
(1996) 02 AP CK 0030

In the Andhra Pradesh High Court

Case No : C.M.A. No's. 1622, 1623 and 1624 of 1995

The Catholic Syrian Bank Limited

APPELLANT

Vs

Sree Jagannatha Constructions Ltd. and Others

RESPONDENT

Date of Decision : 14-02-1996

Acts Referred:

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

Citation : (1996) 3 ALT 45 : (1996) 2 APLJ 310 : (1996) 1 APLJ 310

Hon'ble Judges : P. Venkatarama Reddi, J;G. Bikshapathy, J

Bench : Division Bench

Advocate : B.V. Subbaiah, for the Appellant; M. Mohan Rao, for the Respondent

Final Decision : Allowed

Judgement

P. Venkatarama Reddi, J.—These appeals arise out of the common order passed by the Subordinate Judge, Jangaon, Warangal District in/I.A.45/1995 in O.S.20/1994,1.A.197/ 1995 in O.S.19/1995 and I.A.46/1995 in O.S.4/1995 rejecting the petitioner's applications for grant of an order under Order XXXVIII Rule 5 C.P.C. seeking attachment of the amounts due and payable to the respondents/defendants by the South Central Railway and to issue an order prohibiting the Railway from making payment to the defendants pending disposal of the suits.

2. For the purpose of executing the contract work awarded by the South Central Railway, the respondents approached the appellant-bank for furnishing deferred payment bank guarantee to Vijaya Bank Limited which, in turn, furnished a bank guarantee to the company which sold the equipment namely, three tippers and one excavator. The said equipment was hypothecated to the appellant-bank. It is not in dispute that the respondents defaulted in the payment of the amounts due in instalments towards the equipment purchased as a result of which the appellant-bank had to make good the payment of instalment money to Vijaya Bank. As the respondents failed to pay the said amounts to the appellant-bank despite the fact that the appellant-bank paid it to Vijaya Bank, the appellant-

bank after protracted correspondence instituted three suits in the Sub-Court, Jangaon. The total value of the three suits is Rs. 2422 lakhs. It is stated that with the addition of interest from the dates of filing the suits upto date, the suit claim goes upto rupees forty lakhs approximately.

3. It is seen from the copies of correspondence filed before us which were also marked before the trial court in the I.A.S., that the respondents were promising to discharge the liability soon after the amount is received from the South Central Railway in the pending arbitration case. An ex parte prohibitory order was issued on 13-2-1995. However, in spite of that order, it appears that the respondents received payment of about rupees forty six lakhs in tentative acceptance of their claim in arbitration case and a substantial amount has been received towards the running bills. Out of this, only a sum of rupees five lakhs and odd was paid to the appellant-bank towards the subsequent instalments which are, of course, unrelated to the suit claims.

4. The learned Subordinate Judge held that the appellant could not establish that the defendants were about to dispose of the whole or any part of the property or to remove the property from the local limits of the jurisdiction with intent to obstruct or delay the execution. In other words, the learned Judge was of the view that the ingredients of Order 38, Rule 5 C.P.C. were not satisfied. The Subordinate Judge repeatedly referred to the fact that the respondents have no mala fide intention as they have expressed their readiness to pay the amounts to the Bank soon after the money is received from Railway in the arbitration case. The trial Court also took into consideration the fact that the appellant-bank has adequate securities including the hypothecated equipment to proceed against and therefore, there is no need to attach the amounts due from the Railway before the decree is passed.

5. On hearing the arguments of both the counsel, we are not in a position to agree with the learned counsel for the respondents that there is no warrant for passing an order of attachment under Order 38, Rule 5 C.P.C. One striking feature of the case which stares at the face of the respondents is that despite their categoric assurance to discharge the liability to the Bank soon after the payment is received from the Railway pursuant to pre-arbitration settlement, nothing was paid towards the suit claims notwithstanding the fact that nearly forty six lakhs rupees was received from the Railway. The fact that the said amount was received was evidently not disclosed to the trial court. Prim facie, this conduct on the part of the respondents would warrant an order under Order 38, Rule 5 C.P.C. because it amounts to disposal of a part of their property with intent to delay the execution of the decree that may be passed against the defendants. It is to be remembered that the liability is not being disputed. It is stated by the learned counsel for the respondents that there is some dispute about the interest payable. The possibility of passing a decree against the defendants for a substantial part of the suit claim is thus, a certainty. In these circumstances, if the entire amount received in the arbitration case is diverted for their own use by

the respondents without paying any amount to the bank as promised by them earlier, it could be reasonably inferred that such a step amounts to disposal of a part of their property with intent to delay the execution of the decree.

6. The learned counsel for the respondents submits that there was no averment in the affidavit filed in the I.A.S. that the respondents were resorting to disposal of their properties with a view to obstruct or delay the execution of the decree. It is true that there is no such specific averment in the affidavit but the mere lack of such averment is not conclusive especially having regard to the fact that in the additional affidavit, such averment was specifically made. The learned counsel for the respondents points out that the additional affidavit was served only a day prior to the date of hearing and the respondents had no occasion to file the counter. The additional affidavit was referred to by the trial court. If the respondents wanted time to file counter to the additional affidavit, the request should have been made on the date of hearing. Evidently no such request was made. We therefore do not consider this as a serious infirmity in the appellant's case.

7. coming next to the hypothecated equipment, even according to the respondents, they have always been out of the local limits of jurisdiction of the Sub-Court, Jangaon. According to the respondents, they are deployed at the work-site near Vikarabad. It is no doubt true that the hypothecated moveable properties can be seized and sold. But, for the omission of the bank to take such drastic step, the respondents cannot blame the bank. The approach of the trial court that the very fact that the bank has not resorted to seizure and sale of those properties demonstrates lack of bona fides on the part of the Bank cannot be countenanced. The respondents, in the course of hearing before us, have not mixed up any words to say that the said equipment is required for their works and it would cause them immense hardship if the Bank resorts to seizure of the equipment.

8. The learned counsel for the respondents has cited certain decisions in support of the proposition that the power to order attachment before judgement under Order 38, Rule 5 C.P.C. should not be resorted to lightly and such step can only be taken on recording satisfaction that the ingredients of Order 38, Rule 5 are satisfied. The decisions cited are the cases of *Bharat Tobacco Co. Vs. A. Jamadar and Others*, , *Y. Vijayalakshamma and Anr., Appellants v. V. Sakinala Lakshmaiah and Sons and Anr., Respondents*, AIR 1980 A.P. 176 and *T. Srinivasan and Another Vs. V. Srinivasan*, . The broad principle discernible from these case admits of no doubt and does not in any way advance the case of the respondents. We have already held that it is a fit case where Order 38, Rule 5 C.P.C. ought to be invoked. The facts and circumstances of each case have to be kept in view and on a consideration such facts, we have come to the inevitable conclusion that the lower Court erred in not exercising the power vested in it under Order 38, Rule 5 C.P.C.

9. The last question is, whether we should grant an unconditional order

prohibiting the South Central Railway from paying any amount due towards the contract works being executed by the respondents.

10. Taking into consideration the suggestions made by both the learned counsel in this behalf and the hardship that may be caused to the respondents if the entire or substantial part of the amounts due under running bills are to be withheld by the South Central Railway and the repercussions it has on the execution of a work of Public Utility, we consider fit and proper to pass the following order which will be operative pending disposal of the suits:-

(i) The Administration of South Central Railway is prohibited from disbursing, under the running bills or other wise, a sum over and above 75% to the respondents. In other words, 25% of the amounts due to the Respondent-contractor under the bills or on any other account should be withheld by the Railway administration and the said amount shall be paid over to the appellant-bank for adjustment against the outstanding liability. The learned counsel for the respondents has expressed no objection for the payment of the said amount by the Railway directly to the appellant-bank;

(ii) On or before 15th March, 1996 the respondents shall pay to the appellant-bank a sum of rupees five lakhs in cash or by demand-draft in part-discharge of the suit claim.

(iii) On or before 1st April, 1996, the respondent-company shall furnish a bank guarantee to the satisfaction of the appellant-bank for the payment of a sum of rupees five lakhs payable soon after the decree is passed;

(iv) The deduction from the running bills or final bill or on any other account to the extent of 25% shall be upto the limit of rupees twenty lakhs only and

(v) In the event of default in compliance with the conditions Nos. (ii) and (iii) above, the prohibitory order shall be operative in respect of the entire amount due under the bills or on other account from the South Central Railway.

11. The C.M.As. are allowed with the above directions.

12. We direct the suits to be disposed of expeditiously.