

Chementecno Srl and anr. Vs. Indi Finorcil Pvt. Ltd., Hyd.

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SooperKanoon Citation : sooperkanoon.com/432756

Court : Andhra Pradesh

Decided On : Dec-29-1997

Reported in : 1998(2)ALD311; 1998(2)ALT373

Judge : B. Sudershan Reddy, J.

Acts : [Code of Civil Procedure \(CPC\), 1908](#) - Sections 115 - Order 3, Rule 4 - Order 21, Rules 44 and 46-A - Order XXXVIII

Appeal No. : C.R.P. No. 3276 of 1997

Appellant : Chementecno Srl and anr.

Respondent : indi Finorcil Pvt. Ltd., Hyd.

Advocate for Def. : Mr. B. Nalinkumar, Adv.

Advocate for Pet/Ap. : Mrs. C. Jayashree Sarathi, Adv.

Judgement :

ORDER

1. The respondents-defendants are the petitioners in this revision petition. The instant civil revision petition is filed questioning the correctness of the order passed by the learned V Additional Judge, City Civil Court, Hyderabad in I.A.No.295 of 1996 in O.S-No.241 of 1996. By the impugned order, the trial court directed the petitioners herein to furnish bank guarantee for a sum of US \$

1,83,750 equivalent to Indian currency Rs.63,39,375/- as a security within four weeks from the date of the order. Upon furnishing such security, the ex-parte prohibitory garnishee order dated 7.3.1996 was directed to be vacated and in default of compliance of the order, the ex-parte order dated 7-3-1996 shall remain in force. This is in substance, the order passed by the trial Court.

2. The respondents herein filed an application in the Court below under Order 21 Rule 46, 46-A read with Section 115 CPC for grant of garnishee order prohibiting one Vantech Pesticides Limited and three other companies from making any payments to the petitioners herein either by way of collaboration or otherwise for deposit of the said amount into the Court. The Court by an order dated 7-3-1996 granted an ex-parte order prohibiting the said four companies from making any payments to the petitioners herein until further orders. The petitioners herein filed the counter and an application to vacate the said order dated 7-3-1996.

3. It is required to notice that the respondent herein filed a suit for recovery of an amount of US \$ 1,83,750 equivalent to Indian currency Rs.63,39,375/- with interest and costs towards the commission and collaboration agreements entered into between the parties and four other companies based at Hyderabad. It is its case that the petitioners herein committed breach of contract and trust and indulged in criminal acts. Admittedly, the petitioner-Company is placed in Italy and only its assets in India are the fee receivable from Indian companies with whom the petitioners have entered into collaboration agreements. It is the case of the respondent that if the petitioners are allowed to receive the fee and leave India, great prejudice would be caused to it as it would not be in a position to recover the amount in any manner.

4. There is no need to mention all the facts in detail inasmuch as the controversy between the parties is a very limited one.

5. It is required to notice that Exs.A-1 to A-20 have been marked on behalf of the respondent-plaintiff and no documents whatsoever were marked on behalf of the petitioners. 'It is the case of the respondent' that the petitioner-Company came in contact with the respondent-Company in the year 1993 and there was mutual

agreement that for each Indian client/company that the respondent-Company introduces to the petitioners, the petitioners would have to pay the respondent-Company a commission of 7.5% of the contracted collaboration fee receivable by the petitioner-Company and such commission being payable upon presentation of invoice and linked to the proportion and time of the petitioners receiving payments of due installments of collaboration fee from the respective Indian company.

6. It is the case of the respondent-Company that it had already introduced four Indian companies to the petitioners viz., Vantech Pesticides Limited, Rajyalaxmi Laboratories Private Limited, Vera Laboratories Limited and Betalax Laboratories Limited for the business purposes and the same was subsequently approved by the Government of India. It is required to notice that the petitioners herein while admitting introduction of three companies however disputed the introduction of Vantech Pesticides Limited stating that the deal with the said company was struck even prior to acquaintance of the petitioners with the respondent. It is the case of the respondent-Company that the petitioners herein collected the first installment from the above four companies but paid just two payments of US \$ 24,000 and failed to pay the balance despite several demands and legal notice. Under those circumstances, the respondent-plaintiff filed the suit along with the application.

7. It had so transpired during the hearing of the application that the learned Counsel appearing for the petitioners-defendants submitted that an adequate bank guarantee as a security for the suit amount shall be furnished by the petitioner-Company and under those circumstances, there was no need to pass any order under Order 21, Rule 46 and 46-A CPC. The trial Court was impressed by the said offer by and on behalf of the petitioners-defendants and accordingly, accepted the same and directed the petitioners to furnish bank guarantee for a sum of US \$ 1,83,750 equivalent to Indian currency Rs,63,39,375/-.

8. Sri C.P. Sarathi, learned senior Counsel appearing on behalf of the petitioners submits that there was no concession whatsoever made by the learned Counsel appearing on behalf of the petitioners in the trial Court. Therefore, the learned senior Counsel submits that the trial court ought not to have directed the petitioners herein to furnish bank guarantee.

9. Sri K.G. Kannabiran, learned senior Counsel appearing on behalf of the respondent-plaintiff submits that such a statement of fact was made by the learned Counsel appearing on behalf of the parties and the trial Court had accordingly recorded the same in its order. It is submitted that it is not open to any of the parties to raise such pleas contrary to what is contained in the order passed by the court below.

10. It is however submitted by Sri C.P.Sarathi, learned senior Counsel that even if such a concession was made by the learned Counsel appearing on behalf of the petitioners in the trial Court, yet the petitioners are not bound by the same.

11. It is required to notice that in the memorandum of grounds, it is stated that on verification from Mr.M.N. Bhatkal, advocate of M/s. Singania & Co., the petitioner were informed that the offer made by the said Counsel was only for US \$ 24,000 relating to collaboration agreement dated 10-5-1994 and not for the entire suit claim. In one of the grounds, it is raised that the learned Judge should not have relied on the alleged concession of the Counsel without anything in writing by the petitioners and the Counsel had no authority to consider in any manner whatsoever.

12. In another ground, it is submitted that Mr. Rajesh Bhojwani filed counter affidavit without taking instructions from the petitioners and committed blunders in the counter affidavit stating that all the four companies mentioned in the plaint were introduced to the defendant-Company.

13. In this revision petition, an affidavit Mr. M.N. Bhatkal, senior advocate who is stated to have appeared in the matter in the trial court is filed. In the said affidavit, it is stated as follows:

'2. I state I never conceded at the time of arguments before the lower Court to furnish adequate Bank Guarantee or security for the suit amount I argued that in regard to the agreement dated 10-5-94 part payment of US \$ 24,000 was already paid and the respondent is not entitled even for that amount, as no service has been rendered by the respondents in pursuance of the agreement dt. 10.5.94 and that the respondent is not entitled for any amount under the said agreement.

3. 1 submitted that as per Agreement dt. 10-5-94 if at all there is any liability, it is only to the extent of balance of US \$ 24,000 and that Bank Guarantee can be given to the extent of US \$ 24,000 if the court so orders if a proper application under Order XXXVIII of the Code of Civil Procedure, 1908 is made by the Plaintiff and that the Court should be satisfied for either attaching the property or securing the Plaintiff by a bank guarantee for the balance US \$ 24,000.

14. Thus, it is very difficult to appreciate the submission made by the learned senior Counsel for the petitioners that no concession whatsoever was made by the learned Counsel appearing on behalf of the petitioners in the trial Court. In the very affidavit filed by the said Counsel, it is stated that he argued with regard to agreement dated 10-5-1994 part payment of US \$ 24,000 and if there is any liability, it is only to the extent of balance of US \$ 24,000 and the bank guarantee can be given to the extent of US \$ 24,000 if the Court so orders and if a proper application is made by the plaintiff

15. The order passed by the trial Court does not show that the learned Counsel appearing on behalf of the petitioners made such a statement. On the other hand, the order would show that a categorical statement of fact was made by the learned Counsel appearing on behalf of the petitioners that the petitioner-Company was willing to furnish bankguarantee, It is not unusual for the Counsel appearing in matters to make such statements of fact to avoid the order adverse to the interests of their clients. I do not wish to express any opinion whatsoever about the contents of the affidavit filed by the senior Counsel in this Court as it may not be necessary. Rather, I would proceed on the assumption that what is stated in the order passed by the trial Court is correct and required to be accepted.

16. There are two aspects in the matter. One, whether such a concession was made at all and the other, whether the concession made by the learned Counsel appearing on behalf of the parties is binding upon the petition-Company.

17. So far as the first question is concerned, I have no hesitation whatsoever to go by the record of the Court. It is not open to any Counsel whether senior or an advocate on record to contend contrary to what is stated in the order itself Of course, it would be a different thing altogether if such order is the result of fraud

made by any of the parties to the suit. There is no such plea.

18. The Apex Court in *State of Maharashtra v. Ramdas Shrinivas Nayak*, : 1982 CriLJ1581 while dealing with more or less similar situation held as follows :

'We are afraid that we cannot launch into an inquiry as to what transpired in the High Court. It is simply not done. Public Policy bars us. Judicial decorum restrains us. Matters of judicial record are unquestionable. They are not open to doubt. Judges cannot be dragged into the arena. 'Judgments cannot be treated as mere counters in the game of litigation'. (Per Lord Atkinson in *Somasundaran v. Subramanian*, AIR 1926 PC136). We are bound to accept the statement of the Judges recorded in their judgement, as to what transpired in Court. We cannot allow the statement of the Judges to be contradicted by statements at the Bar or by affidavit and other evidence. If the Judges say in their judgment that something was done, said or admitted before them, that has to be the last word on the subject. The principle is well-settled that statements of fact as to what transpired at the hearing, recorded in the judgement of the court, are conclusive of the facts so stated and no one can contradict such statements by affidavit or other evidence. If a party thinks that the happenings in court have been wrongly recorded in a judgment, it is incumbent upon the party. While the matter is still fresh in the minds of the Judges, to call the attention of the very Judges who have made the record to the fact that the statement made with regard to his conduct was a statement that had been made in error (Per Lord Buckmaster in *Madhusudan v. Chandrabati*, AIR 1917 PC 30). That is the only way to have the record corrected, If no such step is taken, the matter must necessarily end there. Of course a party may resile and an Appellate Court may permit him in rare and appropriate cases to resile from a concession on the ground that the concession was made on a wrong appreciation of the law and had led to gross injustice; but, he may not call in question the very fact of making the concession as recorded in the judgement.....

So the Judges' record is conclusive. Neither lawyer nor litigant may claim to contradict it, except before the Judge himself, but no where else'.

19. In such view of the matter, I have no option whatsoever except to accept as to what is stated in the order passed by the learned trial Judge while disposing of I.A. No.295 of 1996. Under these circumstances, I have no doubt whatsoever to hold that the learned counsel appearing on behalf of the petitioners made a statement of fact before the court stating that the petitioner-Company is believed to furnish bank guarantee to the satisfaction of the Court for a sum of Rs.63,39,375/-. True, the trial Court instead of saying that it was a statement of fact made by the learned senior Counsel characterised the said statement as a concession. There was no question of any concession as such involved. The trial Court could have stated in the order to the effect that such a statement was made. Instead, the trial Court had characterised such statement as a concession. Nothing turns upon such wrong description. The fact remains that the trial court had recorded the statement made by the learned counsel for the petitioners.

20. Sri C.P.Sarathi, learned senior counsel submits that Mr. M.N.Bhatkal is a senior advocate and there is no relationship of advocate and client between him and the petitioners and therefore, he could not have acted on behalf of the petitioners and made such a statement to the Court. The learned senior Counsel places reliance upon a judgement of the Orissa High Court in D. Adinarayana Subudhi v. D. Surya Pradash Rao, : AIR1980 Ori110 . It was held by the Orissa High Court that when a pleader gives an undertaking, he acts as the agent of the client and as representing him. He derives his authority from the client and that is why he is required to file a vakalatnama duly signed by the client as required under Order 3, Rule 4 CPC, He is prohibited from acting without a vakalatnama A senior Advocate is debarred from filing a vakalatnama, taking instructions from the client and from doing 'any act other than pleading required or authorised by law to be done by a party'. He has no power to act on behalf of a party without document in his favour. There is no dispute with the proposition.

21. In Union of India v. S.R. Shareshwar, : (1971)11LLJ117SC the Apex Court observed that a concession made even by the learned Attorney-General on a point of law is not binding upon the parties.

22. In *Periyar and Pareekanni Rubbers Limited v. State of Kerala*, : AIR 1990 SC2192 , the Apex Court observed that a concession made by the Government Pleader in the trial Court cannot bind the Government as it is obviously always unsafe to rely on the wrong or erroneous or wanton concession made by the counsel appearing for the State unless it is in writing on instructions from the responsible officer. The Apex Court however held that the same yardstick cannot be applied when the Advocate General makes a statement across the Bar.

23. In my considered opinion, the judgment upon which reliance is placed by the learned senior Counsel would have no application whatsoever to the facts on hand. The first case relates to the concession made by the learned Attorney-General that too relating to question of law. In the second case, the observations made by the Apex Court are required to be understood in the proper perspective. In that case, concession was made by the Government Pleader without any written instructions from the Government. The Apex Court held that it would be unsafe for the courts to rely upon such concessions without written instructions from the Government.

24. Here is a dispute between two private parties and the same principle cannot be extended to a statement of fact made by the learned Counsel appearing on behalf of one of the parties before the court.

25. Obviously, the petitioners have even gone to the extent of making certain allegations against their own Counsel with a view to avoid the liability. Under the order impugned in this revision petition. In my considered opinion, the Counsel appearing on behalf of the parties cannot be put to such an embarrassing position.

26. Be that as it may, the judgement 1 cited supra squarely applies to the facts on hand. I have no option except to go by the statement of fact recorded by the trial Court in the order under revision. May be, the trial Court had wrongly described the statement of fact as concession. Viewed from that angle, the judgments upon which reliance is placed by the learned senior Counsel would have no application whatsoever. Even in the memorandum of grounds and the affidavit filed in the revision petition, no categorical plea as such is taken except stating that the concession was made only with regard to an amount of US \$ 24,000 and not with

regard to the entire amount. It is interesting to notice that even in the memorandum of grounds and in the affidavit, it is stated that the learned Counsel appearing on behalf of the petitioners committed blunders even in drafting the counter affidavit in the court below. It is difficult to appreciate as to what made the petitioners to subscribe to such contents of the counter affidavit. Obviously, it is an after-thought on the part of the petitioners.

27. Viewed from any angle, I have no hesitation to uphold the order under revision. The same order is maintained in all its force. It is however open to the petitioners herein to furnish the bank guarantee even now and avoid the order of garnishee.

28. However, in view of the controversy between the parties and having regard to the facts and circumstances of the case, I consider it appropriate to direct the trial Court to dispose of the suit as expeditiously as possible preferably within six months from today. Both the learned counsel appearing on behalf of the parties in this revision petition have undertaken before me that they shall cooperate and shall not ask for unreasonable adjournments in the matter to protract the litigation. Under these circumstances, I do not think it would be difficult for the trial Court to dispose of the suit within the time stipulated. There should be a direction accordingly.

29. With the above direction, the Civil Revision Petition is dismissed. No costs.