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(22) In view of the above, the second question is answered against the employer and in favour of the workmen. It is held that the petitions were not barred by limitation.

**Reg. (iii)**

(23) In so far as the third question is concerned, it was contended on behalf of the employer that the Commissioner having issued an order declaring a six days week, the award of the Labour Court could not be enforced. It has already been observed that an award continues to be in force till it is duly altered in accordance with the provisions of section 19(6). That being so, the order issued by the Commissioner could not adversely affect the rights of the workmen. No notice as contemplated under the provisions of section 19(6) was ever given by the employer. Thus, the rights of the workmen shall not be adversely affected by mere issue of the order by the Commissioner. Even otherwise, in our view, the award given by the competent court cannot be annulled by a mere executive order. In these cases, no notice of termination of the award had been given. No new settlement had been arrived at. Consequently, the award was not affected by the order of 12th August, 1986.

(24) The third question is, thus, answered in favour of the workmen.

(25) In view of the above, CWP Nos. 12002 to 12022 and 9374 of 1992 are dismissed. LPA No.768 of 1992 is allowed. It is conceded by Mr. Govind Goel, Advocate that in view of the above, CWP No. 11611 of 1989 is rendered infructuous. It is, accordingly, disposed of No costs.

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**R.N.R.**

*Before Swatanter Kumar, J*

M/S NAGPAL STEEL LTD. & ANOTHER,—*Petitioners*

*versus*

ARJUN DEV VERMA & ANOTHER,—*Respondents*

C.R. No. 3663 OF 1997

The 19th March, 1998

*Code of Civil Procedure, 1908—Order 38 Rl.5—Security to be furnished—Specific allegation that defendants are disposing of*

*immoveable property—Controversy appreciated and defendants directed to furnish security-Default in furnishing security resulting in order of attachment of property—Order upheld—Provisions of order 38 R1. 5 are strigent—To be exercised when the applicant is able to make out a prima facie case and satisfy ingredients.*

Held that the provisions of order 38 Rule 5 of the Code of Civil procedure are strigent and are exercised normally by the Courts when the applicant is able to make out a *prima facie* case on the one hand and on the other hand is able to satisfy the ingredients under these provisions. In the present case there are specific allegations made in the application that the defendants are bent upon disposing of the goods as well as the immovable property at Satsang Road, Industrial Area, Ludhiana to defeat the decree which is likely to be passed in their favour. The allegations were vaguely denied and even detailed reply to this application was not filed. May be the provisions are strigent but where the facts and circumstances of the case makes it apparent on record that the intention of the defendant is not *bona fide* and they are attempting to frustrate the decree which is likely to be passed in favour of the plaintiff and they offend any of the clauses of order 38 Rule 5, the Court would normally come to the rescue of the applicant for such safeguard. The provisions of order 38 Rule 5 certainly postulates different orders and it is not necessary that the Court must straight way pass an order of attachment before judgment. In fact sub rule 1 of Rule 5 of order 38 provides that where the defendant fails to show cause to the court then the court would direct him to deposit in the Court money or other property sufficient to answer the claim of the plaintiff or to furnish the security. Thus the power of the Court to pass an order of the kind dated 6th June, 1997 can not be called without jurisdiction.

(Para 5)

Sunil Chadha Advocate for the Petitioner

Premjit Kalia Advocate for the Respondent

### JUDGMENT

*Swatanter Kumar, J.*

(1) Both Civil Revisions No. 3636 and 3663 of 1997 arise from Common facts thus it is considered appropriate to dispose of both these petitions by a common order. Plaintiff Arjan Dev Verma who is a sole proprietor of M/s Laxmi Iron & Steel Company, Amritsar

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had filed a suit against M/s. Nagpal Steel limited for recovery of Rs. 8,42,000 alongwith costs and interest at the rate of 18% per annum in the court of Civil Judge. Junior Division Amritsar. The plaintiff had averred that they had supplied iron scrap from time to time and they were maintaining mutual and current account for the supply of goods, bills raised and the payments received from time to time. The defendants were also issuing S.T. Forms for the goods received in addition to the acknowledgement receipt of the goods duly endorsed on the challan forms. This suit was contested by the defendants wherein they raised preliminary objection with regard to maintainability of the suit, *locus standi* of the plaintiff, and mis-joinder and non-joinder of the necessary parties etc. The receipt of the goods as such was not denied and in reply to para 3 of the plaint the following averments were made in the corresponding paragraph of the written statement :—

“That the para 3 of the plaint as alleged is absolutely wrong and denied. It is denied that the defendants have been purchasing goods from the plaintiff at Amritsar. It is further denied that the plaintiff maintained account of the defendant in the account books. Whatever goods have been purchased by the defendants the defendant regularly paid the amount to the plaintiff. It is denied that the payment of the goods paid by the defendants were duly credited and debited in the account.....”

(2) Alongwith the suit the plaintiff had filed an application under order 38 Rule 5, Under Order 40 Rule 1 and under order 39 Rules 1 and 2 read with section 151 of the Code of Civil Procedure with the following prayers :—

“Therefore, it is required that the court should direct the respondents within the time to be fixed by it either to furnish the security for the suit amount alongwith costs and future interest or that may be sufficient to satisfy the decree and the above stated properties belonging to the respondents/defendants be attached before judgment and decree. That it will be also more convenient and just that a Receiver be appointed who may take the possession of the above stated properties alongwith goods lying therein so that the respondents may not be able to misappropriate the same and in the meantime, the respondents be restrained by issuing of an *ad-interim*

injunction from disposing of the property bearing No. B-15-669/3, Satsang Road Industrial Area-B, Ludhiana, and the goods lying therein. It is, therefore prayed that this application be accepted in the interest of justice, equity and fair play.

Reply to this application was filed where it was stated that the plaintiff had no *prima facie* case and that there was no provision for directing furnishing of security and that the properties were not liable to be attached.

(3) After hearing learned counsel for the parties the learned trial Court,—*vide* its order dated 6th June, 1997 directed the defendants to furnish security in the sum of Rs. 10 lacs by 30th July, 1997. However, the other prayers of the plaintiffs were declined. As the defendants failed to furnish security by 30th July, 1997 the learned trial Court,—*vide* its order dated 30th July, 1997 while directing issuance of warrant of attachment of the property of the defendant and passed the following order :—

“Present :Counsel for the parties. Security not furnished. Counsel for the defendants states that he has filed the revision before the Hon’ble High Court against the order of this Court,—*vide* which the security was demanded. It is conceded that no stay has been granted so far. Since the security has not been furnished in terms of order dated 6th June, 1997. The property of the defendant is ordered to be attached before judgment for 8th September, 1997. In view of the order dated 6th June, 1997 warrant of attachment is however issued for 13th August, 1997 to enable the defendants to produce the stay order if any.”

(4) The order dated 6th June, 1997 has been assailed before this Court in Civil Revision No. 3663 of 1997 while the order dated 30th July, 1997 has been assailed in Civil Revision No. 3636 of 1997. Therefore, it has been considered appropriate to deal with both these revisions challenging the above orders by a common judgment.

(5) The provisions of order 38 Rule 5 of the Code of Civil Procedure are stringent and are exercised normally by the Courts when the applicant is able to make out a *prima facie* case on the one hand and on the other hand is able to satisfy the ingredients under these provisions. In the present case there are specific allegations made in the application that the defendants are bent

upon disposing of the goods as well as the immovable property at Satsang road, Industrial Area, Ludhiana to defeat the decree which is likely to be passed in their favour. The allegations were vaguely denied and even detailed reply to this application was not filed. May be the provisions are strigent but where the facts and circumstances of the case makes it apparent on record that the intention of the defendant is not *bona fide* and they are attempting to frustrate the decree which is likely to be passed in favour of the plaintiff and they offend any of the clauses to order 38 Rule 5, the court would normally come to the rescue of the applicant for such safeguard. The provision of order 38 Rule 5 certainly postulates different orders and it is not necessary that the Court must straight way pass an order of attachment before judgement. In fact sub rule 1 of Rule 5 of Order 38 provides that where the defendant fails to show cause to the Court then the Court would direct him to deposit in the court money or other property sufficient to answer the claim of the plaintiff or to furnish the security. Thus the power of the court to pass an order of the kind dated 6th June, 1997 cannot be called without jurisdiction. The learned counsel appearing for the petitioner has relied upon the judgment of this court in the case of *Onkar Mal Mittal v. State Bank of Patiala* (1), *Canara Bank v. Smt. Pushpa Gupta* (2), *Om Parkash Bansal v. Canara Bank* (3) and *Satpal Singh v. M/s Sunil Kumar Amit Kumar* (4), in support of his contention that the present application ought to have been rejected by the learned trial Court. There can be no doubt to the propositions stated in the judgments that averments satisfying the ingredients of Order 38 Rule 5 should be stated in the application and the court should apply its mind before passing the requisite orders. In the present case, on the averments in the application as noticed above, Court has applied its mind judiciously as is clear from the impugned order. The learned trial Court upon proper appreciation of the controversy before it had come to the conclusion in its order dated 6th June, 1997 that it would not be appropriate to direct attachment before judgement at the first instance and thus had directed the present petitioner only to furnish security to the extent of Rs. 10 lacs. It is only as a consequence of default of this order that the trial Court has passed the order for attachment before judgment on 30th July, 1997. During that period neither the order

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(1) 1992 (1) RRR 45

(2) 1995 (1) RRR 34

(3) 1995 (1) P.L.R. 725

(4) 1997 (2) All India Land Laws Reporter 47

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dated 6th June, 1997 was challenged nor the application for extension of time or for any other proper relief was moved before the learned trial Court.

(6) The learned counsel for the respondent has placed reliance on the case of *V.K. Natraja Gounder v. S.A. Bangaru Reddiar* (5) and *Premraj Mundra v. Md. Maneck Gazi & others* (6), to substantiate his contention that the order of the trial Court does not suffer from any jurisdictional error. Keeping in view the facts and circumstances of this case where there is eminent threat of disposal of properties with the intention to frustrate the decree which may be passed seen in the background of the defence which lacks in bonafide and substance. Further more the fact that an unpaid seller has a right over the property sold, it becomes necessary to protect the interest of the plaintiff in the suit. The inadequate facts in reply to the application under Order 38 Rule 5 and the averments being totally vague would lead to an inference which may not be favourable to the petitioner by the court at this initial stage of the suit.

(7) For the reasons aforesated I have no hesitation in dismissing both the revisions which are hereby dismissed. However, the petitioner herein is granted one month time to furnish security in terms of the order passed by the learned trial Court dated 6th June, 1997 in the interest of justice. Both these petitions stand dismissed.

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*J.S.T.*

*Before G.S. Singhvi & Iqbal Singh, JJ*

TEJ SINGH,—*Petitioner*

*versus*

STATE OF PUNJAB & OTHERS,—*Respondents*

CWP No. 5884 of 1998

The 22nd July, 1998

*Punjab Civil Service (Executive Branch) (Class I) Rules, 1976—Rls. 7 to 11 & 15—Appointment to service—Recommendation*

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(5) A.I.R. 1965 Madras 212

(6) A.I.R. 1951 Calcutta 156