



**IN THE HIGH COURT OF KARNATAKA AT BENGALURU**

**DATED THIS THE 7<sup>TH</sup> DAY OF MARCH, 2023**

**BEFORE**

**THE HON'BLE MR JUSTICE SREENIVAS HARISH KUMAR**

**WRIT PETITION NO. 2385 OF 2023 (GM-CPC)**

**Between:**

1. M/s. Kamalalaya Hiisoft (P) Ltd.,  
Company incorporated under  
The Companies Act 1956  
Having its registered office at  
Plot No.166  
(Municipal No.8-2-293/82/NL/166)  
New MLA and MP'S Colony,  
Road No.10C, Jubilee Hills,  
Hyderabad TG 500 033

Represented by its Authorized Signatory and  
Chief Operating Officer  
MR Venkata Ranjit Patibandla

2. Mrs. Uma Pani Yalamanchili  
Aged about 63 years  
W/o. Yalamanchili Jithin Kumar  
Having her Office at  
Plot No.166  
(Municipal No.8-2-293/82/NL/166)  
New MLS and MP'S Colony Road  
No. 10 C, Jubilee Hills  
Hyderabad TG-500033

3. Mr. Yalamanchilli Srinivas Naveen  
Aged about 39 years  
S/o Yalamanchili Jithin Kumar,  
Having her Office at  
Plot No.166





(Municipal No.8-2-293/82/NL/166)  
New MLS and MP'S Colony Road  
No. 10 C, Jubilee Hills  
Hyderabad TG-500033

...Petitioners

(By Sri Udaya Holla, Senior Advocate for  
Sri S.Sammith S., Advocate)

**And:**

M/s. Sree Venkateswara Developers  
A Partnership Firm registered under the  
Indian Partnership Act, 1932  
Having its registered office at  
No. 51 Le Parc Richmond  
Richmond Road, Bengaluru -560 025  
Represented by its Managing Partner  
Mr. Adithya Reddy

...Respondent

(By Sri B.C.Thiruvengadam, Senior Advocate for  
Sri Manik B.T., Advocate)

This Writ Petition is filed under Articles 226 and 227 of the Constitution of India, praying to call for records in O.S.No.662/2023 pending on the file of the Learned XXXIX Additional City Civil and Sessions Judge, Bengaluru; quash the impugned order dated 27.01.2023 passed by the learned XXXIX Additional City Civil and Sessions Judge, Bengaluru (CCH-40) in O.S.662/2023 as contained in Annexure-A and etc.

This Writ Petition coming on for **orders** this day, the court made the following:

**ORDER**

The writ petitioners are defendants 1 to 3 in O.S.No.662/2023, on the file of XXXIX Additional City Civil Judge (CCH-40), Bengaluru. The respondent is the plaintiff and it, being a partnership firm, has claimed damages of Rs. 100,00,00,000/- (Rupees One hundred Crores) with interest at the rate of 12% per annum for slanderous and libelous defamatory statements made by the petitioners. The respondent also filed an application under Order XXXVIII Rule 5 CPC requesting the court to pass an order attaching the petitioners' immovable property and bank account before judgment. The suit was filed on 27.01.2023, and on the same day the suit was posted before the court for consideration of I.A.No.1 filed under Order XXXVIII Rule 5 CPC. The petitioners had entered caveat, and in the presence of counsel for respondent and the petitioners, the trial court heard on I.A.1 and posted the case to 30.01.2023 for orders on the application. On 28.01.2023, the petitioners filed this writ petition seeking to quash the order dated 27.01.2023



produced at Annexure A. Since on 30.01.2023, the trial court passed an order directing the petitioners to show cause as to why they should not furnish security for the decree that may be passed in the suit, they have filed an application under Order VI Rule 17 CPC to insert additional prayer in the writ petition for quashing the order dated 30.01.2023, produced at Annexure A1. The application for amendment requires to be allowed.

2. I have heard Sri Udaya Holla, learned senior counsel appearing for Sri S.Sanmith learned counsel for the petitioners, and Sri B.C.Thiruvengadam, learned senior counsel appearing for Sri B.T.Manik for the respondent.

3. It was the argument of Sri Udaya Holla that the orders at Annexures A and A1 were to be quashed for two reasons, firstly that the petitioners had entered caveat, and when the suit was posted before the court for the first time on 27.01.2023, the caveators' counsel was very much present before the court and prayed for time to file statement of objections. But without giving time, the



court posted the case for orders, thus the petitioners who had entered caveat were denied of an opportunity to file their statement of objections.

3.1. His second line of argument was that the affidavit filed along with application for attachment before judgment does not contain essential ingredients specified in Order XXXVIII Rule 5 CPC, and in the absence of the same, the court cannot issue show cause notice also and therefore orders at Annexures A and A1 are to be quashed.

4. Sri B.C.Thiruvengadam replied that the caveators' counsel was heard on 27.01.2023 and only thereafter the case was adjourned to 30.01.2023 for orders. In regard to issuance of show cause notice, he argued that the respondent's suit is for damages of Rs.100,00,00,000/- (One hundred Crores) in connection with defamatory statements made by the petitioners against the respondent. The respondent has documentary evidence to prove its claim. In para 18 of the affidavit, it is clearly



stated that the petitioners are trying to alienate the property and will disappear without meeting the suit claim, and in that event the suit will become infructuous. Therefore, only on being satisfied that ingredients of Order XXXVIII Rule 5 CPC are present, the court directed the petitioners to show cause for the claim made in the plaint. Absolutely there is no infirmity in the order and hence writ petition is to be dismissed.

5. Now it may be stated that once caveat is filed, no interim order can be passed without hearing the caveator; and if the caveator wants to file statement of objections, reasonable time must be granted or otherwise, the very purpose of filing the caveat would be defeated. However, if the party approaching the court makes out an extraordinary circumstance in the presence of caveator requiring intervention of the court to pass an interim order, the court may pass appropriate order to be in force for a limited period till the application for interim relief is



decided on merits. This power of the court cannot be abridged.

6. On the second point of argument of Sri Udaya Holla, what needs to be stated is that the court has just directed the petitioners to show cause as to why they should not furnish security. This order implies that the court has not yet taken a decision either to pass an order of attachment of property or to direct the petitioners to furnish security. Just a show cause notice is issued; depending on the reply given to the show cause, the court may have to take appropriate decision; and in this view the order of issuing show cause notice cannot be questioned in the writ petition or in appeal. Rule 3 of Order XXXVIII CPC also empowers the court to pass an order directing conditional attachment of the whole or any portion of the specified property. Unless attachment order is passed under Rule 6, the conditional order does not become absolute. Even when show cause notice is issued, an order under Rule 6 is to be passed attaching the



property, and mere issuance of show cause notice is no order of attachment, and thus looked there is no scope for challenge to such type of order as the defendant cannot complain that his interest is affected by mere issuance of show cause notice.

7. There is another important aspect. Even to issue show cause notice or order conditional attachment, the court must arrive at a satisfaction that the defendant, in order 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 application must disclose these ingredients and the order of the court must disclose the satisfaction being arrived at based on materials provided by the plaintiff. If the order does not reflect the arrival of satisfaction, such an order can be questioned even before the court passes an order under Rule 6 of Order XXXVIII CPC.



8. In a decision of this court in the case of **PALGHAR ROLLING MILLS PVT. LTD. Vs VISVESVARAYA IRON AND STEEL LIMITED AND ANOTHER [AIR 1985 Kant 282]**, it is held as below :

*"8. The mandatory essentials of O. 38, R. 5 are: (1) the Court must be 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, (ii) is about to dispose of the whole or any part of his property, or (iii) is about to remove the whole or any part of the property from the local limits of the jurisdiction of the Court. Therefore, the most essential requirement of Order 38, R. 5 is the subjective satisfaction of the Court regarding the requirements mentioned above. Order 38, R. 5, in my opinion, is a mandatory provision demanding of the Court to satisfy itself first that the defendant is intending to obstruct or delay the execution of 'the decree that may be passed against him. If the order passed by the Court does not speak or show that the Court has applied its mind to the requirements of Order 38,*



*R. 5 C.P.C., or if the order passed by the Court below does not show clearly that it has considered the material on record, or if the order does not show that the court is satisfied that the 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 the property, the order would be in violation of Order 38, R. 5 C.P.C. Order 38, R. 5 as it stood before the amendment in 1976, would have at the most rendered such order irregular. But, now sub-rule(4) inserted by S. 85(l) of the Act 104 of 1976 reads that if an order of attachment is made without complying with the provisions of sub-rule (1) of R. 5 of O. 38, such attachment shall be void. Sub-rule (4) has been inserted with a view to see that the Courts do not pass such an extraordinary order in a cavalier manner and without satisfying themselves about the requirements of Order 38, R. 5."*

If the application filed by the respondent under Order XXXVIII Rule 5 CPC is perused, it does not disclose the source of information supplementing the allegation the



respondent has made in para 18 of the affidavit, nor the order dated 30.01.2023 indicates application of mind and arriving at a satisfaction based on materials placed before it by the respondent. Therefore the issuance of show cause notice is illegal.

9. Apart from the above there is one more aspect. The respondent's suit is for damages, it has claimed this relief having felt defamed by the petitioner. Their claim for damages is not based on any transaction between them. A question whether the respondent can seek attachment for before judgment in a suit of this type, arises.

10. According to Order XXXVIII Rule 5 CPC, the defendant may be directed to provide security for a specified sum. The show cause notice also directs the defendant as to why he should not be required to furnish security for a specified sum. The term 'sum specified' means an ascertained sum, it may be a debt or a liability or an obligation on the defendant arising from a



transaction between the plaintiff and the defendant. On the day when the suit is filed, if the debt or liability or obligation does not exist, the defendant cannot be asked to furnish security on the application filed under Order XXXVIII Rule 5 CPC. In a suit for damages, such a debt or liability or obligation does not arise until the court quantifies the damages. When Sri Thiruvengandam was questioned as to how an application under Order XXXVIII Rule 5 CPC can be filed in a suit for damages for defamation, his answer was that there is no bar as such in Rule 5 of Order XXXVIII, and he submitted further that according to Rule 1 of Order XXXVIII, an application can be made in any suit other than the suits mentioned in section 16 clauses (a) to (d) of Civil Procedure Code. Since the case on hand does not fall within the clauses of (a) to (d), application under Order XXXVIII Rule 5 CPC is very much maintainable. He also submitted that Rules 1 and 5 of Order XXXVIII CPC must be read together harmoniously.



11. It is not possible to accept the line of argument of Sri Thiruvengadam. Rule 1 of Order XXXVIII CPC deals with arresting a defendant before judgment and Rule 5 deals with attaching a property before judgment. Though the circumstances when the arrest or attachment can be ordered before judgment are same, in my opinion both have different consequences and therefore they cannot be read together. However, it may be stated that when an attachment before judgment is sought, the plaintiff must be able to demonstrate before the court that on the day when the suit was filed, the defendant owed to him in a certain sum of money on account of a transaction between them. The sum must be specific and only if the court is satisfied prima facie that on account of a transaction between the plaintiff and the defendant, there is an obligation or liability on the part of the defendant and in order to avoid the liability or obligation, the defendant is about to dispose of whole or any part of his property or remove the whole or any part of the property from local limits of the jurisdictional court, the court can entertain



application under Order XXXVIII Rule 5 CPC. But in the case on hand the suit is for damages in connection with alleged defamation. The plaintiff may have claimed Rs.100 crores towards damages. Till the court decides whether plaintiff is entitled to damages or not, the claim made by the plaintiff remains a fiction; it is not a specified amount. Obligation or liability does not come into existence till the court passes the decree in favour of the plaintiff. Therefore in a suit of this type application under Order XXXVIII Rule 5 CPC cannot be filed at all. Aptly applicable to a circumstance like this, I may refer to two judgments. In the case of ***M/s. Greenhills Exports (P) Limited and Others vs Coffee Board [ILR 2001 KAR 2950]***, a Division Bench of this court, after referring to many earlier judgments has culled out the following principles :

*"14. (i) A 'debt' is a sum of money which is now payable or will become payable in future by reason of a present obligation. The*



*existing obligation to pay a sum of money is the sine qua non of a debt.*

*"Damages" is money claimed by, or ordered to be paid to, a person as compensation for loss or injury. It merely remains as a claim till adjudication by a Court and becomes a 'debt' when a Court awards it.*

*(ii) In regard to a claim for damages (whether liquidated or unliquidated), there is no 'existing obligation' to pay any amount. No pecuniary liability in regard to a claim for damages, arises till a Court adjudicates upon the claim for damages and holds that the defendant has committed breach and has incurred a liability to compensate the plaintiff for the loss and then assesses the quantum of such liability. An alleged default or breach gives rise only to a right to sue for damages and not to claim any 'debt'. A claim for damages becomes a 'debt due', not when the loss is quantified by the party complaining of breach, but when a competent Court holds on enquiry, that the person against whom the claim for damages is made, has committed breach and incurred*



a pecuniary liability towards the party complaining of breach and assesses the quantum of loss and awards damages. Damages are payable on account of a fiat of the Court and not on account of quantification by the person alleging breach.

(iii) When the contract does not stipulate the quantum of damages, the Court will assess and award compensation in accordance with the principles laid down in Section 73. Where the contract stipulates the quantum of damages or amounts to be recovered as damages, then the party complaining of breach can recover reasonable compensation, the stipulated amount being merely the outside limit.

(iv) When a contract provides that on default by a buyer to pay for and take delivery of goods, the seller is entitled to recover the loss incurred on resale, interest on delayed recovery of the price, godown charges, insurance charges and other expenses incurred by the seller till resale, it cannot be said the buyer incurs the liability to pay those amounts automatically, when



*he fails to take delivery. Failure to take delivery may be due to several valid or lawful reasons which may show that the failure to take delivery is not a 'default' or 'breach' in which event, no pecuniary liability may fasten on him.*

*(v) Even if the loss is ascertainable and the amount claimed as damages has been calculated and ascertained in the manner stipulated in the contract, by the party claiming damages, that will not convert a claim for damages into a claim for an ascertained sum due. Liability to pay damages arises only when a party is found to have committed breach. Ascertainment of the amount awardable as damages is only consequential."*

*(emphasis supplied)*

12. The Hon'ble Supreme Court in ***Raman Tech. and Process Engineering Company and Another vs Solanki Traders [(2008) 2 SCC 302]*** has held as below:



*"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."*

*(emphasis supplied)*

13. In the light of the principles enunciated in the above rulings, it can be stated that Rs.100 Crores that the respondent has claimed cannot be called a specified sum which has arisen out of a transaction giving rise to existence of a debt or liability or obligation. In a suit of this type, an application under Order XXXVIII Rule 5 CPC



cannot be filed; and if it is filed, it should be dismissed *in limine*. Therefore, writ petition is allowed, impugned orders at Annexures-A and A1 are set aside.

**Sd/-  
JUDGE**

CKL  
List No.: 1 Sl No.: 31