

(2011) 11 MAD CK 0290

In the Madras High Court

Case No : A.No. 3608 of 2011 in C.S.No. 520 of 2011

Mohammed Saud, Sole Proprietor, M/s. Navigator Ship
Supplies, Chennai-600035

APPELLANT

Vs

Garuda Catering Company Pvt. Ltd. and Union Bank of India,
Cotton Green branch, Mumbai-400033

RESPONDENT

Date of Decision : 14-11-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 38 Rule 5, Order 38 Rule 5(1), Order 38 Rule 5(2), Order 39 Rule 1, Order 39 Rule 2

Citation : (2011) 11 MAD CK 0290

Hon'ble Judges : K. Sharma, J

Bench : Single Bench

Advocate : Abdul Quddhose, for the Appellant; C. Saravanan and S. Thenmozhi, for the Respondent

Final Decision : Dismissed

Judgement

Honourable Mr. Justice Vinod K. Sharma

1. The plaintiff/applicant has filed this application, for grant of injunction prohibiting the Garnishees from making any payment to the extent of the suit claim i.e. Rs. 33,06,263/- (Rupees thirty three lakhs six thousand two hundred and sixty three only) to the defendant and further to direct the Garnishee to deposit, the amount to the credit of the suit.

2. The plaintiff/applicant has filed a suit for recovery of money for the supplies made by the plaintiff, to the vessel M.V. Sagar Nidhi and M.V. Sagar Manjusha, at the request of the respondent/ defendant.

3. According to the plaintiff/applicant, as on date, against supplies made, there is outstanding amount of Rs. 31,07,203.79 (Rupees thirty one lakhs seven thousand two hundred and three and paise seventy paise only) which plaintiff/applicant is entitled to recover along with the interest at the rate of 24% p.a.

This application has been filed by the plaintiff/applicant by pleading therein as under:

15. The first garnishee who are the owner of the vessels M.V. Sagar Nidhi and M.V. Sagar Manjusha have awarded contract to the defendant for the supply of necessities to their vessels M.V. Sagar Nidhi and M.V. Sagar Manjusha for which they are liable to pay to the respondent/defendant in excess of the suit claim. The defendant are indebted to various creditors. They are attempting to alienate/ encumber their assets with an intent to defeat the rights of the creditors. Unless the first garnishee is restrained by a prohibitory order passed by this Court from making any payment to the extent of the suit claim to the defendant, the applicant/plaintiff will not have any security to recover its dues. The respondent/ defendant is also maintaining a bank account with the second garnishee having current account No. 316505010050063. It is also just and necessary that this Court pass a prohibitory order restraining the 2nd garnishee from releasing payments to the respondent/ defendant.

4. In addition to that the learned counsel for the plaintiff/ applicant has placed reliance on the unreported judgment of Hon'ble Bombay High Court, in Appeal No. 704 of 1992, in Notice of Motion No. 2042 of 1992 in Suit No. 2678 of 1992 wherein it is observed as under:

Admit.

Mr. J.D. Dhankar, learned counsel for the first respondent and Ms. Lubna Vohra, learned counsel for the second respondent, waive service of notice of the appeal. Filing of the paper book disposed with.

The Appeal is treated as being on the day's cause list and is called on for hearing.

The short question, therefore, is whether the main basis of the order of the learned Single Judge, namely, that the prohibitory reliefs sought by the appellants are not covered by the relevant provisions of the C.P.C. and that, therefore, they were not capable of being granted, even if there was no merit in the plea in defence, is well founded in law. We may assume, without granting, that the prohibitory reliefs are not covered by the relevant provisions of the Code. However, the well-settled legal position with respect to the Chartered High Courts is that the powers those High Courts to grant an injunction are not confined to the statutory provisions alone. The Calcutta High Court has held that the powers of that High Court to grant a temporary injunction were not confined to the terms of Order XXXIX Rules 1 and 2 of the Code and that the Chartered High Courts have inherent power under the general equity jurisdiction to grant an injunction independently of the provisions of the Code and also that such power can be exercised by a single Judge sitting on the Original Side of the High Court. *Nakasipara Jute Mills vs. Nirmal Kumar* (1941) 1 Cal 373. Our Court has also taken the same view. *Mulchand vs. Bill & Co.*, (1920) 44 Bom 283.

In *Manohar Lal Chopra Vs. Rai Bahadur Rao Raja Seth Hiralal*, , the question

which fell for consideration was whether having regard to the language of clause (c) of Section 94 of the C.P.C., interim injunctions can be issued only if a provision for their issue is made in Order XXXIX Rules 1 and 2. The submission on behalf of the appellant in that case was that clause (c) of Section 94 provides that the Court may, if it is so prescribed, grant a temporary injunction in order to prevent the ends of justice from being defeated and that the word "prescribed". According to Section 2 of the Code, means prescribed by Rules and that Rules 1 and 2 of Order XXXIX lay down precisely the circumstances in which a temporary injunction may be issued. The majority decision rejected this submission and held that Courts have inherent jurisdiction to issue temporary injunction in circumstances which are not covered by the provisions of Order XXXIX of the Code. The reasons set out in support of this view are as follows;

It is well settled that the provisions of the Code are not exhaustive, for the simple reason that the Legislature is incapable of contemplating all the possible circumstances which may arise in future litigation and consequently for providing the procedure for them. The effect of the expression "if it is so prescribed" is only this that when the rules prescribed the circumstances in which the temporary injunction can be issued, ordinarily the Court is not to use its inherent powers to make the necessary orders in the interests of justice, but is merely to see whether the circumstances of the case bring it within the prescribed rule. If the provisions of Section 94 were not there in the Code, the Court could still issue temporary injunctions, but it could do that in the exercise of its inherent jurisdiction. No party has a right to insist on the Court's exercising that jurisdiction and the Court exercises its inherent jurisdiction only when it considers it absolute necessary for the ends of justice to do so. It is in the incidents of the exercise of the power of the Court to issue temporary injunction that the provisions of S.94 of the Code have their effect and not in taking away the right of the Court to exercise its inherent power.

There is nothing in Order XXXIX, rules 1 and 2, which provides specifically that a temporary injunction is not to be issued in cases which are not mentioned in those rules. The rules only provide that in circumstances mentioned in them the Court may grant a temporary injunction.

Referring to Section 151 of the Code, it was observed:

The section itself says that nothing in the Code shall be deemed to limit or otherwise affect the inherent power of the Court to make orders necessary for the ends of justice. In the face of such a clear statement, it is not possible to hold that the provisions of the Code control the inherent power by limiting it or otherwise affecting it. The inherent power has not been conferred upon the Court; it is a power inherent in the Court by virtue of its duty to do justice between the parties before it.

Further, when the Code itself recognizes the existence of the inherent power of the Court, there is no question of implying any powers outside the limits of the

Code.

In the minority Judgment of Shah, J., the power of Chartered High Courts exercising ordinary original jurisdiction to exercise inherent jurisdiction to issue an injunction was expressly recognized. His Lordship observed:

Power to issue an injunction is restricted by S.94 and O.39, and it is not open to the Civil Court which is not a Chartered High Court to exercise that power ignoring the restrictions imposed thereby, in purported exercise of its inherent jurisdiction.

(Underlining supplied).

For the foregoing reasons, in our opinion, the learned Single Judge, with respect, erred in law in taking the view that he had no power or jurisdiction to grant the prohibitory reliefs claimed, even assuming that there was no substance in the defence raised by the first respondent.

It is true that there are certain further observations in the order under appeal which appear to have a bearing on the merits. However, as we read the order of the learned Single Judge in its entirety, it appears that in view of his predisposition on the issue relating to the power or jurisdiction to grant the reliefs the other matters including the rival pleas have not received due consideration. Having regard to the nature of the controversy between the parties on which we express no opinion, just and proper order required to be passed herein is to set aside the order under appeal and to remand the matter to the learned Single Judge for trial on merits in accordance with law.

To contend that the powers of the Chartered High Courts are not circumscribed by the provisions of Order XXXVIII Rule 5 and Order XXXIX of C.P.C. and in case the reliefs asked for is not covered under these provisions, the Chartered High Courts have inherent power under the general equitable jurisdiction to grant such relief.

5. This judgment cannot advance the case of the applicant, as inherent equitable jurisdiction can be exercised as per the by well settled principle of law, and not contrary to statutory provisions of law.

6. The Courts in appropriate cases can grant temporary injunction in exercise of its inherent power also in cases not covered by Order 39 C.P.C. But inherent power of the Court cannot be invoked to nullify or stultify as statutory provisions. Therefore, while exercising the inherent power, the Court should not overlook the statutory provisions as held by the Hon'ble Supreme Court in (1983) 4 SCC 525 Cotton Corporation of India Ltd. vs. United Industrial Bank Ltd.

7. It is settled law that inherent powers may be exercised "ex-debited Justinian" in cases, where there is no express provision in C.P.C. The said power cannot be exercised in contravention or in conflict of or ignoring express and specific provision of law. Durgesh Sharma Vs. Jayshree,

8. Order 38 Rule 5 bars the grant of relief, unless conditions envisaged under Order 38 Rule 5 are satisfied, as the order passed in violation of the Order 38 Rule 5 sub clause (1) & (2) will be void. The inherent equitable jurisdiction cannot be used to overlook specific bar under a statute or law.

9. Order 38 Rule 5 of the Code of Civil Procedure, which reads as under:

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.

10. A perusal of the above provision would show that the Court has been cloaked with the power to call upon the defendant to furnish security for production of property, even before the judgment, in case the Court is satisfied that the defendant, with an intent to obstruct to delay the execution of any decree that may be passed against him, 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.

11. Further still, Hon"ble Supreme Court of India in the case of Raman Tech. and Process Engg. Co. and Another Vs. Solanki Traders, has observed as under:

The power under Order 38, Rule 5 CPC is a drastic and extraordinary power. Such power should not be exercised mechanically or merely for the asking. It should be used sparingly and strictly in accordance with the Rule. The purpose of Order 38, Rule 5 is not to convert an unsecured debt into a secured debt. Any attempt by a plaintiff to utilize the provisions of Order 38 Rule 5 as a leverage for coercing the defendant to settle the suit claim should be discouraged. Instances

are not wanting where bloated and doubtful claims are realized by unscrupulous plaintiffs, by obtaining orders of attachment before judgment and forcing the defendants for out of court settlements, under threat of attachment.

12 In light of the express provisions of Order 38, Rule 5 CPC and the observations of the Hon'ble Supreme Court in the matter of M/s. Raman Tech & Process Engg. Co. v. M/s. Solanki Trader, supra, the position of law that emerges is as under:

(i) The Court, before calling upon the defendant to furnish security for production of property, has to be satisfied that the defendant, with an intent to obstruct or delay the execution of any decree that may be passed against him, 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.

This satisfaction of the Court has to be objective and not subjective in as much as there has to be a positive and definite material before the Court to enable the Court to come to a prima facie conclusion that the defendant is about to dispose of the whole or part of his property with an intention to obstruct or delay the execution of any decree that may be passed against him. Merely because a suit is filed or about to be filed against him, the defendant is not debarred from dealing with his property.

Accordingly, mere fact that some material is placed before the Court showing that defendant has disposed of some of his properties would by itself not be sufficient for the Court to exercise the powers conferred upon it under Order 38, Rule 5 CPC without there being further material on record to show that the property is being disposed off by the defendant with an intention to frustrate the probable decree that may be passed against him.

The intention of the defendant to remove or dispose of the whole or part of his property, with a view of obstructing or delaying the execution of any decree that may be passed against him is sine qua non before the power under Order 38, Rule 5 can be exercised by the Court.

However, it may also be observed here that the question of ascertaining the intention of the defendant is a vexed question having no easy solution and precise mathematical tests. The true intention of the defendant in disposing of the whole or part of his property would thus, have to be determined by the Court having regard to the particular facts and circumstances of each case.

(ii) The Plaintiff-Applicant is required to satisfy the Court that all the ingredients specified in Order 38, Rule 5(1) CPC exist before the application filed by the Plaintiff-Applicant can be allowed. The same is evident from the reading of Clause 4 of the Order 38, Rule 5.

Merely because the defendant will not be prejudiced cannot be a ground in itself for the Plaintiff-Applicant to argue that the power under Order 38, Rule 5 CPC should be exercised by the Court.

Accordingly, the Plaintiff-Applicant is required to place sufficient material before the Court so as to enable the Court to form a prima facie opinion that the defendant, with an intent to obstruct or delay the execution of any decree that may be passed against him, is about to dispose of the whole or any part of his property.

In order to do so, the Plaintiff-Applicant may be required to swear an affidavit in support of his application detailing the name, address and sufficiently describing the identity of the person or persons from whom he has received the information about the attempts of the defendant to dispose of the whole or any part of his property with an intent to obstruct or delay the execution of any decree that may be passed against him.

(iii) As the matter with regard to the power of the Court to call upon the defendant to furnish security for production of property, even before the judgment, has been detailed and expressly provided in Order 38, Rule 5 CPC, the Court cannot resort to its inherent powers u/s 151 CPC and call upon the defendant to furnish security for production of property in case the ingredients of Order 38, Rule 5(1) CPC are not fulfilled. Reference in this regard can be made to the judgment of the Hon"ble Supreme Court in the Nahar Industrial Enterprises Ltd. Vs. Hong Kong and Shanghai Banking Corporation, wherein it has been held that where a matter has expressly been provided for in the CPC, inherent power cannot be resorted to.

13. When the present application filed by the plaintiff- Applicant is viewed in light of the position of law detailed above. I find no merit in it. The plaintiff-Applicant in the present application has failed to disclose any sufficient material, to prima facie satisfy this Court about the obstructive conduct of the defendant to invoke the jurisdiction under Order 38 Rule 5 of C.P.C. Other than vague allegations, no material has been placed before the Court, to show that the defendant is about to dispose of the whole or part of his property with an intention to obstruct or delay the execution of any decree that may be passed against.

14 Accordingly, the present application being without any merits, is dismissed but with no order as to costs.