IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 11.05.2018
Delivered on : 04.06.2018

CORAM

THE HONOURABLE Mr.JUSTICE V.PARTHIBAN
and
THE HONOURABLE Mr.JUSTICE P.D.AUDIKESAVALU

O.S.A.(COMM.DIV.) No.155 of 2018 &
C.M.P.No.8643 of 2018

1.M/s.Empee Distilleries Limited,
Rep by its Managing Director,
Mr.Shaji Purushothaman,
No.59, Harris Road, Pudupet,
Chennai 600 002.

2.M/s.Empee Sugar and Chemicals Limited,
Rep by its Chairman & Managing Director,
Mr.M.P.Purushothaman,
No.59, Harris Road, Pudupet,
Chennai 600 002.

3.M/s.Appollo Alchobev Limited,
Rep by its Joint Managing Director,
Ms.Nisha Purushothaman,
No.59, Harris Road, Pudupet,
Chennai 600 002.

... Appellants /Respondents/Defendants

Vs.

1.M/s.Gimpex Private Ltd.,
Formerly known as Gimpex Ltd.,
Rep by its Authorised Signatory,
Mr.K.Raja,
S/o.Mr.Kothandaraman,
No.282, Linghi Chetty Street,
Chennai 600 001.

2.The Tamil Nadu State Marketing Corporation
(TASMAC),
No.8, CMDA Tower, 4th Floor,
Gandhi Irwin Bridge Road, Egmore,
Chennai 600 008. ... Respondents

PRAYER : Original Side Appeal filed under Order XXXVI Rule 11 of

Original Side Rules read with Section 13 of the Commercial Courts, Commercial Division and Commercial Appellate Division, against the order of this Hon'ble Court dated 28.03.2018 passed in Application No.2527 of 2018 in Application No.2215 of 2018 in C.S.(Comm.Div)No.161 of 2018 in exercise of Original Civil Jurisdiction of High court of Madras.

For Appellants	:	Mr.N.L.Raja (SC) for Mr.P.Bakiyaraj
For Respondents	:	Mr.A.L.Somayaji (SC) for M/s.AAV Partners for R1 Mr.Satish Kumar for R2

J U D G M E N T

V.PARTHIBAN,J.

This Original Side Appeal has been preferred against the order of this Hon'ble Court dated 28.03.2018 passed in Application No.2527 of 2018 in Application No.2215 of 2018 in C.S.(Comm.Div)No.161 of 2018.

2. The appeal arises out of order passed by the learned Single Judge in the above said applications granting prohibitory order in favour of the plaintiff as against the defendants who are appellants herein and also refusing to vacate the prohibitory order as against the plaintiff who is the first respondent herein. The appellants are the defendants in the suit. The First respondent herein is the plaintiff and the second respondent is the State Corporation and garnishee.

3. The facts which gave rise to filing of the present appeal are briefly stated hereunder:-

The appellants and the first respondent have entered into a business understanding viz., supply of coal by the first respondent to the appellants and in order to regulate the rights and liabilities of the business transaction, a settlement was entered into between them on 21.11.2004. As per the settlement, various payments have been made by the appellants to the first respondent/plaintiff upon as a consequential supply of coal by the plaintiff and after giving credit to the supply made, there was an outstanding of Rs.19,98,09,283/- in terms of the schedule annexed to the settlement.

4. It appears that the parties have entered into subsequent settlement on 17.03.2017, thereby, certain additional immovable properties have been given as security for the payment due and the total liability has been reduced to Rs.6,67,23,218/-. However, the subsequent settlement entered

into between the parties have not been acted upon by the appellants and therefore, it appears that the same was revoked at the instance of the first respondent/plaintiff through legal notice dated 28.02.2018. The legal notice claimed a sum of Rs.19,54,29,693/- as a total outstanding debt payable by the appellants to the first respondent/plaintiff. Since, there was no response to the said notice, the first respondent has filed the suit, claiming the above said amount from the appellants who are the defendants in the suit. The second respondent has been added in the applications as Garnishee, since the second respondent/garnishee owes money to the appellants, in view of the business transaction between the appellants and the garnishee.

5. The first respondent/plaintiff moved the Trial Court for a prohibitory order under the provisions of the Civil Procedure Code, prohibiting the second respondent viz., the Tamil Nadu State Marketing Corporation (TASMAC) from making any payment to the appellants to the extent of the suit claim. The learned Judge who heard the case, had granted the prohibitory orders by restraining the second respondent TASMAC from paying any due to the appellants in regard to the supplies effected by the appellants in favour of the TASMAC upto 19.03.2018. Against the order passed by the learned Judge, the appellants herein moved an Application No.2527 of 2018 in Application No.2215 of 2018, seeking to vacate the interim order. The learned Judge after hearing both the applications, confirmed the prohibitory order and closed both the applications filed on behalf of the first respondent/plaintiff as well as the appellants, seeking to vacate the interim order. The order passed by the learned Judge dated 28.03.2018, is put to challenge in the present appeal.

6. The learned senior counsel Mr.N.L.Raja, appearing for the appellants would at the outset submit that the order passed by the learned Judge is incorrect and unsustainable for the reason that firstly, the learned Judge ought to have directed the appellants to furnish security before passing such drastic prohibitory orders against the appellants. According to the learned senior counsel, appellants were not granted enough opportunity to furnish security. The learned Judge has passed the prohibitory order without giving adequate opportunity to the appellants and therefore, the order passed by the learned Judge is liable to be interfered with.

7. Secondly, the learned senior counsel for the appellants would also submit that under the subsequent settlement dated 17.03.2017, the liability had been reduced as effected in the settlement and for which, specific security has been provided for by way of immovable properties and it was

always open to the first respondent/plaintiff to enforce the right under the subsequent settlement. Therefore, the first respondent/plaintiff not entitled to the prohibitory orders. According to the learned senior counsel, the amount which is claimed in the suit is highly inflated and has no basis at all and what was due to the plaintiff was only Rs.6,67,23,218/- and not Rs.19,54,29,693/-. According to the learned senior counsel, the immovable properties which were handed over to the first respondent/plaintiff were sufficient security for the alleged amount due to them and therefore, the prohibitory order was not called for as to right of the first respondent/plaintiff to proceed against the appellants, was sufficiently secured.

8. The learned senior counsel would further submit that the learned Judge ought to have invoked Order 38 Rule 5 of the Civil Procedure Code and ought to have called upon the appellants to furnish security. In the instant case, the learned Judge had not followed the said procedure and straight away passed the prohibitory orders. Such order passed by the learned Judge violates the procedure as contemplated in the Civil Procedure Code. Infact, during the course of the arguments, a memo of calculation of payment due to the first respondent had been filed, stating that the amount which was actually due was only Rs.6,67,23,218/- and not the amount as claimed by the first respondent/plaintiff in the suit. The learned senior counsel would rely on the decision of the Hon'ble Supreme Court of India, reported in (2008) 2 SCC 302, in the matter of Raman Tech. & Process Engg. Co and another Vs. Solanki Traders. He would draw the attention of this Court to paragraph No.5 of the order passed by the Hon'ble Supreme Court of India, which is reproduced below:-

> "5. The power under Order 38 Rule 5 COC is a drastic and extraordinary power. Such power should not be exercised mechanically or merely for the asking. It should be used sparingly and strictly in accordance with the Rule. The purpose of Order 38 Rule 5 is not to convert an unsecured debt into a secured debt. Any attempt by a plaintiff to utilise the provisions of Order 38 Rule 5 as a leverage for coercing the defendant to settle the suit claim should be discouraged. Instances are not wanting where bloated and doubtful claims are realised by unscrupulous plaintiffs by obtaining orders of attachment before judgment and forcing the defendants for out-of-court settlements under threat of attachment."

He would therefore submit that the power vested in the Civil Court must be exercised judiciously and sparingly. In the instant case, such care was not taken by the learned Judge before passing the prohibitory orders.

9. During the course of the arguments, the learned senior counsel would submit on behalf of the appellants that the appellants were ready and willing to give Bank guarantee for the amount which according to them, is due and payable as per the memo of calculation submitted before this Court and upon such furnishing of Bank guarantee, the prohibitory order may be vacated. This offer was ostensibly made on the basis of the revised settlement entered into between the parties on 17.03.2017, as per which, the entire liability has been reduced to Rs.6,67,23,218/-.

10. Per contra, Mr.A.L.Somayaji, learned senior counsel appearing for the first respondent/plaintiff would submit that sufficient opportunity was given to the appellants and in the absence of effective response from the appellants, the order came to be passed. He would strongly deny the submission made on behalf of the appellants that the actual due was only Rs.6,67,23,218/- and not as claimed in the suit. According to the learned senior counsel, the amount mentioned in the settlement agreement dated 17.03.2017, is only a part of the debt payable to the first respondent/plaintiff and the said amount did not reflect the actual payment due to the first respondent/plaintiff.

11. According to the learned senior counsel appearing for the first respondent/plaintiff, the arguments made on behalf of the appellants that sufficient security was made available by way of immovable properties, cannot be a valid argument for the reason that the same became unenforceable for more than one reason, as follows:-

(i) The Flats which were secured for discharge of the debt had several defects and the construction was not completed at all.

(ii) The title of the property in which the Flats were constructed was not perfect or proper and it appears to be a defective title and therefore, it was not a valid security arrangement which can be enforceable by the first respondent/plaintiff in discharge of debts by the appellants.

(iii) According to the learned senior counsel, the Flats which were to be handed over under the settlement agreements dated 21.11.2014 and 17.03.2017, had not been handed over to enable the first respondent/plaintiff to enforce their right to sell the property.

12. In the said circumstances, the first respondent/plaintiff had no other option except to approach the Trial Court for enforcement of the right in order to secure the

interest as against the appellants. Since, large amounts of money were due from the second respondent/garnishee to the appellants, the learned Judge thought fit to secure the interest of the first respondent/plaintiff by granting prohibitory orders and the order passed by the learned Judge was on the basis of the materials placed before him and the order being well founded, the same does not call for any interference.

13. The learned senior counsel appearing for the first respondent/garnishee would rely on the decision of this Court in the matter of ECC Leasing Company Limited Vs. Paramount Airways Pvt.Ltd., reported in 2010 (1) CTC 300. He would rely on paragraph No.21 of the order passed by the learned Judge of this Court as follows:-

> "21. Going by the language employed in Section 9(ii), it is clear that this Court has wide powers, ranging from a prohibitory order to an order for detention or preservation or interim custody or the appointment of a Receiver or even the sale of the goods which are the subject matter of the arbitration agreement. While the power to grant a prohibitory order is analogous to the power under Order 39, Rules 1 and 2, C.P.C., the power to order sale should be construed as akin to the power conferred upon a Civil Court under Order 39, Rule 6, C.P.C. Similarly, the power to order the detention, preservation or inspection of any property under sub-clause (c) of clause (ii) of Section 9 is equivalent to the power conferred under Order 39, Rule 7, C.P.C. and the power to appoint a Receiver should be construed as similar to the one under Order 40, Rule 1, C.P.C."

14. The learned senior counsel appearing for the first respondent/plaintiff would submit that the Court has wide powers ranging from prohibitory order to an order for detention etc., under Order 39. In the instant case, such power has been invoked and exercised by the learned Judge and the same cannot be faulted with. As regards the submission made on behalf of the appellants that what was claimed in the suit was inflated and imaginary and what was actually due is only Rs.6,63,23,218/-, the learned senior counsel appearing for the first respondent/plaintiff would submit that the same is disputed and it is a matter of evidence before the Trial Court. The learned senior counsel would also submit that the appellants have not filed written statement before the Trial Court and therefore, the memo of calculation filed before the Appellate Bench, cannot be accepted and acceptance of such calculation would foreclose the right of the first respondent/plaintiff to enforce their right to have dues settled in their favour by the appellants.

15. According to the learned senior counsel, the actual due from the appellants have been spelt out in detail in the legal notice which was issued prior to the filing of the suit on 28.02.2018 and subsequently, the details of the payment due have been clearly mentioned in the plaint. In the absence of any written statement and adjudication of lis between the parties, the case of the appellants need not be accepted conclusively. According to the learned senior counsel, the balance of convenience is in favour of the first respondent/plaintiff. Therefore, the learned Judge rightly granted the prohibitory orders and the same does not call for any interference.

16. On behalf of the second respondent/garnishee, a submission was made that the appellants have not raised any invoice for the period in question and whatever they have stated in the counter affidavit filed before the learned single Judge, will stand by the same.

17. We have given our careful consideration to the submissions made on behalf of the appellants as well as the respondents. The arguments advanced on behalf of the appellants by the learned senior counsel that the learned Judge ought to have given the appellants an opportunity to furnish the security before passing the prohibitory orders, cannot be accepted as a valid piece of argument for the reason that the so called immovable properties (Flats) given as security under the settlement, have become unenforceable prima facie, since there appears to be some dispute in the title of the land in which the Flats were constructed. Moreover, it appears prima facie that the Flats which were secured against the debt, have not been handed over or conveyed to the first respondent/plaintiff as per the settlement agreements and also the Flats were not fully constructed. Infact, these defects were pointed out by the first respondent/plaintiff in their legal notice and therefore, the first respondent/plaintiff has rightly sought prohibitory orders in the suit in order to secure the debt as against the appellants.

18. As regards the submission of the learned senior counsel for the appellants that the amount as claimed in the suit was not payable and what is stated in the subsequent settlement agreement dated 17.03.2017 alone is payable, for which, the appellants were willing to give Bank guarantee, it is to be seen that in the face of the dispute of the amount mentioned in the settlement dated 17.03.2017 and also in the teeth of the various averments contained in the plaint in regard to the quantum payable as outstanding by the appellants to the first respondent/plaintiff, such submission cannot be accepted at face value, since it is a matter of evidence before the Trial Court and cannot be decided on the basis of the submissions in the affidavit alone.

19. Moreover, as rightly contended by the learned senior counsel appearing for the first respondent/plaintiff that any acceptance of the amount as mentioned in the memo of calculation submitted before this Bench, would amount to foreclosing the right of the first respondent/plaintiff to enforce their right for the amount claimed in the suit. In the said circumstances, the offer made on behalf of the appellants for furnishing of the Bank guarantee only for Rs.6,67,23,218, has to be rejected outright as that would completely undermine the interest of the first respondent/plaintiff in the suit.

20. Further, the submission made on behalf of the appellants regarding their liability towards the first respondent/plaintiff is also flawed for the reason that there was no written statement filed before the Trial Court and for the first time, certain factual particulars were placed before the Appellate Court. In the absence of factual materials being placed before the Trial Court, it is not open to the appellants to assail the order of the learned Judge and it is not for the Appellate Court also to appreciate new materials being placed before the Bench by the appellants. Even otherwise, such matters do fall within the realm of evidence and the same has to be decided only in the course of the trial before the learned Judge and it is not for the Appellate Court to decide in respect of the quantum of liability conclusively in respect of one party or the other. Moreover, from the records, it is seen that no contra materials were placed for consideration before the learned Judge in denying the averments made in the plaint filed in support of the suit.

21. Infact, in the affidavit filed in support of the vacate stay application, it was mentioned that the appellants were ready and willing to abide by the terms of the two settlement agreements i.e., the statement agreement dated 21.11.2014 and the subsequent statement agreement dated 17.03.2017. In the face of such admission by the appellants, we do not see how the appellants could come up with the memo of calculation before us, stating that they were liable to pay only Rs.6,67,23,218/-. We find that such submission made on behalf of the appellants is a desperate attempt to get the order passed by the learned single Judge diluted. We found that such submission prima facie is without any merit and substance, in the absence of evidence being let in on the issue.

22. Moreover, under Section 94 of the Civil Procedure Code, the Courts have the power to pass orders to prevent the ends of justice being defeated in supplemental proceedings. Section 94 reads as follows:-

"94.Supplementary proceedings :- In order to prevent the ends of justice from being defeated the Court may, if it is so prescribed,--

(a) issue a warrant to arrest the defendant and bring him before the Court to show cause why he should not give security for his appearance, and if he fails to comply with any order for security commit him to the civil prison;

(b) direct the defendant to furnish security to produce any property belonging to him and to place the same at the disposal of the Court or order the attachment of any property.

(c) grant a temporary injunction and in case of disobedience commit the person guilty thereof to the civil prison and order that his property be attached and sold;

(d) appoint a receiver of any property and enforce the performance of his duties by attaching and selling his property;

(e) make such other interlocutory orders as may appear to the Court to be just and convenient."

23. On the whole, we do not see any infirmity in the order passed by the learned Judge which is impugned in the present appeal. We do not see any merit in the contention putforth on behalf of the appellants. Lastly, the learned senior counsel requested this Court to clarify that the prohibitory orders should be construed to mean to the extent of the suit claim and in any excess amount payable by the second respondent/garnishee to the appellants can be clarified and paid. Needless to mention that any such order ought to be meant only to the extent of the suit claim. However, specific request is made, we make it clear that the prohibitory order passed by the learned Judge which is under appeal, is restricted only to the extent of the suit claim and not otherwise.

24. With the above observations, the Original Side Appeal stands dismissed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(CS IV)

//True copy//

Sub Assistant Registrar

gsk

To

1.The Tamil Nadu State Marketing Corporation
(TASMAC),
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Chennai 600 008.

2.The Sub Assistant Registrar,
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Chennai 104.

+4cc's to Mr.P.Bakiyaraj, Advocate SR.No.34637, 33592
+1cc to Mr.AAV Partners, Advocate SR.No.34582

O.S.A.(COMM.DIV.) No.155 of 2018

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