

(2011) 03 MAD CK 0422
In the Madras High Court
Case No : O.S.A. No. 74 of 2011

Perim Janardhana Rao, Jay AR Enterprises and K. Rajendra
Reddy

APPELLANT

Vs

M. Balaji

RESPONDENT

Date of Decision : 25-03-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 38 Rule 5, Order 38 Rule 5(1)
Negotiable Instruments Act, 1881 (NI) — Section 118, 138, 139

Citation : (2011) 03 MAD CK 0422

Hon'ble Judges : V. Periya Karupiah, J;R. Banumathi, J

Bench : Division Bench

Advocate : S. Anandraj, for the Appellant; S. Sridhar, for the Respondent

Final Decision : Dismissed

Judgement

V. Periya Karupiah, J.—This appeal has been directed against the order passed by the learned single Judge in O.A. No. 1203 of 2010 and Application No. 6505 of 2010 in C.S. No. 941 of 2010.

2. The brief facts of the case of the Plaintiff / applicant is as follows:

(i) The Plaintiff/applicant has been doing real estate business since 2002. The first Defendant had approached the Plaintiff/applicant to purchase the lands at Bangalore in order to sell the same and to make profit. Earlier, the first Defendant purchased 50% of 3 acres of land in Giddanahalli Village, Bangalore Rural District and had sold the same and gained huge profit. The first Defendant again approached the Plaintiff/applicant to purchase some more lands and had entered into agreements in respect of the land at Bidaraguppe Village, Anekal Taluk measuring an extent of 5 acres 22 = guntas for which the Plaintiff paid heave advance to the land owners. The first Defendant requested the Plaintiff/applicant to get the sale deed registered in his name and promised to pay the sale consideration as agreed by him. The Defendants paid the sale consideration out of his own funds and got the sale deeds executed in the name of the first

Defendant. The first Defendant agreed to purchase the lands at the rate of Rs. 46,00,000/- per acre and the total sale consideration comes to Rs. 2,56,00,000/-, but the first Defendant paid only Rs. 1,77,00,000/- to the Plaintiff/applicant and he is liable to pay a sum of Rs. 79,00,000/-. The first Defendant issued a cheque for a said sum of Rs. 79,00,000/- drawn on the account of the second Defendant bearing No. 401681 dated 30.10.2007 on ABN Amro bank, Haddows Road, Chennai towards the balance amount due and payable to the Plaintiff/applicant. The said cheque had been dishonoured. Therefore, a complaint was given against the first Defendant u/s 138 of the Negotiable Instruments Act before the XVI Additional Chief Metropolitan Magistrate Court, Bangalore and the same was pending. The Defendants failed to pay the entire dues to the Plaintiff. Hence, a suit was filed for recovery of a sum of Rs. 79,00,000/- together with interest at 18% from 30.10.2007 and as on 25.10.2010, the Defendants are liable to pay a sum of Rs. 1,21,66,000/- to the Plaintiff/applicant.

(ii) Since the Defendants came to know about the steps taken by the Plaintiff/applicant to recover the dues, they tried to alienate all their properties, in order to defeat Plaintiff's rights. Hence, the Plaintiff/applicant prayed this Court to direct the Defendants to furnish security for the suit claim amount of Rs. 1,21,66,000/- failing which to attach the properties set out in the petition.

(iii) The first Respondent has filed a counter to the above application stating that apart from the dishonoured cheque and the judgment of the Criminal Court, the Plaintiff has no piece of evidence to establish the liability of the Defendants to the suit claim. A dishonoured cheque and a conviction by the Criminal Court alone is not sufficient to presume a prima-facie case in favour of the Plaintiff for recovery of money. According to the first Respondent, the Plaintiff was guilty of fraud and misappropriation of his funds, in collusion with a person by name Krishnamoorthy, who was appointed as his Power Agent by the first Defendant. The first Defendant has already lodged a criminal complaint for fraud, misappropriation etc., and a charge sheet has been laid on the file of the Judicial Magistrate, Poonamallee. Therefore, According to the first Respondent, there is no basis for the suit claim and hence the interim direction for furnishing security cannot be ordered.

3. The learned single Judge has considered the submissions made by both sides before him and had come to a conclusion of directing the Appellants / Respondents to furnish security to an extent of a sum of Rs. 79,00,000/- within a period of three weeks from the date of receipt of a copy of the order and that in default of furnishing security within the said time, the immovable properties morefully set out in the schedule to Judge's summons shall stand automatically attached and the same shall remain under attachment until further orders of this Court.

4. Aggrieved by such an order passed by the learned single Judge, the Appellants have preferred the present appeal.

5. The Appellants are the Defendants in the suit and Respondents in the application in A. No. 6505 of 2010 filed before the learned single Judge. For convenience sake, the rank of the parties in the suit are maintained in this judgment also.

6. Heard Mr. S. Anandraj, learned Counsel for the Appellants / Defendants and Mr. S. Sridhar, learned Counsel for the Respondent / Plaintiff.

7. The learned Counsel for the Appellants / Defendants would submit in their arguments that the suit was filed by the Plaintiff against the Appellants for recovery of a sum of Rs. 1,21,66,000/- with subsequent interest at 18% p.a on the principle sum of Rs. 79,00,000/- said to have been due from the Defendants to which the Defendants are seriously contenting in the suit. He would further submit in his arguments that the Plaintiff had based his claim for the sum of Rs. 79,00,000/- as the balance amount payable towards the sale consideration in respect of the property purchased by the Defendants through the Plaintiff by virtue of three sale deeds dated 19.03.2004 and one sale deed dated 11.04.2005. He would further submit that the Plaintiff has no prima-facie case for the suit claim since all the considerations arising out of four sale deeds would be only to an extent of approximately Rs. 89,00,000/- and the Plaintiff's case was that the Defendants have paid a sum of Rs. 1,79,00,000/- towards sale consideration and therefore there could not be any balance amount payable by the Defendants to the Plaintiff. He would further submit in his arguments that the learned single Judge has not understood the said point that the Plaintiff has no prima-facie case, but had ordered for furnishing security to an extent of Rs. 79,00,000/- as if it were prima facie found to be due from the Defendants. He would further submit that the sale agreement stated to have been the cause of action in between the parties was in between the Plaintiff and third party and it would not bind the Defendants and it lost sight while passing the judgment by the learned single Judge. He would also submit that the Defendants' case was that they have issued the cheque signed blank and it was utilised for raising a claim of Rs. 79,00,000/-. He would also submit that the Plaintiff had also pursued his remedy through Criminal Court by filing private complaint u/s 138 of Negotiable Instruments Act and the same was convicted against the Defendants and the appeal has been filed against the said judgment, but the learned single Judge had relied upon the judgment of the Criminal Court to find out a prima-facie case against the Defendants which is not correct. He would also submit that the Criminal Court judgment is not binding upon the civil court and the said judgment is also subject to the appeals preferred by the Defendants and therefore, there cannot be any prima-facie case for passing an order of directing the Defendants to furnish security. He would draw the attention of the Court to a judgment of Hon"ble Apex Court reported in Raman Tech. and Process Engg. Co. and Another Vs. Solanki Traders, the principle that no order could be passed under Order 38 Rule 5 Code of CPC without the satisfaction of reasonable chance of a decree being passed in the suit against the Defendants. He would further submit that the order of furnishing security by the learned single Judge has to be

set aside for want of prima-facie case and the appeal filed by the Defendants may be allowed.

8. The learned Counsel for the Respondent / Plaintiff would submit in his arguments that the learned single Judge has correctly come to the conclusion of directing the Defendants to furnish security for a sum of Rs. 79,00,000/- and in default to attach the properties scheduled in the Judges Summons. He would also submit in the Court that the Criminal Case filed by the Plaintiff before the Judicial Magistrate u/s 138 of Negotiable Instruments Act was convicted and the Defendants were sentenced to pay a compensation of Rs. 89,00,000/- and the said judgment of Criminal Court can be taken as a piece of evidence for ascertaining the prima-facie case, since the said judgment has not been varied or set aside. He would further submit in his arguments that the Defendants have issued a cheque for the sum of Rs. 79,00,000/-, the amount being the balance sale consideration of four sale deeds through them the Defendants purchased the properties with third parties with the help of the Plaintiff and the cheque issued by the Defendants were supported by consideration and the same was returned by the Defendants and was handed over. The said issuance of the cheque itself would be proving prima-facie case u/s 118 and 139 of Negotiable Instruments Act by drawing the presumption. The said presumptions were found not rebutted by the Defendants in the Criminal Case and therefore, they were convicted. He would therefore, submit that the Criminal Court judgment is a finding that the Defendants are liable to pay the said sum of Rs. 79,00,000/- with subsequent interest. He would further submit that the Defendants had not paid any amount thereafter and therefore, the suit claim is still outstanding and it cannot be said that the amount has been paid by the Defendants to the Plaintiff. He would also submit that the learned single Judge was right in coming to the conclusion that there is a prima-facie case for ordering security. He would further submit in his arguments that the first Defendant has though stated in his counter on behalf of all the Defendants that they are not taking steps to alienate the schedule mentioned property, they have executed power deeds and the Power Agents have alienated several items of properties. He would also submit that finding fault with the Power Agents, the Defendants cannot take umbrage from violating their own undertaking since they are the principals of the Power Agents and the acts of Power Agents will bind the Defendants as Principal. He would further submit in his arguments that the Defendants have admittedly alienated the properties even after the filing of the suit and after passing the order of furnishing security and therefore, the Defendants cannot ask for vacating the order of furnishing security nor evade from the same. He would also submit that the learned single Judge had given reasons for the direction passed against the Defendants to furnish security and therefore the said order passed by the learned single Judge need not be disturbed. He would therefore request the Court to dismiss the appeal.

9. We have given anxious consideration to the arguments advanced on either side.

10. According to the submissions made by both sides, we could understand that a cheque was stated to have been furnished by the Defendants in favour of the Plaintiff for a sum of Rs. 79,00,000/- payable to the Plaintiff towards the balance consideration for effecting the sale deeds in favour of the Defendants from third parties through the Plaintiff. The said sale deeds are stated to be executed by (1) One Chennakesavan to the Defendants and one Krishnamoorthy for a sum of Rs. 3,00,000/- dated 19.03.2005; (2) one Sriramaiah in favour of the Defendants and Krishnamoorthy for a sum of Rs. 26,00,000/- dated 19.03.2005; (3) One Lakshminarayanan in favour of the Defendants and Krishnamoorthy for a sum of Rs. 24,00,000/- dated 19.03.2005; and (4) one Narayanappa in favour of the Defendants and Krishnamoorthy for a sum of Rs. 36,40,000/- dated 11.04.2005. The Defendants have denied the payment by saying that the total amount of the four sale deeds would only effect around Rs. 89,00,000/- and therefore the sum of Rs. 79,00,000/- stated to have been due payable to the Plaintiff by the Defendants cannot be a true one. Further, it has been brought to the notice of this Court that the Defendants have executed the document available at Page 64 of the typed set on 15.04.2006 through their general Power Agent Krishnamoorthy. In the said document, it has been categorically mentioned that a sum of Rs. 79,00,000/- is due out of the total amount of Rs. 2,56,00,000/- towards sale of 5 acres 22-1/2 guntas at the rate of Rs. 46,00,000/- per acre. The veracity of the said document cannot be gone into at this stage. But the truth, genuineness and the validity of the said document can be decided only during the full-fledged trial.

11. Apart from that, it is an admitted fact that a criminal complaint has been launched against the Defendants u/s 138 of Negotiable Instruments Act for the dishonour of the cheque issued by the Defendants for a sum of Rs. 79,00,000/- and the said case was also taken on file and trial was conducted before the Judicial Magistrate, Bangalore and judgment was rendered with conviction against the Defendants. Further, it has been made known to the Court that the appeal has been preferred against the said judgment of conviction and sentence. However, a competent Court has gone into the facts and circumstances of the case and decided that the issuance of the cheque was true and it had been bounced on presentation before the Bank. The said factum of coming to the conclusion about the truth and genuineness of the cheque can be taken for ascertaining the prima-facie case in favour of the Plaintiff. Moreover, the cheque issued by the Defendants was admitted, but it was stated to be a blank cheque. No doubt, the signature of the Defendants have been admitted and in the said circumstances, the presumption as to its genuineness can be found by virtue of Section 118 of Negotiable Instruments Act. When a proceedings has been initiated u/s 138 of Negotiable Instruments Act and the signature of the cheque has also been admitted the presumption u/s 139 of Negotiable Instruments Act is also available in favour of the Plaintiff. All these prima-facie case can be shown as not correct only in the course of a full-fledged trial. Till then, the presumption will hold good and the Plaintiff is prima-facie found entitled to the said amount of

Rs. 79,00,000/- as mentioned in the cheque issued by the Defendants.

12. Therefore, the Plaintiff has established prima-facie case for the purpose of passing an interim order in his favour. As regards the provisions of Order 38 Rule 5 CPC, we have to see the reasons enunciated in the said role. According to Rule 5(1) of Order 38 of CPC, if the Defendants are with an intention to obstruct or delay the execution of any decree that may be passed against them or about to dispose 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, the Court can pass suitable orders of furnishing security and in default to attach the property. Therefore, any one of the two contingencies mentioned in Order 38 Rule 5(1) Code of CPC should be present for passing an order of furnishing security. As regards this case, the Plaintiff had furnished in his affidavit that the Defendants are selling the property in order to evade payment of the decree amount likely to be passed in this case. It is also fairly admitted that the Power Agents of the Defendants are doing all the mischieves and it has to be verified by the Defendants as to whether all the properties sold are part of the properties mentioned in the schedule of Judges Summons and thereafter only the remaining schedule of property unencumbered may be furnished to the Court. In the said circumstances, the Court can presume that the Defendants through their Power Agents cannot control the sale of the property as it was executed by the Power Agents themselves and therefore, the properties belonging to the Defendants are being sold even after filing of the suit. If all the properties of the Defendants have been sold nothing would be available for the decree amount likely to be passed and this case will be defeated. In the facts and circumstances of the case, we can find a prima-facie case regarding the sustenance of the suit claim and the compliance of the provisions of Order 38 Rule 5 Code of CPC have been satisfied and the opportunities given to the Defendants have not been availed and therefore, it has become necessary for this Court also to confirm the order passed by the learned single Judge in directing the Defendants to furnish security for the principal sum of Rs. 79,00,000/-. Accordingly, the order passed by the learned single Judge is confirmed and the appeal is liable to be dismissed. However, the time limit granted by the learned single Judge to furnish security has been lapsed since the appeal has been preferred. Therefore, we are inclined to grant three weeks time for furnishing security as per the direction of the learned single Judge from the date of receipt of a copy of this order.

13. With the aforesaid observation, we confirm the judgment of the learned single Judge passed in A. No. 6505 of 2010 and the appeal preferred by the Appellants / Defendants is dismissed without costs.