(1993) 07 MAD CK 0018

In the Madras High Court

Espee Agencies and Others APPELLANT

Vs

State Bank of India RESPONDENT

Date of Decision : 09-07-1993

Acts Referred:
Civil Procedure Code, 1908 (CPC) — Order 26 Rule 10C

Citation : (1993) 2 MLJ 377

Hon'ble Judges : Srinivasan, J

Bench : Single Bench

Judgement

Srinivasan, J.—The respondent filed the suit O.S. No. 622 of 1992 on the file of the Principal Sub Court, Trichy, for recovery of a sum of

more than Rs. 1 crore in all. In the plaint, the plaintiff has also prayed for a direction to sell the mortgage properties shown in Schedule ''A'' to the

plaint and the hypothecated property shown in Schedule ''B'' to the plaint without prejudice to the plaintiffs right of seizure and to auction the same

either by way of private treaty or by way of public auction. The petitioners who are the defendants in the suit have not yet filed the written

statement in the suit though it is nearly a year from the date of filing of the suit.

2. The plaintiff filed I.A. No. 489 of 1992 for appointment of a Receiver to take inventory of the stock-in-trade and other assets of the defendants

and to take possession and auction the same and to remit the sale proceeds into court to the credit of the suit. The application was opposed by the

petitioners. Ultimately, the parties made a joint endorsement on 12.10.1992 as follows:

The respondents are willing to surrender all the stocks of their business mentioned in items 1,2(a), 3(a) and 4 as mentioned in the petition. The stocks are available ""now at C-95, Fort Station Road, Thillai Nagar, Tiruchirapalli-17. The date of surrender is on 14.10.1992 at 8 a.m. Both

Advocates should take inventory and sign the surrender of stock statement list.

Pursuant to the said joint endorsement, the stocks were inventoried and handed over to the plaintiff on 14.10.1992. The petitioners set out the

value of the goods in the inventory as Rs. 3,26,023.79 in all. The plaintiff protested against the same and made an endorsement that it has not

accepted the value of the goods given by the petitioners herein and without prejudice to the other rights of the plaintiff, the goods were taken over

by it on that date.

3. Subsequently, the plaintiff filed I.A. No. 705 of 1992 for appointment of an Advocate-Commissioner to auction the goods covered in the

inventory and surrendered to the plaintiff. In the affidavit filed in support of the application, it is stated that at the time of making the joint

endorsement in the receiver application, the defendants promised to give consent either to repurchase the goods after paying the value or to give

consent to auction the same. It is alleged in the affidavit that the stock is lying idle in the Bank premises and if time lapsed, the value of the stock

will get reduced and the defendants will take advantage of the said fact and argue on that point. Hence, in order to avoid the reduction in value of

the goods, the direction for appointment of a commissioner to sell the same was made. The petitioners filed a counter-affidavit alleging that the

plaintiff agreed to give credit to the value of the goods as set out in the inventory. In fact, it was stated that the plaintiff agreed to give credit for Rs.

3,24,000 and only on that understanding, the goods were surrendered to the plaintiff.

4. There is no record for either the alleged agreement of the plaintiff to give credit for Rs. 3,24,000 or for the alleged agreement by the defendants

to pay the value of the goods and take back the goods or to agree for reauction. In those circumstances, the court has to proceed as if there was

no agreement of any kind with regard to the goods between the parties. The court below has appointed the Commissioner accepting the

contentions of the plaintiff that the goods will get deteriorated in value if they are kept idle for a long time. The Commissioner was directed to give

notice to both sides and sell the goods in public auction.

5. This revision petition has been filed against the said order. Four contentions are urged by learned Counsel for the petitioners. The first is that the

goods are textile goods and they cannot be considered to be perishables. No one can deny the fact that textile goods will get reduced in value in

course of time either by fading of colour or by change of fashion or due to other reasons. Hence, there is no point in keeping the goods idle without

either the plaintiff selling the same and realising the value or the defendants selling the same and paying the value to the plaintiff. The defendants

have already surrendered the goods on the footing that they were not in a position to sell the same. Hence, the plaintiff must be allowed to sell them

and in the interest of justice, it is better that the Advocate-Commissioner sells the same.

6. The second contention is that if the goods are sold in public auction they will not fetch the proper value and the nature of the goods are such that

they should be kept in a show room and be sold piece-meal. Because such a possibility was not available to the defendants, they surrendered the

goods. Having surrendered the goods to the plaintiffs custody, it is not open to the defendants to raise the contention at this stage and prevent the

plaintiff from bringing the goods for sale by public auction. If the defendants are so keen on selling the goods piecemeal, they should deposit the

value of the goods which according to them in Rs. 3,26,023.79. Even now, the defendants will be given an opportunity to deposit that amount with

the Bank and take back the goods, so that they can sell it at a profitable price if they are so inclined. I will give a period of four weeks time to the

defendants for making such a deposit.

7. The third contention is that the Bank being in custody of the goods should not be permitted to sell the same and they should keep it as security

till the suit is disposed. It is also argued that the Bank is also having security in the shape of immovable properties which are described in Schedule

''A'' to the plaint and there is no necessity for the sale of the goods at this stage. There is no merit in this contention as the clear statement of the

bank is that the securities are not sufficient to meet the amount due to the bank. The defendants have not chosen to file a written statement till now

setting out the amounts which are due to the bank according to them or furnish the total value of the security. In the circumstances, this contention is rejected.

8. The next contention is that in law, the bank is not entitled to pray for sale of the goods before a decree is passed in its favour. The application

has been filed under Order 26, Rule 10(c) of the Code of Civil Procedure. Rule 10(c) refers to appointment of Commissioner for sale of

immovable property. Clause 1 reads thus:

Where, in any suit, it becomes necessary to sell any movable property which is in the custody of the court pending the determination of the suit and

which cannot be conveniently preserved, the court may, if, for reasons to be recorded, it is of opinion that it is necessary or expedient in the

interests of justice so to do, issue a commission to such person as it thinks fit, directing him to conduct such sale and report thereon to the court.

Clause 3 provides that every such sale shall be held, as for as may be, in accordance with the procedure prescribed for the sale of movable

property in execution of a decree.

9. This Rule contemplates the sale of movable property even before the passing of a decree and pending the determination of the suit. In this case,

the goods cannot be conveniently preserved till the end of the suit as the value will go down considerably if the goods are kept idle. The defendants

having expressed their inability to sell the goods and giving the value to the plaintiff have surrendered the goods already to the plaintiff. Hence, there

is no difficulty in holding that this is a fit case in which the goods should be directed to be sold even before the determination of the suit. The order

passed by the court below directing the sale of the goods by an Advocate-Commissioner is quite appropriate in the facts and circumstances of the

case and it meets the ends of justice. I have no doubt that the defendants are only trying to protract the proceedings as long as possible and

prevent the bank from realising its dues.

10. In the result, the civil revision petition has to fail and be dismissed. However, as stated already, I am of the view that one more opportunity

could be given to the defendants to pay the value of the goods according to their statement to the Bank and take back the goods so that they can

sell the same at a profit if they are so inclined. The defendants are granted time till 6.8.1993. If the defendants deposit with the Bank a sum of Rs.

3,26,000 on or before 6.8.1993, the Bank shall return the goods to the defendants/petitioners herein If such deposit is not made by the

defendants, the Advocate-Commissioner appointed by the trial Court shall proceed to sell the goods by auction after due notice to the parties.

11. It is also open to the defendants to get private purchasers and in case, such purchasers are brought to the Bank, the latter will permit inspection

of goods. The goods will be released by the Bank if money is deposited as directed above. If money is deposited and the goods are released, the

Bank will keep the said amount in suspense till the disposal of the suit. The civil revision petition is ordered accordingly. No costs.

