

CR No. 6903 of 2015 (O&M)
CR No. 6923 of 2015 (O&M)

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228 (2 cases)

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

CR No. 6903 of 2015 (O&M)
Date of Decision: 17.01.2019

M/s Prem Steel and Allied Industries and others

-Petitioners

Vs

Roopak Kumar Bhardwaj and others

-Respondents

CR No. 6923 of 2015 (O&M)

M/s Prem Steel and Allied Industries and others

-Petitioners

Vs

M/s Jog Dhian Rameshwar Dass and others

-Respondents

CORAM: HON'BLE MR. JUSTICE RAJ MOHAN SINGH

Present: Mr. Swarn Tiwana, Advocate,
for the petitioner(s).

Mr. Gitish Bhardwaj, Advocate, and
Mr. Saurabh Sharma, Advocate,
for the respondents.

RAJ MOHAN SINGH, J. (ORAL)

Vide this common order, CR No. 6903 of 2015 (O&M)
titled 'M/s Prem Steel and Allied Industries and others vs
Roopak Kumar Bhardwaj and others' and CR No. 6923 of 2015
(O&M) titled 'M/s Prem Steel and Allied Industries and others vs
M/s Jog Dhian Rameshwar Dass and others' are being decided.

Common facts are being noticed.

Petitioner(s) have assailed the order dated 08.09.2015 passed by Civil Judge (Junior Division), Amloh whereby the application filed by the plaintiffs under Order 38 Rule 5 CPC for attachment of the property before judgment/decreed was allowed.

In a suit for recovery filed by the plaintiffs, aforesaid application came to be filed. In the application under Order 38 Rule 5 CPC, the plaintiffs have pleaded in para no.12 that the plaintiffs have come to know that the defendants are out and out to dispose of the aforesaid property in their names in order to avoid recovery of the decretal amount which may be passed against them by the trial Court. Though in the reply to the aforesaid application filed by the defendants, the same was denied but the impugned order was passed by the trial Court in respect of 7 Bigha 15 Biswas comprised in Khewat No.22/21, Khatauni No.44, Khasra No.182 and the same was ordered to be attached.

I have heard learned counsel for the parties.

Learned counsel for the petitioners submitted that there is no material on record to allege that the petitioners are bent upon to alienate the suit property in order to ward off their liability (if any) arising out of suit itself, rather petitioners being the defendants in the suit have also set up a counter claim

against the plaintiffs and the same is also pending consideration before the competent Court.

Learned counsel further submitted that the impugned order does not specify mandatory requirement of law in terms of Order 38 Rule 5 CPC as held in **M/s Raman Tech & Process Engg. Co. & Anr., vs. M/s Solanki Traders, 2008(1) R.C.R. (Civil) 195.**

Learned counsel further submitted that object of Order 38 Rule 5 CPC is to prevent defendants from defeating the realisation of decree that may ultimately be passed in favour of the plaintiffs either by attempting to dispose of or removing from the jurisdiction of the Court his immovables. The words “*to obstruct or delay execution of any decree that may be passed against him*” in Rule 5 makes 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 defendants. The Court has to be satisfied that the plaintiffs 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 plaintiffs, the order of attachment before judgment in terms of Order 38 Rule 5 CPC unless they also establish that the defendants are attempting to remove or dispose of their assets with an intention to defeat the decree that may be

passed. Even where the defendants are removing or disposing off their properties, attachment before judgment cannot be passed, if the plaintiffs are not in a position to satisfy that they have a *prima facie* case.

Learned counsel also relied upon **Ruby Jain and another vs Punjab Wakf Board and thers, 2016(3) RCR (Civil) 909, Maha Singh vs Subhash Chander, 2015(5) Law Herald 4624, Harvinder Singh vs Sarwan Singh and another, 2008(3) RCR (Civil) 543, Iqbal Singh vs Punjab Pesticides, Patti 2001(4) RCR (Civil) 649** and contended that the Court must record its satisfaction that the defendants are attempting to dispose of whole or any part of their property or about to remove the same from the local limits of the jurisdiction of the Court. Even mere leasing of property by the defendants-respondents will not amount to dispose of or to remove the said property from the local limits of jurisdiction of the Court. It would be open to the parties to lead evidence in support of their case and the plaintiffs cannot seek attachment of property in terms of Order 38 Rule 5 CPC. The order of attachment or for providing security merely on the apprehension of the plaintiffs cannot be granted. Powers under Order 38 Rule 5 CPC are drastic in nature and are to be exercised in extraordinary circumstances. The powers can be sparingly used/exercised. Such powers

cannot be exercised mechanically and merely on the asking of the party. 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 be resorted to on some defined legal parameters so as to secure ends of justice. The party invoking the aforesaid provision must show *prima facie* case and satisfy the Court that the defendants are about to remove or dispose of the whole or part of their property with an intention to obstruct or delay the execution of any decree that may be passed against them.

In the absence of mandatory requirement of Order 38 Rule 5 CPC, the order would be *void ab initio*. Under the aforesaid provision, the defendants can be called upon to furnish security for production of the property at any stage of the suit, when the Court is satisfied that the defendants with intention to obstruct or delay the execution of any decree that may be passed against them are about to dispose of whole or any part of the property, or about to remove the whole or any part of their property from the local limits of the jurisdiction of the Court. The Court can direct the defendants either to furnish security in such sum as may be specified in the order, to produce and place at the disposal of the Court; the said property

or value of the same or such portion as may be sufficient to satisfy the decree. The plaintiffs shall, unless the Court otherwise directs, specify the property required to be attached and the estimated value thereof. The Court may also in the order direct the conditional attachment of the property so specified therein. If the order of attachment is made without compliance of the provision of sub-Rule(1) of Order 38 Rule 5 CPC, such attachment shall be void in law.

Evidently, the defendants have already set up a counter claim and that fact itself makes the entire exercise to be illegal.

For the reasons recorded hereinabove, the revision petition is allowed and the impugned order is set aside.

Normal consequences to follow.

17.01.2019
Jyoti Yadav

(RAJ MOHAN SINGH)
JUDGE

1. Whether speaking/reasoned : Yes/No
2. Whether reportable : Yes/No