

**HIGH COURT OF JAMMU AND KASHMIR  
AT JAMMU**

**Cond. No. 125/2009  
C. Rev. no. 10/2009**

**Date of Decision: 01.01.2010**

---

**Sutlej Industries Ltd                      Vs. M/S Shirdhiya Synthetics Pvt. Ltd**

---

**Coram:**

---

**HON'BLE MR. JUSTICE SUNIL HALI, JUDGE.**

---

***Appearing Counsel:***

For the Petitioner(s):	Mr. D. S. Thakur, Advocate.
For the Respondent(s) :	Mr. S. K. Shukla, Advocate.

---

- |     |   |   |        |
|-----|---|---|--------|
| i)  | Whether to be reported in<br>Press, Journal/Media | : | Yes/No |
| ii/ | Whether to be reported in<br>Digest/Journal       | : | Yes/No |
- 

**Condl. No. 125/2009**

On the no objection of learned counsel for the respondent, this application is allowed, delay in filing the revision petition is condoned and revision petition is taken up for consideration.

**C. Revision no. 10/2009**

Petitioner has filed a suit for recovery of Rs. 52,03,865/- under Order 37 of the Code of Civil Procedure before learned Additional District Judge Kathua. An application for attachment of the property before judgment was filed during the pendency of the suit. The trial Court passed the following order on 20.04.2007 in the said application:-

❧ Issue notice to other side to show cause why plots G-4 & 5 situated at Ind. Area Bhilwara (Raj) be not attached & put up for their objections on 05.05.2007. Meanwhile the

other side is temporarily restrained from alienating or transferring the same to any body whosoever till next hearing.め

An application came to be filed by M/S Radha Krishna Sutz Pvt. Ltd. for being impleaded as party-defendant to the suit. This plea of the applicant to intervene in the application of the plaintiff filed under Order 38 Rule 5 of the Code of Civil Procedure was allowed, however, it was not impleaded as a party-defendant to the suit for the reasons that it was neither a necessary nor a proper party. For having been allowed to intervene in the application of the plaintiff for attachment of the property before judgment, this revision has been filed.

The plaintiff-petitioner has sought attachment of the property for which an agreement to sell for a consideration amount of Rs. 45,11,000/- had been executed by defendant no.1 in favour of the intervener. This agreement has been executed at a time when there was no order of attachment. Order 38 Rule 5 envisages that attachment before judgment would be made where the Court is satisfied that the defendant, is about to dispose of the whole or any part of his property or is about to remove the whole or any part of his property from the local limits of the jurisdiction of Court with the intention to obstruct or delay the execution of any decree that may be passed against him. This provision would not apply where the

sale deed has already been executed by the defendant in favour of a third person. A transaction of sale having already taken place even prior to the institution of a suit cannot be said to have been made with the intention to obstruct or delay the execution of any decree. Rule 10 states that attachment before judgment shall not affect the rights existing prior to the attachment of persons not party to the suit, nor bar any person holding a decree against the defendant from applying for the sale of the property under attachment in execution of such decree. This provision makes it clear that attachment before judgment shall not affect the rights, existing prior to the attachment of person not party to the suit.

The question for consideration in the present revision petition is as to whether the intervention of respondent no.4 was permissible or not.

The power to implead a party in a suit is governed by Order 1 Rule 10 of the Code of Civil Procedure. For facility of reference, rule 10 (2) is reproduced below:-

§(2) Court may strike out or add parties:- The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined whether as plaintiff or defendant, or whose presence before the Court may be

necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added. ॐ

The plain language of this rule clearly envisages that the impleadment of a party in a suit as plaintiff or a defendant can be ordered under this rule if such impleadment is necessary for purposes of adjudication upon and settle all questions involved in the suit. It is clearly implied in this rule that a party can be impleaded only in a suit either as a plaintiff or a defendant.

In the present case the trial Court has dismissed the application of respondent no. 4 for being impleaded as a defendant, however, the trial Court has directed its impleadment as a party in an application under Order 38 Rule 5. By dismissing the application of respondent no.4 for its impleadment as a party defendant, no direction could have been given by the Court to respondent no.4 to contest the application as this was beyond the scope of Order 1 Rule 10(2). Prima facie such a course could not have been adopted.

Examining this angle on the other context, it be seen that the trial Court, while passing order in the application under Order 38 Rule 5, can ask the defendant to produce and furnish security for production of the property in the event any decree is passed against him. This provision also clearly hints towards the fact that the proceedings under Order 38 Rule 5 can be

necessitated only against a person who is defendant before the Court. There is no provision under the Code of Civil Procedure which implies that without being a party to the suit, a person can be impleaded in an application which has been filed during the pendency of the suit.

The trial Court has yet to pass orders on the application of the plaintiff for attachment of the property before judgment. Adjudication of the application Order 38 Rule 5 has yet to be made and defendant nos. 1 to 3 can raise all the issues before the Court including the fact that the property in question has been sold to the respondent no.4 by executing an agreement to sell. The question as to whether on the basis of an agreement to sell the defendants could transfer the property in the name of respondent no.4, can be decided by the trial Court while dealing with the said application.

The impleadment of respondent no.4 as a party is not necessary. Since respondent no.4 has not questioned the order of the trial Court, while rejecting his application for impleadment as a defendant, he cannot be permitted to contest the application under Order 38 Rule 5.

For the reasons stated above, this revision petition is allowed and the order of the trial Court is set aside.



Parties are directed to appear before the trial Court on  
February 2, 2010.

Record be sent back forthwith.

**(SUNIL HALI)**  
**Judge**

JAMMU:  
01.01.2010  
Anil Raina, Secy.