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IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

CR-5853-2023 (O&M)
Date of decision : 05.08.2024

AMIR SINGH YADAVPetitioner

Versus

MAHESH KUMAR ...Respondent

CORAM: HON'BLE MR. JUSTICE PANKAJ JAIN

Present : Mr. Ajay Jain, Advocate
for the petitioner.

Mr. Prashant S. Chauhan, Advocate
for the respondent.

PANKAJ JAIN, J. (ORAL)

Plaintiff is aggrieved of the order dated 21st of September, 2023 passed by Additional Civil Judge (Sr. Division) Rewari whereby an application filed by the defendant seeking substitution of the property in relation to the application filed by the plaintiff under Order 38 Rule 5 CPC has been allowed.

2. Plaintiff filed suit for recovery of Rs.11,62,800/- against the defendant on 31st of January, 2023. Along with Civil Suit an application under Order 38 Rule 5 CPC, 1908 was filed seeking attachment of the property before judgment. In the application, plaintiff sought attachment before judgment of a particular property i.e. Plot No.C-164, Ansal Town,

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Sector 19, Rewari, Tehsil and District Rewari which was in joint name of the defendant, his sister and brother-in-law. On 10th of February, 2023 when the defendant appeared, he suffered statement through his counsel to the effect that the defendant shall not alienate the property which was mentioned in the application under Order 38 Rule 5 CPC filed by the plaintiff till filing of written statement.

3. Order dated 10th of February, 2023 passed by ACJ (SD), Rewari reads as under:

“Present: Sh. Mukesh Kumar Gupta, Advocate for plaintiff.
Sh. R.K. Tiwari, Advocate for defendant.

Power of attorney on behalf of defendant filed. The learned counsel for defendant suffered statement that the suit land as mentioned in the Vasika No. 2026 dated 16.06.2022 will not be alienated till the filing of written- statement. Keeping in view the statement suffered by the learned counsel for defendant now the defendant is restrained from alienating the suit land till the filing of written-statement. Now to come upon 10.04.2023 for filing of written statement and reply to application under Order 38 Rule 5 & under Order 39 Rules 1 & 2 and Section 94 & 151 CPC.

Sd/-
ACJ (SD), Rewari.”

4. On 13th of July, 2023, the defendant filed written statement as well as reply to the application under Order 38 Rule 5 and Order 39 Rules 1 & 2 and Section 94 & 151 CPC. He filed another application seeking substitution of the property and offered that agricultural land bearing



Khewat No.115, Khatoni No.126 Rect. No. 28 Killa No. 10 (8-7), 11 (8-0), Kita 2 measuring 16 Kanal 7 Marla of its 1/4th share i.e. 4 Kanal 1.75 Marla situated in the revenue estate of village Sundroj, District Rewari be attached in place of property which was being sought to be attached by the applicant/plaintiff. The aforesaid application now stands allowed vide impugned order.

5. Mr. Jain while assailing the order has drawn attention of this Court towards order dated 10th of February, 2023 and the application filed by the defendant to contend that the application was totally misconceived. At no point of time any order of attachment was passed and thus, there was no occasion for the Trial Court to entertain the application and substitute the property. He submits that Trial Court ought to have tested the application filed by the plaintiff independently on the touchstone of parameters under Order 38 Rule 5 CPC. He thus submits that there is a material irregularity on the face of it and this Court needs to correct the same exercising revisional jurisdiction under Article 227 of the Constitution of India.

6. Per Contra, Counsel for the respondent/defendant submits that once the defendant himself offered to secure the interest of the plaintiff, there was no reason to pass an order on the application under Order 38 Rule 5 CPC. Trial Court after considering the evaluation of the property has rightly allowed the defendant to substitute the same. He further submits that Plot No.C-164, Ansal Town, Sector 19, Rewari being a joint property of the

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defendant along with his sister and brother-in-law who are not the defendants could not have been attached under Order 38 Rule 5 CPC.

7. Mr. Jain joins issue thereon and submits that even the agricultural land which has been allowed to be substituted is a joint holding.

8. I have heard counsel for the parties and have carefully gone through records of the case.

9. In order to appreciate the arguments raised by Mr. Jain, it will be apposite to peruse Order 38 Rule 5 of Code of Civil Procedure, 1908.

The same reads as under :

“5. Where defendant may be called upon to furnish security for production of property.—(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.

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(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.] ”

10. Provision contained in Order 38 Rule 5 CPC is an extraordinary provision and a drastic one. It is not the provision to be adopted as a matter of course. At a nebulous juncture when the suit is yet to be tried and the defence of the defendant is still to be tested, the provision has to be invoked with utmost caution and circumspection. The object behind enactment of the provision is to enable the plaintiff to realise the amount of the decree if one is eventually passed. In other words the objective is to prevent decree in the offing from being rendered infructuous. It has to be invoked only when there is cogent material on record for the Court to believe possible mischief at the hands of defendant with an intent to defeat or to obstruct the execution of decree yet to passed.

11. In the present case, the defendant at the first instance in order to secure the interest of the plaintiff suffered a statement offering not to transfer the property which was subject matter of the application filed under Order 38 Rule 5 CPC. At the time of filing of written statement he offered to substitute the said property by another property and also placed on record the evaluation thereof. Evaluation of property offered is not in dispute.

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12. Trial Court after being satisfied with the evaluation of the property allowed the substitution. The plea raised by Mr. Jain w.r.t. decision of the application on the parameters of Order 38 Rule 5 CPC. is misconceived in the light of the fact that the defendant has not resisted the claim of the plaintiff/applicant. At the first instance, the defendant himself suffered a statement w.r.t. Plot No.C-164, Ansal Town, Sector 19, Rewari Tehsil and District Rewari which was jointly held by the defendant as well as his sister and brother-in-law. He has now substituted the same with an agricultural land. Evaluation of which is sufficient to secure the interest of the plaintiff.

13. In view of above, this Court does not find any reason to interfere in the present revision petition. Resultantly, the same is dismissed.

14. Pending applications, if any, shall also stand disposed off.

August 05, 2024

(Pankaj Jain)
Judge

Dpr

Whether speaking/reasoned : Yes

Whether reportable : Yes