

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

Civil Revision No.8051 of 2016 (O&M)

Date of decision: 17.11.2017

Manjit Kaur and another

.....Petitioners

Versus

Ashwani Bindra

.....Respondent

CORAM:HON'BLE MS. JUSTICE RITU BAHRI

Present: Mr. Amit Dhawan, Advocate,
for the petitioners.

Mr. G.S. Nagh, Advocate,
for the respondent.

Ritu Bahri, J.

Challenge in this petition is to the order dated 06.10.2016 (Annexure P-9) passed by the Additional Civil Judge (Senior Division), Phillaur, whereby application filed by plaintiff (respondent herein) under Order 38 Rule 5 of the Code of Civil Procedure (for short 'CPC') for attachment of property of defendants (petitioners herein) before judgment has been disposed of by giving direction to defendants (petitioners) to furnish security in the shape of surety bonds to the tune of Rs.22,00,000/- within one month from the date of passing of the order.

Defendant-petitioner No.1 is the owner of property situated at VPO Bhar Singh Pur, Tehsil Phillaur, District Jalandhar. Vide agreement to sell dated 20.03.2015, plaintiff-respondent had agreed to purchase land measuring 5 Kanals, out of the property owned by petitioner No.1, for a sale consideration of Rs.81,00,000/- and paid a sum of Rs.22,00,000/- as earnest money. Stipulated date for execution and registration of the sale deed was

fixed as 22.07.2015. However, on 22.07.2015, plaintiff-respondent did not

turn up to get the sale deed executed in his favour, as he was not having the balance sale consideration. Petitioner No.1 got her presence marked before the Sub Registrar, Phillaur by executing an affidavit in this regard. Later on, plaintiff-respondent filed a civil suit against the petitioners seeking recovery of Rs.22,00,000/-, which was paid as earnest money along with interest and damages. He also prayed for permanent injunction restraining defendant-petitioners from making any addition/alteration or transfer of the suit property.

Upon notice, defendant-petitioner No.1 appeared before the trial Court and filed an application (Annexure P-2) for directing respondent-plaintiff to get the sale deed executed as per agreement to sell dated 20.03.2015. Plaintiff-respondent filed reply (Annexure P-3) to the said application stating therein that he was claiming only recovery of the earnest money and was not keen to get the sale deed executed. This application was dismissed by the trial Court vide order dated 17.02.2016. Subsequently, petitioners filed their written statement (Annexure P-4) praying dismissal of the suit, as the plaintiff had failed to get the sale deed executed. Thereafter, trial Court, vide order dated 29.03.2016 (Annexure P-5), dismissed the application filed by plaintiff-respondent under Order 39 Rules 1 and 2 CPC. Appeal (Annexure P-6) against the said order is pending before the District Judge, Jalandhar. In the meantime, plaintiff-respondent filed an application (Annexure P-7) under Order 38 Rule 5 CPC before the trial Court seeking attachment of the property of petitioners (land measuring 5 Kanals) during pendency of the suit. Petitioners filed reply (Annexure P-8) to the said application taking a plea that once an application filed by plaintiff under Order 39 Rule 1 and 2 CPC has been dismissed and the earnest money stood forfeited, application under Order 38 Rule 5 CPC was liable to be dismissed.

Vide order dated 06.10.2016 (Annexure P-9), trial Court disposed of the said application by giving direction to the petitioners to furnish security in the shape of surety bonds to the tune of Rs.22,00,000/- within one month from the date of passing of the said order. Hence, this petition.

Learned counsel for the petitioners has argued that once an application of plaintiff-respondent for grant of ad-interim injunction has been declined by the trial Court vide order dated 29.03.2016 (Annexure P-5), present petitioners (defendants) could not be directed to give security by way of surety bonds to the tune of Rs.22,00,000/-. He has referred to the judgment passed in **Bank of India Vs. M/s National Tile Work Industries and others**, 1987 (1) ILR (Delhi) 374 on the proposition that for attachment of property before judgment, plaintiff has to prove a *prima facie* case in his favour that the defendant has acted or is about to act with intent to obstruct or delay execution. Mere allegations would not be sufficient to prove the same.

On the other hand, learned counsel for the respondent has referred to the judgment passed by Hon'ble the Supreme Court in **Radhey Shyam and another Vs. Chhabi Nath and others**, 2015 (1) PLJ 407, wherein guidelines have been issued to the effect that High Courts should not entertain writ petitions in cases of pure property disputes, disputes relating to partition suits, matters relating to execution of a decree, in cases of dispute between landlord & tenant, in a cases of money decree and in various other cases where disputed questions of property are involved.

After hearing learned counsel for the parties, this petition deserves to be dismissed. Reliance, at this stage, can be placed on a verdict given by Hon'ble the Supreme Court in **Radhey Shyam's** case (supra), wherein it has

“22. The Bench in Surya Dev Rai also observed in para 25 of its judgment that distinction between Articles 226 and 227 stood almost obliterated. In para 24 of the said judgment distinction in the two articles has been noted. In view thereof, observation that scope of [Article 226](#) and [227](#) was obliterated was not correct as rightly observed by the referring Bench in Para 32 quoted above. We make it clear that though despite the curtailment of revisional jurisdiction under Section 115 CPC by Act 46 of 1999, jurisdiction of the High Court under [Article 227](#) remains unaffected, it has been wrongly assumed in certain quarters that the said jurisdiction has been expanded. Scope of [Article 227](#) has been explained in several decisions including [Waryam Singh and another vs. Amarnath and another](#), AIR 1954 SC 215, [Ouseph Mathai vs. M. Abdul Khadir](#), 2002 (1) RCR (Rent) 182, [Shalini Shyam Shetty vs. Rajendra Shankar Patil](#), 2011 (1) RCR (Rent) 1 and [Sameer Suresh Gupta vs. Rahul Kumar Agarwal](#), 2013 (9) SCC 374. In Shalini Shyam Shetty, this Court observed :

"64. However, this Court unfortunately discerns that of late there is a growing trend amongst several High Courts to entertain writ petition in cases of pure property disputes. Disputes relating to partition suits, matters relating to execution of a decree, in cases of dispute between landlord and tenant and also in a case of money decree and in various other cases where disputed questions of property are involved, writ courts are entertaining such disputes. In some cases the High Courts, in a routine manner, entertain petitions under [Article 227](#) over such disputes and such petitions are treated as writ petitions.

65. We would like to make it clear that in view of the law referred to above in cases of property rights and in disputes between private individuals writ court should not interfere unless there is any infraction of statute or it can be shown that a private individual is acting in collusion with a statutory authority.

66. We may also observe that in some High Courts there is a tendency of entertaining petitions under [Article 227](#) of the Constitution by terming them as writ petitions. This is sought to be justified on an erroneous appreciation of the ratio in Surya Dev and in view of the recent amendment to Section 115 of the Civil Procedure Code by the Civil Procedure Code ([Amendment](#)) Act, 1999. It is urged that as a result of the amendment, scope of Section 115 CPC has been curtailed. In our view, even if the scope of Section 115 CPC is curtailed that has not resulted in expanding the High Court's power of superintendence. It is too well known to be reiterated that in exercising its jurisdiction, High Court must follow the regime of law.

67. As a result of frequent interference by the Hon'ble High Court either under [Article 226](#) or 227 of the Constitution with pending civil and at times criminal cases, the disposal of cases by the civil and criminal courts gets further impeded and thus causing serious problems in the administration of

justice. This Court hopes and trusts that in exercising its power either under [Article 226](#) or 227, the Hon'ble High Court will follow the time honoured principles discussed above. Those principles have been formulated by this Court for ends of justice and the High Courts as the highest courts of justice within their jurisdiction will adhere to them strictly."

23. Thus, we are of the view that judicial orders of civil courts are not amenable to a writ of certiorari under [Article 226](#). We are also in agreement with the view of the referring Bench that a writ of mandamus does not lie against a private person not discharging any public duty. Scope of [Article 227](#) is different from [Article 226](#)."

As per ratio of the above said judgment, writ courts should not interfere in disputes relating to property matters between private individuals unless there is any infraction of statute.

Before referring to the judgment passed by the Delhi High Court in **Bank of India's** case (supra), Order 38 Rule 5 is reproduced as under:-

"Rule 5 : "(1) Where, at any stage of a 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,

.... the Court may direct the defendant, within a time to be fixed by it, either to furnish 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.

- (2) The plaintiff shall, unless the Court otherwise directs, specify the property required to be attached and the estimated value thereof.

- (3) The Court may also in the order direct the conditional attachment of the whole or any portion of the property so specified.

- (4) If an order of attachment is made without complying with the provisions of sub rule (1) of this rule, such attachment shall be void."

In **Bank of India's** case (supra), it has been observed by the Delhi High Court that the object of entire Order 38 CPC is to safeguard the interest of the plaintiff and thwart any possible attempt by the defendant to

the defendant. It has been further observed that mere fact that no harm would be caused to defendant or that defendant would not be prejudiced by such an order could be no ground to pass order under Order 38 Rule 5 CPC for attachment before judgment. It is in its very nature an extraordinary jurisdiction and has to be exercised sparingly and strictly in accordance with procedure prescribed by the Code. The approach of the Court has to be very cautious and not casual or routine like.

In the facts of the present case, while declining the application filed by plaintiff under Order 39 Rules 1 and 2 CPC, it was held that since it was a suit for recovery, defendants-petitioners could not be restrained from selling their land. At the same time, keeping in view that defendant-petitioner No.1 had received a sum of Rs.22,00,000/- as earnest money (which was 1/3rd of the total sale consideration of Rs.81,00,000/-), a direction has been given, vide impugned order dated 06.10.2016 (Annexure P-9, to the petitioners to furnish security in the shape of surety bonds to the tune of Rs.22,00,000/-, instead of attaching the property in disputes. This has been done to meet the ends of justice and to secure the interest of plaintiff-respondent in case suit filed by him is decreed. In these circumstances, no ground is made out to interfere in the impugned order.

Resultantly, the present petition is dismissed.

17.11.2017
ajp

(RITU BAHRI)
JUDGE

Whether speaking/reasoned : Yes/No
Whether reportable : Yes/No