

In the High Court of Punjab and Haryana, at Chandigarh

Civil Revision No. 2147 of 2013

Date of Decision: 21.01.2016

Gurdeep Singh

... Petitioner(s)

Versus

M/s Krishana Agricultural Steel Works and Others

... Respondent(s)

CORAM: Hon'ble Mr. Justice Shekher Dhawan.

1. Whether reporters of local newspapers may be allowed to see judgment?
2. To be referred to reporters or not?
3. Whether the judgment should be reported in the Digest?

Present: Mr. Rakesh Gupta, Advocate
for the petitioner(s).

Ms. Harveen Kaur, Advocate
for the respondents.

Shekher Dhawan, J.

Present petition is challenge to the order dated 19.10.2012, passed by learned Civil Judge (Junior Division), Amloh, whereby application filed under Order 38 Rule 5 read with Section 151 CPC for attachment, before the judgment, of the land of the defendants, was dismissed.

Relevant facts of the case that present petitioner (plaintiff) had filed civil suit for recovery of ₹ 17,69,206/- against the respondents and an application under Order 38 Rule 5 read with Section 151 CPC was filed for passing order for attachment of property of the defendants

during the pendency of litigation. The grounds taken in the application were that the defendants entered into an agreement of sale with one Paramjit Singh son of Money Singh and also intending to create charge over the said land to which they have no right, title or authority. Plaintiff had made request to the defendants to refrain from doing such acts and as such necessity of application under Order 38 Rule 5 CPC.

Notice of the application was given to the respondent/defendants, who filed a detailed reply and *inter-alia* taken the plea that suit for recovery was without any merit and was likely to be dismissed. More so, the property, for which attachment before judgment has been sought, has already been mortgaged with the bank and the bank has got first charge over the property. So the property could not be sold till the charge of the bank is removed. The Court below dismissed the application filed for attachment of property of the defendants before the judgment.

Learned counsel for the petitioner submitted that as per provisions of Order 38 CPC, the Court below was required to conduct a detailed enquiry before passing the order on an application under Order 38 Rule 5 CPC. But the Court below has not adopted that procedure and the said order is liable to be set aside on this ground alone.

Learned counsel for the petitioner placed reliance upon judgment from Division Bench of Andhra Pradesh High Court rendered in ***New India Assurance Company Limited v. Bhagyanagar Ventures Limited 2010 AIR (AP) 96***, wherein it has been observed that even if a prima facie case is made out for attachment before

judgment, order of attachment cannot be straightaway issued without following the procedure contemplated in Order 38 Rule 5 CPC.

Learned counsel for the petitioner also placed reliance upon judgment of co-ordinate Bench of this Court rendered in ***Jaggar Singh v. Bhagwant Rai (Civil Revision No. 6855 of 2008, decided on 6.5.2009)***, wherein a view has been taken that in case an application under Order 38 Rule 5 CPC was filed, objections have been filed by the respondents and the application was dismissed, such an order would fall under Order 38 Rule 5 CPC and not under Rule 6 and revision petition is maintainable against such an order.

Learned counsel for the respondents submitted that present petition itself is not maintainable because as per Order 43 Rule 1(q) CPC, only appeal is maintainable and present revision petition is not maintainable. In support of his contention reliance has been placed upon judgment from Karnataka High Court rendered in ***Abdul Jabbar Mamu v. Mohd. Ruknuddin 1996(7) KantLJ 19.***

Learned counsel for the respondents also took the plea that even otherwise the Court below has already decided the controversy keeping in view the fact that property was already mortgaged with the bank and that is why application under Order 38 Rule 5 CPC was dismissed and present petition is also liable to be dismissed.

Having considered the submissions made by learned counsel for the parties, there is no dispute of the fact on the file that application under Order 38 Rule 5 CPC was filed before the Court below. Reply/objections were filed by the defendants and the Court below

decided the application without holding any enquiry. It is also not disputed that any attachment of the property of the defendants was not ordered by the Court below. As per provision of Order 43 Rule 1(q) CPC, only appeal shall lie against the order passed on the application under Order 38 Rules 2, 3, or 6 CPC. For ready reference, provisions of Order 43 Rule 1(q) CPC are reproduced as under:-

"ORDER 43-APPEALS FROM ORDERS

1 . Appeal from orders— An appeal shall lie from the following orders under the provisions of section 104, namely:—

*(a) to (p) XXX XXX XXX XXX XXX XXX XXX XX
(q) an order under rule 2, rule 3 or rule 6 of Order XXXVIII".*

The above provision makes it ample clear that in case of order passed on an application under Order 38 Rules 2, 3 or 6 CPC, only appeal shall lie and revision shall not be maintainable.

As per view taken by the Division Bench of the Andhra Pradesh High Court in ***New India Assurance Company's case*** (*supra*), appeal is maintainable at the stage of attaching the property and not at the stage of show cause notice issued and in such case appeal is not maintainable.

As per view taken by this Court in ***Jaggar Singh's case*** (*supra*), such order passed on an application under Order 38 Rule 5 CPC entailed only a revision and not an appeal.

In the case in hand, application was contested by the

defendants and the same was dismissed. Such an order passed by the Court under Order 38 Rule 5 CPC is not appealable and the revision petition is maintainable.

As regards merits of the case, undisputedly no enquiry has been held by the Court below before passing the impugned order, which is must before deciding such an application. It is also not the case of respondents that conditional warrants of attachment was to be issued and thereafter the attachment was to be set aside.

In view of above, present petition is accepted and impugned order dated 19.10.2012 stands set aside.

(Shekher Dhawan)
Judge

January 21, 2016

"DK"