(2002) 04 BOM CK 0108

Bombay High Court (Nagpur Bench)

Case No: Civil Revision Application No. 358 of 1995

Murtuzakhan Mahabobkhan since deceased through L.Rs. Rashida Begum and Others		APPELLANT
	Vs	
Ballarpur Industries Limited		RESPONDENT

Date of Decision: April 3, 2002

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 38 Rule 5, Order 38 Rule 5(1)

Citation: (2002) 4 ALLMR 499 : (2002) 4 BomCR 530 : (2002) 3 BOMLR 949 : (2002) 3 CivCC 447 : (2002) 3 MhLj 399 : (2002) 4 RCR(Civil) 400

Hon'ble Judges: D.D. Sinha, J

Bench: Single Bench

Advocate: Anjan De, for the Appellant; A.A. Naik, for the Respondent

Final Decision: Allowed

Judgement

D.D. Sinha, J.
Heard Shri Anjan De, learned Counsel for the applicant, and Shri Naik, learned Counsel for the non-applicant.

2. In the present revision, order dated 25-10-1994 passed by the 2nd Joint Civil Judge, Senior Division, Chandrapur below Exh. 4 in Special Civil Suit No. 132/1994 is assailed.

3. Shri Anjan De, learned Counsel for the applicant, states that the non-applicant/plaintiff has filed a suit against the applicant/defendant for recovery of Rs. 1,50,000/- and during pendency of the suit, the non-applicant/plaintiff moved an application under Order XXXVIII, Rule 5 of the CPC for attachment of property before judgment. The said

application is allowed by the Court below by the impugned order and applicant is directed to furnish security to the tune of Rs. 1,60,000/- with solvent surety in like amount in the trial Court.

4. It is contended by the learned Counsel for the applicant that the impugned order is bad in law since non-applicant/plaintiff has not brought on record any material to show that the applicant/defendant was intending to obstruct or delay execution of any decree, which would be passed in the civil suit. Similarly, the plaintiff has also failed to show that the defendant is about to dispose of 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 and, therefore, is likely to defeat the decree or delay execution of the decree. It is contended that application (Exh. 4), which is filed by the non-applicant/plaintiff under Order XXXVIII, Rule 5 of the CPC is completely silent in this regard and, therefore, in view of Sub-rule (4) of Rule 5 of Order XXXVIII of the Code of Civil Procedure, the impugned order is void since same is passed without complying with the provisions of Sub-rule (1) of Rule 5 of Order XXXVIII of the Code of Civil Procedure. It is, therefore, prayed that the revision, may be allowed and impugned order may be set aside.

5. Shri Naik, learned Counsel for the non-applicant, states that the only property at the relevant time owned and possessed by the applicant/defendant was a truck bearing No. MTG 9288. It is contended that the non-applicant/plaintiff has a good case and, therefore, if the non-applicant succeeds in the suit and applicant is allowed to dispose of the truck, then it would be difficult for the non-applicant to recover the amount of Rs. 1,50,0007- and it would not only delay execution of the decree, but also defeat the decree itself and, therefore, the impugned order is sustainable in law.

6. I have considered the contentions canvassed by the learned respective Counsel for the parties. The short question which falls for my consideration is -- "whether the plaintiff has placed on record sufficient material to show that requirement of Sub-rule (1)(a) and (b) of Rule 5 of Order XXXVIII of the CPC is fulfilled and Court was justified in passing impugned order?"

7. In order to appreciate the issue in question, it would be proper at this stage to consider the provisions of Order XXXVIII, Rule 5 of the Code of Civil Procedure. Rule 5 of Order XXXVIII deals with power of the Court to call upon defendant in view of contingencies mentioned therein to furnish security or produce the property. Sub-rule (1) of Rule 5 contemplates that at any stage of the suit, if it is brought to the notice of the Court and the Court is satisfied that the defendant with intent to obstruct or delay the execution of the 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, in such situation, the Court is empowered to direct defendant within a stipulated period to furnish security in such sum as may be specified in the order and further direct the defendant to produce and place the same 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.

8. In view of the above referred provision, it is amply clear that before exercising power under Sub-rule (1) of Rule 5 of Order XXXVIII of the Code of Civil Procedure, the plaintiff is required to satisfy the Court that the defendant is about to dispose of the whole or part of the property or is about to remove whole or part of the property from the local limits of jurisdiction of the Court with intent to obstruct or delay execution of the decree that may be passed against him. In absence thereof, it will not be possible to exercise power under this provision.

9. It must be borne in mind that Rule 5 of Order XXXVIII of the CPC gives extra-ordinary powers to the Court and the Court can direct the defendant to furnish such security, which would protect the interest of the plaintiff in case final decree is passed in favour of the plaintiff. These powers are not to be exercised by the Court in the normal course and can be exercised by the Court only when the Court is satisfied on the basis of adequate material placed before it by the plaintiff, which would show that the defendant is about to dispose of whole or part of his property as contemplated in Sub-rule l(a) of Rule 5 or is about to remove the whole or part of his property from the local limits of jurisdiction of the Court with intent to obstruct or delay execution of the decree. The Court is not supposed to exercise these powers unless it is satisfied that contingencies mentioned in Sub-clauses (a) and (b) of Sub-rule (1) of Rule 5 of Order XXXVIII of the CPC do exist.

10. In the instant case, the application filed by the non-applicant under Order XXXVIII, Rule 5 of the CPC does not mention anything, which would show that the applicant/defendant is about to dispose of the truck, i.e. the only property owned by him nor does it indicate that the applicant is about to remove the truck from the local limits of jurisdiction of the Court. On the other hand, recitals in the application show that possession of truck in question was handed over to the non-applicant by the applicant/defendant and non-applicant is in possession of the said vehicle. In view of this factual position and in absence of specific averment in the application in this regard, it is not possible to hold that the non-applicant/plaintiff has fulfilled the requirements of Sub-rule (1) of Rule 5 of Order XXXVIII of the CPC and, therefore, in view of this legal position, impugned order cannot be sustained.

11. For the reasons stated hereinabove, the question is answered in negative. The impugned order is not sustainable in law.

12. The impugned order dated 25-10-1994 passed by the trial Court is set aside. The revision is allowed. No order as to costs.