

(2006) 04 AP CK 0010
In the Andhra Pradesh High Court
Case No : C.M.A. No. 132 of 2006

Deepika Constructions, Engineers and Civil Contractors and
Another

APPELLANT

Vs

Garikipati Radha Krishnaiah and Others

RESPONDENT

Date of Decision : 06-04-2006

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 38 Rule 5, Order 38 Rule 5(1), Order 38 Rule 5(3), Order 38 Rule 5(4), Order 38 Rule 6

Citation : (2006) 3 ALD 831 : (2006) 3 ALT 308

Hon'ble Judges : D.S.R. Varma, J;B. Seshasayana Reddy, J

Bench : Division Bench

Advocate : Bankatlal Mandhani, for the Appellant; B. Srinivasa Rao, for Respondent Nos. 1 and 2., for the Respondent

Final Decision : Dismissed

Judgement

B. Seshasayana Reddy, J.—This Civil Miscellaneous Appeal under Order 43 Rule 1 (q) is directed against an order dated 17-11-2004 passed in I.A.No. 181 of 2004 in O.S.No. 12 of 2004 on the file of the Court of II Additional District Judge, Guntur.

2. The appellants in this appeal are defendants 1 and 2 in O.S.No. 12 of 2004. 1st Respondent-plaintiff filed a suit for recovery of a sum of Rs. 10,85,933/- with interest and costs from the defendants basing on a promissory note dated 9-4-2001 for Rs. 6,50,000/-. In the said suit the plaintiff moved I.A.No. 181 of 2004 under Order 38 Rule 5 r/w Section 151 of C.P.C. seeking attachment before judgment of amounts lying with the Executive Engineer AMRB Projects, Gandhamarigudem, Nalgonda, payable to defendants 1 and 2 on account of remodelling of Udaya Samudram Tank, Ponnugal, pending disposal of the suit.

3. The material averments in the affidavit filed in support of I.A.No. 181 of 2004 sworn to by Garikapati Radha Krishnaian-Plaintiff read that the defendants with an intent to obstruct or delay execution of the decree that may be passed against

them are trying to dispose of their property and also with a view to evade debts due to them and other genuine creditors are trying to alienate the property. The defendants have to receive several amounts on account of the contract work completed by them. The defendants are hastily attempting to take away the amounts due from the department and if they are permitted to do so, he may not be in a position to recover any thing from the defendants in the event of decree being passed against them in the suit.

4. The learned District Judge, on perusal of the material available on record, issued a show cause notice to the defendants No. 1 and 2 while ordering conditional attachment by way of pro order on 19-3-2004.

5. Defendants Nos. 1 and 2 entered appearance and filed counter. It is stated in the counter affidavit that the plaintiff is not entitled to any relief under Order 38 Rule 5 C.P.C. unless he makes out a case that the defendants No. 1 and 2 are attempting to alienate their properties. It is further stated in the counter that the defendant No. 1 is a registered contractor having its contract works in State of A.P. and elsewhere in India, with annual turnover in crores. They have machinery and immovable properties worth crores of rupees besides deposits in Bank.

6. Learned District Judge, on consideration of rival claims of the parties, directed the defendants No. 1 and 2 to furnish their own security to the suit claim along with one third party security by submitting their original title deeds for the value of the suit claim, by an order dated 17-11 -2004. For better appreciation, we may extract the relevant portion of the order and it is thus;

In the result, the respondents 1 and 2 who are defendants 1 and 2 in the main suit, are directed to furnish their own security to the suit claim in the name of the Court with one third party security in the name of the Court by submitting their original title deeds for the value of the suit claim. On fulfillment of such conditions, the interim attachment orders passed in this matter, dated 9-2-2004, are raised, Failing which the interim attachment orders passed by this Court shall continue till disposal of the main suit. If the respondents 1 and 2 fulfilled the conditions as imposed against them, the attachment orders passed in this matter against R-3 and R-4 will be raised. If not, they shall continue till disposal of the main suit. Ordered accordingly, Call on for compliance report by 10-12-2004.

Assailing the said order, the defendants No. 1 and 2 have come up with the present Civil Miscellaneous Appeal.

7. Heard learned Counsel for the parties.

8. Learned Counsel appearing for the appellants-defendants No. 1 and 2 submits that the appellants-defendants No. 1 and 2 were having credit facilities with the Andhra Bank to a tune of Rs. 70,00,000/- as on the date of pronote and as such, there was no necessity for the appellants-defendants 1 and 2 to borrow money from a private money lender, such as the 1st respondent-plaintiff by paying exorbitant rate of interest. He further submits that statement of accounts

furnished by Andhra Bank reflects of the appellants-defendants 1 and 2 availing credit facility with the Bank as on the date of the suit pronote. A further submission has been made by the learned Counsel that the 2nd appellant/2nd defendant owns two residential flats in posh locality worth Rs. 20,00,000/- each besides having number of running contract works on hand. He would further contend that the order of attachment is made without complying the provisions of Sub-rule (1) of Rule 5 of Order 38 of CPC. In support of his submissions, reliance has been placed on the following decisions:

Sripathi Panditarajula Venkanna Babu Vs. Varalakshmi Finance Corporation, , Chairman and Managing Director, Rastriya Pariyojna Nirman Nigam Limited and Others Vs. Rambachane Singh, , Surender Singh Bajaj Vs. Kitty Steels Limited and Another, , Avinash Constructions and Sri P.V. Venugopal Rao Vs. Mrs. P. Usha Rao and Financial Adviser and Chief Controller of Accounts, A.P. TRANSCO, and Guntupalli Ramalingeswara Rao Vs. Bhattala Veerabhadram, .

In Sripathi Panditarajula Venkanna Babu's case (1st cited) it has been held that the Court before ordering attachment should be satisfied by cogent evidence that the defendant was about to alienate his properties and also that the said alienation is attempted to delay or defeat the decree. Para 7 of the judgment passed therein needs to be noted and it is thus:

An order of attachment before Judgment affects the right of the owner of the property to deal with the same even before any verdict is available against him as regards the claim of the plaintiff. Such an order is not to be passed merely for the asking or in the routine manner. There must be cogent, prima facie, materials to lead the Court to the conclusion that there has been attempts by the defendant to dispose of the property with a view to defeat the decree. Mere satisfaction that there has been an attempt to dispose of the property is in itself not sufficient and there must be further conclusion, again prima facie, that the attempt to alienate is to delay or defeat the decree. For reaching such satisfaction, there has to be before the Court some tangible material than the mere statement without giving any particulars and without disclosing the source of the information of attempted alienation. The learned Subordinate Judge should have been alert to the fact that there was actually no third party affidavit as the second affidavit was only of the Clerk of the respondent-firm who was under its control as an employee. The affidavits in themselves do not disclose as to when an attempt was made to alienate, what type of alienation was intended to be made and to whom the alienation was being desired to be made and who gave such information. The learned Subordinate Judge did not make any such enquiry before passing the order which grossly and adversely affected the appellant. In the order passed on 4-12-1995, no time was fixed to enable the appellant to furnish security. While passing the final order, the Court was not alive to the fact that the respondent's agent had accompanied the bailiff from the Madras Court and finding the respondent merely absent recorded remark that the security was not furnished by the appellant. One fails to understand as to how if the appellant

was absent, he failed to furnish security. Merely because the appellant was not present at the spot when the bailiff went there, it did not mean that he was absent for all times. It could not certainly be said that the appellant must be found at his place whenever the bailiff choose to visit and the moment he is not found, the property would be attached. There was no genuine attempt made to enable the appellant to furnish security. The report further shows that the bailiff went to item one of the property and finding that the appellant was absent, he called upon the wife and son of the appellant to furnish security and on their failure to do so, attached the property. Obviously no time was given to the respondent to know of the order of the Court and to furnish security as directed. The procedure followed is highly irregular. Consequently, we are to hold that the appellant was never given any opportunity to furnish security for which the impugned order passed is void under Order 38, Rule 5(4) CPC. In that view of the matter, we set aside the impugned order and allow the civil miscellaneous appeal with costs.

In *Chairman and Managing Director, Rastriya Pariyojna Nirman Nigam Limited* (2nd cited) it has been held that an Order under Order 38 Rule 5 can be passed only after primary satisfaction of obstructive conduct of defendant-appellant and that mere allegation of likelihood of appellant leaving jurisdiction of Court after recovering money from garnishee in itself without reaching primary satisfaction is not sufficient to pass order of attachment before judgment.

In *Surender Singh Bajaj's* case (3rd cited) it has been held that the satisfaction of the Court that the defendant with an intention to obstruct or delay the execution of the decree that may be passed by it, 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 the Court, *issine qua non* for exercising the power under Order 38, Rule 5.

In *Avinash Constructions* case, (4th cited) it has been held that before passing an order under Order 38 Rule 5 CPC, it is incumbent upon the Court to satisfy itself of the existence of the conditions laid down in the said Order. The conditions precedent for passing an order under Order 38 Rule 5 CPC are:

- (1) Satisfaction of the court whether the defendant is about to dispose of the whole or any part of his property; or
- (2) The defendant is about to remove the whole or any part of his property from local limits of the jurisdiction of the court;
- (3) The defendant should be asked, within a time to be fixed by it, to furnish security, or;
- (4) To show cause why such a security should not be furnished.

If these conditions are violated, the order becomes void in terms of Sub-rule (4) of Rule 5 of Order 38 CPC.

In Guntupalli Ramalingeswara Rao's case (5th cited) it has been held that the Court should record satisfaction before ordering conditional attachment. Order passed without recording satisfaction is liable to be set aside.

9. Learned Counsel appearing for the 1st respondent-plaintiff submits that the Court below ordered show cause notice as well as conditional attachment on 19-3-2004 and thereupon the appellants-defendants 1 and 2 entered appearance and filed counter and the order impugned in the appeal came to be passed on hearing both the parties and thus the impugned order does not suffer from any illegality or irregularity warranting interference of this Court and accordingly, the appeal is liable to be dismissed. It is also submitted by him that the affidavit filed in support of the application seeking attachment of the properties of the appellant No. 2-Defendant No. 2 lying in the hands of respondents 2 and 3 herein is explicit that the appellants-defendants No. 1 and 2 are trying to dispose of their properties with a view to avoid and defeat the debts due to him and other genuine creditors. It is further averred in the affidavit that the appellants-defendants No. 1 and 2 also indebted to others namely G. Venkata Rattaiah, G. Rama Meera Prasad and Katta Brahma Vardhana Rao and, in the circumstances of the case, the trial Court is justified in directing the appellants-defendants No. 1 and 2 to furnish their own security apart from third party security as a condition precedent for raising the attachment order dated 9-2-2004.

10. Learned Counsel appearing for the appellants/defendants 1 and 2 would contend that on the date of the pro-note, the appellant No. 2-defendant No. 2 was out of country and this factual aspect would create any amount of doubt on the genuineness of the pronote which formed the basis for the suit claim and thus it would be undesirable to grant attachment before judgment of the amounts payable to the appellants/defendants pending the suit. During the course of arguments he refers to the Photostat copies of passport and endorsements made therein.

11. We are not inclined to refer the endorsement made on the passport since the appellants/defendants did not choose to make available those documents in the trial Court nor there was any pleading advertent to the entries on the passport in the counter filed resisting the application of 1st respondent-plaintiff. Copy of counter filed by the appellants/ defendants resisting the application of 1st respondent/plaintiff has been made available at page 21 of the paper book. The counter comprises three paragraphs. For better appreciation, we may reproduce the contents of the counter affidavit and it is thus:

1. The respondents submit that the I.A. filed for attachment before judgment is not maintainable in law. The petitioner has not specifically made out the requisite conditions for affecting the attachment before judgment as contemplated under Order 38 Rule 5 of CPC. The affidavit filed by the petitioner seeking attachment before judgment does not contain any specific allegation against the respondents stating that the respondents are about to dispose of the whole or any part of their properties or is about to remove the whole or any part of their property

from the local limits of the jurisdiction of the Court. Unless the petitioner makes out his case stating that the respondents are selling away their properties and that they are likely to go away from A.P. he is not entitled to the relief as contemplated under Order 38 Rule 5 of CPC.

2. The respondents deny all the allegations of the affidavit filed by the petitioner. The petitioner filed a false suit on the basis of fabricated and forged documents. The respondent has not borrowed the suit claim amount and not executed the suit documents. The petitioner filed false suit at the instance of Gadde Venkata Rattaiah to have a wrongful gain.

3. The respondent No. 1 is a registered contractor having its contract works in the State of A.P. and elsewhere in India, with annual turnover in crores. The respondents are having machinery and immovable properties valued at crores. The respondents are having deposits with Bank and CDS deposits. The respondent No. 1 is having credit facilities with the Bank. The respondents are neither disposing of their properties nor leaving the State of Andhra Pradesh. Unless the attachment order is raised the respondents shall suffer irreparable loss and hardship for want of circulation of money in carrying out the contract works. If attachment order is raised no prejudice is going to be caused to the petitioner.

It is explicit from the counter affidavit filed by the appellants/defendants that 2nd defendant did not plead that he was away from the country on the date of the suit pronote. In the absence of such a pleading we are not inclined to refer the entries appearing on the copy of the passport filed along with material papers in the appeal.

12. Before an order is passed under Order 38 Rule 5 CPC it is incumbent upon the civil court to satisfy itself of the existence of the conditions laid down in Order 38 Rule 5 of CPC. Order 38 Rule 5 CPC reads as follows:

Where defendant may be called upon to furnish security for production of property:

5(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.

It is necessary to refer Order 38, Rule 6 of CPC, which reads as follows:

Order XXXVIII, Rule 6: Attachment where cause not shown or security not furnished:

(1) Where the defendant fails to show cause why he should not furnish security, or fails to furnish the security required, within the time fixed by the Court, the Court may order that the property specified, or such portion thereof as appears sufficient to satisfy any decree which may be passed in the suit, be attached.

(2) Where the defendant shows such cause or furnishes the required security, and the property specified or any portion of it has been attached, the Court shall order the attachment to be withdrawn, or make such other order as it thinks fit.

It is well settled that conditional order of attachment could be without notice to the defendant vide the decision of this Court in Yenamala Chandra Reddy Vs. Nuvvula Chandramouli Naidu and Others, . The very fact that the defendant could file an application under Order 38, Rule 6(2) of CPC for withdrawal of attachment indicates that the power of issue of conditional attachment without notice to defendant under Order 38 Rule 5(3) of CPC is manifest.

13. 1st respondent-plaintiff specifically pleaded in the affidavit filed in support of the petition under Order 38 Rule 5 CPC that the defendants are indebted to various creditors namely Gadde Venkata Rattaiah, G. Rama Meera Prasad and Katta Brahma Vardhanarao and that they are trying to alienate the property to avoid and defeat the debts due to him and other genuine creditors. It is further averred in the affidavit that the appellants/defendants are hastily attempting to withdraw the amounts due from the Department and if they are permitted to do so he may not be in a position to recover anything from them in the event of decree being granted in the suit. The learned District Judge while issuing show cause notice ordered conditional attachment. The appellants/defendants failed to furnish the security and consequently attachment came to be effected. The appellants/defendants in pursuance of the show cause notice entered appearance and filed counter. The learned District Judge, on considering the material on record, directed the appellants/defendants to furnish their own security along with third party security to the suit claim as a condition precedent for raising the interim attachment order effected on 9-2-2004. In the given facts and circumstances of the case, we do not see any violation of the conditions stipulated under Order 38 Rule 5 CPC in the order impugned in this appeal.

14. Accordingly, this Civil Miscellaneous Appeal fails and the same is dismissed.
No order as to costs.