

(2002) 01 AP CK 0004

Andhra Pradesh High Court

Case No: C.R.P. No. 1749 of 2000

Madhusudhan K. Jani and
Another

APPELLANT

Vs

Andhra Bank, Bhanur Branch
and Others

RESPONDENT

Date of Decision: Jan. 28, 2002

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 37 Rule 3, Order 37 Rule 3(4), Order 37 Rule 3(5), Order 37 Rule 5(3), 115

Citation: (2002) 3 ALT 521 : (2002) 1 APLJ 241

Hon'ble Judges: G. Rohini, J

Bench: Single Bench

Advocate: Bimal Bhasker, for the Appellant; M.V. Durga Prasad, for the Respondent Nos. 1 and 2, for the Respondent

Final Decision: Dismissed

Judgement

@JUDGMENTTAG-ORDER

G. Rohini, J.

The plaintiffs are the petitioners in this Civil Revision Petition which is directed against the order dated 28-09-1999 made by the II Senior Civil Judge, City Civil Court at Hyderabad in I.A.No. 1319 of 1997 in O.S.No. 1234 of 1997 allowing an application filed under Order 37 Rule 3 (5) of CPC thereby granting leave to defendants 4 and 5 to defend the suit.

2. The brief facts of the case are as follows:

The revision petitioners filed O.S. No. 1234 of 1997 against defendants 1 to 5 seeking a decree for recovery of Rs. 51,84,850/-. The defendants 1 to 3 failed to appear before the Court, but defendants 4 and 5, Branch Manager and Chairman

and Managing Director of Andhra Bank, which is a Nationalised Bank filed I.A. No. 1319 of 1997 seeking leave of the Court to defend the suit. In the affidavit filed in support of the said application, it has been stated on behalf of defendants 4 and 5 that the suit has been filed as a counter blast to the criminal cases filed against the 1st plaintiff and defendants 1 to 3, which are under investigation by the Central Bureau of Investigation. The 1st defendant, who was the Manager of the defendant No. 4 Branch at the relevant point of time, in collusion with Plaintiff No. 1 and defendants 2 and 3 misappropriated funds of the Bank to the tune of crores of rupees. The matter was handed over to the CBI and consequent thereto the CBI filed FIR in RC No. 8-A and 9-A against the plaintiffs as well as defendants 1 to 3 and charge-sheets are yet to be filed. The suit transaction is the subject matter of investigation pending with the CBI. It is also stated that no cause of action is disclosed in the suit against the Bank and there are absolutely no bona fides on the part of the plaintiffs in filing the suit, which is an attempt to pre-empt the criminal proceedings initiated against them. It is also stated that the records available in the Bank do not support the correctness of the allegations in the plaint. Accordingly the defendants 4 and 5 claimed that there are triable issues in respect of the suit claim and as such requested to grant leave to defend the suit.

3. The plaintiffs contested the said application by filing counter contending inter alia that the petitioners failed to make out any reason or justifiable cause as to why the suit should not be decreed.

4. The trial Court having heard both the parties, by order dated 28-9-1999 allowed the said application holding that the suit claim is connected with the criminal proceedings against the plaintiffs and defendants 1 to 3 with regard to misappropriation of amount by committing fraud on the Bank, and therefore, there are triable issues to be decided in regular course of trial of the suit. Aggrieved by the said order, the plaintiffs have come up with the present Civil Revision Petition.

5. Heard the learned counsel for the petitioners as well as the learned counsel for the respondents 1 and 2, who are the defendants 4 and 5 in the lower Court.

6. The learned counsel for the petitioners submits that in the facts and circumstances of the case, the Court below ought not to have granted leave to defendants 4 and 5 to defend the suit. He contends that the mere allegations of fraud made by the defendants 4 and 5 cannot be taken into consideration in the absence of any proof, and therefore, it cannot be said that there is any triable issue to grant leave to defend the suit. On the other hand, the learned counsel for the respondents submits that the Bank has clearly made out a triable issue and the court below in exercise of discretion conferred under Order 37 Rule 3 (5) of CPC has rightly granted leave to defend and the same does not warrant any interference in the Revision Petition.

7. Having regard to the contentions raised by the respective parties and on a perusal of the material on record, the point that arises for consideration is whether the order under revision made in exercise of discretion conferred under Rule 3 (5) of Order 37 of CPC warrants interference by this court u/s 115 of CPC.

8. Order 37 of CPC deals with summary procedure for the suits with an object of quick disposal of the suits based upon bills of exchange, hundies and promissory notes and the suits in which the plaintiff seeks to recover a debt or liquidated demand in money payable by the defendant arising on a written contract or on an enactment or on a guarantee. Rule 3 of Order 37 prescribes the procedure for appearance of the defendant in a summary suit. As per Sub-rule (5) of Rule 3 the defendant may, at any time within 10 days from the service of summons for judgment served under Sub-rule (4), apply for leave to defend the suit, and leave to defend may be granted by the Court unconditional or upon such terms as may appear to the Court to be just.

9. It is necessary to extract Sub-rule (5) of Rule 3, which runs as follows:

Order 37 Rule 3: (Procedure for the appearance of defendant):-

(a)

(2).....

(3)

(4).....

(5) The defendant may, at any time within ten days from the service of such summons for judgment, by affidavit or otherwise disclosing such facts as may be deemed sufficient to entitle him to defend, apply on such summons for leave to defend such suit, and leave to defend may be granted to him unconditionally or upon such terms as may appear to the court of Judge to be just.

Provided that leave to defend shall not be refused unless the court is satisfied that the facts disclosed by the defendant do not indicate that he has a substantial defence to raise or that the defence intended to be put up by the defendant is frivolous or vexatious.

Provided further that, where a part of the amount claimed by the plaintiff is admitted by the defendant to be due from him, leave to defend the suit shall not be granted unless the amount so admitted to be due is deposited by the defendant in Court.

10. A plain reading of the aforesaid provision shows that the affidavit filed in support of the application for leave to defend has to disclose the facts as may be deemed sufficient to entitle the defendant to defend. The first proviso makes it further clear that the application shall not be refused except where the Court is

satisfied that the facts so disclosed by the defendant do not indicate that the defendant has a substantial defence to raise or where the Court is satisfied that defence intended to be put up is frivolous or vexatious.

11. Thus it is clear that what is required to be examined at the stage of grant of leave to defend is whether the facts stated in the affidavit, if established, would entitle the defendant to defend. At that stage, it is not necessary for the defendant to establish the facts stated in the affidavit nor the Court is required to decide whether the defence is legal or equitable.

12. The power conferred under Rule 5(3) of Order 37 of CPC is purely discretionary and each case has to be decided on the facts and circumstances of a particular case. It is well settled that where the lower Court in exercise of its discretion grants leave to defend, this court will not interfere in a Revision Petition except where the discretion exercised is found to be arbitrary or perverse.

13. In a recent decision in [M/s. Sunil Enterprises and Another Vs. SBI Commercial and International Bank Ltd.](#), the Supreme Court on a review of the earlier decisions summed up the principles on this aspect, which are as follows:

(A) If the defendant satisfies the court that he has a good defence to the claim on merits, the defendant is entitled to unconditional leave to defend.

(B) if the defendant raises a triable issue indicating that he has a fair or bona fide or reasonable defence, although not a possibly good defence, the defendant is entitled to unconditional leave to defend.

(C) If the defendant discloses such facts as may be deemed sufficient to entitle him to defend, that is, if the affidavit discloses that at the trial he may be able to establish a defence to the plaintiff's claim, the court may impose conditions at the time of granting leave to defend -the conditions being as to time of trial or mode of trial but not as to payment into court or furnishing security.

(D) If the defendant discloses such facts as may be deemed sufficient to entitle him to defend, that is, if the affidavit discloses that at the trial he may be able to establish a defence to the plaintiff's claim, the court may impose conditions at the time of granting leave to defend -the conditions being as to time of trial or mode of trial but not as to payment into court or furnishing security.

(E) If the defendant has no defence or the defence is illusory or sham or practically moonshine, the court may show mercy to the defendant by enabling him to try to prove a defence but at the same time protect the plaintiff imposing the condition that the amount claimed should be paid into court or otherwise secured.

14. If the facts in the case on hand are analysed in the light of the aforesaid principles laid down by the Supreme Court, it may be noticed that the fact that criminal case is pending against the plaintiffs and defendants 1 to 3, is not disputed

by the plaintiffs in the counter filed by them. It is the specific case of the defendants 4 and 5 that the suit transactions relate to transfer of FDRs and the loans availed in collusion with defendant No. 1, who is an Officer of the Bank and that the plaintiffs as well as defendants 1 to 3 are figured as accused in the FIR filed by the CBI. The Court below on the basis of the material on record, has recorded its prima facie satisfaction that the suit claim is connected with the criminal case pending against the plaintiffs and the defendants 1 to 3 with regard to the misappropriation of amount by committing fraud on the Bank. In the circumstances the defence put up by the defendants 4 and 5 cannot be said to be sham or illusory. The facts disclosed by the defendants 4 and 5 are sufficient to entitle them to defend the suit and as rightly held by the Court below they have succeeded in raising a triable issue indicating that they have a bona fide and reasonable defence. Therefore, it cannot be said that the order under revision is either illegal or suffers from any material irregularity in exercise of jurisdiction vested under law.

15. The learned counsel for the petitioners would also contend that in view of the fact that defendants 1 to 3 did not appear before the Court or did not seek the leave of the Court to defend the suit, the Court below ought to have decreed the suit against defendants 1 to 3 and since the Court below failed to do so, the order under Revision cannot be sustained. I am unable to agree with the said submission since no material is available before this Court regarding the steps taken against the defendants 1 to 3. At any rate while adjudicating the correctness of the order under Revision it is not necessary for this Court to express any opinion on the said issue.

16. For the reasons stated supra, this is not a fit case, warranting interference with the discretion exercised by the court below. The Civil Revision Petition is accordingly dismissed. There shall be no order as to costs.