



2026:DHC:2207



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

Date of decision: 11th MARCH, 2026

IN THE MATTER OF:

I.A. 4623/2019 & I.A. 8900/2019, I.A. 11461/2019

IN

+ **CS(COMM) 166/2019 & CCP(O) 74/2019, I.A. 10609/2020, I.A. 19721/2023, I.A. 33382/2024**

M/S R K BARARIA

.....Plaintiff

Through: *Appearance not given*

versus

NANDI INFRATECH PRIVATE LIMITED

.....Defendant

Through: Mr. Vinay Kumar Garg, Senior Advocate, Mr. Bipin Kumar, Mr. Suresh Chandra Sharma, Mr. K. S. Rekhi, Mr. Shivom Sharma, Advocates

CORAM:

HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

JUDGMENT

I.A. 4623/2019 & I.A. 8900/2019, I.A. 11461/2019

1. The present applications being I.A. 4623/2019 has been filed by the Plaintiff under Order XXXIX Rule 1 and 2 read with Section 151 of the CPC seeking *ex-parte* ad-interim injunction restraining the Defendant, their agents, representatives or any other person from selling, transferring, alienating or creating any third party interest in 50 Flats in Tower A, J, B, & I and 130 Flats in other Towers and further retrain them, their agents, representatives or any other person acting on their behalf from transferring



in any manner till the disposal of the main suit. I.A. 8900/2019 has been filed by the Defendant under Order XXXIX Rule 4 read with Section 151 of the CPC for setting aside the Interim Order dated 09.04.2019 passed by this Court and I.A. 11461/2019 which has also been filed by the Defendant under Order XXXIX Rule 4 read with Section 151 of the CPC seeking modification of the Interim Order dated 05.07.2019 passed by this Court.

2. Shorn of unnecessary details, the facts of the case read as under:

- i. The Plaintiff is M/s R. K. Bararia, which is a proprietorship concern engaged in civil constructions and Nandi Infratech Private Limited is the Defendant, who is the Project Developer and has awarded the work of construction to the Plaintiff.
- ii. The Plaintiff and the Defendant entered into a Construction Contract dated 31.01.2015 (*hereinafter referred to as “the Contract”*) for the construction of multi-storeyed flats in the project “Amaatra Homes” at Sector 10, Greater Noida. (*hereinafter referred to as “the Project”*)
- iii. Initially, as per the award letter dated 1.11.2014, the scope of work entailed construction of 08 towers i.e., B, C, D, E, F, G, H & I of the Project for a tentative value of Rs. 36,12,50,000/- and later two more towers i.e., A and J were added and hence the Plaintiff had to construct a total of 10 towers.
- iv. The Plaintiff has filed the instant suit seeking recovery against the Defendant for the sum of Rs. 10,32,54,740/- along with interest at the rate of 18% per annum which is due and payable for the work executed under the Contract. It is also alleged by the Plaintiff that the termination of the Contract by the Defendant was arbitrarily and wrongful.



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- v. A cross Suit being CS(OS) No. 160/2018 was filed by the Defendant against the Plaintiff herein stating that the Plaintiff has been paid an extra sum of Rs. 2,58,00,000/-. Liquidated damages to the extent of Rs. 8,59,00,000/- due to delay in execution of the Project had also been claimed in the said Suit filed by the Defendant.
 - vi. The present Suit was listed for hearing on 09.04.2019. This Court found that since the amount claimed by the Plaintiff is quite substantial and the claim of the Defendant is primarily for liquidated damages which are to be established at trial, it directed that any transfer of flats in Tower A and J made by the Defendant in the Project constructed by the Plaintiff shall be subject to further Order of this Court. The Defendant was permitted to deal with these flats by informing the proposed buyers of the Order of this Court. Certain Orders were also passed for carrying out joint measurements for ascertaining the value of the work which the Plaintiff has done under the Contract.
 - vii. The said Order was modified on 05.07.2019. The Order sheet dated 05.07.2019 reveals that the learned Counsel for the Defendant made a settlement offer for deposit of Rs. 5,00,00,000/- being a sale consideration for 06 flats to ensure that the entire Project was not stalled.
3. This Court on 05.07.2019 modified the Order dated 09.04.2019 by directing that the sale consideration of the first 06 flats or any other number of flats amounting to a total sum of Rs. 5,00,00,000/- which are sold by the Defendant, shall be deposited with the Registrar General of this Court and subject to such deposit, the Defendant was free to deal with the remaining



flats in the Project.

4. It is pertinent to mention that the prayer in I.A. 11461/2019 is for modification of the Order dated 05.07.2019 and pass an Order for keeping the 16 flats of total sale consideration value of more than Rs. 5,00,00,000/- as security till the disposal of the application being I.A. 4623/2019 under Order XXXIX Rule 1 and 2 filed at the first instance of the Suit.

5. This Court *vide* Order dated 17.01.2023 recorded that the Defendant had not deposited the requisite amount in terms of the Order dated 05.07.2019 leading to contempt of the Order of this Court and therefore, the Plaintiff had filed a contempt petition being CCP (O) 74/2019 for non-compliance of the said Order. The Defendant was directed to file an affidavit within a period of four weeks placing on record the details of the flats in two towers i.e., A and J which have been sold by the Defendant in the aftermath of the Order dated 09.04.2019 together with the details of the sale consideration realized as a result of the said sales.

6. An affidavit has been filed by the Defendant on 01.03.2023 in compliance of the Order dated 17.01.2023. Relevant paragraph of the said affidavit reads as under:

“4. I say that when the IA No. 8900/2019 was listed for hearing on 05.07.2019 before this Hon'ble Court, the Hon'ble Court was pleased to pass an order dated 05.07.2019, whereby a liberty was given to the Defendant company to deal with the flats in Tower 'A' & 'J' subject to deposit of sale consideration of first 6 flats or any other number of flats amounting to a total sum of Rs. 5 Cr., which are sold by the company. I further say that this Hon'ble Court in the said order also recorded that the said deposit shall be without prejudice to the rights and contentions of the parties



till the time of completion of joint measurement. The said deposit shall also be without prejudice to the fact that it is the case of the company that upon joint measurement being conducted, it would be evident that the Contractor, in fact, owes money to the Company.

5. I say that 29 flats in Tower 'A' and 28 flats in Tower 'J' have been sold so far after 05.07.2019 and two flats are unsold. I say that the total sale consideration of the said flats was Rs. 30,42,83,303/- out of which the defendant has received Rs. 29,93,27,014/- time to time in structured manner as per the payment plan opted by the individual buyer.

6. I say that the defendant finding itself unable to comply with the order dated 05.07.2019 passed by this Hon'ble Court preferred another application under Order 39 Rule 4 read with Section 151, I CPC being LA. No. 11461 of 2019 for modification of the order dated 05.07.2019 and instead of deposit of the amount of 5 crores offered security of 16 flats of total value of about Rs.5,04,27,638/- till the final disposal of the application under Order 39 Rule 1 & 2 filed by the Plaintiff.”

7. Another affidavit has been filed by the Defendant on 09.05.2023.

Relevant paragraph of the said affidavit reads as under:-

“3. I say that due to upward surge in Real Estate market, the value of the flats in Real Estate Project, namely, "AMAATRA HOMES" has substantially increased, as per current trend in the real estate market. It is respectfully submitted that due to immediate requirement of funds required for the purpose of completing the construction of the said Project, the Defendant has to sell four flats. It is submitted that the Defendant, despite all obstacles arising out of recession in real estate market clubbed



with negative market sentiments due to Covid-19 Pandemic, left no stones unturned to complete the construction and development of the said Project as high stakes of several innocent homebuyers were involved. I say that due to Defendant's conviction to complete the said Project despite all odds, the said Project was duly completed and flats therein were handed over to the respective Allottees, after obtaining Occupancy Certificate from GNIDA. I say that as of date the Defendant has an unsold inventory of 17 flats in total in the said Project. I say that subject to this Hon'ble Court allowing I.A No. 11461 of 2019, the Defendant is ready and willing to secure as many flats from the aforesaid unsold stock, as may be directed by this Hon'ble Court.

4. I say that the current valuation of the said unsold inventory in the said Project is approximately quantified @ Rs.4800 per sq. feet. The Defendant further sometimes also provide discounts however, the average rate upon which the Defendant has currently sold some flats in the said Project is Rs. 4400/- per sq. feet. It is submitted that without prejudice rights of the Defendant, the rights and interests of the Plaintiff insofar as deposit of amount before the Registry of this Hon'ble Court is concerned could be secured by offering approximately 11,300 sq. feet of area in the said Project, which approximately culminates into 12 flats. The Defendant, therefore, respectfully prays to this Hon'ble Court to allow the Defendant to secure 12 flats in the said Project. The detail of unsold 17 flats is annexed herewith for kind and ready reference of this Hon'ble Court.

A tabular chart encompassing the details of 17 unsold inventory/ flats in the said Project is annexed herewith as Document-2.



5. *I say that in order to substantiate the respectful submission as contained in Para No. 3 of the present Affidavit, the Defendant intends to draw kind attention of this Hon'ble Court towards the following germane facts:*

(a) The current price upon which the Defendant is marketing its flats in the aforesaid Project is @ 4800 per sq. feet. The total area of 17 unsold flats is 17114 sq. feet. Accordingly, as per the current rate, the value of the aforementioned 17 flats comes to Rs. 8 crores approximately.

A copy of current offering rate as published and circulated by Defendant is annexed herewith as Document-3.

(b) The other Real Estate Developers, who are developing and marketing their respective projects adjacent to the Defendant's Project, are also currently selling their flats in their respective Project within the range of Rs. 4700/- to Rs. 6000/-per sq. feet.

Copies of price list and brochures of other Real Estate Developers are annexed herewith as Document-4(Colly)''

8. Perusal of the said affidavit indicates that due to an upward surge in real estate market, the value of the flats in the project, namely, "Amaatra Homes" substantially increased and the Defendant was in an immediate requirement of funds for the purpose of completion of construction of the Project. The said affidavit indicates that only 17 flats are left out of a total inventory of 942 flats under the Project and the Defendant is willing to secure 12 flats as unsold stocks. The details of the 17 unsold flats were



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furnished along with the affidavit.

9. The amount was deposited only in the year 2024 i.e., after 05 years and that too in two tranches of Rs. 2,00,00,000/- and Rs. 3,00,00,000/- on 15.02.2024 and 10.05.2024 respectively.

10. Learned Senior Counsel appearing on behalf of the Defendant strenuously submits that in a suit for recovery of money, an injunction on immovable property cannot be passed. He draws the attention of this Court and contends that an Order under Order XXXIX Rule 1 and 2 can be passed only when the suit is regarding a property and that the property which is the subject matter of the suit is endangered of being wasted, damaged or alienated by any party of the suit or where there is an eminent danger that the Defendant will remove or dispose of the property with a view to defraud its creditors or where there is a threat of dispossession of the Plaintiff from the suit property. He states that until and unless all these conditions are satisfied, no order under Order XXXIX Rule 1 and 2 can be passed even in a suit pertaining to an immovable property. He, therefore, states that in the present Suit which is one for recovery of money, no Order can be passed while exercising the jurisdiction under Order XXXIX Rule 1 and 2.

11. Learned Senior Counsel appearing on behalf of the Defendant thereafter, draws attention of this Court to Order XXXVIII Rule 5 and contends that in a suit for recovery of money, the Court can only pass an attachment before judgment, and even to pass such an Order, the Plaintiff has to satisfy the Court that there is a threat that the Defendant could dispose of whole or a part of his property or is about to remove whole or a part of his property from the local limits of the jurisdiction of the Court and thereby reducing the decree passed in a suit for recovery of money only to a paper



decree. He further states that the facts of this case do not demonstrate that either of these two conditions under XXXVIII Rule 5 are satisfied for passing an Order under the aforesaid provision.

12. He, therefore, states that the Order dated 09.04.2019 as modified *vide* Order dated 05.07.2019 has been passed wholly without jurisdiction, and therefore, cannot be confirmed and resultantly, I.A. 8900/2019 which has been filed by the Defendant under Order XXXIX Rule 4 read with Section 151 of the CPC for vacation/setting aside the Interim Order dated 09.04.2019 passed by this Court and as modified by the Order dated 05.07.2019 should be allowed,

13. Learned Senior Counsel appearing on behalf of the Defendant draws attention of this Court to a judgment of a Division Bench of this Court in Evolve Info Train India Pvt. Ltd. v. Versatile Commotrade Pvt. Ltd. & Anr., (2018) SCC OnLine Del 7016, Sunil Kakrania & Ors. v. M/s. Saltee Infrastructure Ltd. & Anr., (2009) SCC OnLine Cal 1638, Kohinoor Steel Private Limited v. Pravesh Chandra Kapoor, (2010) SCC OnLine Cal 1856 and Maharashtra Jeevan Pradhikaran and Another v. Lark Construction Pvt. Ltd., (2005) 1 Mah LJ 953 to substantiate his contention that interim injunction against him in a property cannot be granted in a money suit.

14. Learned Senior Counsel appearing on behalf of the Defendant draws the attention of this Court to a judgment of the Apex Court in Raman Tech. & Process Engg. Co. And Another v. Solanki Traders, (2008) SCC 2 302 to highlight the circumstances under which Order XXXVIII Rule 5 can be invoked. Relevant paragraphs of the said judgment reads as under:

“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. Maneck Gazi [AIR 1951 Cal 156] for a clear summary of the principles.”

15. Learned Senior Counsel appearing on behalf of the Defendant thereafter has taken this Court to a judgment of Premraj Mundra v. Md. Maneck Gazi & Ors., (1951) SCC OnLine Cal 20, a judgment relied upon by the Apex Court, wherein the Single Bench of the Calcutta High Court has laid down the guiding principles before exercising powers under Order



XXXVIII Rule 5 which reads as under:-

“18. From a perusal of all the authorities, I think that the following guiding principles can be deduced:

(1) That an order under O. 38, Rr. 5 & 6, can only be issued, if circumstances exist as are stated therein.

(2) Whether such circumstances exist is a question of fact that must be proved to the satisfaction of the Court.

(3) That the Court would not be justified in issuing an order for attachment before judgment, or for security, merely because it thinks that no harm would be done thereby or that the defts. would not be prejudiced.

(4) That the affidavits in support of the contentions of the applicant, must not be vague, & must be properly verified. Where it is affirmed true to knowledge or information or belief, it must be stated as to which portion is true to knowledge, the source of information should be disclosed, & the grounds for belief should be stated.

(5) That a mere allegation that the deft, was selling off & his properties is not sufficient. Particulars must be stated.

(6) There is no rule that transactions before suit cannot be taken into consideration, but the object of attachment before judgment must be to prevent future transfer or alienation.

(7) Where only a small portion of the property belonging to the deft, is being disposed of, no inference can be drawn in the absence of other circumstances that the alienation is necessarily to defraud or delay the pltf's. claim.

(8) That the mere fact of transfer is not enough, since



nobody can be prevented from dealing with his properties simply of cause a suit has been filed: There must be additional circumstances to show that the transfer is with an intention to delay or defeat the pltf.'s claim. It is open to the Court to look to the conduct of the parties immediately before suit, & to examine the surrounding circumstances, to draw an inference as to whether the deft. is about to dispose of the property, & if so, with what intention. The Court is entitled to consider the nature of the claim & the defence put forward.

(9) The fact that the deft, is in insolvent circumstances or in acute financial embarrassment, is a relevant circumstance, but not by itself Sufficient.

(10) That in the case of running businesses, the strictest caution is necessary & the mere fact that a business has been closed, or that its turnover has diminished, is not enough.

(11) Where however the deft, starts disposing of his properties one by one, immediately upon getting a notice of the pltf.'s claim, &/or where he had transferred the major portion of his properties shortly prior to the institution of the suit & was in an embarrassed financial condition, these were grounds from which an inference could be legitimately drawn that the object of the deft. was to delay and defeat the pltf.'s claim.

(12) Mere removal of properties outside jurisdiction, is not enough, but where the deft, with notice of the pltf.'s claim, suddenly begins removal of his properties outside the jurisdiction of the appropriate Court, & without any other satisfactory reason, an adverse inference may be drawn against the deft. Where the removal is to a foreign country, the inference is greatly strengthened.



(13) The deft, in a suit is under no liability to take any special care in administering his affairs, simply because, there is a claim pending against him. Mere neglect, or suffering execution by other creditors, is not a sufficient reason for an order under O. 38 of the Code.

(14) The sale of properties at a gross undervalue, or benami transfers, are always good indications of an intention to defeat the pltfs. claim. The Court must however be very cautious about the evidence on these points & not rely on vague allegations.”

16. Learned Senior Counsel appearing on behalf of the Defendant, therefore, states that the Order dated 09.04.2019 passed by this Court and modified by the Order dated 05.07.2019 has been passed without any jurisdiction wherein this Court has invoked the power of Order XXXIX Rule 1 and 2 in an immovable property which is not a subject matter of the present suit and has also not applied its mind to acknowledge various factors to be kept in mind while exercising the power under Order XXXVIII Rule 5. Hence, I.A. 4623/2019 which has been filed by the Plaintiff under Order XXXIX Rule 1 and 2 ought to be dismissed and I.A. 8900/2019 and I.A. 11461/2019 should be allowed/disposed of accordingly.

17. *Per contra*, learned Senior Counsel appearing on behalf of the Plaintiff strenuously contends that the power of the Court while dealing with an application under Order XXXIX Rule 1 and 2, is inherent in its nature and Orders can be passed to meet the ends of justice. He states that the Order dated 05.07.2019 shows that the learned Counsel for the Defendant has himself offered a sum of Rs. 5,00,00,000/-. He states that the conduct of the Defendant is such that he kept on selling the flats in the Project without



adhering to the commitment given by it to the Court and the requisite amount came to be deposited only on 15.02.2024 and 10.05.2024 which is about 4 years after the Order was passed and the Defendant, therefore, does not deserve any indulgence of this Court for modification of the Order.

18. The learned Senior Counsel for the Plaintiff has relied upon several orders of this Court and various other High Courts, wherein Orders regarding immovable properties have been passed even in recovery suits by exercising powers under Order XXXIX Rules 1 & 2 of CPC.

19. Heard learned Counsels for the Parties and perused the material on record.

20. The present suit is one for recovery of money. Material on record indicates that the money is to be recovered from the sale of flats. In order to balance the equities, this Court on 09.04.2019 passed the following Orders. Relevant paragraph of the said Order reads as under:

“3. Considering the nature of the disputes between the parties, since the amount claimed by the Contractor is quite substantial and the claim of the Company is primarily for liquidated damages, which are to be established at trial, any transfer of flats made by the Company in Amatra Homes project in Tower Nos. 'A and J' shall be subject to further orders of this court. The Company is free to deal with those flats by informing the proposed buyers of the order of this Court. Let reply to the injunction application be filed within two weeks and reponder, if any, be filed within one week thereafter.”

21. When the matter came up for hearing on 05.07.2019, this Court while dealing with the application being I.A. 4623/2019 filed by the Plaintiff under Order XXXIX Rule 1 and 2 and an application being I.A. 8900/2019 filed



by the Defendant under Order XXXIX Rule 4, noted the submission of learned Counsel for the Defendant that the Defendant is volunteering to pay a sum of Rs. 5,00,00,000/- in order to secure the decree. Though the Plaintiff in its pleadings has stated that the Plaintiff has not approached under Order XXXVIII Rule 5, the offer made by the learned Counsel for the Defendant is to secure the amount which is the principle under Order XXXVIII Rule 5. Relevant paragraph of the said Order is reproduced and reads as under:

“4. It is submitted by ld. counsel for the Contractor that the settlement offer made by his client was for the payment of Rs.5 crores. Mr. Uppal, ld. Senior Counsel submits that his client is willing to deposit the sale consideration of 6 flats, which would be more than Rs.5 crores, in order to ensure that the entire project is not stalled.

5. Accordingly, it is directed that the sale consideration of the first 6 flats or any other number of flats amounting to a total sum of Rs.5 crores, which are sold by the Company, shall be deposited with the Registrar General of this Court. Subject to the said deposit of Rs. 5 crores, the Company is free to deal with the remaining flats in the said project. The above deposit shall be without prejudice to the rights and contentions of the parties till the time of completion of the joint measurement. The said deposit shall also be without prejudice to the fact that it is the case of the company that upon joint measurement being conducted, it would be evident that the Contractor, in fact, owes money to the Company.”

(emphasis supplied)

22. Admittedly, the said amount which has been offered by the Defendant came to be deposited only in May 2024 which is 4 years after the Order was passed. No valid reason is forthcoming as to why the amount was not



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deposited. The fact that an application has been filed for modification of the Order dated 05.07.2019 alone cannot be a reason for not complying with the Order.

23. The only inference that can be drawn by this Court after reading the applicaiton is that the Defendant was in need of funds for which purpose the flats were sold and the money has been utilized by the Defendant without complying with the Order of the Court. In the opinion of this Court, the conditions under Order XXXVIII Rule 5, therefore, stands automatically fulfilled. There is nothing on record to show that other than this asset there is any other asset available to the Defendant from a where a decree even if passed against the Defendant, can be satisfied. It seems that the only asset from where the Defendant can get liquid cash is only from the sale of the flats in this Project and if these flats are sold without the money being secured, the Plaintiff might only end up having a paper decree. The statement of the Plaintiff that the Plaintiff has sought for directions under Order XXXIX Rules 1 and 2 of CPC and not under Order XXXVIII Rule 5 of CPC is irrelevant and immaterial as the Court has the power to exercise powers under Order XXXVIII Rule 5 of CPC even if prayers are made under Order XXXIX Rules 1 and 2.

24. The question as to whether the Order dated 09.04.2019 passed by this Court and as modified by the Order dated 05.07.2019 could have been passed under Order XXXIX Rule 1 and 2 in a suit for recovery of money, therefore, pales into insignificance because of the conduct of the Defendant. The conduct of the Defendant does not inspire any confidence in this Court for modification of the said Order or return of the money.

25. In the opinion of this Court, the Order dated 09.04.2019 passed by



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this Court and as modified by the Order dated 05.07.2019 does not call for any modification and neither it is required to be vacated. The amount which is sought for in the plaint is Rs. 10,32,54,740/- and an amount of Rs. 5,00,00,000/- stands deposited in this Court.

26. An assertion made by learned Counsel for the Defendant to demonstrate its solvency is that its gross income stands at Rs. 24,00,00,000/, its current income is at Rs. 60,00,00,000/- and its net profit is Rs. 9,00,00,000/-. However, in the absence of any verifiable material, this assertion cannot be accepted. If this were the position, then there was no reason for the Defendant to not comply with its own undertaking given to this Court. It is settled law that violation of an undertaking given to this Court amounts to contempt. The contention of the learned Senior Counsel for the Defendant that the inventory of the builder is not a reflection of its financial condition cannot be accepted in the absence of any material to show the actual inventory of the defendant reflecting alternative projects and other means for funds generation.

27. In view of the above, the present applications are disposed of.

CS(COMM) 166/2019 & CCP(O) 74/2019, I.A. 10609/2020, I.A. 19721/2023, I.A. 33382/2024

List on 11.08.2026.

SUBRAMONIUM PRASAD, J

MARCH 11, 2026

Prateek