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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

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Date of decision: 3rd March, 2022

+ CS(COMM) 1217/2018 & IA No.17502/2019(for condonation of delay of 185 days in re-filing WS)

**BELA GOYAL PROPRIETOR OF
ISPAT SANGRAH (INDIA)**

..... Plaintiff

Through: Mr. Rajiv Bajaj and Mr. Karan
Prakash, Advocates.

versus

VIPL - MIPL JV (JAIPUR) & ORS.

..... Defendants

Through: Ms. Geeta Luthra, Sr. Advocate with
Mr. Jatin and Mr. Adarsh Kothari,
Advocates for D-1
Mr. Rajive R. Raj, Advocate for
Intervener IDBI Bank.

CORAM:

HON'BLE MR. JUSTICE AMIT BANSAL

AMIT BANSAL, J. (Oral)

I.A. No.15168/2018(u/O.XXXVIII R.5 CPC), I.A. No.12937/2021(of D-1 for directions) I.A. No.2181/2019(u/O.I R.10(2) CPC), I.A. No.3649/2019(u/O.XXXIX R.4 CPC), I.A. No.3650/2019(u/S.151 CPC)

1. The present commercial suit has been filed on behalf of the plaintiff seeking recovery of ₹2,70,82,437/- along with interest against the defendant no.1, which is a joint venture of the defendants no.2 and 3. The plaintiff claims to be a supplier of iron material, TMT, etc. for the defendants no.1, 2 and 3, who were awarded the contract by the defendant no.4 for construction

of eleven towers in respect of different categories of dwelling units located at the Air Force Naval Housing Board, Boitawala Village, Jaipur (Construction Project).

2. The case of the plaintiff is that a purchase order was issued by the defendant no.1 pursuant to which the goods were supplied by the plaintiff and invoices were raised in respect thereof. It is contended on behalf of the plaintiff that the defendants no.1, 2 and 3 gave three undated cheques totaling ₹75,00,000/- in May, 2016, which were dishonoured. Consequently, the plaintiff has filed the present suit for recovery, claiming ₹2,70,82,437/- against the defendants. The aforesaid suit was accompanied by an application under Order XXXVIII Rule 5 read with Order XXXIX Rules 1 and 2 of the Code of Civil Procedure, 1908 (CPC), which was filed for an attachment before the judgment. In the aforesaid application, the following prayer has been made:

“Pass an ex-parte order that Defendant No. 4 may be directed to deposit the award amount in terms award dated 14.09.2018 passed by sole arbitrator before this Hon'ble court till the pendency of the case or in alternative the award dated 14.09.2018 may be attached.”

3. On the first date of hearing itself, counsel appeared on behalf of the defendant no.4 and submitted before the Court that the defendant no.4 would be releasing the payment in terms of the arbitration award dated 14th September, 2018 in favour of the defendant no.1. Accordingly, in the application filed under Order XXXVIII Rules 1 and 5 of the CPC, this Court, vide order dated 02nd November, 2018 directed that out of the awarded sum, the defendant no. 4 shall deposit a sum of ₹2,70,00,000/- before the Registrar General of this Court and the aforesaid amount was

directed to be put in a fixed deposit. Notice in the application was issued to the defendants no.1, 2 and 3.

4. Thereafter, twelve other vendors of the defendants no.1, 2 and 3 filed recovery suits against the defendants no.1, 2 and 3 before the Commercial Courts at Patiala House Courts and obtained similar orders as passed by this Court on 2nd November, 2018, whereby the defendant no. 4 was directed to deposit in court the amounts claimed in the respective suits, out of sums awarded under the arbitration award.

5. On behalf of IDBI Bank, three applications have been preferred, viz. (i) I.A. No.2181/2019 under Order I Rule 10(2) of the CPC seeking intervention/impleadment in the present proceedings; (ii) I.A. No.3649/2019 under Order XXXIX Rule 4 of the CPC seeking setting aside of the order dated 2nd November, 2018 to the extent that it directed the defendant no.4 to deposit a sum of ₹2,70,00,000/- before this Court; and, (iii) I.A. No.3650/2019 under Section 151 of the CPC seeking release of money deposited by the defendant no.4 in terms of the order dated 2nd November, 2018 passed by this Court. Replies have been filed by the plaintiff in opposition of all the aforesaid applications.

6. Applications under Order VII Rule 11 of the CPC, being IA No.1790/2020 and Order VII Rule 10 of the CPC, being IA No.1791/2020, were filed on behalf of the defendant no.1, which were dismissed by this Court vide order dated 3rd January, 2022.

7. Yet another application has been filed on behalf of the defendant no.1 (I.A. No.12937/2021) in which directions are sought for release of money deposited by the defendant no.4 before the Registrar General of this Court in favour of IDBI Bank. In the said application, it has been averred that (i) the

defendant no.2 got issued bank guarantees from IDBI Bank, which were illegally encashed by the defendant no.4; (ii) against the said encashment, the defendant no.1 initiated arbitration proceedings which culminated into an award dated 14th September, 2018, whereby the defendant no.1 was directed to refund the amount of the bank guarantee so encashed; (iii) IDBI Bank filed OA No. 1080/2017 before the DRT-II, Delhi seeking recovery of ₹14,87,69,853/- against the defendant no.2; (iv) in the said OA, the DRT-II passed an attachment order dated 12th April, 2019 directing attachment of the amount payable in terms of the aforesaid award; (v) the DRT-II passed orders dated 26th February, 2021 and 13th April, 2021, holding that IDBI Bank, being a secured creditor, has a higher claim than the plaintiffs in the twelve commercial suits and therefore, issued letters to the Commercial Courts where the aforesaid amounts were deposited, directing the amounts to be deposited before the Registrar, DRT; (vi) pursuant to the aforesaid orders passed by the DRT-II, orders dated 15th March, 2021 and 3rd May, 2021 were passed by the respective Commercial Courts in respect of all the aforesaid twelve suits and the entire amount that was deposited in the aforesaid suits was remitted with interest to the DRT-II; and, (vii) few of the plaintiffs in the commercial suits before Patiala House Courts approached the Debts Recovery Appellate Tribunal (DRAT) challenging the order dated 13th April, 2021 passed by the DRT-II, which appeal is still pending before the DRAT.

8. Counsel for the plaintiff has made the following submissions:

- (i) The plaintiff was a *bonafide* supplier to the defendant nos. 1, 2 and 3 of various goods required for the Construction Project and amounts claimed under the suit are payable to the plaintiff.

- (ii) All the conditions prescribed under Order XXXVIII Rule 5 of the CPC are fulfilled in the present case and therefore, this Court correctly ordered the deposit of ₹2,70,00,000/- crores under the arbitration award with the Registrar General of this Court.
- (iii) There has been no assignment of the arbitration award by the defendant no.1 in favour of IDBI Bank and therefore, IDBI Bank cannot claim any amounts in respect of the award.
- (iv) IDBI Bank and the plaintiff are similarly placed as both had claims against the defendants which are pending adjudication.
- (v) IDBI Bank is not a secured creditor in respect of the amounts due under the arbitration award.
- (vi) Arbitration award has been passed only in favour of the defendant no.1, whereas the OA has been filed by IDBI Bank only against the defendant no.2.
- (vii) There is no authority in favour of Pravin Kumar Singh on behalf of the defendant no.1 in respect of the present suit.

9. Senior counsel appearing on behalf of the defendant no.1 made the following submissions:

- (i) The present suit was filed in collusion between the plaintiff and the defendant no.4 and that is how the defendant no. 4, despite not being on caveat, appeared on first date before this Court and stated that it is ready to pay the amount in terms of the arbitration award.
- (ii) Defendant no.4 was neither a necessary nor proper party to the suit and was deliberately impleaded as party by the plaintiff so as to obtain a collusive order directing the defendant no.4 to deposit amounts before this Court, in respect of the application filed by the plaintiff

under Order XXXVIII Rule 5 of the CPC.

- (iii) Defendant no.4 appeared in the suit only on 2nd November, 2018 through counsel and thereafter, has never appeared in the present suit.
 - (iv) Defendant no.4 got the other vendors similarly placed like the plaintiff herein, to file twelve similar suits before various competent courts and similar orders were obtained therein, directing the defendant no.4 herein to deposit the amounts, which were the subject matter of the aforesaid suits. Counsel appeared on behalf of the defendant no.4 on the first date in ten out of the aforesaid twelve cases.
 - (v) Conditions prescribed under Order XXXVIII Rules 1 and 5 of the CPC were not fulfilled in the present case and therefore, no attachment order could have been passed by the court on 2nd November, 2018. In this regard reliance is placed on the judgment of the Supreme Court in **Raman Tech. & Process Engg. Co. & Anr. v. Solanki Traders**, (2008) 2 SCC 302 and of the Calcutta High Court in **Premraj Mundra v. Md. Maneck Gazi & Ors.**, AIR 1951 Cal 156.
10. Counsel appearing on behalf of IDBI Bank has made the following submissions:
- (i) IDBI Bank does not wish to be impleaded as a party in the present suit and only seeks intervention as the amounts due to the IDBI Bank as a secured creditor stand deposited before this Court.
 - (ii) Bank guarantee was issued by IDBI Bank at the behest of the defendant no.2, who was the customer of IDBI Bank, in favour of the defendant no.4 towards the execution of the Construction Project. The bank guarantee was invoked by the defendant no.4 and in terms of which IDBI Bank had to release ₹6,50,00,000/- in favour of the

defendant no.4.

- (iii) Attention of the Court is drawn to the various documents filed with the impleadment application to contend that IDBI Bank was the secured creditor in respect of the amount given under the bank guarantee and was consequently, also a secured creditor in respect of the amounts under the arbitration award.
- (iv) Other than the sums deposited by the defendant no.4 before this Court and the sums that were subject matter of the twelve commercial suits before the Patiala House Courts, IDBI Bank has already received the entire amounts that were granted in terms of the arbitration award.
- (v) The amounts deposited in the twelve suits before the Patiala House Courts have already been remitted to DRT-II.

11. At the outset, reference may be made to the averments made by the plaintiff in its application under Order XXXVIII Rule 5 and Order XXXIX Rules 1 and 2 of the CPC. The plaintiff has pleaded therein that:

- (i) An arbitration award of ₹11,18,11,298/- was passed in favour of the defendant no.1 and against the defendant no.4.
- (ii) Not only the plaintiff, but there are also various other vendors who have dues against the defendant no.1 and the aforesaid vendors have initiated proceedings under Section 138 of the Negotiable Instruments Act, 1881. The defendants are not appearing in the said cases filed against them.
- (iii) The plaintiff along with other vendors tried to visit the office of the defendant no.1, but the same was found closed.
- (iv) If the defendant no.4 was to release the amount in terms of the arbitration award in favour of the defendant no.1, the defendant no.1

shall “usurp the amount and shall remove the amount within the local limit of jurisdiction of this Court” and therefore, it may be difficult for the plaintiff to recover the said amount from the defendant no.1.

12. In light of the aforesaid averments, it has to be determined whether the necessary ingredients of Order XXXVIII Rule 5 of the CPC have been fulfilled for the court to direct the defendant to furnish security or deposit the amount claimed in the suit before the Court. The provisions of Order XXXVIII Rule 5 of the CPC have been elucidated by the Supreme Court in ***Raman Tech.*** (supra). The relevant observations of the Supreme Court are set out 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.)”

13. The Supreme Court has observed that the provisions of Order XXXVIII Rule 5 of the CPC have to be used sparingly and strictly in accordance with the said Rule and it cannot be used to convert an unsecured debt into a secured debt. It has further been observed by the Supreme Court that the plaintiff has to satisfy 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.

14. In *M/s. K. C. V. Airways Ltd. & Anr. v. 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 extraordinary 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.”

15. The aforesaid judgments were followed by me in the order dated 27th January, 2022 in CS(OS) 332/2021 titled ***Rajnish Gupta & Anr. v. Mukesh Garg & Anr.***

16. Applying the aforesaid principles in the facts of the present case, it cannot be said that the defendant no.1 in the present case is seeking to remove the sum awarded in its favour by the arbitration award from the jurisdiction of this Court so as to obstruct or delay execution of the decree. The whole intent of the defendant no.1 is to transfer the aforesaid amount in favour of IDBI Bank, which is a secured creditor of the defendant no.2. In fact, a specific prayer has been made in the I.A. No.12937/2020 filed by the defendant no.1, that the amount be released in favour of IDBI Bank, being a secured creditor. It is the plaintiff, which is attempting to convert its unsecured debt into a secured debt by means of the present application. Merely because the plaintiff has a good case on merits in the suit, it cannot a ground for passing an order under provisions of Order XXXVIII Rule 5 of the CPC requiring the defendants to deposit in Court the entire amount claimed in the suit.

17. The *ex parte* ad interim order dated 2nd November, 2018 passed by this Court was clearly on account of collusion between the plaintiff and the defendant no.4. It was only on account of the defendant no.4 appearing before the Court on the said date of hearing and stating that it is agreeable to pay the amounts due under the arbitration award in favour of the defendant no.1 that this Court passed the order dated 2nd November, 2018 directing the

defendant no.4 to deposit a sum of ₹2,70,00,000/-, being the subject matter of the present suit, before the Registrar General of this Court. Generally, orders under Order XXXVII Rule 5 of the CPC directing the defendant to furnish security are not passed without issuing notice to the defendant. But, in the present case, the aforesaid order was passed on the first date in the suit itself, without notice to the defendants no.1, 2 and 3, who were the parties adversely affected by the said order.

18. I am in agreement with the submission made on behalf of the defendants that the defendant no.4 was made a party in the suit only with a view to obtain the aforesaid order behind the back of the defendants no.1, 2 and 3. Otherwise, in the facts pleaded in the plaint and the prayers made therein, the defendant no.4 was neither a necessary nor a proper party to the suit. The collusion between the different vendors and the defendant no.4 continued and based on the aforesaid order dated 02nd November, 2018, twelve different suits were filed by different vendors before the Commercial Courts at Patiala House Courts and similar *ex parte* orders were obtained directing the defendant no.4 to deposit the amounts claimed in the respective suits before the Commercial Court. As in the present case, counsel appeared for the defendant no.4 on the very first date itself in ten of the twelve suits, when the ad interim orders were passed under Order XXXVIII Rule 5 of the CPC. Defendant no.4, while choosing not to challenge the arbitration award, set up the aforesaid vendors to file suits against the defendants and in which the aforesaid orders were passed on account of the collusion between the defendant no.4 and the various vendors. It may be pertinent to note here that the defendant no.4, after appearing on the first date of hearing on 2nd November, 2018, when the aforesaid order was passed, has never appeared

in the present suit.

19. It has been contended on behalf of the plaintiff that whereas the arbitration award is in favour of the defendant no.1, the OA filed by the bank is against the defendant no.2. Further, the arbitration award has not been assigned by the defendant no.1 in favour of IDBI Bank. Therefore, IDBI Bank cannot seek attachment of the amounts due to the defendant no.1 in terms of the aforesaid arbitration award. The aforesaid contention overlooks the fact that the defendant no.1 is nothing but a joint venture of the defendants no.2 and 3 created specifically for execution of the construction contract with the defendant no.4. It is not a separate legal entity in itself. In the plaint itself, it is pleaded that the defendants no.2 and 3 are two companies incorporated under the Companies Act, 2013 and the defendant no.1 is a joint venture between the defendants no.2 and 3. Address of the defendant no.1 given in the memo of parties is also the same as that of the defendant no.2. Throughout, reference to the defendant no.1 in the plaint has been as a joint venture of the defendants no.2 and 3. It has nowhere been pleaded that the defendant no.1 is a separate legal entity. Most of the invoices filed by the plaintiffs along with the plaint are also raised on the defendant no.2. Hence, from a reading of the plaint, it is clear that the defendant no.1 is not a separate legal entity but is merely an extension of the defendants no.2 and 3. Therefore, even if the arbitration award is passed in favour of the defendant no.1, that would accrue to the benefit of the defendants no.2 and 3. Consequently, the defendants no.2 and 3 are free to utilize the amounts due to them under the arbitration award to settle their dues with IDBI Bank, which is a secured creditor. Other than the sums deposited by the defendant no.4 before this Court and the sums that were

subject matter of the twelve commercial suits before the Patiala House Courts, IDBI Bank has already received the entire amounts that were granted in terms of the arbitration award. Even the amounts deposited in the twelve suits before the Patiala House Courts have already been remitted to DRT-II.

20. The contention whether there is a proper authorization in favour of Praveen Kumar Singh to represent the defendant no.1 cannot be decided at this stage and will be considered at the stage of trial.

21. Therefore, the application of the plaintiff, being I.A. No.15168/2018 filed under Order XXXVIII Rule 5 of the CPC is devoid of any merits and the same is dismissed. I.A. 12937/2021 is allowed. Consequently, in the facts and circumstances of the present case, the amount of ₹2,70,00,000/- deposited by the defendant no.4 and kept in a fixed deposit in terms of the order dated 2nd November, 2018 passed by this Court is directed to be transferred to the DRT-II along with the accrued interest.

22. In view of the directions passed above, no orders are required to be passed in the applications filed on behalf of IDBI Bank, being I.A. No.2181/2019, I.A. No.3649/2019, and I.A. No.3650/2019. The same are disposed of as infructuous.

23. Any observation or expression of opinion in this judgment will have no bearing on the merits of the suit.

AMIT BANSAL, J.

MARCH 03, 2022

ak/dk