, a case is not made out under Order XXXVIII Rule 5 of the CPC for grant of attachment. In fact, if immovable properties have been purchased by the defendants in Delhi, it goes contrary to the assertion of the plaintiffs that the defendants will dispose of the properties to frustrate the decree.

14. Insofar as the application under Order XXXIX Rules 1 and 2 of the CPC is concerned, it is a settled position of law that ordinarily, in recovery suits, the court does not pass interim injunctions restraining the defendants from alienating its properties.

15. Therefore, at this stage, I am not convinced that the plaintiffs have failed to make out a case for grant of relief under Order XXXVIII Rule 5 of the CPC or Order XXXIX Rules 1 and 2 of the CPC.

16. Accordingly, both applications are dismissed. CS(OS) 332/2021

17. At the oral request made on behalf of the counsel for the defendants, which is not opposed by counsel for the plaintiffs, the defendant no.2 is deleted from the array of the parties. Amended memo of parties be filed within three days.

18. Let draft of issues be filed on behalf of the parties within one week.

19. List for framing of issues on 14th February, 2022.

AMIT BANSAL, J.

JANUARY 27, 2022 dk