IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

CR No.4299 of 2018(O&M)
Date of Decision: 05.09.2018

Central Bank of India ...... Petitioner
Versus
State of Haryana and others .....Respondents

CORAM: ***HON'BLE MR. JUSTICE RAJ MOHAN SINGH***

Present: Mr. C.S. Pasricha, Advocate
for the petitioner.

Mr. R.T. Redhu, DAG, Haryana.

Mr. Arun Bansal, Advocate
for respondent No.2.

Mr. Brij Mohan, Advocate
for respondent No.3.

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RAJ MOHAN SINGH, J.

[1]. Petitioner/Bank has filed this revision petition against the order dated 06.06.2018 passed by Additional District Judge, Karnal in Civil Appeal No.369 of 2018 titled M/s Shri Ambica International Food Company Pvt. Ltd. Vs. Ashok Kumar Goel, vide which the Lower Appellate Court has granted restraint order in the application under Order 38 Rule 5 CPC qua lifting of rice kept in the demised premises which has been duly charged/pledged in favour of the petitioner/Bank and the Bank had already obtained the order from District Magistrate to take possession of the pledged property.

[2]. Respondent No.3/Ashok Kumar Goel had availed facility of cash credit limit of Rs.15 crores from the petitioner/Bank. The aforesaid facility was duly secured against pledge of warehouse receipt including primary security as pledge of stock of paddy and rice as per warehouse receipt valuing Rs.2400 lacs at the time of sanction. Pledge of warehouse receipt (representing stock of paddy, rice) of National Collateral Management Service Limited (NCML) was duly endorsed in favour of the Bank and registered with warehouse with lien noted in favour of the Bank. The aforesaid facility was duly secured by way of guarantee of respondent No.3 Ashok Kumar Goel, Ishwar Chand Goel, Subhash Chand Goel and respondent No.2 M/s Shri Ambica International Foods Co. Pvt. Ltd. The entire stock of rice lying in the premises was pledged with the petitioner/Bank. The sanction letter was duly acknowledged by respondent No.3 being borrower. The copy of agreement of pledge of goods to secure a demand cash credit (warehouse receipt) dated 20.11.2015 was executed by respondent No.3 in favour of the petitioner/Bank showing sanction and creation of charge over the warehouse receipt. The same was accompanied by resolution of the Board on 20.11.2015 of respondent No.2/plaintiff/appellant vide which it was resolved to furnish guarantee in the loan account of respondent No.3 in favour of the petitioner/Bank.

[3]. After availing warehouse receipt limit of Rs.15 crores from the petitioner/Bank, respondent No.3 besides other borrowers, mortgagors and guarantors failed to maintain the financial discipline of the Bank and the account became irregular due to accumulation of over dues in the account. Respondents No.2 and 3 and other borrowers, mortgagors and guarantors were informed/reminded for getting the account adjusted, but they did not pay any heed. Default had occurred in the loan account and the same was classified as Non Performing Asset (NPA).

[4]. District Magistrate was approached by the petitioner/Bank for providing necessary police help for removing the pledged stock of rice of M/s AG Enterprises in lieu of the pledge agreement entered into between the parties. Vide order dated 02.05.2018, District Magistrate appointed Naib Tehsildar, Nilokheri as Duty Magistrate for the purpose of handing over the possession of pledged goods in case of no stay order from any competent Court.

[5]. The possession was not handed over as the police assistance was not given. Respondents No.2 and 3 were guarantor and borrower in the loan facility availed from the petitioner/Bank.

[6]. A collusive suit was filed by respondent No.2

(guarantor) against respondent No.3 (borrower) without impleading the petitioner/Bank as necessary party. The said suit was filed on 19.05.2018 after passing of order dated 02.05.2018 by the District Magistrate. An application under Order 38 Rule 5 CPC was filed along with the suit. The application was dismissed by Civil Judge (Junior Division), Karnal vide order dated 31.05.2018.

[7]. An appeal was filed by the plaintiff/respondent No.2 before the Lower Appellate Court against the order dated 31.05.2018 passed by Cviil Judge (Junior Division), Karnal. Lower Appellate Court vide order dated 06.06.2018, restrained respondent No.3 from removing or alienating the rice kept in Silos in question.

[8]. Learned counsel for the petitioner/Bank submitted that filing of the suit is a collusive affair between the guarantor and the borrower and the petitioner/Bank was intentionally not impleaded as defendant in the suit. The subject matter of the suit was already pledged with the petitioner/Bank and any order passed in the absence of the petitioner/Bank would be against the principles of natural justice. Learned counsel further submitted that by the impugned order, petitioner/Bank has been deprived of its recovery of crores of rupees. Now, respondents No.2 and 3 are relying upon the impugned order to say that

there is a stay with regard to taking of the possession of the pledged goods by the petitioner/Bank. Petitioner is a nationalized bank and is bound to recover public money. Individual interest of any private person has to give way to the public interest. Even though, the petitioner has approached this Court without seeking its impleadment before the Lower Appellate Court, but supervisory jurisdiction of the High Court under Article 227 of the Constitution of India can be invoked as the jurisdiction of the High Court is not affected by amendment of Section 115 CPC and the High Court can revise the order of subordinate Court when manifest injustice is caused to the party which is not capable of correction at any later stage of proceedings.

[9]. Keeping in view the perishable nature of the goods stored in the godown for the last 2-3 years, it would be in the fitness of things to exercise supervisory jurisdiction of the High Court under Article 227 of the Constitution of India in such compelling circumstances as the delay would occasion irreparable loss to the petitioner/Bank.

[10]. At this stage, maintainability of appeal against the order in the application under Order 38 Rule 5 CPC in the context of attaching the property cannot be commented upon as the interim order passed by the Lower Appellate Court is under

challenge. The appeal is pending before the Lower Appellate Court. Virtually an application under Order 38 Rule read with Section 151 CPC has been allowed by the Lower Appellate Court. Since the suit in which the Lower Appellate Court has passed the impugned order appears to be between the guarantor and borrower, therefore, binding nature of the said order viz-a-viz the petitioner/Bank cannot be endorsed. At the same time, the order has come in existence at the instance of the plaintiff after dismissal of the prayer by the trial Court. The object of Order 38 Rule 5 CPC is to prevent any defendant from defeating the realisation of decree that may ultimately be passed in favour of the plaintiff either by attempting to dispose of or removing from the jurisdiction of the Court his immovables. The ratio of ***M/s Raman Tech. & Process Engg. Co. and Anr., Vs. M/s Solanki Traders, 2008(1) RCR (Civil) 195*** would apply *mutatis mutandis*. The words “to obstruct or delay the execution of any decree that may be passed against him” in Rule 5 make it clear that before exercising the powers under the said Rule, the Court should be satisfied that there is a reasonable chance of a decree being passed in a suit against the defendant. The Court has to be satisfied that the plaintiff in all probability would succeed on the basis of *prima facie* case. Having just or valid claim or *prima facie* case will not entitle the plaintiff the order of attachment before judgment in terms of Order 38 Rule 5 CPC unless he also establishes that the defendant is attempting to remove or dispose of his assets with the intention to defeat the decree that may be passed. Even where the defendant is removing or disposing of his property, attachment before judgment cannot be passed, if the plaintiff is not in a position to satisfy that he has *prima facie* case.

[11]. The power under Order 38 Rule 5 CPC is a drastic and extra-ordinary power and the same has to be sparingly exercised. Such powers cannot be exercised mechanically and merely on the asking of the parties. The purpose of Order 38 Rule 5 CPC is not to bring an unsecured debt under the category of secured debt. Such an intended effort to seek leverage of this kind has to be discarded. The provision can only be resorted to on some defined legal parameters so as to secure ends of justice. The party invoking Order 38 Rule 5 CPC must show *prima facie* case and also satisfy the Court that the defendant is about to remove or dispose of the whole or part of his property with an intention to obstruct or delay the execution of any decree that may be passed against him. In the absence of mandatory requirement of Order 38 Rule 5 CPC, the order would be *void ab initio*.

[12]. Perusal of the impugned order would show that the Lower Appellate Court has not recorded any satisfaction on the

basis of defined parameters of Order 38 Rule 5 CPC, nor any sum has been specified in the order on valuation of the material. It is only on the basis of plea raised by the plaintiff, the impugned order was passed without satisfaction of the Lower Appellate Court. The order does not commensurate to the claim made by the plaintiff in the suit viz-a-viz the total valuation of the pledged material.

[13]. At this stage, this Court would like to exercise powers under Article 227 of the Constitution of India to implead the petitioner/Bank in the pending appeal before the Lower Appellate Court and set aside the impugned order in view of defined parameters of Order 38 Rule 5 CPC. Keeping in view the nature of property involved in Silos, the case is remanded to the Lower Appellate Court to decide the application under Order 38 Rule 5 CPC on merits with speaking order within two weeks from the date of receipt of certified copy of this order. Lower Appellate Court would also be obligated to see the maintainability of the appeal against the order passed in the application under Order 38 Rule 5 CPC in accordance with law.

[14]. Disposed of accordingly.

September 05, 2018 **(RAJ MOHAN SINGH)**
Prince **JUDGE**
Whether speaking/reasoned Yes/No
Whether reportable Yes/No