

(1997) 12 KL CK 0030

High Court Of Kerala

Case No: C.R.P. 2113/97 and C.M.A. 225 and 235 of 1997

Woodys" Hotel Private Ltd. and
Another

APPELLANT

Vs

Prasant Kumar Panigrahy

RESPONDENT

Date of Decision: Dec. 19, 1997

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 38 Rule 5, Order 39 Rule 1, Order 39 Rule 2

Hon'ble Judges: K.S. Radhakrishnan, J; K.K. Usha, J

Bench: Division Bench

Advocate: K.K. Chandran Pillai, for the Appellant; K.R. Kurup and C.R. Syam Kumar, for the Respondent

Judgement

@JUDGMENTTAG-ORDER

K.S. Radhakrishnan, J.

Plaintiffs in O.S. No. 326 of 1,997 are the Petitioners in C.R.P. No. 2113 of 1997 and Appellants in C.M.A. No. 225 of 1997. They are the Petitioners in I.A. Nos. 3101 and 3102 of 1997. C.R.P. No. 2113 of 1997 is filed against the Order in I.A. No. 3102 of 1997, and C.M.A. No. 225 of 1997 is filed against the Order in I.A. No. 3101 of 1997. Defendant is the Appellant in C.M.A. No. 236 of 1997, which is filed against the Order in I.A. No. 3101 of 1997.

2. Suit was instituted for realisation of Rs. 5,39,590 and also for other consequential reliefs. An agreement was entered into between the Plaintiffs and the Defendant for supply of kitchen articles for their new hotel which is being set up at Ernakulam. As per the agreement, Defendant received a sum of Rs. 3,25,000 for supply of various articles. Defendant did not supply the articles according to specification, and articles supplied were also defective. Plaintiffs rejected most of the items except four items. Defendant was requested to take back the articles and to pay back the amount received from the Plaintiffs. In the suit Plaintiffs filed I.A. No. 3102 of 1997 for a

direction to the Defendant to furnish security for the amount of Rs. 7 lakhs and also for immediate attachment of items shown in the attachment schedule.

3. Plaintiffs also filed I.A. No. 3101 of 1997 under Order XXXIX, Rules 1 and 2 CPC for an injunction restraining the Defendant from transferring, alienating, removing or otherwise dealing with the articles, equipments, etc., in the business premises of the Respondent-concern at Bangalore.

4. Defendant filed counter-affidavits in both the petitions. Defendant admitted the receipt of Rs. 3,25,000. According to him, when second Plaintiff visited the factory at Bangalore on 22nd February 1996, articles worth Rs. 2,15,834 were despatched to the Plaintiffs, through M/s Classic Carriers on 25th February 1996, and were delivered at the premises of the Plaintiffs. As per the terms of the agreement, 40 percent of the value of the goods was to be paid by the Plaintiffs before despatch. In order to avoid payment, Plaintiffs issued a letter dated 9th March 1996 to the Defendant stating that some of the articles supplied were defective and did not conform to the specifications as per the contract. According to him, articles supplied were received by the Plaintiffs, and articles worth Rs. 47,000 are lying in the business premises of the Defendant. All the articles supplied by the Defendant are strictly in accordance with the specification stated in the quotation.

5. After considering various aspects of the matter, trial court granted an order of injunction with regard to items 1 to 8 mentioned in the attachment schedule. However, with regard to items 11 to 14, the trial court permitted the Defendant to utilise the same for manufacturing goods only after furnishing security of Rs. 1 lakh. It was ordered that, till security is furnished, Defendant would be restrained from utilising those items in the schedule. On the basis of the above direction, court below dismissed I.A. No. 3102 of 1997 and partly allowed I.A. No. 3101 of 1997. Aggrieved by he same, Plaintiffs and Defendant have come up before this Court.

6. When the matter came up for hearing, it was submitted by counsel for the Defendant that some of the items manufactured for the Plaintiffs are already lying in the business premises of the Defendant, and that the articles supplied by him would cover the entire amount advanced by the Plaintiffs. According to the Defendant since these goods are customer made articles, Defendant could not be in a position to dispose of the same. It is his case that huge loss has occasioned to him on this aspect. Counsel for the Plaintiffs on the other hand submitted that Plaintiffs were unaware of those facts and expressed their willingness to take delivery of those articles, if they are made on the basis of specification. Plaintiffs volunteered to send their representative to inspect the articles already manufactured.

7. Accordingly this Court passed an order on 14th November 1997 permitting the second Plaintiff or his representative to make an inspection on 18th November 1997, Brother of the second Plaintiff visited the factory premises on 18th November

1997. Later he filed an affidavit stating that he could not find any finished articles stored inside the factory premises for delivery to the Plaintiffs. According to him, only semi-finished counter was seen among other things. However, counter-affidavit has been filed on behalf of the Defendant specifying 10 items, which according to him, are items directed to be manufactured by the Plaintiffs, and the same are lying in the factory premises of the Defendant.

8. There is serious controversy between the parties as to whether the Defendant has manufactured articles as per the specification agreed to between the parties, and whether those items are lying in the factory premises of the Defendant. In our view, these are all matters of evidence, which is to be decided in the suit. Hence we are not expressing any opinion regarding those contentions. At this stage, we are concerned only with the validity or otherwise of the orders passed by the trial court in I.A. Nos. 3101, and 3102 of 1997.

9. We have perused the affidavits filed in support of both the petitions as well as the attachment schedule. In the attachment schedule there are all together 14 items. Attachment schedule shows that there are three welding machines, five buffing/grinding machines, one drilling machine, one sheet cutting machine, one filing machine, three filing cabinet, four office tables and one typewriter machine. Items 9 and 10 are one telephone and one steel almirah. As far as items 11 to 14 are concerned, no details or specifications have been given in the attachment schedule. Item 11 is described as Aluminium Sheet (bulk), item 12 is described as Stainless Steel Sheets (bulk), item 13 is described as iron angles, rods and pipes and item 14 is described as S.S. rods and pipes (bulk) and all other items. Plaintiffs sought to attach all the above mentioned items. As far as items 11 to 14 are concerned, court below ordered that the said items could be utilised by Defendant only after furnishing security for Rs. 1 lakh. As far as items 1 to 8 are concerned, court below has granted injunction restraining the Defendant from removing the said items.

10. The object of Order XXXVIII, Rule 5 is to prevent any attempt on the part of the Defendant to defeat the fruits of the decree that may be passed against him. Attachment before judgment is levied where the court on an application of the Plaintiff is satisfied that the Defendant with intent to obstruct or delay the execution of a decree that may be passed against him (a) is about to dispose of the whole or part of his property, or (b) is about to remove the whole or any part of the property from the local limits of the jurisdiction of the court. The sole object behind the order levying attachment before judgment is to give an assurance to the Plaintiff that his decree if made would be satisfied. It is a sort of guarantee against the decree becoming infructuous for want of property available from which Plaintiff can satisfy the decree. Action by attachment under Order XXXVIII, Rule 5 is preventive and not punitive. Court can look into the conduct of the parties, immediately before the suit, and examine all the surrounding circumstances and from this Court can draw inference whether the Defendant is about to dispose of his property, and if so, with

what intention. Before passing an order under Order XXXVIII, Rule 5, court must satisfy itself that the transfers are going to be made by the Defendant and that such transfers are made with the object to frustrate the Plaintiff, if he wins the suit, in executing the decree. On being satisfied with the condition sufficient to pass an order of attachment before judgment, it is in the power of the court to call upon the Defendant to furnish security and court may pass an order of conditional attachment.

11. However, attachment before judgment is an extra ordinary power, and the court may grant the same with care and caution. The power under Order XXXVIII is a drastic one, and the attachment before judgment is not to be granted on a mere assertion by the Plaintiff that the Defendant is attempting to dispose of whole or part of his property or to remove whole or any part of his property from the jurisdiction of the Court. Court has to satisfy itself on the basis of materials, and its satisfaction would be reflected in the order which the court passes under Order XXXVIII, Rule 5. In other words, before issuing an order of attachment, court must be satisfied that the Defendant is about to dispose of whole or any part of his property or to remove whole or any part of his property from the jurisdiction of the court.

12. While filing the application for attachment along with the affidavit, Plaintiff should state precisely the grounds on which belief or apprehension which the Plaintiff entertains that the Defendant is about to dispose of his property or to remove the property so as to obstruct or delay the execution of the decree. Mere verbatim reproduction of the grievances in the affidavit would not be sufficient. If it is a case that the Defendant is attempting to remove the machinery and other equipments so as to defeat the claim of the Plaintiff, Plaintiff may show in the affidavit why he entertains such a belief and from which source he has obtained information to entertain that belief. The burden is entirely on the Plaintiff to show that the Defendant is attempting to dispose of the whole or part of the property or to remove whole or part of the property from the local limits of the court in order to obstruct or delay the execution of the decree. In a given case, it may not be possible for the Plaintiff to gather all the materials or information, but he should establish before the court, the basis on which he claims that Defendant is intending to dispose of his property to obstruct or delay the execution of the decree. In this connection it may be noted that a Division Bench of this Court in *Pareed Master v. Antony* 1987 (2) KLT 649 reiterated some of the guidelines laid down by the Calcutta High Court in [Premraj Mundra Vs. Md. Maneck Gazi and Others](#),

13. In the instant case, in the petition for attachment, it is stated by the Plaintiffs as follows:

...The Respondent is doing very profitable business even now at Bangalore. Even during the time when he committed breach with respect to the agreement entered into with us, he supplied articles of the same nature for other hotels in Kerala. This

shows the extreme disinterestedness shown by the Respondent in the matter of supply of articles to us....

In the meanwhile we made detailed enquiries about the Respondent in his native place. Our enquiry revealed that Respondent has not got any immovable property in his name. He has got the workshop and also the machinery, equipments and other articles in the workshop as his only assets. He is residing in a rented house according to our information. It is also understood that Respondent owes amounts to other persons also, and he is not financially Sound at present. Under the above circumstances, if the suit is decreed in our favour, we may not be able to realise the decree amount, unless sufficient safe guards are made with respect to the machinery, equipments and other articles that are there in the Respondent's workshop. The workshop is housed at A-3, 56/1, Kottigepalaya, Magadi Main Road, Bangalore-79. We also understand that the Respondent is intending to transfer the machinery and equipments in the work shop with intention to defect the creditors and to obstruct the execution of the decree that may be passed in the suit.

The affidavit filed by the Plaintiffs shows that the Defendant is doing very profitable business at Bangalore and that he is supplying various articles of the same nature to other Hotels in Kerala. If that is the position, it is difficult to believe that the Defendant would close down the business and remove machinery and other items to defeat the claim of the Plaintiffs. Plaintiffs have also not stated in the affidavit what type of enquiry they have made, and what are the materials on which they entertain the belief that the Defendant is attempting to dispose of his property and machinery in spite of the fact that Defendant is having a good business at Bangalore. We are of the view that the averments made by the Plaintiffs in the affidavit would not be sufficient to satisfy the court to order attachment of the items mentioned in the attachment schedule.

14. In the attachment schedule also Plaintiffs have not given any details with regard to items 11 to 14. We are at a loss to understand how the court below has ordered attachment of items 11 to 14. There is no material to show that those items belonged to the Defendant. In the absence of any specification with regard to items 11 to 14, we are of the view that court below is not justified in ordering attachment of those items.

15. We, therefore, lift the attachment with regard to items 11 to 14 With regard to items 1 to 8, evidently those items exclusively belonged to the Defendant. In view of the fact that Defendant has no intention to part with items 1 to 8, they would remain under-attachment till the suit is disposed of.

The order in I.A. No. 3102 of 1997 is modified as above and C.R.P. No. 2113 of 1997 is disposed of accordingly. The order in I.A. No. 3101 of 1997 is vacated. Consequently C.M.A. No. 225 would stand dismissed and C.M.A. No. 236 of 1997 would stand allowed.