
(2001) 07 AP CK 0062

In the Andhra Pradesh High Court

Case No : Appeal Against Order No. 1492 of 2001

Bommanasaree Mandir

APPELLANT

Vs

Manisha Sarees

RESPONDENT

Date of Decision : 23-07-2001

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 38 Rule 5, Order 38 Rule 6

Citation : AIR 2002 AP 66 : (2001) 4 ALT 780 : (2001) 2 APLJ 173

Hon'ble Judges : P.S. Narayana, J; B. Subhashan Reddy, J

Bench : Division Bench

Advocate : K.B. Satyanarayana, for the Appellant; R. Satyanarayana Reddy, for the Respondent

Final Decision : Dismissed

Judgement

P.S. Narayana, J.—Appellant is the respondent-defendant in I.A. No. 150 of 2001 in O.S. No. 384 of 2001 on the file of the VII Senior Civil Judge, City Civil Court, Hyderabad.

2. The present appeal is filed by the appellant aggrieved by an order made by the learned Judge on 19-3-2001 under Order 38 Rule 6 CPC.

3. The respondent-plaintiff filed a suit O.S. No. 384 of 2001 on the file of the VII Senior Civil Judge, City Civil Court, Hyderabad for recovery of certain amounts. Along with the suit, the respondent has also filed an application I.A. No. 150 of 2001 under Order 38 Rule 5 read with Section 151 CPC seeking attachment before judgment. It was averred by the respondent-plaintiff that he is a wholesale dealer of Banaras, Calcutta cotton and other fancy sarees and has been doing the business for the last several years at Sultan Bazar, Hyderabad. It was also averred that the appellant-respondent-defendant is carrying on cloth business under the name and style of "Bommana Saree Mandir" at Tilak Road, Hyderabad. It was further averred that the appellant herein used to buy sarees from the respondent on 30 days credit basis from 1997 onwards and in that

process certain payments were not made within the stipulated time for the last several months and has been taking time by making certain false promises. It was also specifically averred in the affidavit filed in support of the said application that on reliable sources, the respondent herein came to know that the appellant is making serious attempts to shift the business by closing the shop with a view to defraud his creditors and that he is also indebted to several other wholesale dealers in the market and if he succeeds either in shifting the business or closing the shop, he will be put to serious loss and damage and he will not be able to recover any amounts and as such in the facts and circumstances, it may be just and necessary to attach the cloth material i.e. sarees to a tune of Rs. 6,66,974/- by way of attachment before judgment. It is also brought to our notice that in support of this affidavit, a third party affidavit supporting his application has also been filed along with the party's affidavit.

4. As can be seen from the material available on record, on 5-3-2001, the learned Judge had passed the following order;

"Heard. Perused petitioner's affidavi, the averments of the plaint and the documents. Issue show cause notice to the respondent under Order 38 Rule 5(1) of CPC why attachment cannot be ordered to furnish security for suit amount on 15-3-2001."

5. Subsequent thereto certain adjournments had been granted and ultimately inasmuch as the condition specified in the show cause notice was not complied with, the present impugned order was made by the learned Judge, which is to the following effect.

"The respondent did not submit the security for the suit amount though time was granted till this day. The respondent earlier said he would settle the matter with the petitioner or file security. But faulted. Waited till after 4.00 p.m.

Heard. Issue warrant of attachment of movables on payment of bata under Order 38 Rule 6 CPC by 27-3-2001."

6. Aggrieved by the above said order, the present appeal is filed. It is also brought to our notice a counter was also filed before the trial Court to the application filed by the respondent seeking the relief of attachment before judgment.

7. It is also brought to our notice that the appellant-respondent-defendant had filed a memo on 16-3-2001 to the effect that if there are any dues as on that day, he is ready and willing to pay the same and he had also under taken that he is not going to close the business or shift the business till the suit amount is settled by both the parties.

8. heard both the counsel.

9. Sri K.V. Satyanarayana, the learned counsel representing the appellant-respondent-defendant had vehemently contended that the impugned order is not

sustainable in law. The order as such must be read and the other circumstances cannot be imported and those allegations cannot be read into the order and if the order as such is taken, it is ex facie and illegal order and hence it is liable to be set aside. The learned counsel while elaborating his submissions has also drawn our attention to the provisions of Order 38 Rules 5 and 6 CPC. The learned counsel had also placed reliance on the decisions in *Nidhi Cleaning and Forwarding Co. v. Associated Cement Companies Limited* 1996 (1) ALD 497. *Ankinapalli Obul Reddy Vs. Dadibathina China Gurava Reddy and Others*, and also *Sripathi Panditarajula Venkanna Babu Vs. Varalakshmi Finance Corporation*, . The learned counsel had also drawn our attention to certain portions of these judgments and had contended that the principles laid down in these judgments had not been followed by the Court below while making the impugned order. The form, which is to be given while issuing the notice also has not been complied with. Further, no reasons as such had been recorded and hence it is not in compliance with the provisions of Order 38 Rule 5 CPC. It was also contended that for non-compliance of the mandatory provisions of Order 38 Rule 5 CPC, the order of attachment before judgment is void and hence it is liable to be set aside.

10. Sri Satyanarayana Reddy, the learned counsel representing the respondent-petitioner-plaintiff had made elaborate submissions. The learned counsel had drawn our attention to a third party affidavit, a supporting affidavit filed which clearly goes to show that in what circumstances the respondent-defendant is placed at present. The learned counsel had also drawn our attention to several cheques issued before the institution of the suit and also after the institution of the suit during the hearing of the application seeking attachment before judgment. Evidently, these cheques are not honoured. Apart from it, the learned counsel also had drawn our attention to certain portions of the counter filed by the other party before the Court below where an assertion was made relating to settlement of accounts. The learned counsel further contended that in the facts and circumstances, the claim is a bona fide claim and in case if the impugned order is not sustained, the respondent-plaintiff will not be able to realize any amount at all even in the event of his ultimate success in the main suit. Further, the learned counsel also had drawn our attention to the contents of the third party affidavit filed in support of the application seeking attachment before judgment. Lastly, the learned counsel had also contended that at the best all these aspects may amount to only an irregularity and it cannot amount to an illegality and as far as procedural aspects are concerned, normally, the Court should lean in favour of doing substantial justice between the parties.

11. Having heard the elaborate submissions made by both the learned counsel, we are of the considered opinion that in the light of the several facts and circumstances as can be revealed from the material on record, we are satisfied that the impugned order is in substantial compliance with the provisions of Order 38 Rule 5 and Order 38 Rule 6 CPC and hence the impugned order does not suffer from any illegality.

12. The conduct of the parties has to be taken into consideration. Further, several transactions between the parties also clearly reveal that in the event of the proper security not being furnished, it will be very difficult for the respondent-plaintiff to realize the amount from the appellant. While considering the application for attachment before judgment under Order 38 Rule 5 CPC, the Courts are expected to look into the object of the provision also. When the Court feels that the interest of the plaintiff has to be safeguarded, then necessarily in such circumstances, it is always better to call upon the opposite party to give the necessary safeguard by furnishing security or any other form of bank guarantee for the purpose of complying with the terms of the decree which he ultimately suffer at the time of disposal of the suit. Keeping in view the object and the purpose of Order 38 Rule 5 CPC, we are of the considered opinion that the impugned order passed by the Court below is not liable to be interfered with on any count whatsoever much less on any illegality. Before parting, even otherwise, the aspects pointed out by the appellant are only at the best aspects relating to the irregularity in the procedure and such curable irregularities cannot affect the substantial rights of the parties. Further, some facts which clinch and stare at us are the admission of transaction of sale of sarees by the respondent and purchase by the appellant, the admission made by the appellant that some amounts are due and the issuance of cheques in settlement of the dues and bouncing of the same.

13. In the light of this background, we are not inclined to interfere with the order of the Court below. There are no merits in the appeal and it is accordingly dismissed.