HONOURABLE SRI JUSTICE A.RAJASHEKER REDDY

Civil Revision Petition No. 1732 OF 2015

Between:

Kakanuru Jagadeeswara Reddy. …Petitioner

And

Sirigiri Ranganaiah. … Respondent

Date of Judgment pronounced: 21.07.2015

Submitted for Approval:

The Hon'ble Sri Justice A.Rajasheker Reddy

1. Whether Reporters of Local newspapers may be allowed to see the Judgments? Yes/No

2. Whether the copies of judgment may be marked to Law Reporters/Journals Yes/No

3. Whether His Lordship wish to see the fair copy of the Judgment? Yes/No

HONOURABLE SRI JUSTICE A.RAJASHEKER REDDY

Civil Revision Petition No. 1732 OF 2015

ORDER :

This Civil Revision Petition is filed against order and decree dated 12.03.2015 in I.A.No.1586 of 2014 in O.S.No.70 of 2014 on the file of the Court of the III Additional District Judge, Kurnool at Nandal, wherein the Court below dismissed the application filed under Order 38 Rule 5 CPC, seeking attachment of the schedule property before judgment of the contract amount to an extent of 30,00,000/- of the respondent/defendant lying with the disbursing officer i.e., Executive Engineer, Panchayat Raj Division, Kurnool and also direct him to deposit the same into the Court pending disposal of the suit.

2. It is the case of the petitioner that he filed suit against the respondent/defendant for recovery of an amount of Rs.22,73,575/- with future interest and costs of the suit due under the promissory note dated 22.01.2010 said to have been executed by the respondent/defendant.

3. Learned counsel for the petitioner submits that the trial Court instead of attaching the share of the respondent before the judgment in the partnership firm, of which the respondent is having share, straight away dismissed the interlocutory application, without considering the said aspect. In support of his contention, he relied on the judgment reported in **Vattumalli Narayana Rao v. Medrarapu Krishna Rao and others**[1]

4. On the other hand, learned counsel for the respondent submits that the suit pronote was allegedly executed by the respondent, as such, the amounts pertaining to the partnership firm cannot be attached, since the partnership firm is not liable to pay the said amounts, even if the suit is decreed against the respondent. He also submits that this Court in some judgments categorically held that the suit pronote executed by the respondent in his individual capacity, cannot be treated as liability of the partnership firm, of which the respondent is a partner. It is also found that the pronote does not show that the amount so obtained for the benefit of the partnership firm. He also submits that the trial Court, after considering the case on merits, held that the petitioner has not made out any case for attachment before judgment as per Order 38 Rule 5 of CPC. In support of his contention, he relied on the judgments reported in **Surender Singh Bajaj v. Kitty Steels Limited and another**[2] and **Thummala**

Rama Rao and others v. Chodagam Venkateswara Rao and others[3].

5. In the instant case on hand, it is the case of the petitioner that the suit pronote was executed by respondent, but not by the partnership firm, of which the respondent is a partner. When that is the case, the amount lying to the credit of partnership firm cannot held to be liable to pay the said amount. It is also not the case of the petitioner that the alleged pronote is executed on behalf of the partnership firm. Though several judgments are referred to by the learned counsel for the petitioner before the Court below, all of them pertaining to the cases where pronotes were executed on behalf of the firms, as such, the trial Court found that they are not applicable to the facts of the case on hand. When once the partnership firm is not liable to pay the amounts in respect of the pronote executed by the respondent individually, the partnership firm of which the respondent is a partner, cannot be held liable and its property cannot be attached before judgment. The trial Court, after considering the same on merits held that ingredients under Order 38 Rule 5 are not made out for granting attachment before judgment.

In **Surender Singh Bajaj v. Kitty Steels Limited and another (supra)**

> "10. Since we hold that the application filed by the plaintiffs under Order 38, Rule 5 CPC in this case is maintainable, the next question to be considered is whether in allowing the application, the Court below acted legally or not? It is well settled that an order under Order 38, Rule 5 CPC should not be passed merely for the sake of asking or merely because of the fact that the garnishee has huge sum of money payable to the defendant. The law in this regard were discussed by this Court in Sripathi Panditarajula Venkanna Babu v. Varalakhsmi Finance Corporation, Rajahmundry, 1996 (4) ALD 453 (DB), wherein the steps necessary to be taken before an order is passed were clearly discussed and laid down. Further a Division Bench of this Court in Chairman and Managing Director, R.P.N. Nigam Limited, New Delhi v. Rambachane Singh, , dealing with necessary conditions for ordering an application filed under Order 38, Rule 5, CPC was pleased to hold:
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> ".......Such an order is not to be passed in a routine manner merely for the asking for it but that the Court has to be satisfied on tangible materials placed before it that there are attempt at alienation and that the steps are taken so as to delay or obstruct the judgment that may

be ultimately passed against the defendant. Before passing an order, the defendant is first of all to be called upon to furnish security in the shape of specific sum to produce and place at the disposal of the Court when required, the property specified by the plaintiff in his petition or such portion of it as may be sufficient to satisfy the decree or call upon him to show-cause as to why he shall not furnish security. But such an order can be passed only after the primary satisfaction of the obstructive conduct of the defendant. The ultimate attachment order can be passed only if the defendant either fails to show-cause why the security shall not be furnished or fails to furnish the security as required........"

The only allegation made by the plaintiffs in the affidavit filed in support of the application is that the defendant No. 2 is "now trying to leave beyond the jurisdiction of the Court" and that "he is attempting to withdraw the money deposited with the defendant No. 2 and if the attachment before judgment is not granted it would be very difficult for the plaintiffs to recover their dues from the defendant No. 1." That is the only allegation in the affidavit. Therefore, the question to be considered is whether the above allegation of the plaintiffs could constitute necessary conditions precedent to order an application under Order 38, Rule 5, CPC. The above circumstance stated by the plaintiffs in the affidavit, even if true, in itself, in my considered opinion is not sufficient to pass an order under Order 38, Rule 5 CPC unless it is also pleaded that by the impugned conduct of the defendant No. 1, he was intending to delay the execution of the decree that may be passed by the Court against him. The satisfaction of the Court that the defendant with an intention to obstruct or delay the execution of the decree that may be passed by it, 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, is sine qua non for exercising the power under Order 38, Rule 5. This condition is totally absent in the instant case. In the impugned order, nowhere the Court below has recorded such satisfaction. In that view of the matter, the Court below ought not to have ordered the application filed by the plaintiffs under Order 38, Rule 5 CPC."

In **Thummala Rama Rao and others v. Chodagam Venkateswara Rao and others (supra),** it is held as follows:

"7. It is clear from this section that a debt has to be incurred by a partner on behalf of a firm expressly or necessarily implying an intention to bind the firm, if the firm or the other partners are sought to be made liable for the debts. It is the appellants' case in the lower Court and before us that the 1st defendant, who was the managing partner of the firm was producing a picture called "Priyuralu" and it was for that purpose, the defendants 1 and 5 borrowed from the plaintiffs under the three promissory notes. The 10th defendant examined as D. W. 1 has deposed that in 1951, the 1st defendant was producing a picture under the banner of Bharata Lakshmi Productions and that by that time, he and the other appellants ceased to be partners of the 11th defendant-firm. Similarly, the 6th defendant examined as D. W. 4 stated that the 1st defendant was thinking of producing the picture "Priyuralu" independently by himself after he joined as a partner and that that was another reason why he retired from the partnership for tear that the 1st defendant might utilise the firm's money for that film and he also stated that the 1st defendant started "Bharata Lakshmi Productions and that the 11th defendant-firm had no connection with it.

P. W. 1 Chodagam Veeraraghavaiab, is the elder brother of the 1st plaintiff, the 2nd plaintiff is his wife and the 3rd plaintiff is his daughter. He admitted that the film "Priyuralu" was released in February 1952; but he claimed that it was produced by the 11th defendant-firm. There is no evidence as regards this claim that the picture "Priyuralu" was produced by the 11th defendant-firm, Further the business of the 11th defendant firm was only one of distributing films produced by others. He admitted that the 5th defendant was not the managing partner. In view of the fact that the suit promissory notes were executed by the defendants 1 and 5 in their individual capacity respectively and not on behalf of the firm, we are of the opinion that, when the amounts were borrowed under Exs. A-1 to A-3 by the defendants 1 and 5, they were not acting on behalf of the firm and there was no intention on their part expressed or implied at the time to bind the firm and that the three plaintiffs did not intend at the time to make the firm liable. Reliance is placed by the learned counsel for the plaintiffs on Ex. A-4, the agreement subsequently entered into. It is clear from a perusal of Ex. A-4 that it does) hot create any fresh liability and there is under it no undertaking to pay the suit debts. We are of the opinion that the appellants cannot be made liable for the suit claim and that the decree passed against them by the lower Court has to be set aside."

In **Vattumalli Narayana Rao v. Medrarapu Krishna Rao and others (supra),** it is the case where the pronote was executed by the respondent on behalf of the firm, wherein it is held that it binds the firm. In the present case on hand, even according to the case of the petitioner, the alleged pronote was executed by the respondent on his individual capacity and not on behalf of the partnership firm, as such, the aforesaid judgment is not applicable to the case of the petitioner.

In view of the above facts and circumstances, I do not see any illegality or infirmity in the order passed by the Court below warranting interference by exercising Article 227 of the Constitution of India.

Accordingly, the Civil Revision Petition is dismissed. There shall be no order as to costs. As a sequel thereto, miscellaneous petitions, if any, pending in this Civil Revision Petition, shall stand dismissed.

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A.RAJASHEKER REDDY, J

21.07.2015.

KVS

<u>HONOURABLE SRI JUSTICE A.RAJASHEKER REDDY</u>

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[1] 2002 (5) ALD 588

[2] 2002 (3) ALD 741 (DB)

[3] AIR 1963 Andhra Pradesh 154 (V 50 C 54)