

**Shree Krishan Binani and Anr. Vs. Progressive Constructions Limited**

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**SooperKanoon Citation :** [sooperkanoon.com/62415](http://sooperkanoon.com/62415)

**Court :** Kolkata

**Decided On :** Aug-05-2015

**Judge :** Soumen Sen

**Appellant :** Shree Krishan Binani and Anr.

**Respondent :** Progressive Constructions Limited

**Judgement :**

ORDER

SHEET GA No.1840 of 2014 CS No.202 of 2014 IN THE HIGH COURT AT CALCUTTA Ordinary Original Civil Jurisdiction ORIGINAL SIDE SHREE KRISHAN BINANI & ANR.

Versus PROGRESSIVE CONSTRUCTIONS LIMITED BEFORE: The Hon'ble JUSTICE SOUMEN SEN Date : 5th August, 2015.

Appearance: Mr.Sumon Dutt, Adv.Mr.Kumar Gupta, Adv.Mr.Rajesh Kr.

Gupta, Adv.Mr.Ramesh Dhara, Adv.Mr.Soumabho Ghose, Adv.Mr.Uttam Sharma, Adv.The Court: The Court: In a suit for recovery of money, the petitioner has filed this application in the nature of attachment before judgment.

The claim in the suit has arisen out of price of goods sold and delivered.

The petitioner claims to have sold goods of diverse specifications between January 2009 and April 2011 to the respondents.

The petitioner states that against the supply made for the period from January 2009 to April 2011, the petitioner raised bills and/or invoices aggregating to Rs.2,76,77,888/-.

The respondent in acknowledgement of its dues made part payment of a sum of Rs.2,22,00,720/-.

The respondents, however, had failed and neglected to pay the balance amount.

After giving credit for the part payments made a sum of Rs.54,77,168/- had remained due and payable by the respondent on account of goods sold and delivered.

The petitioner further states that in respect of the materials sold and delivered in April 2011 the respondent also did not issue Central Sales Tax Declaration Forms amounting to Rs.53,038/-.

Under such circumstances, the petitioner has claimed a sum of Rs.95,99,75/- together with interest.

The petitioner states that the notice of demand sent by the petitioner was returned with the endorsement unclaimed.

However, subsequently, copies of statement of accounts and other documents as desired by the respondent were supplied to the respondent in order to enable the respondent to reconcile the accounts and enable the respondent to make payment of the balance sum.

The petitioner in justification of its claim for security and attachment before judgment has stated that the materials supplied by the petitioner were to be utilized for the projects of National High Way Authority of India and the incomes from the said project forms as the main source of income for the petitioner.

The petitioner states that the respondent has no other asset out of which the claim of the petitioner could be satisfied.

The petitioner has also given particulars of the bank accounts of the defendant and has stated that from the information gathered by the petitioner it appears that the respondent is going through financial penury and the monies receivable from NHAI are the only property of the respondent which could satisfy the decree.

The respondent with the sole intention of defrauding its creditors is withdrawing the said sums with undue haste.

During the pendency of the proceeding, pursuant to the notice served upon NHAI, the said authority appeared and filed an affidavit in which it is contended by the said authority that the bills are yet to be finalized in respect of the work done by the defendant and if it is found that any amount is payable to the defendant company after adjustment, NHAI shall not release it to the defendant company without deducting the amount as may be directed by this Honble Court.

The defendant in the affidavit in opposition has referred to few letters purported to have been sent to the plaintiff by courier to show that the accounts have been settled by and between the parties and no amount is due and payable by the defendant to the plaintiff.

It is stated that the payments which have been made by the respondent against the bills raised by the petitioner was in full and final satisfaction of the claims of the petitioner which would be evident from the letter dated 18th February, 2012.

The respondent stated that the respondent did not issue the Sales Tax Declaration Form in respect of the materials sold in April, 2011 as the goods supplied were returned by the respondent to the petitioner as they were all of inferior quality.

The respondent relies upon a communication dated 26th March, 2012 which apparently was sent to the petitioner by courier.

Mr.Sumon Dutt, learned Counsel, appearing on behalf of the petitioner submits that on the basis of the materials disclosed in the petition and the nature of the

defence, it can be safely concluded that the defendant has no defence to the claim of the plaintiff inasmuch as the letters on which reliance have been placed by the respondent in denying its liability are all manufactured and/or fabricated and/or brought into existence only for the purpose of this litigation.

The defendant is unable to demonstrate that the said letters in fact were dispatched or received by the plaintiff.

It is submitted that since the defendants did not return the said goods and have utilized the said goods for its business purpose, there is an acceptance of the goods within the meaning of Section 42 of the Sale of Goods Act.

It is submitted that in the petition the petitioner has specified the property required to be attached and the estimated value thereof.

It is also stated in the said petition that the defendant is going to remove and/or dispose of the money receivable from NHAI inasmuch as it is stated in the petition that the defendant with intend to defraud the creditor is likely to siphon of the said money unless restrained in order to render the present proceeding infructuous.

The learned Counsel has relied upon Section 94 (b) and (c) of the Code of Civil Procedure and Section 151 of the Code and cites the judgment in Manohar Lal Chopra Versus Rai Bahadur Rao Raja Seth Hiralal reported at AIR1962 Supreme Court 527 paragraph 18 and submits that in construing provisions Section 94 CPC.

It was held that if the provisions of Section 94 were not there in the Code, the Court could still issue temporary injunctions but it could do that in the exercise of its inherent jurisdiction and the Court exercises its inherent jurisdiction only when it considers it absolutely necessary for the ends of justice.

Mr.Soumabho Ghose, learned Counsel appearing on behalf of the defendant on the other hand submits that the basis of the application is to convert the money claim into a secured claim.

It is submitted that in order to invoke the jurisdiction of this court under Order 38, Rule 5 of the Code of Civil Procedure, it is incumbent upon the plaintiff to demonstrate that the conditions of Order 38 Rule 5 are fulfilled.

In a suit for recovery of money the plaintiff cannot be considered to be a secured creditor unless the dues are secured in accordance with law.

In the instant case the money is not secured and the claim is purely on account of price of goods sold and delivered.

It is submitted that it is not law of the land, as held in Kohinoor Steel PVT.LTD.versus Pravesh Chandra Kapoor reported at AIR2011 Calcutta 29, that a defendant in a money suit must show that its earning is sufficient to pay all the decretal amount if the suit is ultimately decreed, otherwise he would suffer an order of injunction in the form of attachment before judgment or should give security during the pendency of this suit.

The learned Counsel has also relied upon the Division Bench judgment in Fertiliser Corporation of India LTD.versus Indian Explosive LTD.reported at AIR2006 Calcutta 97 and Sunil Kakrania Versus Saltee Infrastructure LTD.reported at AIR2009 Cal 260 to argue that unless the plaintiff is able to demonstrate that the conditions of Order 38, Rule 5 is fulfilled the plaintiff is not entitled to any order.

It is further argued that in Sunil Kakrania (supra) the Honble Division Bench considered whether on invocation of Section 151 of the Code, the Court should pass an order of injunction or order of attachment even though the ingredients of order 38 Rule 5 are absent.

Both Mr.Ghose and Mr.Dutt has relied upon paragraphs 26 and 27 of Sunil Kakrania although for different purposes.

Mr.Ghose would submit that paragraphs 26 and 27 support the contention of the defendant, whereas Mr.Dutt would submit that the Honble Division Bench declined to pass an order of attachment since the required averment in the petition was missing.

There is no dispute that the plaintiff has supplied diveRs.goods to the defendant between January 2009 and April 2011.

The defendant also admits to have paid a sum of Rs.2,22,00,720/-.

The defendant has failed to establish that the goods were of inferior quality or that the goods sold in April 2011 were returned to the plaintiff.

The letters relied upon by the defendant would not show or prima facie establish that the goods were returned due to inferior quality or the amounts paid by the defendant were in full and final settlement of all claims between the parties.

Moreover, the said letters were purported to have been sent by some obscure courier company and there is nothing on record to show that the said letters in fact were delivered to the plaintiff.

It is settled law that the letters sent by registered post raise a stronger presumption than a letter sent either under certificate of posting or by a courier.

In the purported letters claimed to have been sent by the defendant to the plaintiff, the defendant has raised certain dispute with regard to the quality of the materials.

If the defendant relies on the said letters then the defendant has to establish that the said letters in fact were posted and were received by the plaintiff.

There is no reason forthcoming as to why the defendant in such important matters and when it sought to deny its liabilities decided to send the said letters by courier.

There is something more that its meet the eyes.

The manner, timing and mode of dispatch of the said letters create a serious doubt in the mind of this Court with regard to the genuinity of the said letters and the contents thereof.

The said letters appear to have been brought into existence for the purpose of denying its liability.

Even if this Court doubts the genuinity of the letters, the next question that would arise for consideration is notwithstanding the existence or nonexistence of the said letters the plaintiff would still be entitled to an order of attachment on the basis of the pleadings i.e. to say an attachment order in a suit for recovery of money.

The judgment cited at the bar in my respectful reading does not say that the Court will be a lame duck if it appears to the Court that the very intention is to defraud the creditors and for the ends of justice some protective order is necessary.

Any other interpretation or restriction on the power of the Court to pass equitable orders on a satisfaction being recorded about the genuinity of the claim would result in injustice to the plaintiff and would defeat the very object and purpose of the Code.

The provisions of the Code in my view are required to be interpreted and applied for the ends of justice and should not be used as a tool by unscrupulous litigants to avoid liability.

The sanctity of commercial transactions and the trade requires that the Court must come to the aid of the plaintiff who has been able to establish a strong prima facie case and a valid claim.

In Raman Tech and Process Eng.

Co. versus Solanki Traders reported at (2008). SCC 302 the Honble Supreme Court in dealing the scope of Order 38 Rule 5 held : 5. The power under Order 38, Rule 5 Code of Civil Procedure 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 and unsecured debt into a secured debt.

Any attempt by a Plaintiff to utilise the provisions of Order 38, Rule 5 as 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.

6. A Defendant is not debarred from dealing with his property merely because a suit is filed or about to be filed against him.

Shifting of business from one premises to another premises or removal of machinery to another premises by itself is not a ground for granting attachment before judgment.

A plaintiff should show, *prima facie*, that his claim is bona fide and valid and also satisfy the Court that the Defendant is about to remove or dispose of the whole or part of his property, with the intention of obstructing or delaying the execution of any decree that may be passed against him, before power is exercised under Order 38, Rule 5 Code of Civil Procedure.

Courts should also keep in view the principles relating to grant of attachment before judgment.

See *Premraj Mundra v.*

*Md. Manech Gazil* for a clear summary of the principles. In paragraph 6, of the report it clearly says that before an order could be passed for attachment the plaintiff would be required to show *prima facie* that his claim is bona fide and valid and also satisfy the Court that the defendant is about to remove or dispose of the whole or part of his property with the intention of obstructing or delaying the execution of any decree that may be passed against him.

There cannot be any doubt that the plaintiff has been able to establish and demonstrate that his claim is more than bona fide and valid, inasmuch as there is hardly any defence disclosed in the affidavit filed by the defendant which could really nullify the claim of the plaintiff or inspire a confidence in the mind of the Court with regard to the defence of the defendant.

The defendant does not deny the transaction and delivery of the goods and its utilisation.

There is no contemporaneous document to show that the liability of the defendant was denied.

The purported communications relied upon in the affidavit, even if taken to be correct, hardly raise any defence to the claim of the plaintiff.

The conduct of the defendant is far from bona fide.

The affidavit filed by NHA1 goes to show that it is extremely doubtful as to whether the defendant would ultimately receive any money from NHA1.

The defendant has also not disclosed anything to show that the defendant is otherwise solvent and in the event any decree is passed, the same would not be rendered infructuous.

Even if for the sake of argument it is accepted that the contents of the letters relied upon by the defendant are correct, even then the defendant has asked for rebate of 30% of the value of the goods.

Under such circumstances, I direct the defendant to furnish security for a sum of Rs.25 lakhs to the satisfaction of the Registrar, High Court, Original Side within a period of four weeks from date, failing which the interim order already passed shall continue till the disposal of the suit.

This application, accordingly, stands disposed of.

However, there shall be no order as to costs.

Urgent certified website copies of this order, if applied for, be urgently supplied to the parties subject to compliance with all requisite formalities.

(SOUMEN SEN, J.) sp/b.pal

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