

(1986) 03 KAR CK 0013

In the Karnataka High Court

Case No : C.R.P. No"s. 56 and 2328 of 1984 and M.F.A. No. 1587 of 1984

K. Kunhambu

APPELLANT

Vs

Syndicate Bank, Manipal and Another

RESPONDENT

Date of Decision : 07-03-1986

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 6, Order 39 Rule 7, Order 39 Rule 8, Order 39 Rule 8 (3), Order 40 Rule 1

Citation : AIR 1987 Kar 40 : (1986) ILR (Kar) 1843

Hon'ble Judges : P.A. Kulkarni, J

Bench : Single Bench

Advocate : U.L. Narayana Rao, for the Appellant; B.R. Aswatharam, for the Respondent

Judgement

1. C.R.P. No. 56/1984 by the 1st defendant is directed against the order dt. 12012-1983 passed by the Principal Civil Judge, Mangalore, in O.S. No. 250/1983 rejecting I.A. No. 4.
2. C.R.P. No. 2328/1984 by the 1st and 2nd defendants is directed against the order dt. 18-7-1984 passed by the Principal Civil Judge, Mangalore, in O.S. No. 250/1983 allowing I.A. 6.
3. M.F.A. No. 1587/1984 by the 1st and 2nd defendants is directed against the order dt. 18-7-1984 passed by the Principal Civil Judge, Mangalore, in O.S. No. 250/1983 allowing I.A. No. 5.
4. As all these matters arise out of the orders passed in O.S. No. 250/1983, I deem it proper to dispose of these matters by a common order.
5. The plaintiff filed O.S. No. 250/1983 against the revision petitioners in both the C.R.P s and the appellants in the M.F.A. to recover Rs.56,72,778.75 alleging that the Ist defendant, for the purpose of his business, approached the plaintiff-bank for two types of facilities viz., Secured Loan in a sum of Rs.8.50 lakhs and secured over drafting sum of Rs.6.50 lakhs. The plaintiff agreed to grant the

necessary accommodation to the defendants. After mutual discussion, the plaintiff made available to the defendants the said facilities. The 1st defendant pledged the stock-in-trade and the machineries and mortgaged his property in Mangalore and Immovable landed property situated in Kodagu District as security. Defendant 2 stood as co-obligant. Both of them pledged the stock-in-trade and the machinery and mortgaged the property in Mangalore and Immovable property situated in Kodagu District as security for the said loans. After giving deduction to all the payments made by the defendants, still Rs.56,72,778.75 are due from the defendants. Hence the suit.

6. After filing the suit, the plaintiff filed an application I.A. No. 2 under O. 39, R. 7 for an order of detention and preservation of the hypothecated stock-in-trade and the machineries.

7. The trial court passed on 30-11-1983 an order of detention and preservation of "A" and "B" schedule properties by seizure thereof and issued notice of I.A. 2 to the defendants.

8. The defendants filed I.A. 4 to modify/ discharge/rescind/recall the order of seizure, detention and preservation made by the Court on I.A. 2.

9. The court below, on consideration of the materials, rejected I.A. 4. Hence the revision in C.R.P. 56/1984.

10. The plaintiff filed an application I.A. No.5 under O.40, R.1 C.P.C. for the appointment of a Receiver in respect of the Immovable properties described in plaint Schedules-A (item No. 2), C.D.E and F.

11. The defendants resisted it. The plaintiff also filed an application I.A. No. 6 under O. 39, R. 6 C.P.C. for the sale of the hypothecated movables seized as per the ex parte order on I.A. 2. It was also resisted by the defendants.

12. The court below passed an order on 18-7-1984 allowing both I. As. 5 and 6. Being aggrieved by the order passed on I.A. No. 5, -the defendants have approached this court with M.F.A. No. 1587/1984. Being aggrieved by the order passed on I.A. No. 6, the defendants have approached this court with C.R.P. No.. 2328/1984.

13. The defendants have borrowed in all about Rs.15 lakhs from the plaintiff-Bank by hypothecating the properties mentioned in the suit-schedule "A", "B","C","D, "E" and V. The plaintiff after giving deductions to the amounts paid by the defendants has filed the suit to recover a sum of Rs.56, 72,778.75, from the defendants.

14. I.A. 2 was filed by the plaintiff under O. 39, R. 7 C.P.C. for the detention and preservation of the hypothecated stock-in trade set out in Schedule-A of the plaint and of the hypothecated machinery set out in Schedule-B of the plaint, and to direct the seizure of the said items and hand over the same to the custody of the plaintiff-bank or to such other person as the court deems fit alleging that as

per the terms of the hypothecation deed, the plaintiff-bank is entitled to seize and sell the hypothecated properties and that the items are the subject matter of the suit and a charge decree is claimed against the said items. The plaintiff further alleged that the defendants are not taking any interest in the upkeep of the machinery and the factory is neglected by the defendants and is not in a working condition. It was further alleged that the letter written by the 1st defendant to the plaintiff disclosed that the defendants were not taking any interest in the upkeep of the machinery or the factory. Further the plaintiff alleged that it has got the first charge over the hypothecated items and the same had to be preserved and suitable steps had to be taken in that regard. It is further alleged that in case they are not taken care of immediately, they will not be available for realization of the decree amount. They further alleged that the defendants may dispose of the hypothecated items if they come to know of the filing of the suit by the plaintiff. Hence the notice maybe dispensed with.

15. The court below passed an ex parte order on I.A. 2 as follows:

"Heard the arguments on I.A. 2. Case made out. Issue an order for detention and preservation of "A" and B" schedule properties by seizure of the properties under O. 39, R. 7 C.P.C. as prayed for. Issue notice of I.A. 2 by 15-1-1984."

The above order was made on 30-11-1983. Sri U.L. Narayana Rao, learned counsel for the petitioners urged that the order passed is in violation of O. 39, Rr. 6, 7 and 8 and also in violation of the principles laid down by this Court in Palghar Rolling Mills Pvt. Ltd. Vs. Visvesvaraya Iron and Steel Ltd. and Another,

16. Order 39 Rule 7 C.P.C. reads thus:

"7(I). The court may, on the application of any party to a suit and on such terms as it thinks fit. -

a) Make an order for the detention, preservation or inspection of any property which is the subject matter of such suit, or as to which any question may arise therein;

b) For all or any of the purposes aforesaid authorize any person to enter upon or into any land or building in the possession of any other party to such suit; and

c) For all or any of the purposes aforesaid authorize any samples to be taken, or any observation to be made or experiment to be tried, which may seem necessary or expedient for the purpose of obtaining full information or evidence.

2) The provisions as to execution of process shall apply, mutates mutatis, to persons authorized to enter under this rule."

This rule authorizes the court to pass an order for the detention, preservation or inspection etc. of the subject matter of the suit. The learned counsel Sri Narayana Rao drew my attention to O. 39, R. 8, C.P.C. which reads as follows:

"8(I) An application by the plaintiff for an order under R. 6 or R. 7 may be made

at any time after institution of the suit.

2) An application by the defendant for a like order may be made at any time after appearance.

3) Before making an order under R. 6 or R. 7 on an application made for the purpose, the court shall, except where it appears that the object of making such order would be defeated by the delay, direct notice thereof to be given to the opposite party."

According to Sri Narayana Rao, R. 8(3) contemplated that the court should not normally pass an order under R. 6 or 7 without notice to the other party to be affected thereby. According to him, the court must find that the object of making such an order would otherwise be defeated by the delay. In short he contended that without issuing notice as contemplated by O. 39, R. 8(3), if any order was passed under R. 7, it would be an order passed without jurisdiction and such an order would be illegal and void.

16A. Sub-rule (3) of R. 8 was not to be found in the CPC as it stood before the amendment in 1976. Rule 8(3) does not take away the jurisdiction of the court to pass an ex parte order but it only cautions the court that it could pass an ex parte order if it appeared to it that the object of making such order would be defeated by the delay. Thus O. 39, R. 8(3) does not take away the jurisdiction of the court to pass an order under O. 39, R. 7, C.P.C. It only gives a caution to the court that if it wants to pass an ex parte order, it should be satisfied that the object of making such order would otherwise be defeated by the delay. If that were present to the mind of the court while passing an ex parte order, it would satisfy the requirement of law.

17. The ruling in Palghar Rolling Mills Pvt. Ltd. Vs. Visvesvaraya Iron and Steel Ltd. and Another, considers an order under O. 38, R.5. The words used in O. 38, R. 5 are different from the words used in O. 39, R. 7. C.P.C. Order 38, R. 5(4) states that if an order of attachment is made without complying with the provisions of sub-rule (1), such attachment shall be void. A similar provision is not to be found in O. 39, R. 8 or 7 or 6. Therefore, the said ruling of this court relied on by the learned counsel Sri Narayana Rao will not be of much assistance to him in the present case.

18. I have extracted the ex parte order passed on 30-11-1983 by the court below on I.A. No. 2. What the court below mentioned in the said order is that the case was made out, In I.A. No. 2, it has been mentioned by the plaintiff that the notice of the application maybe dispensed with as it was likely that the defendants may dispose of the hypothecated properties if they came to know of the institution of the suit. Therefore, the expression "the case made out" would only indicate that if an ex parte order was not made immediately, the defendants might remove or cause disappearance of the properties. No doubt it would have been much better if the court had stated in specific terms that if-the ex parte order under O. 39, R. 7 was not passed immediately, the properties were likely to

be removed by the defendants. In order to comply with R. 8(3) of O. 39, the court was of the opinion that the case as contemplated by R. 8(3) had been made out. The court should see that the order passed by it should be in compliance with the requirements of O. 39, R. 8(3). The simple omission to mention the specific words used in O. 39, R. 8(3) O.P.C. will not make the order bad if the order passed goes to show that the court has applied its mind to the facts of the "Case and if the court was satisfied that the delay that might be caused in passing an order would defeat the ends of justice and would defeat the object of making such an order. Therefore, the argument of Sri Narayana Rao that the ex parte order passed on IA. No. 2 does not satisfy the requirements of O. 39, R. 8(3), C.P.C. does not appeal to me. However, I would like to caution the trial courts that while passing an ex parte order under O. 39, Rr. 6 and 7, it should state clearly in the order that if the ex parte order was not made immediately, the object of making such an order would otherwise be defeated by the delay that might be caused by the issuance of the notice. In my opinion, the order passed on I.A. No. 2 cannot be said to be illegal or null and void or cannot be said to be passed without jurisdiction.

19. I. A. No. 4 has been filed by the I st defendant u/s 151 read with Order 39, Rule 7 requesting the court to modify/discharge/rescind /recall the order passed on I.A. 2 alleging that he was running the business so that he could generate funds to clear the liability and that he has absolutely no intention of removing/alienating/disposing of the stock-in-trade or the hypothecated machineries. He has further alleged that if on the basis of the order made, the stock-in trade is seized and machineries are removed, they would deteriorate in quality and value and go waste and will not fetch a proper price. Further he himself has stated in his counter that the machineries were taking to rust and if not used, they would be damaged and may not bring sufficient price in the market. Further he has stated in his letter-dated 2-9-1986 addressed to the plaintiff-bank as follows: -

"With reference to the above subject matter we beg to inform you that our Saw Mill is not working since the year 1976 and all the machineries have been dismantled for repairing etc. Now these machineries have started rusting and partly became scrap already. Further due to the flood and cyclone the superstructure has been fallen almost completely. Apart from these as we used to point out the present location is not at all suitable for running a saw mill due to the flood in the rainy season which normally engulfs the entire saw mills, inadequate transport facilities and very frequent thefts.

Considering the above facts we request you to kindly allow us to sell the machineries along with the super-structure immediately. Please note that the entire sales proceeds shall be remitted to your bank."

Thus this letter itself goes to show that the machineries had started rusting and had partly become scrap already. Further he has stated that due to flood and cyclone the superstructure has fallen almost completely. He has further stated that the present location is not at all suitable for running a sawmill due to the

flood and also due to inadequate transport facilities and very frequent thefts. Thus For his own admission, the machineries hypothecated to the Bank are rusting day by: day and some parts of the machinery have practically become a scrap. Thus these admissions would go to show that the security i.e., the hypothecated machinery was losing its value and shortly it would partake the character of a scrap itself. When these are the admissions made by the 1st defendant himself, it would be in the interest of the Defendants as well as the plaintiff that the hypothecated machineries seized as per the ex parte order dt. 30-11-1983 made on I.A. 2 should be brought to sale.

20. The learned counsel Sri U.L. Narayana Rao submitted that the machineries concerned were of foreign make and that they had got great value and if sold they might not fetch proper price. According to him they are worth about Rs.5 lakhs. According to Amin's mahazar it is worth Rs.1.40 lakhs. The defendant himself has valued the machinery at Rs. 2 lakhs in his letter dated 2-9-1983. These circumstances would go to indicate that the value of the hypothecated machinery is deteriorating day by day and that the security would not be sufficient to liquidate the debt, which was mounting day-by-day. Therefore, under these circumstances, it would be in the interest of both the parties that the machinery should be sold and the sale proceeds should be adjusted towards the loan amount.

21. The learned counsel Sri Narayana Rao submitted that these machineries are necessary to run the business and earn profits for paying towards the suit loan. But his own letter dt. 2-9-1983 would go to show that the machinery itself has been dismantled and it had started rusting and had partly become a scrap already and he had stopped working it since 1976. This would go to show that the say of the 1 st defendant that he would run the machinery, earn the profit and pay the same towards the suit loan, is only a make-believe story. Therefore, the order passed by the court below rejecting I.A. No. 4 does not call for interference at all.

22. Further it can be seen with advantage that the order challenged in C.R.P No. 56/1984 is an order rejecting I.A. No. 4. The petitioner has not challenged the order passed on I.A. No. 2 and hence it has become final. Therefore, even viewed from this angle, the order passed by the court below rejecting I.A. No. 4 does not call for any interference. Thus C.R.P. No. 56/1984 merits to be dismissed.

23. The order passed on I.A. No. 6 is only regarding the sale of the machinery. The trial court has rightly allowed I.A. No. 6 for the reasons already stated. Therefore, the order passed on I.A. No. 6 by the court below does not call for any interference, Therefore, C.R.P. No. 2328/1984 challenging the order passed on I.A. No. 6 also merits to be dismissed.

24. M.F.A. No. 1587/1984 has been filed against the order passed by the court below on IA. No..5 appointing a Receiver in respect of the Immovable properties.

According to Sri Narayana. Rao, the properties in respect of which Receiver has been appointed, measures about 381 acres where plantation crops like cardamom, cocoa, pepper and coffee have been raised. According to him it was worth more than Rs. one crore. According to him, the appointment of the Receiver was highly erroneous. According to him, it was not just and convenient to appoint a Receiver in the present case.

25. The learned Author Sri Mulla has stated in his commentary on the Civil P.C., Vol. II 13th Edition at page 1538 as follows:

"In a mortgagee's suit for foreclosure or sale, where the mortgagee is entitled to enter into possession on default in payment of the mortgage moneys, the mortgagee is entitled prima facie to an order for the appointment of a receiver. The mortgagee in possession also is entitled to the appointment of a Receiver, notwithstanding that he has been paid all his interest and costs out of rents received by him while in possession and that he has surplus rent in his hands. It was so held in: *Mason v. Westoby* (1886) 32 Ch D 206. In that case Bacon V. C. said: "It is said that the appointment of a receiver will cause great expense to the mortgagors; but that cannot be helped. The mortgagee, acting in accordance with her "strict right enters into possession because she cannot get her interest. As mortgagee in possession she becomes subject to heavy responsibilities, and from those responsibilities she is entitled to be relieved by the appointment of a receiver. She has, however, while in possession, received more than the amount of her interest and costs. but that surplus she must pay to the receiver." The appointment of a receiver will be made almost as a matter of course in the case of an English mortgage on an application of the mortgagee if the interest payable under the mortgage is in arrears and the mortgagee is entitled to sell the property for default in payment of interest. If the interest is in arrears it may be just and convenient to appoint a receiver although the security is sufficient. A receiver is appointed to safeguard the interests of the mortgagee and if after the appointment of a receiver the mortgagor's interest is attached and sold in execution of money decree, the purchaser is not entitled to the income of the property realized by the receiver before the sale. In making the appointment, it has been held that the court will not consider matters that have happened since the application, though these may be the subjects of a fresh application. Where the security had diminished by the act or default of the mortgagor, or is apparently insufficient to meet the entire dues of the mortgagee on the foot of the bond in suit, and in the last mentioned type of cases, the executing Court can also appoint a receiver. A receiver may be appointed at the instance of an equitable mortgagee or of a simple mortgagee."

26. It has been laid down in *Ally Ramzan Yezdi v. Balthazar & Son, Ltd.* AIR 1936 Rang 290 that:

"In a mortgage suit, when interest is in arrear, the court will normally appoint a receiver, as of course, whether or not the property appears to be of sufficient value to cover the mortgage debt and interest, and whether or not the right of

the mortgagee to obtain a personal decree subsists or has been lost."

Further in Bai Fatubai Fidaali Lala Vs. Yusufally Esmailjee Nagree, it has been laid down that:

"In the case of an equitable mortgage or a simple mortgage the fact of interest being in arrears, with something more, would be sufficient for the court to exercise its discretion and appoint a receiver on the footing that it was just and convenient to do so. Thus where the conduct of the defendant clearly showed that he took advantage of his own sisters, paid interest for some time and thereafter declined to pay the principal sum as well as interest on the mortgage deed on the plea that somehow in his own way of thinking he had repaid the full amount which was due from him, held that it was just and equitable that a receiver should be appointed."

27. Sri Narayana Rao urged that the amount claimed by the plaintiff in the suit was usurious and it exceeded the principal amount of Rs. 15 lakhs borrowed by the defendants. I am not concerned at this stage whether the interest claimed by the plaintiff is usurious or not. But the fact remains that on the basis of the agreement between the parties, the amount had been worked out by the plaintiff-bank and the suit was filed to recover the balance due from the defendants. If the defendants think that the amount paid by them had already discharged the debt, it will not be a circumstance to deny the appointment of a Receiver as laid down by the Bombay ruling referred above.

28. It has been laid down in Manindra Chandra Ray Chaudhury and Another Vs. Suniti Bala Debi and Others, that:

"The court may appoint a receiver at the instance of a mortgagee where the action is either for foreclosure or sale if there is reason to suspect that the security is insufficient or if the interest is in arrear."

In Sri Rajah Rao Venkatakumara Mahipathi Surya Rao Bahadur Garu, the Maharaja of Pittapuram Vs. Gokuldoss Goverdhanadoss and Others, , it has been held that:

"The possession of a Receiver in a mortgage suit is prima facie for the benefit of the party who obtained the appointment."

It is further held that:

"A mortgagee who is not entitled to possession of the mortgaged properties is entitled to ask for the appointment of a receiver. Whether the mortgagee is or is not entitled to possession, he may invite the court to appoint a receiver if the demands of justice require that the mortgagor should be deprived of such possession."

It is stated in the above case that if interest has fallen in arrears, the mortgagee is entitled to seek an appointment of a receiver.

In *Banshi Dhar Vs. Ghisalal and Others*, it has been held:

"No limitation has been placed on the Court's power to appoint a receiver under Order 40 Rule I excepting that the circumstances of a given case warrant, on the ground of justice and convenience that a receiver should be appointed. Even in a case of a simple mortgage, if the circumstances of the case justify a receiver can be appointed under O. 40, R. L"

Similar principle has been laid down in *Pasumarthi Perraju Vs. Central Bank of India*, and also in *Chhaganlal vi Ramnarayan* AIR 1956 MP 244 and also in *J. Kishenlal Phoolchand v. A. Rathan Singh* ILR 1955 Mys 174 : AIR 1954 Mys 162.

29. An equitable mortgage has got all the characteristics of a simple mortgage. As per the agreement between the parties, the principal amount is Rs.15 lakhs and the rate of interest is 20%. Whether the interest claimed at 20% is usurious or not is not a matter to be considered while considering the application under O. 40, R.1, C.P.C. According to the plaintiff, the claim has swollen to Rs.56,72,778.75. Therefore, the amount that is claimed by the plaintiff even as per the agreement is huge as can be seen from the averments in the plaint. The defendants are not in a position to clear the loan amount. The very fact that the defendants have not paid the remaining amount even though they claim to be in possession of 381 acres of plantation land, would go to show that everything does not appear to be well with the defendants. The very fact of non-payment would show that the income derived from the plantation is being rather dissipated by the defendants. The claim, which was Rs.56 lakhs and odd on the date; of suit would swell further by a few lakhs of rupees by the time the suit is disposed of. Therefore, the security offered might not be sufficient to pay off the mortgage debt. Section 66 of the T.P. Act, 1882 reads:

"A mortgagor in possession of the mortgaged property is not liable to the mortgagee for allowing the property to deteriorate; but he must not commit any act which is destructive or permanently injurious thereto, if the security is insufficient or will be rendered insufficient by such act.

Explanation:- A security is insufficient within the meaning of this section unless the value of the mortgaged property exceeds by one third, or, if consisting of buildings, exceeds by one-half, the amount for the time being due on the mortgage."

Even as per the version of the defendants, the value of the hypothecated properties was about a crore or a crore and a "half rupees. The Suit is for recovering Rs.56 lakhs and odd. By the time the preliminary decree is obtained and by the time the final decree is passed, it would swell to few more lakhs of rupees bordering Rs. one crore. Therefore, the value of the security by the time the amount would be recovered would be highly insufficient and it may not be sufficient to meet the decree that may be passed against the defendants. Therefore, viewed even from this angle, the appointment of a Receiver would be just and convenient" as required by O. 40, R. 1, C.P.C.

30. The application I.A. No. 5 filed under O. 40, R. 1, C.P.C. and the affidavit of the Bank Officer annexed to it show that the defendants have secreted all the timber logs set out in item I of Schedule A of the plaint. Further, Para 5 further says:

"I say the mortgaged properties more fully set out in the plaint schedule are in the possession and enjoyment of the defendants and the said properties contain valuable timber trees and the defendants are trying further to cut and remove the timber trees standing thereon."

Further it is stated that the defendants are likely to dispose of the same in order to defeat the plaintiff's right.

31. The fact that some trees were cut, is admitted by the defendants themselves in the counter-affidavit filed by the defendants. The argument of Sri Narayana Rao is that these trees were cut and sold and the defendants have paid the sale proceeds to the plaintiff-bank. Therefore, according to him, cutting of the trees was an honest act on the part of the defendants and it was done only with a view to pay the loan and to preserve the estate. Even the stock-in-trade, which had been hypothecated to the Bank, is not now available. The very fact that the trees were cut and the very fact that the defendant-I as per his letter dated 2-9-1983 has stated that he is not in a position to run the business, would go to show that the defendants are likely to cut and remove even the remaining trees standing in the estate and would secrete the proceeds thereof. Therefore, these circumstances would clearly indicate that if the Receiver is not appointed and possession of the property is not taken immediately, the defendants would cut the valuable timber growth and secrete them and keep them away. Therefore, even viewed from this angle, the appointment of the Receiver made by the court below cannot be considered to be opposed to law or the principles of justice, equity and good conscience. Therefore, under these circumstances, the order passed by the court below appointing the Receiver also does not merit any interference. Consequently M.F.A. No. 1587/1984 also merits to be dismissed.

32. In the result, the C.R.P. No. 56/1984 and C.R.P. No. 2328/1984 and M.F.A. No. 1587/1984 are dismissed. The orders passed by the court below in all these three matters are confirmed. No costs in all the three matters.

33. At this stage, Sri U.L. Narayana Rao submitted that his clients intend to approach the Supreme Court and the order passed by this Court may be stayed for two months. I think that when the party feels that he should approach the Supreme Court, this court should not come in his way to approach the Supreme Court. Therefore, the order passed by this Court in all these three matters is stayed for two months from today i.e., till 7-5-1986 in order to enable the defendants to approach the Supreme Court.

34. Order accordingly.