IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

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IN VIRTUAL COURT
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CR No. 2777 of 2019 (O & M)
Date of decision : 19.8.2021

Puneet Mehta **……Petitioner**

Vs.

Jagdeep Singh **……Respondent**

Coram: HON'BLE MR. JUSTICE RAJBIR SEHRAWAT

Present : Mr. K.S. Virk, Advocate, for the petitioner

Mr. Piyush Bansal, Advocate, for the respondent

Rajbir Sehrawat, J. (Oral)

This petition under Article 227 of the Constitution of India read with Section 151 CPC has been filed against the order dated 19.3.2019, passed by the Civil Judge (Senior Division), Gurugram, whereby application filed by the respondent/plaintiff under Order 38 Rule 5 CPC, in a suit for recovery of money, was allowed.

It has been argued by counsel for the petitioner that the Trial Court has wrongly passed the order for attachment of his property before decree. In the suit; to claim the liability of the petitioner for an amount of Rs.1.10 crore to be repaid with interest @ of 18% per annum, reliance of the respondent has been only upon an alleged undertaking dated 31.3.2017, wherein the property comprised in G-121, Palam Vihar, Gurugram, measuring 520.26 sq. yards, to the extent of 50%, was quoted as surety. Counsel for the petitioner has submitted that the said document is fabricated and it is not even referred to anywhere in the pleadings of the respondent.

Therefore, there is no prima facie case in favour of the respondent. Accordingly, the Court below could not have passed order of attachment of property; while exercising powers under Order 38 Rule 5 CPC.

It is further submitted by the counsel for the petitioner that since the property attached by the Court is a residential house, therefore, it could not have been attached even if the final decree was to be passed by the Court below. Therefore, the same could not have been attached before passing of the decree. It is also submitted by the counsel that the claim of the petitioner is only for Rs.1.10 crore with interest, whereas the petitioner has been put under the liability of bank guarantee for Rs. 2 crores in addition to attachment of house, which is much more than the claim of the respondent. Counsel has further submitted that the Court below could not have passed the order, both, for attachment of the property, as well as, for bank guarantee. The Court could have passed order only qua either the attachment of property or the bank guarantee.

Counsel for the respondent has submitted that although there is no requirement of assessing prima facie case in favour of the plaintiff under the bare language of Order 38 Rule 5 CPC, however, in the present case, the respondent/plaintiff is having even more than prima facie case in his favour. The petitioner had obtained the amount of loan through the bank transactions. The same is matter of record. There is nothing to show that the said amount has been re-paid by the petitioner through any bank transaction or otherwise. Therefore, even the condition of existence of prima facie case in favour of the plaintiff; is duly satisfied in this case.

Qua the validity of the undertaking, disputed by counsel for the petitioner, counsel for the respondent has submitted that the document is very much genuine, duly signed by the petitioner and that the respondent would prove the same by leading relevant evidence at the time of trial.

Counsel for the respondent has also submitted that the claim of the respondent/plaintiff is for the principle amount of Rs. 1.10 crore which is to carry interest at the rate mentioned in the plaint. Therefore, the Court was required to ensure that a sufficient amount/property of sufficient value is required from the petitioner. Regarding the point of attachment before decree, counsel for the respondent has placed reliance on the judgment of this Court rendered in **CR No. 5705 of 1999** titled as **Manjit Kaur v. Gurjant Singh and others.**

Counsel for the respondent has further submitted that since the property sought to be attached by the Court was not of the value of the amount which is claimed by the respondent and for which the decree could be passed by the Court, therefore, the Trial Court has rightly ordered attachment of the property mentioned in the order, as well as, qua furnishing of the bank guarantee. There is nothing on record to show that the property alone could have been sufficient to meet the amount of decree, in case the suit was decided in favour of the respondent.

While replying to the argument of counsel for the petitioner that what could not have been attached in execution of a final decree cannot be attached under Order 38 Rule 5 CPC, the learned counsel for the respondent has submitted that the situation is not applicable in the present case. Section 60 CPC which prohibits the attachment of a residential house in execution of final decree is not relevant for the stage of passing order under Order 38 Rule 5 CPC.

Having considered the arguments of counsel for the parties, this Court does not find any substance in the arguments of counsel for the petitioner. It is not even disputed that substantial part of the amount claimed by the respondent as loan availed by the petitioner, has been transferred to the petitioner through bank transactions. There is nothing on record, at this stage, to show, even prima facie, the repayment of the said amount. Hence, as per the pleadings of the parties, the respondent does have a prima facie case in his favour. Needless to say, that any claim qua the document, stated to be the undertaking furnished by the petitioner, would be subject matter of the trial. If the respondent fails to prove the same in accordance with law, the suit of the respondent would; obviously; be dismissed. Hence, that aspect is not relevant for the purpose of order to be passed under Order 38 Rule 5 CPC. So far as the argument of counsel for the petitioner that the amount of alleged loan is only Rs.1.10 crore and the Court has resorted to excessive bank guarantee and the attachment is concerned, even this argument is liable to be noted only to be rejected. Sufficiency of the security for compliance of the possible decree qua the claim of the plaintiff is to be assessed by the Trial Court. The same has been done in the present case as well. Otherwise also, as per the pleadings, the loan as alleged by the plaintiff, also carries interest at the rate mentioned in the plaint, which can result into multiplication of the original amount to any extent, keeping in view the average pendency of these kind of cases. Hence, there is nothing wrong qua the quantity of surety sought to be ensured by the Court below through the bank guarantee, as well as, attachment of the property.

Although the counsel for the petitioner has also submitted that since the property attached by the Court is the only residential house of the petitioner and therefore, the same could not have been attached by the Court in exercise of powers under Order 38 Rule 5 CPC, however, the case of the petitioner prima facie, does not even falls in the categories of the persons whose houses are protected from attachment by Section 60 of CPC. Even if the case of the petitioner is covered under Section 60 CPC then also this argument is totally irrelevant for the purpose of stage of passing of the order under Order 38 Rule 5 CPC. The purpose of the attachment order under this provision is not to sell the property in execution of the possible decree as such. Rather the object of the attachment is only to prevent the petitioner from disposing of that property even before passing of that decree. If the petitioner sell the alleged only residential house before any decree is passed against him; then the said house and the proceeds received by the petitioner for such sale loose the protection of Section 60 CPC. The petitioner cannot be heard to say that even if the petitioner disposes of the said property before passing of the final decree against him; the respondent could not have claimed the amount so received by the petitioner for the said sale; in execution of the final decree to be passed in his favour. Needless to say, that the stated object of Order 38 Rule 5 CPC is only to prevent the prospective judgment debtor from disposing of his properties to defeat the claim of the plaintiff and not to ensure the sale of the property sought to be attached even before passing of the decree.

In view of the above, this Court does not find any illegality or perversity with the order passed by the Court below.

However, during pendency of the present petition before this Court; and on account of a misconception arising from an interim order, the petitioner is stated to have sold the property which was attached by the Court below and has created a Bank Guarantee for an amount of Rs. 2 crores out of the sale proceeds of the said property, which has been placed on record before this Court. The photocopy of this bank guarantee be retained in the record of this petition; and the original bank guarantee attached with the present petition, be transferred to the trial Court for taking the same on record of civil suit. Since the bank guarantee is in the name of Punjab & Haryana High Court, the trial Court may direct the petitioner to get the same entered in the name of trial Court by adopting appropriate means. Hence; it further ordered that the petitioner shall not be visited by any adverse consequences only for the sale of the said property. But the Trial Court may require from petitioner some alternate property in lieu of the sold property; to ensure compliance qua attachment order.

Accordingly, the present petition is disposed of in above terms.

(RAJBIR SEHRAWAT)
JUDGE

19.8.2021
Ashwani

Speaking/Reasoned : Yes/No
Reportable : Yes/No