

IN THE HIGH COURT OF SINDH, KARACHI

C.P. NO. D- 5879 OF 2016

PRESENT:**MR. JUSTICE NADEEM AKHTAR
MR. JUSTICE ARSHAD HUSSAIN KHAN**

Petitioner Through Mr. Khadim Hussain Thaheem Advocate

Date of 01.11.2016
Hearing:

ARSHAD HUSSAIN KHAN, J. The petitioner through the instant constitutional petition has challenged order dated 20.10.2016 passed by the learned IIIrd Senior Civil Judge Karachi (South) whereby the application of respondent No.2 (Muhammad Sajid Muneer) under Order XXXVIII Rule 5 of CPC was allowed.

2. Brief facts leading to filing of the present petition as averred therein are that the petitioner is a private limited company and carrying out its business in the name of M/s. Tuwairqi Steel Mills Limited in Export Processing Zone Authority, Karachi. The Petitioner appointed respondent No.2 as its Deputy Manager Mechanical on a salary of Rs.60,000/- per month. Respondent No.2 without giving prior notice resigned from his job and before acceptance of his resignation, he joined K-electric and filed a civil suit against the petitioner for declaration, recovery of Rs.13,278,556/-, permanent Injunction and damages. Along with said civil suit respondent No.2 (Plaintiff in the said suit) also filed application under Order XXXVIII Rule 5 of CPC wherein attachment of bank account of the petitioner was sought before judgment on the ground that he (respondent No.2) has serious apprehension that the petitioner (defendant in the suit) will deprive respondent No.2 from getting his legitimate and natural rights as the petitioner has secretly disposed of assets of the company. The petitioner controverted said stance of the respondent through counter affidavit and categorically stated that the petitioner has no intension to remove and / or dispose of whole or part of its Steel Mill / assets of the petitioner. The learned senior civil judge, after hearing the parties passed the impugned order.

3. The counsel for the petitioner was asked to satisfy this court as to how this constitutional petition is maintainable against the order impugned in the present proceedings.

4. Heard learned counsel for the petitioner on the point of maintainability. It is contended by learned counsel that since no appeal has been provided under the law against the order passed under Order XXXVIII Rule 5 of CPC, therefore the petitioner, after being aggrieved by the order impugned herein, having no other remedy, filed the present petition. Further contended that the impugned order is even otherwise, not sustainable in law as the same has been passed in violation of provisions of law under Order XXXVIII Rule 5 of CPC, hence learned judge failed to exercise the power vested in him and as such order impugned herein is without jurisdiction and this court can set aside the same in the constitutional jurisdiction of this court.

5. Admittedly no appeal has been provided against the order passed under Order XXXVIII Rule 5 of CPC, however, it is also cardinal principle of law that where the order is not appealable the revision may lie against the said order. But in any event, the writ jurisdiction of the high court cannot be invoked merely on the ground that order is not appealable. In the circumstances, the contention raised by learned counsel for the petitioner appears to be based on misconception hence, dispelled. However, in the present matter since the learned counsel emphasized that the order impugned in the present proceeding is void being passed without jurisdiction and as such the same is liable to be set-aside in the writ jurisdiction of this court, therefore, in the interest of justice, we feel imperative to discuss the case in hand as under.

6. The case of the petitioner precisely is that the learned senior civil judge while passing the impugned order ignored the prerequisite essential elements for attachment before judgment prescribed procedure. It is also the case of the petitioner that the affidavit filed by the respondent in support of his application was without any documentary evidence which could support the stance of the respondent in the application, therefore, the satisfaction of the learned senior civil judge, which was made basis of passing of the order impugned herein was illusory and capricious thus the same is liable to be set aside.

7. Without touching the merit of the case and before going into further discussion, it would be appropriate to reproduce the relevant portions of the impugned order as under:

"7. The perusal of record further reveals that the applicant/plaintiff has agitated that he has outstanding dues on the opponent/defendant and for non-payment by the opponent/defendant he sustained damages. The opponent/defendant has mainly rebutted the amount of damages as claimed by the plaintiff and also amount of outstanding dues as prayed by the plaintiff. The contention of the learned advocate for the applicant/plaintiff also corroborate this application that his rights prima facie established so that, interim injunction was granted to him.

8. The learned advocate for opponent/defendant has agitated that the application is not properly filed as it does not disclose that the property required to be attached and any apprehension from applicant/plaintiff that the other side is going to dispose of the assets. The reply of learned advocate for the applicant/plaintiff on this point is somehow justified that in application they have clearly mentioned that the opponent/defendant is secretly disposing of the assets of company for generating funds or their own salaries and benefits instead of filing winding up of company. The applicant and its affidavit are part and parcel and the affidavit clearly shows that the contents of application also be treated as part and parcel. Hence, it cannot be said that in application such apprehension is not mentioned.

9. Finally, I will be failing in my duties if I do not discuss the case law relied by learned advocates. The advocate for opponent/defendant relied on reported judgment in case of M/S Arrow Trading Company (SUPRA) in which properties sought to be attached was two letters of credit open in favour of those defendants who had no privity of contract. The plaintiff himself referred dispute to defendant (commercial arbitration board) whereby he had agreed that all dispute would be submitted for arbitration and award would be final. But, in this case no such exercise for settlement of dispute has been done. The facts and circumstances are totally different to the facts and circumstances of the reported judgment.

10. As result of above reasons, in view of pleadings, submissions made by learned advocate for parties and case law relied by them I am satisfied that the defendants should submit solvent security for some of Rs.32,78,556/- on satisfaction of this court within one month or the amount mentioned above be attached from bank account No.179601013062 UBL Bank FTC Branch as mentioned in application and be deposited with Nazir of this Court who should invest the same in some profitable scheme and same be disposed of according to final disposal of this suit and in case failure the applicant /plaintiff may point out any property proportionate to value of sum of Rs. 32,78,556/- for attachment. The application in hand is hereby allowed accordingly. There is no order as to costs."

[Underlining to add emphasis]

8. In the present case the petitioner was called upon to furnish solvent security within one month or the amount be attached from the bank account of the petitioner under Rule 5 of Order XXXVIII,

C. P. C. which runs as under:-

"(1) Where, at any stage of the 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.

(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 part of the property so specified."

9. From the reading of the above provision, it is clear that this provision is purely discretionary and equitable; the Court, if satisfied by an affidavit or otherwise that the defendant with the intent to obstruct or delay the execution of any decree that may be passed against him, is about to dispose of the property, at any stage of the suit, in that event the Court can pass an order under Order XXXVIII, rule 5, C.P.C. Furthermore, now it is well settled that the scheme of Order XXXVIII and the use of 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 power under the said Rule, the court should be satisfied that there is reasonable chance of a decree being passed in the suit against the defendant. This would mean that the court should be satisfied that the plaintiff has a *prima facie* case. If averments in the plaint and documents produced in support of it, do not satisfy the court about the existence of a *prima facie* case, the court will not go to the next stage of examining whether the interest of the plaintiff should be protected by exercising power under Order 38 Rule 5 of CPC. The Hon'ble Supreme Court in the case of *Mohiuddin Molla v. The province of East Pakistan and others* (**PLD 1962 SC 119**) while discussing the scope of the Order 38 Rule 5 of CPC has held under:

"The Court has inherent jurisdiction to preserve the property of the judgment-debtor in order that it may be available for realization of the decretal amount. This principle has been recognized to Order XXXVIII, rule 5 of the Civil Procedure Code which empowers the Court to attach the property of the defendant in order that any decree that is passed in the suit may be satisfied by sale of the attached property. If the Court has power to attach the property of the defendant at a time when there is only a possibility of a decree in favour of the plaintiff, it will be anomalous to hold that after he has actually secured a decree the Court cannot act to protect his interests just because the execution of the decree has been postponed. The jurisdiction of the Court to attach the property of the defendant truly arises from the fact that the Court has power to grant relief. A power to grant relief necessarily implies power to take all such steps as may be needed to ensure the grant of relief to the plaintiff. Full relief is not granted to a plaintiff by a paper decree. It is only when the decree is satisfied that he gets full relief and the Court has power to pass all such orders as may be required for the satisfaction of the decree unless any such order be expressly or by necessary implication prohibited. Order XXXVIII, rule 5, should be regarded as a provision which recognizes a power rather than a provision which confers a power. The Civil Procedure Code, generally speaking, does not create new powers but regulates the exercise of power already possessed by the Court. Even before the Civil Procedure Code was enacted the Civil Court possessed powers of the kind mentioned in the Civil Procedure Code. It possessed these powers because the Civil Court has jurisdiction to determine and protect civil rights and for the protection of those rights the exercise of such powers is essential"

10. In the present case, it appears from the impugned order that respondent No.2 / plaintiff filed the suit for recovery of his outstanding dues in respect of the services rendered by him to the petitioner and respondent No.2, in view of the trial court, had established *prima facie* right over the said outstanding dues upon which learned trial Court granted interim injunction in favour of respondent No.2.

11. It is now a well-established that Article 199 of the Constitution casts an obligation on the High Court to act in the aid of law and protects the rights within the frame work of Constitution, and if there is any error on the point of law committed by the courts below or the tribunal or their decision takes no notice of any pertinent provision of law, then obviously this court may exercise Constitutional jurisdiction subject to the non-availability of any alternate remedy under the law. This extra ordinary jurisdiction of High Court may be invoked to encounter and collide with extraordinary situation. This Constitutional jurisdiction is limited to the exercise of powers in the aid of curing or making correction and rectification in the order of the courts or tribunals below passed in violation of any provision of law or as a result of exceeding their

authority and jurisdiction or due to exercising jurisdiction not vested in them or non-exercise of jurisdiction vested in them. The jurisdiction conferred under Article 199 of the Constitution is discretionary with the objects to foster justice in aid of justice and not to perpetuate injustice. However, if it is found that substantial justice has been done between the parties then this discretion may not be exercised. So far as the exercise of the discretionary powers in upsetting the order passed by the court below is concerned, this court has to comprehend what illegality or irregularity and or violation of law has been committed by the courts below which caused miscarriage of justice. Reliance is placed on the case *Muslim Commercial Bank Ltd. through Attorney v. Abdul Waheed Abro and 2 others (2015 PLC 259)*.

12. Reverting back to the case in hand, the impugned order transpires that the learned senior civil judge after issuing notice of the application under Order XXXVIII Rule 5, CPC filed by respondent No.2, giving opportunity to the petitioner to rebut the contention raised therein and after hearing the counsel for the parties and upon satisfaction the order on the said application was passed, hence the order impugned herein cannot be said to be passed in violation of the provision of law.

13. The upshot of the above discussion, we are of the considered view that the present petition is not maintainable being devoid of any legal substance and as such the same is dismissed in limine.

JUDGE

Karachi;
Dated:

JUDGE