
(1981) 03 AP CK 0002
In the Andhra Pradesh High Court
Case No : C.R.P. No. 6775 of 1980

The Hamali Co-operative Labour Contract Society Ltd.	APPELLANT
Vs	
K. Venkatiah and Others	RESPONDENT

Date of Decision : 19-03-1981

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 38 Rule 5, Order 38 Rule 6

Citation : AIR 1981 AP 391 : (1981) 1 APLJ 383

Hon'ble Judges : Madhusudan Rao, J

Bench : Single Bench

Advocate : V. Parabrahmma Sastry, for the Appellant; Satyanarayana Prasad, for T. Veerabhadrayya, for the Respondent

Final Decision : Dismissed

Judgement

Madhusudan Rao, J.—This revision is directed against the order of the learned Subordinate Judge, Warangal, in I. A. No. 282 of 1980 in O. S. No. 119 of 1979 on the file of his Court. The petitioner is the 1st defendant in the suit. The 1st respondent herein is the plaintiff who instituted the suit for recovering a sum of Rs. 64,337-56 with interest against the petitioner and the 2nd respondent. The petitioner is the Hamali Cooperative Labour Contract Society Ltd, Warangal, represented by its President. The 2nd defendant in the suit is the Chairman of the Society. After instituting the suit, the plaintiff filed I. A. No. 282/80 under Order 38, Rule 5, C. P. C. praying the Court for attachment of the bills of the 1st defendant worth Rs. 70,000/- and lying to the credit of the 1st defendant in the office of the Senior Regional Manager, Central Warehousing Corporation, Hyderabad.

Along with the application he filed an affidavit stating that after he filed the suit the 1st defendant withdraw amounts from the Banks to a tune of Rs. 70,612-27 and was keeping meagre amounts in the Banks with a view to defeat the execution of the decree which may be passed in favour of the plaintiff. Notice of this application having been taken by the petitioner and the 2nd respondent,

they filed counters with their affidavits opposing the application. On a consideration of the affirmations of the parties in the affidavits, the learned Subordinate Judge passed an order directing the petitioner to furnish security in a sum of Rs. 70,000/-. It was also observed in the order that, if the petitioner does not furnish the security demanded, encashment of the bills totaling Rs. 70,000/- payable to the credit of the petitioner will be prohibited by a pro-order with notice to garnishee. The petitioner came up to this Court with this revision application questioning this order.

2. Shri V. Parabrahmasastry, the learned counsel for the petitioner, contends that the order directing the defendant in the suit to furnish security before judgment should not be passed by the Court except when the Court finds prima facie case in favour of the plaintiff and further finds that the defendant was trying to dispose of his property with the intention of delaying or defeating the decree that may be passed in the suit. It is submitted by Sri Sastry that the lower Court did not make any attempt to arrive at either of the two findings, but on the other hand passed an order directing furnishing of security, being of the view that, while dealing with an application for attachment before judgment or for demanding the defendant to furnish security, the Court should not consider the merits of the contentions of either party but to straightway grant the prayer of the plaintiff.

Sri Satyanarayana Prasad, the learned counsel for the respondent, refutes the contentions and submits that the Court below was satisfied that the petitioner-defendant was making attempts to defeat the decree that may be passed in favour of the plaintiff and that therefore the Court has passed an appropriate order by demanding the petitioner to furnish security in a reasonable sum of Rs. 70,000/-.

3. The short question for consideration in this revision, is whether the order of the lower Court directing the defendant to furnish security in a sum of Rs. 70,000/- is proper and is in accordance with the law. Order 38, Rule 5, to the extent relevant, reads as follows:

"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 remove the whole or any part of his property, or

(b) is about to remove the whole or any 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) xx XX xx XX

(3) The. Court may also in the order direct the conditional attachment of the whole or any portion of the property so specified."

The provision empowers the Court to direct the defendant within a particular time to be fixed either to furnish security in such sum as may be specified or to show cause as to why he should not furnish security. After the defendant files his objection, it would be open to the Court to consider whether the direction for furnishing security should be made. The direction can be made only when the Court is satisfied by affidavit or otherwise that the defendant, with intent to obstruct or delay the execution of the 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 the property from the local limits of the jurisdiction of the Court. It may be noticed even at this stage that the language of Order 38, Rule 5, C. P. C. does not take in its ambit the merits or demerits of the plaintiffs claim in the suit.

The rule contemplates the conduct of the defendant by way of the disposal of his property wholly or partly and the intention attendant upon the conduct. Even if the case of the plaintiff in the suit is, on its face, strong and, in all probability, the suit is likely to be decreed in his favour, the Court cannot pass any order of attachment or make any direction to the defendant to furnish security before judgment merely on that strength of his case. The jurisdiction of the Court arises only when the Court is satisfied by affidavit or otherwise that a person, who is a defendant in the suit which is pending in the Court, is about to dispose of the whole or any part of his property with the intention to obstruct or delay the execution of the decree that may be passed against him. It is the mala fide intention and the bad conduct of the defendant that gives jurisdiction to the Court and not the strength or weakness of the claims of the parties in the main suit.

4. Relying on Premraj Mundra Vs. Md. Maneck Gazi and Others, , Sri Parabrahma Sastry contends that, when an application is made for an order under Order 38, Rules 5 and 6, C. P. C., the Court has to consider the merits of the defendant's plea and also the merits of the plaintiffs case. In the case relied, it was observed by Sinha, J., as follows (at p. 157):

"It is true that at this stage I cannot come to a final decision as to the merits of the defence, but I am entitled to consider the evidence, as has been presented before me, to discover, whether the defence is a bona fide one, or whether the defendants have any reasonable chance of success at the trial. Further, as I will presently explain, I have to come to a decision as to the intention of the defendants and as to whether I should believe the case made by them, or that of the petitioner and his witnesses." On the basis of this observation of the learned

Judge, Sri Parabrahmasastry vehemently contends that it is absolutely necessary for the Court to examine the merits of the plaintiffs case as also the defendant's case and to dismiss an application under Order 38, Rule 5 or Rule 6, if the Court finds either that the case of the plaintiff is bad or that the case of the defendant is strong and good. I do not think it necessary to dwell at length with the facts of the Calcutta case relied; suffice it to say that the Judge who decided the case had to make those observations in the context of the facts which arose before him. Even in this decision, it was pointed out as follows (at p. 158):

"... .. the creditor is seldom in a position, immediately on the filing of a suit, to establish by conclusive evidence that the defendant was about to dispose of his properties with the intention of delaying or obstructing his claim. The unfortunate creditor who cannot get his claim paid is entitled to as much protection as the debtor. Legal proceedings in this country are still expensive and protracted. The plaintiff often finds that after a long and expensive litigation, he gets a decree which is worse than useless, as in the meantime the defendant has got rid of all his properties. In my opinion, therefore, although the provisions of this rule are to be applied with caution, if they are applied too strictly, the plaintiff can only obtain an order under conditions which are theoretically possible, but which in practice will be impossible to demonstrate to the hilt. I think that the Court should follow the golden mean and come to a conclusion on the facts and circumstances of each case as to whether a reasonable man should apprehend that what the defendant was doing was with the intention of defeating the plaintiffs claim. A certain amount of inference from the facts disclosed is inescapable."

The case relied therefore does not support Sri Parabrahma Sastry's contention of there being a duty on the Court to examine the merits in the suit. It could no doubt be open to the Court and the Court certainly is not precluded from considering the respective merits in the claims of the parties while arriving at decisions in regard to the main questions of intention and conduct of the defendant. To illustrate, if the claim of the plaintiff is, on its face, frivolous or prima facie bad, the allegation that the defendant is disposing of his property with the intention of defeating the possible decree that may be passed against him, would be too weak to merit acceptance. If, on the other hand, the claim of the plaintiff is prima facie strong and if the defendant is disposing of properties after the institution or immediately before the institution of the suit, the allegation of the plaintiff, that the defendant is disposing of his property with intent to defeat or delay the claim of the plaintiff in the event of the plaintiffs suit being decreed, may have to be carefully investigated and should not be dismissed out of hand.

The mere pendency of a suit and the disposal of properties by the defendant may not also by themselves be grounds for an attachment before judgment or for demanding security. Nobody is debarred from dealing with his property simply because a suit has been filed against him. There is no rule which enjoins upon

the defendant in a suit not to dispose of his property merely because there is a claim pending against him in the suit. The sine qua non for an order of attachment before judgment or for an order demanding security before judgment is that the defendant is disposing of or about to dispose of his property with the dishonest intention of defeating or delaying the possible decree in the suit. The merits of the claims of the contending parties are merely ancillary factors for consideration by the Court in arriving at a conclusion with regard to the essential requirements of Order 38, Rule 5, C. P. C.

5. The next case relied on by V.K. Nataraja Gounder Vs. S.A. Bangaru Reddiar, . In this case, it was held that the remedy of an attachment before judgment is extraordinary and, if granted, it casts an obligation on the party against whom it is made, even before he is heard in defence to the suit and that, therefore, a Court has to act with the utmost circumspection and with maximum care and caution before issuing such an order to avoid it becoming a weapon of oppression in the hands of unscrupulous plaintiffs. There can be no exception to the observations in Nataraja's case ordering attachment or directing the furnishing of security even before judgment, is certainly an exception to the general system of administration of justice and the Courts will have to certainly act with great circumspection and caution while dealing with applications for such extraordinary orders. In Nataraja's case even, it was clearly held that it is incumbent on the plaintiff to state the grounds on which he entertains the belief of apprehension that the defendant would dispose of or remove the property and it was held therein that the plaintiff must establish & prima facie case in the suit before he could obtain an order under Order 38, Rule 5, C. P. C. What is laid down in the ruling is that the Court must insist on strict proof of the plaintiff's allegation in regard to the intention and conduct of the defendant.

6. Yet another authority cited by Sri Parabrahma Sastry is Chandrika Prashad Singh and Others Vs. Hira Lal and Others, It was held in this case that the power to attach under Order 38, Rule 5 is not to be exercised lightly or without clear proof of the existence of the mischief aimed at in the rule. To attach a defendant's property before his liability has been established by a decree may have the effect of seriously embarrassing him in the conduct of his defence. This power should be exercised only when the Court is satisfied not only that the defendant is about to dispose of the property or to remove it from the jurisdiction of the Court, but also that his object in so doing is to obstruct or delay the execution of any decree that may be passed against him and deprive the plaintiff, if successful, of the fruits of victory. Even this ruling does not strike any note different from the view taken by me with regard to the object and purpose of Order 38, Rule 5, C. P. C.

7. The only question therefore for consideration in this revision is whether the lower Court gave the finding in regard to the intention and conduct of the petitioner before passing the impugned order. Sri Parabrahma Sastry's contention is that there is no such finding. On an examination of the impugned

order, it does not appeal that there is any express finding in regard to that intention of the conduct of the defendant so as to render him liable to a direction for furnishing security. But what Order 38, Rule 5, C. P. C. contemplates is not an express finding, but a satisfaction on the part of the Court by affidavit or otherwise. No doubt, whenever the law enjoins upon the Court to pass an order after being fully satisfied, it is necessary for the Court to express its satisfaction in the form of a finding but the fact that the Court does not express a specific finding cannot detract from the substantial value of the order if the order shows that it has been passed after the satisfaction required under the law.

As pointed out by Sri Satyanarayana Pra-sad, the learned counsel for the respondent, on a reading of the affidavit filed by the parties and the order of the learned Subordinate Judge, there can be little doubt that the learned Judge was satisfied with the allegation of the plaintiff that the defendant was disposing of the property with intent to defeat the decree. May be, the Subordinate Judge did not express these facts in so many words. But even a cursory reading of the order of the learned Subordinate Judge makes his satisfaction too patent to be ignored. The learned Subordinate Judge has clearly observed in paragraph 8 as follows:

"R-1 it registered society. It has an obligation to discharge liability of plaintiff if it is true. Under the amended provisions of Order 38, Rule 5, C. P. C. and under the circumstances of this case, R-1 is bound to furnish security for Rs. 70,000/- towards suit claim, failing which the petitioner shall be entitled to the pro-order as prayed. By furnishing security R-1 can avoid alleged hardship. By mere allegation that he would suffer hardship R-1 cannot make the petitioner suffer."

These observations of the learned Subordinate Judge make it more than clear that in passing the impugned order, he was satisfied with the allegation of the plaintiff to the effect that the defendant was disposing of his property with the intention of defeating the decree that may be passed in the suit. Under the circumstances, therefore, I do not find any merit in this revision petition which is accordingly dismissed with costs.

8. The petitioner is granted six weeks time from today for furnishing security for Rs. 70,000/- to the satisfaction of the lower Court.