

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

CR No.8803 of 2016.

Date of Decision: 09.01.2017.

Jarnail Singh

....Petitioner.

VERSUS

Harpreet Singh and another

....Respondents.

CORAM: HON'BLE MRS. JUSTICE SNEH PRASHAR.

Present: Mr. R.K. Shukla, Advocate for the petitioner.

SNEH PRASHAR, J.

Assailing the order dated 12.08.2016 passed by learned Civil Judge (Junior Division), Patiala, petitioner-defendant Jarnail Singh had preferred the instant revision petition. By virtue of the impugned order, learned trial Court had allowed the application under Order 38 Rule 5 of the Code of Civil Procedure (for short, "CPC") filed by the respondents-plaintiffs for attachment of the property of the petitioner.

The submissions made by Mr. R.K. Shukla, learned counsel for the petitioner have been considered.

Learned counsel for the petitioner contends that the power under Order 38 Rule 5 CPC is an extraordinary power and should not be exercised mechanically or merely on the asking of the plaintiff unless the plaintiff is able to show prima facie, that his claim is bonafide and valid and also satisfies the Court that the defendant is about to remove or dispose of

the whole or part of his property with an intention of obstructing or delaying the execution of any decree that may be passed against him. Referring to the case in hand, learned counsel contends that learned trial Court has not given any finding regarding its satisfaction that the defendants are about to dispose of whole or any part of their property or are about to move any part of the property from the local limits of the jurisdiction of the Court. Learned trial Court also neither gave any show cause notice to the petitioner nor asked him to furnish security before passing order of attachment of the property of the petitioner. The order was passed without adverting to the requirements of Order 38 Rule 5 CPC and is liable to be set aside. To support his argument, learned counsel relied upon *M/s Raman Tech & Process Engg. Co. & Anr. vs. M/s Solanki Traders, 2008(1) RCR (Civil) 195* and *Ruby Jain and another vs. Punjab Wakf Board and others, 2016(3) RCR (Civil) 909.*

The facts, as extracted from the impugned order, reveal that the petitioner-defendant vide an agreement to sell dated 01.07.2011 had agreed to sell to the respondents the land measuring 10 Bighas out of the total land 59 Bighas 7 Biswas owned by him. He paid an amount of Rs.25,00,000/- as earnest money at the time of execution of the agreement to sell and the remaining amount of Rs.15,00,000/- was to be paid on 15.09.2011. However, at the instance of the petitioner-defendant, Rs.5,00,000/- more were paid by the respondents-plaintiffs to Parminder Singh, a close relative of the petitioner-defendant qua which a separate writing dated 15.11.2011 was executed. The respondents-plaintiffs alleged that the petitioner-defendant failed to get the sale deed of the land executed and registered and the property then came under litigation and therefore, no sale deed in

respect of the same could be executed. As such, the respondents-plaintiffs filed a suit for recovery of an amount of Rs.60,00,000/- i.e. the amount of earnest money paid by them alongwith interest as per the terms of the agreement to sell dated 01.07.2011.

Resisting the claim, the petitioner-defendant submitted that out of the earnest money of Rs.25,00,000/-, only Rs.20,00,000/- were paid in cash and the postdated cheque of Rs.5,00,000/- given at the time of the execution of the agreement to sell, on presentation, was dishonoured by the bank and the said fact was brought to the notice of the respondents-plaintiffs. Despite assurance given by the respondents-plaintiffs that they will pay the amount of the cheque as well as the balance amount of Rs.15,00,000/- on 15.09.2011, they failed to do so and also did not get the sale deed executed in their favour. The petitioner-defendant also denied that he had authorized one Parminder Singh to receive any amount on his behalf from the respondents-plaintiffs. In that manner, the petitioner-defendant pleaded that the sale deed could not be executed and registered due to fault on part of the respondents-plaintiffs. He added that on account of non performance of the agreement of sale on part of the respondents-plaintiffs, he suffered huge loss as the land, in respect of which he had entered into an agreement of sale with one Balbir Singh, had to be purchased by him by taking loan from his relatives and friends. He denied that there was litigation pending with regard to his share in the land.

There may be dispute with regard to the amount received by the petitioner-defendant as earnest money in lieu of the agreement to sell dated 01.07.2011 executed by him in favour of the respondents-plaintiffs, but

earnest money by the petitioner-defendant. Though the petitioner-defendant claimed that there is no litigation regarding his share but it is not his plea that there is no litigation pending with regard to the land that was subject matter of the sale transaction. The respondents-plaintiffs have filed a suit for recovery of the amount paid by them as earnest money and the contentious issue relating to their entitlement to recover the amount will be decided by the Court based on the pleadings and evidence led by both the parties. At this juncture, execution of the agreement of sale and receipt of earnest money by the petitioner-defendant is an admitted fact.

As per provisions of Order 38 Rule 5 CPC, 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, 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 Court may direct the defendant to furnish the security to produce and to 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. In his reply to the application, the petitioner-defendant had stated that on account of non performance of the agreement of sale between him and the respondents-plaintiffs, the land which he was to purchase from one Balbir Singh and his wife Rani had to be purchased by him by taking loan from relatives and other persons. He also submitted that since he is not liable to pay anything to the respondents-plaintiffs, he has a right to deal with the property in the manner he likes. His pleadings to the said effect prima facie clearly indicate that as alleged by the respondent-plaintiffs, he intends to create charge upon

his land with an intention to obstruct or delay the execution of the decree for recovery that may be passed against him. Considering the said facts, there appears no illegality or perversity in the order passed by learned trial Court.

However, it is observed that the order will be operative only to the extent of the property that was subject matter of sale between the parties. It is also ordered that in case the petitioner-defendant is ready to furnish security to the extent of the amount to be fixed by learned trial Court, which shall not be less than the amount of earnest money alleged to be paid by the respondents-plaintiffs, the petitioner-defendant shall be at liberty to move an application to learned trial Court to modify the impugned order accordingly as per law.

Thus, there being no merit in the petition, it is hereby dismissed.

(SNEH PRASHAR)
JUDGE

09.01.2017.
jitender sharma

Whether speaking/ reasoned : **Yes**

Whether Reportable : **Yes**