

**HIGH COURT OF GUJARAT****RAJASTHAN CYLINDER AND CONTAINER LTD AND ANR***Versus***ESSAR STEEL LTD****Date of Decision:** 11 November 2008**Citation:** 2008 LawSuit(Guj) 2704**Hon'ble Judges:** [M R Shah](#)**Eq. Citations:** 2009 AIR(Guj) 116**Case Type:** S C A**Case No:** 13386 of 2008**Subject:** Civil, Constitution**Acts Referred:**[Constitution Of India Art 227](#)[Code Of Civil Procedure, 1908 Or 39R 2, Or 38R 5, Or 39R 1](#)**Advocates:** [Keyur Gandhi](#), [Nanavati Associates](#), [S I Nanavati](#), [V D Nanavati](#)**Cases Cited in (+): 1****M. R. Shah, J.**

**[1]** Rule, Shri Keyur Gandhi, learned advocate with M/s. Nanavati Associates waives service of notice of rule on behalf of the respondent. With the consent of the learned advocates for the respective parties, the matter is taken up for final hearing today.

**[2]** By way of this petition under Article 227 of the Constitution of India, the petitioners original defendants Nos. 1 and 2 have prayed for an appropriate writ, direction and/or order quashing and setting aside the impugned order dated 29.9.2008 passed by the learned Second Additional Senior Civil Judge, Surat passed below Exh. 5 in Special Civil Suit No. 256 of 2003, by which the learned trial Court has directed the petitioners original defendants to furnish security of Rs. 17 lacs in the form of Bank Guarantee under Order 38 Rule 5 of the Code of Civil Procedure, 1908.

**[3]** Respondent-plaintiff had instituted the Special Civil Suit No. 256 of 2003 in the Court of learned Civil Judge (S.D.), Surat to recover Rs. 16,22,059.95. It appears that an agreement was entered into between the petitioners-defendants and respondent-plaintiff to supply Steel materials. It is the case on behalf of the petitioners that as per the agreement the goods were required to be supplied as per the agreed schedule and post dated cheque was drawn by the petitioners-defendants against the said payment only on receipt of the goods as per the agreed schedule and the post dated cheques were drawn by the petitioners which were required to be deposited after pre-confirmation from the petitioners-defendants. It appears that post dated cheques were issued by the petitioners-defendants from time to time and they were honoured and the dispute arose in March, 2002 when the purchase order for supply of 100 M.T. was placed amounting to Rs. 11,94,028/- which alleged to have been remained outstanding in the books of respondent-plaintiff. It is the case on behalf of the petitioners that the said goods were not supplied in time and therefore, the petitioners-defendants were constrained to purchase some materials in the open market at the higher rate. There was stop payment of cheques and the four cheques which were issued by the petitioners were dishonoured with an endorsement "payment stopped by the drawer". There are some criminal complaints pending before the Criminal Court for dishonour of the cheque. That Debit Notes amounting to Rs. 68,40,276.52 were raised by the petitioners-defendants being the differential amount between the agreed price and the market price. It was the case on behalf of the petitioners that they have received only 2390.550 M.T. from respondent-plaintiff against the contract to supply 6000 M.T. Steel materials. Therefore, the petitioners-defendants had filed Civil Suit No. 129 of 2003 against the respondent herein in the Court of 6th Additional Senior Civil Judge, Surat for damages. That, thereafter the respondent-plaintiff had filed the present suit being Special Civil Suit No. 256 of 2003 against the petitioners-defendants to recover Rs. 16,22,059,95 ps. In the said suit the respondent-plaintiff submitted interim application at Exh. 5 under Order 38 Rule 5 r/w Order 39 Rules 1 & 2 of the Code of Civil Procedure. That after a period of almost 5 years of filing the suit as well as the interim application Exh.5, the learned trial Court has passed the impugned order directing the petitioners-defendants to furnish security of Rs. 17 lacs in the form of bank guarantee exercising the jurisdiction under Order 38 Rule 5 of the Code of Civil Procedure. Being aggrieved and dissatisfied with the impugned order passed by the learned trial Court directing the petitioners-defendants to furnish security of 17 lacs in the form of bank guarantee under Order 38 Rule 5 of the Code of Civil Procedure, the petitioners-defendants have preferred the present Special Civil Application under Article 227 of the Constitution of India.

**[4]** Shri Sudhir Nanavati, learned Senior Advocate appearing for the petitioners-defendants has vehemently submitted that learned trial Court has committed an error

in directing the petitioners-defendants to furnish the bank guarantee of Rs. 17 lacs under Order 38 Rule 5 of the Code of Civil Procedure. It is submitted that as such there is no finding given by the learned trial Court that the petitioners-defendants were likely to dispose of the property to defeat the decree that may be passed. It is submitted that ingredients of Order 38 Rule 5 of the Code of Civil Procedure are not attracted at all. It is further submitted that only in a case where an opinion is formed that the defendants were trying to defeat the realization of the decree that may ultimately be passed in favour of the plaintiffs, either by attempting to dispose of or remove from the Jurisdiction of the Court any movables, in that case, only Order 38 Rule 5 of the Code of Civil Procedure can be invoked. It is submitted that the impugned order is passed by the learned trial Court only on the ground that the plaintiff has good case on merits and there are legal dues and decree is likely to be passed; It is submitted that whether there is good prima facie case on merits and/or decree is likely to be passed is irrelevant and there is no ground to pass the order under Order 38 Rule 5 of the Code of Civil Procedure. It is further submitted that even in the impugned order itself the learned trial Court has specifically observed that even during this 5 years of pendency of application Exh.5, the petitioners-defendants have not transferred any properties with a view to frustrate the purpose of the present suit. In that view of the matter, the impugned order passed by the learned trial Court directing the petitioners-defendants to furnish the bank guarantee of Rs. 17 lacs under Order 38 Rule 5 of the Code of Civil Procedure deserves to be quashed and set aside. Learned Senior Advocate appearing for the petitioners has heavily relied upon the decision of the Hon'ble Supreme Court in the case of [Raman Tech & Process Engg. Co and Anr. v. Solanki Traders](#), 2008 2 SCC 302. Relying upon the above decision and making above submissions, it is requested to allow the present Special Civil Application.

**[5]** Petition is opposed by Shri Keyur Gandhi, learned advocate for the respondent-plaintiff. It is submitted that by impugned order the learned trial Court has only passed an order to furnish the security and, therefore, no prejudice will be caused to the petitioners and therefore, it is requested not to interfere with the discretionary order passed by the learned trial Court. It is submitted that impugned order is passed by the learned trial Court in exercising discretion of furnishing the security only and, therefore, the same is not required to be interfered with by this Court in exercise of powers under Article 227 of the Constitution of India. It is also farther submitted by Shri Keyur Gandhi, learned advocate for the respondent-plaintiff that learned trial Court has found that the plaintiff has good case on merits and the dues are legal and, therefore, with a view to protect the interest of the plaintiff when the defendants are directed to furnish the security only it cannot be said that the learned trial Court has committed any error and/or illegality in passing the impugned order. It is submitted that the learned trial Court is required to consider the prima facie case and when a

prima facie opinion has been found by the learned trial Court that the plaintiff has good case on merits and the dues prima facie seems to be legal and genuine, the learned trial Court is justified in passing the impugned order. Shri Gandhi, learned advocate for the respondent-plaintiff has relied upon the decision of the Hon'ble Supreme Court in the case of [Rajendran and Ors. v. Shanker Sundaram and Ors.](#), 2008 2 SCC 724. It is submitted by Shri Gandhi, learned advocate for the respondent that as observed by the Hon'ble Supreme Court the Court while exercising the jurisdiction under Order 38 Rule 5 of the Code of Civil Procedure is required to form a prima facie opinion at this stage. Making above submissions and relying upon the aforesaid decision, it is requested to dismiss the present Special Civil Application.

**[6]** Heard the learned advocates appearing for the respective parties. At the outset, it is required to be noted that impugned order has been passed by the learned trial Court in exercise of powers under Order 38 Rule 5 of the Code of Civil Procedure and the petitioners-defendants are directed to furnish the security in the form of Bank guarantee of Rs. 17 lacs. Order 38 Rule 5 of the Code of Civil Procedure confer powers or jurisdiction upon the Court to direct the petitioners-defendants either to furnish the 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; where at any stage of the 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. Therefore, before passing any order under Order 38 Rule 5 of the Code of Civil Procedure aforesaid two conditions are to be satisfied. Thus, the Court is to be satisfied and there must be a prima facie opinion and satisfaction of the Court that defendant 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, with intent to obstruct or delay the execution of any decree that may be passed against him. Therefore, unless and until, there is a satisfaction by the Court and the prima facie finding by the learned trial Court to the aforesaid extent no order can be passed by the Court under Order 38 Rule 5 of the Code of Civil Procedure either to furnish the security and/or any other order under the said provisions.

**[7]** Identical question came to be considered by the Hon'ble Supreme Court in the case of Raman Tech & Process Engg. Co. and Anr. and considering the scope object and nature of the power of the Court under Order 38 Rule 5 of the Code of Civil Procedure, the Hon'ble Supreme Court has observed and held that the object of supplemental

proceedings is to prevent the ends of justice being defeated. The object of Order 38 Rule 5 of the Code of Civil Procedure, is to prevent any defendant from defeating the realization of the decree that may ultimately be in favour of the plaintiff, either by attempting to dispose of or remove from the jurisdiction of the Court, his movables. Paras 4 and 5 of the said judgment are as under:

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 realization 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 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 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 utilize 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 settlement, under threat of attachment.

Thus as per the decision of the Hon'ble Supreme Court, over and above, the conditions mentioned under Order 38 Rule 5 of the Code of Civil Procedure are

satisfied before exercising the power under the said Rule, the Court should be satisfied that there is a reasonable chance of decree being passed in the suit against the defendant. It is also further observed by the Hon'ble Supreme Court in the said decision that further, he needs to establish that the defendant is attempting to remove or dispose of his assets with the intention of defeating the decree that may be passed.

Therefore, the decision of the Hon'ble Supreme Court in the case of Rajendran and Ors. relied upon by the learned advocate for the respondent that Court while exercising its jurisdiction under Order 38 Rule 5 of the Code of Civil Procedure is required to form a prima facie opinion at that stage and it need not go into the correctness and/or otherwise and all the contentions raised by the parties are to be considered or trial is required to be considered in light of the observations made by the Hon'ble Supreme Court in the aforesaid decision. On fair reading of the aforesaid decision in the case of Rajendran and Ors., the Hon'ble Supreme Court has not stated that when a prima facie opinion is formed that a decree is likely to be passed order under Order 38 Rule 5 of the Code of Civil Procedure may be passed and conditions contemplated under Order 38 Rule 5 of the Code of Civil Procedure are not required to be satisfied. The Hon'ble Supreme Court in the case of Raman Tech & Process Engg. Co. and Anr. has specifically Held that before exercising the power under Order 38 Rule 5 of the Code of Civil Procedure, the Court should be satisfied that there is a reasonable chance of a decree being passed in the suit against the defendant and further he needs to establish that the defendant is attempting to remove or dispose of his assets with the intention of defeating the decree that may be passed. Therefore, even in a case where the plaintiff has established that the defendant is attempting to remove or dispose of his assets with the intention of defeating the decree that may be passed, in that case, also if prima facie found that there is no reasonable chance of a decree to be passed in the suit against the defendant, the Court may not pass order under Order 38 Rule 5 of the Code of Civil Procedure. Therefore, before exercising the power under Order 38 Rule 5 of the Code of Civil Procedure, the conditions mentioned under Order 38 Rule 5 of the Code of Civil Procedure are required to be satisfied before exercising the power under the said Rule, and the Court should be satisfied that there is a reasonable chance of decree being passed in the suit against the defendant. Now, considering the facts of the case on hand, it appears that the learned trial Court has passed the impugned order only on the ground that the plaintiff is likely to be succeeded in the suit and it is prima facie established that the suit amounts are due from the defendants. However, learned trial Court has specifically observed in the impugned order that "present suit is filed in the year 2003 and today now 5 years have been lapsed but during that 5 years defendants

have not transferred any property with a view to frustrate the purpose of the present suit. There is no material on, record placed by the plaintiffs which shows that defendants are likely to dispose alienate and transfer their property with a view to defeat the decree, it is likely to be passed in the present suit. So, in absence of such cogent and strong evidence disposing of the property by the defendants and order of attachment and injunction cannot be passed because it will ruin the day-to-day business of the defendant firm.

In view of the above specific findings given by the learned trial Court, the learned trial Court ought not have passed the order under Order 38 Rule 5 of the Code of Civil Procedure directing the petitioners-defendants to furnish the security by way of bank guarantee of Rs. 17 lacs. It is required to be noted that even directing the defendants to furnish the bank guarantee is as good as passing the order directing the petitioners-defendants to deposit the amount. Even to furnish the security of 17 lacs by way of bank guarantee is harsh and drastic order. Under the circumstances, merely because, the learned trial Court is of the opinion that prima facie it is established that suit amount is due from the defendants, the learned trial Court was not justified in passing the impugned order under Order 38 Rule 5 of the Code of Civil Procedure more particularly, as stated herein above and even considering the findings of the learned trial Court the conditions contemplated under Order 38 Rule 5 of the Code of Civil Procedure are not satisfied. Under the circumstances, the impugned order passed by the learned trial Court deserves to be quashed and set aside. It is also required to be noted that at this stage the suit was filed in the year 2003 and the Exh. 5 application under Order 38 Rule 5 of the Code of Civil Procedure was also filed in the year 2003, which came to be disposed of in the year 2008 i.e. after a period of 5 years and after 5 years the learned trial Court has passed an order under Order 38 Rule 5 of the Code of Civil Procedure and in between there was no injunction and/or no order in favour of the plaintiff and against the defendants & Still there was no transfer of property by defendant, therefore, also it is required to be considered how far the learned trial Court is justified in passing the impugned order under Order 38 Rule 5 of the Code of Civil Procedure after a period of 5 years.

**[8]** For the reasons stated above, the petition succeeds. The impugned order dated 29.9.2008 passed by the learned Second Additional Senior Civil Judge, Surat passed below Exh. 5 in Special Civil Suit No. 256 of 2003 is hereby quashed and set aside. Considering the fact that the suit is of the year 2003, the same is ordered to be expedited. At this stage, learned advocates for the respective parties have requested that two suits filed by the rival parties be heard together by one Court as the suits are between the same parties. Under the circumstances, it will be open for the respective

parties to submit an appropriate application before the learned Principal District Judge, Surat for hearing of the Civil Suit No. 129 of 2003 pending in the Court of learned 6th Additional Senior Civil Judge, Surat and also Civil Suit No. 256 of 2003 pending in the Court of learned 2nd Additional Senior Civil Judge, Surat be heard together by one Court and the learned Principal District Judge is directed to consider the same. With these, present Special Civil Application is allowed. Rule is made absolute. There shall be no order as to costs.

