

HON'BLE SRI JUSTICE M. SATYANARAYANA MURTHY

CIVIL REVISION PETITION No.2677 OF 2016

ORDER:

This revision, under Article 227 of the Constitution of India, is filed challenging the common Order dated 11.03.2016 in I.A. Nos.1024 of 2015 and 173 of 2016 in O.S. No.573 of 2015 passed by the X Additional Chief Judge, City Civil Court, Hyderabad, whereby the trial court granted leave to the respondents 1 to 3, to defend the suit, while rejecting the request of the plaintiff to pass a decree.

02. The parties will hereinafter be referred to as the petitioner and respondents, for convenience of reference.

03. The revision petitioner herein is the first respondent, and the respondents 1 to 3 herein are the petitioners in I.A. No.1024 of 2015 and respondent No.4 herein is the petitioner in I.A. No.173 of 2016.

04. The respondents 1 to 3 herein filed an application under Rule 3(5) of Order XXXVII of the Code of Civil Procedure, 1908 (for short, 'CPC') seeking leave of the Court defend the suit while permitting to file written statement and counter claim. It is contended that respondent No.4 herein awarded a contract to the revision petitioner herein for execution of earth works, pavement works, structures, RE walls, Road furniture, Drainage works, etc., in section 2(KM 0+500 to KM 15+211 Guntur Bypass, KM 408 to KM 420_448 and Mangalagiri Bypass KM 0+000 to KM 13+495 (Old Chainages). The revision petitioner in turn sub-contracted the works like earth works, GSB, WMM, Structures, RE Wall works, Toll

Plaza work, Plantation work etc., to second respondent represented by the third respondent and subsequently the second respondent company was amalgamated into the first respondent company with liabilities. The said sub-contract work was given under the letter of intent dated 17.06.2009.

05. The second respondent raised invoices for the work done on monthly basis till the termination of the agreement. The sub-contract work was based on lump-sum contract and the period was three years. However, the sub-contract agreement was terminated just after seven months. The revision petitioner released a sum of Rs.4,46,27,777/-. The sub-contract was terminated on 05.02.2013. According to the second respondent, certain works executed by it were uncertified by the plaintiff and the amounts certified by the revision petitioner was arrived at by the revision petitioner himself ignoring various works executed by the second respondent. According to the second respondent, it is entitled to a sum of Rs.1,27,72,500/-. After the amalgamation of the company, the revision petitioner insisted the third respondent to come for settlement of account to Malasiya on 05.10.2012. Under the guise of meeting with the CEO, and CEO by threaten and duress, they obtained signatures on papers prepared by them. According to respondents 1 to 3, the revision petitioner arrived at Rs.3,50,40,308/- as the certified amount, unilaterally. The respondents 1 to 3 have issued a reply notice dated 18.12.2003 and demanded Rs.1,27,72,500/-. He also contended that the claim for recovery of suit amount is not based on any written contract. The suit cannot be filed under summary procedure, the alleged minutes dated 05.10.2012 cannot constitute the written contract and the

same is under cloud and sought leave to defend the suit under Rule 3(5) of Order XXXVII of CPC

06. The revision petitioner filed counter denying material allegations, while contending that the sub-contract was lump-sum contract for Rs.106,13,89,476/- on written terms and conditions and the work to be attended are part of main contract and such main contract embodies all ancillary and miscellaneous works connected thereto. He denied any liability to pay Rs.1,27,72,500/- while pleading that the suit is rightly filed under summary procedure. It is further contended that respondents 1 to 3 have filed the interlocutory application without making out any grounds to defend. The defence set up by them is patently dishonest and unreasonable. The third respondent voluntarily without any coercion executed the document dated 05.10.2012. At no point of time, the executants claimed that it was by force and coercion till the reply notice is caused. The long silence of the executants would demonstrate that the document was freely executed without any force or coercion and prayed to dismiss the petition.

07. Upon hearing argument of both the counsel, considering rival contentions, the trial court granted leave to defend the suit under Rule 3(5) of Order XXXVII of CPC, since the defendants made out a ground for granting leave to defend the suit filed under summary procedure under Order XXXVII of CPC.

08. Aggrieved by the order passed by the trial court in I.A. No.1024 of 2015 in O.S. No.573 of 2015, the present revision petition is filed raising several contentions mainly contending that the Order passed by the trial court in I.A. No.1024 of 2015 dated 11.03.2016 is contrary to Rule 3(5) of Oder XXXVII of CPC and that

the suit is based on a written contract. Therefore, the contention that the suit would attract summary procedure is false and that the trial court on erroneous appreciation of law concluded that the respondents 1 to 3 made out a strong prima facie case to grant leave to defend the suit and committed an error. The trial court also failed to consider the minutes of the meeting dated 05.10.2012, which is reduced into writing, and later admission at various stages, including admission notice dated 18.12.2013, which are sufficient to conclude that the respondents 1 to 3 admitted the execution of Memorandum by way of minutes in the meeting and so also their liability and when such admission is unequivocal and unconditional, the trial court ought not to have granted leave to defend unless the admitted amount is deposited in terms of Rule 3(5) of Order XXXVII of CPC, but totally ignored the admission and committed an error in passing the impugned Order.

09. On the strength of the alleged admissions in the notice, basing on the Letter dated 18.12.2013, the revision petitioner insisted this Court to direct the respondents 1 to 3 to deposit the amount admitted in terms of Rule 3(5) of Order XXXVII of CPC while granting leave to defend the suit. The learned counsel for the revision petitioner has also drawn the attention of this Court to a Judgment of the Apex Court in **SOUTHERN SALES AND SERVICES AND OTHERS v. SAUERMILCH DESIGN AND HANDELS GMBH**¹ to contend that when the defendants admitted the total or part of liability, unless the same is deposited to the credit of the suit, no

¹ AIR 2009 SC 320

unconditional leave can be granted and requested this Court to pass appropriate Order.

10. Sri G.Gopala Krishna, learned counsel for the respondents, contended that when the defendants made out prima facie defence, the Court is under obligation to grant leave to defend the suit in view of the Judgment of the Apex Court in **STATE BANK OF HYDERABAD v. RABO BANK**² and that the suit is under Order XXXVII of CPC is not maintainable and prayed for dismissal of the revision petition confirming the Order passed by the trial court.

11. In view of the rival contentions, the point that arise for consideration is,

“Whether the respondents 1 to 3 has made out a just and reasonable defence to grant leave to them, to contest the suit?”

POINT:

12. The trial court, at paragraph 17 of the Order under challenge, concluded that the suit would fall within the ambit of Order 37 of CPC i.e. summary procedure, since the relief of recovery of amount claimed based on the written contract and the finding recorded by the trial court is not under challenge by respondents 1 to 3 by filing a separate revision petition. Therefore, the finding recorded by the trial court about maintainability of the suit under the summary procedure cannot be disturbed in the revision petition filed by the plaintiff.

13. The major contest between the revision petitioner and respondents is that the respondents admitted its liability to pay an amount of Rs.1,05,48,344.94 ps. The relevant portion in the notice

² (2015) 10 SCC 521

dated 18.12.2013 received by this court is extracted herein for better appreciation.

“11.....It is also alleged by Our Client that Mr.Agarwal was forced by directors and officials of your client to make payment immediately but on request of Mr.Agarwal to make payment of the amount after final settlement of accounts between your client and M/s IJMII, as Our Client was supposed to receive payments against various works done for your client and the same may be adjusted with the dues as alleged by your client, to which some good sense prevailed on your client and they accepted the proposal of Mr.Agarwal. However, later out client came to know that the account between your client and M/s.IJMII is not finalized till date and Our Client is not liable to make any payment as per the agreed terms and in view of breach of agreement.

12. Our Client also states that at a later point of time your client instructed Our Client to submit a request letter to M/s IJMII requesting them to adjust the outstanding due of Rs.1,05,48,344.94 ps (Rupees One Crore five Lakhs Forty Eight Thousand Three Hundred Forty Four and Ninety Four Paise Only) payable to Our Client by M/s. IJMII to your client's final account settlement. Even after incurring so much of financial losses, Our Client with good intention submitted a request letter to M/s IJMII but M/s IJMII rejected their request stating that no money can be adjusted with your client as M/s IJMII has paid extra money to your client and it is to be sorted out between two parties that your client and Our Client.”

14. Taking advantage of these specific allegations made in the notice, the counsel for the revision petitioner requested this Court to direct the respondents 1 to 3 to deposit the admitted amount while granting leave for the balance of claim. In fact, as seen from the Order passed by the trial court, no witness was examined and no document was marked. This Court, though received the notice while deciding the revision petition under Article 227 of the

Constitution, cannot substitute its opinion to the opinion of the Additional District Judge, since the document which is brought on record herein by filing the miscellaneous petition was not placed before the trial court and even the trial court did not consider any of those admissions referred above, but observed at paragraph 11 that out of deliberation at the request of the second defendant (second respondent herein), 50% rebate was given and the second defendant undertook to pay Rs.1,05,48,344/- and the said admission was made in the deliberations held at Koulampur, Malaysia on 05.10.2012. As it is not based on any material, the trial court did not consider the contents of the notice and did not record any finding with regard to the admission of liability, if any, made in the said notice.

15. In those circumstances, this Court cannot decide the propriety, legality and regularity of the Order, when the document is not placed before the trial court. However the document produced before this Court is vital to the case of the respondents.

16. According to Rule 60 of Civil Rules of Practice, any fact required to be proved upon an affidavit in any interlocutory proceeding shall unless otherwise provided by these rules, or ordered by the Court, be proved by affidavit but the Judge may, in any case, direct evidence to be given orally, and thereupon the evidence shall be recorded, and exhibits marked, in the same manner as in a suit and lists of the witnesses and exhibits shall be prepared and annexed to the judgment. Thus, it is the duty of the parties to produce, if they desire to produce any document and mark them as exhibits, then the court shall annex a list of exhibits to the order.

17. It is evident from the Order under challenge that the trial court did not mark any document, and in the absence of marking of any document, as required under Rule 60 of CRP, how the Court came to such conclusion that the defendants (respondents herein) made out a plausible or just and reasonable defence, while ignoring the document produced before the trial court along with the suit, is mystery.

18. It is the duty of the Court to advert to the document including the basis of the claim under Order XXXVII of CPC, while deciding the application under Rule 3(5) of Order XXXVI of CPC and find out whether there is any justifiable defence in proposed defence set up by the defendants, but without adverting to any such document, the trial court came to such conclusion that the defendants made out a justifiable defence prima facie and granted unconditional leave to the defendants to defend the suit.

19. Therefore, the Order passed by the trial court is without any basis. Hence, the matter is remanded to the trial court directing to follow the procedure prescribed under Rule 60 of CRP and decide the matter afresh considering all the documents available on record and pass appropriate orders, in accordance with law.

20. With the above direction, the revision petition is disposed of. No costs.

21. Miscellaneous petitions, if any, pending in this revision petition shall stand closed.

M. SATYANARAYANA MURTHY, J

30-09-2016
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