
(2001) 05 RAJ CK 0054

In the Rajasthan High Court

Case No : Civil Miscellaneous Appeal No's. 256, 257, 288 and 289 of 2001

Cosmopolitan Trading Corporation

APPELLANT

Vs

Engineering Sales Corporation and Others

RESPONDENT

Date of Decision : 03-05-2001

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 38 Rule 5, Order 39 Rule 1, Order 39 Rule 2
Penal Code, 1860 (IPC) — Section 406, 420, 421

Citation : AIR 2001 Raj 331 : (2002) 1 RLW 409 : (2001) 4 WLN 6

Hon'ble Judges : Shiv Kumar Sharma, J

Bench : Single Bench

Advocate : N.K. Maloo, for the Appellant; S. Kasliwal and S.P. Bhargava, for the Respondent

Final Decision : Allowed

Judgement

Sharma, J.—These four civil miscellaneous appeals have been filed by the plaintiffs M/s. Cosmopolitan Trading Corporation and Harish Chand Bader impugning the orders dated February 3, 2001 of the learned District Judge Jaipur City whereby the applications seeking temporary injunction and attachment before judgment of the property of the defendant- respondents were dismissed.

2. The parties shall be hereinafter referred in the same manner as they were arrayed in the plaints.

3. The plaintiff M/s. Cosmopolitan Trading Corporation instituted a suit for recovery of Rs. 17.40 lacs against the defendants 1 to 5. Alongwith the suit applications bearing No. 135/2000 under Order 38 Rule 5 and No. 137/200 under Order 39 Rules 1 and 2 CPC were filed. Similarly the plaintiff Harish Chand Bader instituted another suit for recovery of Rs. 19.80 lacs against the defendants I to 5 with two applications under Order 38 Rule 5 and Order 39 Rules 1 and 2 CPC bearing Nos. 134/2000 and 136/2000. The plaintiffs averred in the applications that the defendants 1 to 5 are bent upon to dispose of their properties in order to make impossible of execution of the decree to be passed in the suits. In the

business establishment of the defendants loss of more than 100 crores has been incurred. The defendants are indulged in siphoning money out of the company and went to leave the country. By filing additional affidavit the plaintiffs pleaded that the defendants entered into an agreement to sale the property for a consideration of Rs. 2 crores and received Rs. 20 lacs as advance payment. They have borrowed more than Rs. 1 crore from Bank of Rajasthan and it has been agreed between them that the amount shall be paid to the bank and the property which is equitably mortgaged with the Bank, shall be released. The plaintiffs asserted by filing copy of show cause notice served by the custom department on the defendants that they diverted high money to Foreign Countries through fictitious transactions. It was therefore prayed that the defendants 1 to 5 be restrained from alienating the property and the sixth defendant Bank of Rajasthan be restrained from releasing title deeds of the mortgaged property. A prayer was also made to issue order of attachment before judgment of the property of defendants 1 to 5.

4. In support of reply filed by the defendants 1 to 5, second defendant Prakash Chand filed affidavit. Reply was not signed by third defendant Arun Kumar. The defendants denied this fact that they intend to run out of the country. The fact of entering into agreement to sale of the property in consideration of Rs. 2 crores and receiving advance payment of Rs. 20 lacs was however not denied. Sixth defendant Bank of Rajasthan also filed reply and admitted that the property was mortgaged with the Bank and about Rs. 1 crore were due against the defendants 1 to 5.

5. Learned District Judge by two different orders dated February 3, 2001 dismissed the applications under Order 39 Rules 1 and 2 and Order 38 Rule 5 CPC of the plaintiffs M/s. Cosmopolitan Trading Corporation and Harish Chand Bader as indicated hereinabove.

6. I deem it appropriate at this juncture to consider the relevant statutory provisions. Rule 5 of Order 38 CPC reads as under-

"Rule 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.

(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."

7. It is well settled that the object of the provisions for attachment before judgment is to prevent any attempt on the part of the defendant to defeat the realisation of the decree that may be passed against him. The rule applies only where the defendant is about to dispose of, or remove from the local limits of the jurisdiction of the court, his properties. It is therefore, necessary before the rule can be applied to show that the defendant has acted, or is about to act with the intent to obstruct or delay the execution of the decree that may be passed against him. There must be definite evidence on the points that the defendant is about to dispose of the whole or part of his property and that the disposal is with the intention of obstructing or delaying the decree that may be passed against him. As the court must act with the utmost circumspection before issuing the order under this rule, the affidavit filed in support of the application therefore must disclose the malafide intention and conduct of the defendant in disposing of his property with dishonest intention. Before exercising jurisdiction under this rule and passing orders for the attachment of properties before judgment, the court should satisfy itself of the practical certainty of the plaintiffs success and of the existence of a grave danger and of a real fear that the dishonest defendant, undoubtedly liable in making away with the probable fruits of the judgment. The sine qua non for an order under this rule is that the defendant is doing all these things with the dishonest intention of defeating or delaying the possible decree in the suit. Though the remedy provided under Order 38 Rule 5 is a harsh one and judicial discretion should not be exercised until a clear case has been made out, the court can order to furnish security if it is satisfied.

8. Having heard learned counsel for the parties and after closely scrutinised the affidavit filed by the plaintiffs and the legal objections raised by the defendants I am satisfied that the ingredients required to attract the provisions of order 38 Rule 5 CPC are found lacking in the instant matters. The plaintiffs having failed to establish a clear case of attachment before judgment of the defendant's property are not entitled to any relief under Order 38 Rule 5 CPC.

9. This brings me to the other relief of temporary injunction sought by the plaintiff. Undeniably the injunction applications have been filed in suits for recovery of money therefore the principal question that requires my consideration is, whether an injunction can be granted in a suit for recovery of money where the court is satisfied that the defendant threatens or intends to remove or dispose of his property?

10. The plaintiffs in their rejoinders specifically averred that the defendants 1 to 5 intend to sell their properties and for this purpose an agreement to sell in respect of the properties shown in para 12 of the applications, was executed on June 14, 2000 before the Deputy Registrar (11). It was also pleaded that sixth respondent Bank of Rajasthan instituted FIR No. 18/2000 on January 14, 2000 against the defendants under Sections 406, 420 and 421 of the Indian Penal Code. These averments have been supported by the affidavits of Harish Chand Bader. The affidavits have not been countered by the defendants. Therefore from the uncontroverted affidavits of Harish Chand Bader in both the applications it is prima facie established that the defendants 1 to 5 intend to sell the property. In view of this filing of affidavit of Property Dealer Ashok Joshi is not required and I do not agree with the observations of the learned court below. The learned Judge ought to have acted upon the uncontroverted affidavits of Harish Chand Bader.

11. Full Bench of Delhi High Court in *Chanddu Lal v. Municipal Corporation of Delhi* (1), indicated that a person who seeks a temporary injunction must satisfy the court as to the insistence of the following conditions.

"First, that there is a serious question to be tried in the suit and that on the facts before the court there is a probability of his being entitled to the relief asked for by him,

secondly, that the court's interference is necessary to protect him from that species of injury which the court calls irreparable, before his legal right can be established on trial, and

thirdly, that the comparative mischief or inconvenience which is likely to issue from withholding the injunction will be greater than that which is likely to arise from granting it."

12. As already stated the plaintiffs instituted two suits for recovery of Rs. 17.40 lacs and 19.80 lacs against the defendants 1 to 5 who submitted replies raising various legal questions in respect of maintainability of suits. But from the cheques issued by the defendants in favour of the plaintiffs against payment of advance interest and other material on record it is prima facie made out that various amounts of loans were advanced by the plaintiffs to the defendants. The apprehension of the plaintiffs that the properties of the defendants 1 to 5 are exposed to manifest peril when the defendants committed default in payment of loan amount is perfectly just. The Division Bench of Allahabad High Court in *Manoj Kumar Singhal v. Bank of India* (2), in some what similar situation observed that when it is prima facie made out that the plaintiff Bank advanced loan to the defendants, the balance of convenience is in favour of the plaintiff bank because in case the defendants are allowed to transfer, alienate the property, that would cause an irreparable loss to the plaintiff bank. It was indicated by their Lordships of Allahabad High Court that-

"The institution of the suit and pendency of the suit enable the defendants to create more encumbrances on the properties. Various liabilities so created

further complicate the situation when it comes to the recovery of the amount qua which a decree may be passed on conclusion of the trial."

It was further held that-

".....it will certainly by put loan irreparable loss if the defendants are allowed to dispose of, transfer or alienate the property in question in any manner with a view to defraud their creditor i.e. Bank."

13. Earlier also the Division Bench of Allahabad High Court in Allahabad Bank Ltd. v. Rana Sheo Ambar Singh and Ors. (3), indicated that an injunction can be granted to restrain a threatened disposal of property in fraud of creditors, whether the property is movable or immovable.

14. Calcutta High Court in Albert Judah Judah v. Rampada Gupta and Anr. (4), held that an injunction can be granted even in a suit for money. Where the court is satisfied that the defendant threatens or intends to remove or dispose of his property which is wholly outside the scope of the suit.

15. In view of the discussion made hereinabove I am of the view that injunction can be granted in a suit for recovery of money where the court is satisfied that the defendant threatens or intends to remove or dispose of his property. Learned District Judge disposed of applications seeking attachment before judgment and temporary injunction by a common order and rightly declined the relief of "attachment before judgment", but so far as relief of temporary injunction is concerned, the discretion has not been exercised by the learned Judge in accordance with the reason and on sound judicial principles and to that extent the impugned orders call for interference by this Court.

16. Resultantly, the civil miscellaneous appeals bearing Nos. 256/2001 and 257/2001 respectively preferred by M/s. Cosmopolitan Trading Corporation and Harish Chand Bader stand allowed and the impugned orders dated February 3, 2001 of the learned District Judge Jaipur City are set aside. While allowing the temporary injunction applications filed by the plaintiffs M/s. Cosmopolitan Trading Corporation and Harish Chand Bader I direct that the defendants 1 to 5 not to transfer or alienate their property in any manner whatsoever till the final disposal of the civil suits. The learned District Judge is expected to dispose of the civil suits as expeditiously as possible.

17. The civil miscellaneous appeals bearing Nos. 288/2001 and 289/2001 shall stand dismissed. No costs.