

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 12 - 01 - 2015

CORAM:

THE HON'BLE TMT. JUSTICE PUSHPA SATHYANARAYANA

A.S. No. 635 of 2008
and
M.P. Nos. 1 to 3 of 2008

M/s Subhiksha Trading Services Pvt., Ltd.
Rep. By its Company Secretary
Having registered office at
2/5 Habib Complex
Durgabai Deshmukh Road
R.A. Puram
Chennai - 28

...Appellant/Defendant

Vs.

M/s Wels
A registered Partnership Firm
Rep. by its Partner, Mr. C.S. Ram
Mahalakshmi Buildings
Old No. 92, New No. 98, Mount Road
Guindy
Chennai - 32

...Respondent/Plaintiff

Appeal under Section 96 r/w Order XLI Rule 1 of the Civil Procedure Code, against the judgment and decree dated 31.10.2007 passed by the IV Additional Judge, City Civil Court, Chennai, in O.S. No. 3713 of 2005.

For Appellant : Mr. Prakash Goklaney
For Respondent : Mr. Ajoykumar Gnanam

Judgment Reserved on 05.8.2014

JUDGMENT

The challenge by means of this Appeal by the defendant filed under Section 96 of the Code of Civil Procedure, 1908, is to the impugned judgment dated 31.10.2007 passed by the IV Additional Judge, City Civil Court, Chennai, in O.S. No. 3713 of 2005 decreeing the

suit for a sum of Rs. 2,97,264/- with interest at the rate of 12% per annum as against the claim of Rs.7,46,751.19 together with interest at 24% per annum.

2. The case of the plaintiff, as narrated in the plaint, runs as follows:-

(a) The plaintiff is a firm engaged in the business of rendering Security Service, Consultancy, Personal Management Services, etc. since 1967. While so, when the defendant, who is engaged in the business of sale of consumer goods, Groceries and Pharmaceuticals, approached the plaintiff firm for providing security services at its shops and godowns throughout the city of Chennai, they agreed to provide them on certain terms and conditions mutually agreed upon and accordingly, they sent a Letter Agreement dated 23.02.1999 to the defendant mentioning the notice period for termination of service besides stating about the contemplated payments to personnel, Consultancy Service Charges and further Credit Service Charges. Further, since the terms and conditions were also accepted by the defendant, they implemented the proposal by providing security services for the shops and godowns of the defendant.

(b) The defendant besides committing default in payment, by letter dated 02.02.2002, asked the plaintiff to restrict their security services to only certain shops without giving two months notice, which is one of the terms and conditions as per the agreement. Therefore, according to the plaintiff, the defendant had become liable to pay service charges for two months with regard to the units for which security services were unilaterally withdrawn by them. Further, since the defendant was irregular in making the payments, the plaintiff terminated the security services by letter dated 14.6.2002.

(c) The further averment of the plaintiff is that the last payment made by the defendant was of Rs.32,815.85 on 05.6.2002 while the outstanding balance was Rs.7,02,746.98 as on 17.02.2004. It is also averred that despite the letter dated 17.02.2004 asking for payment and though the same was received by the defendant on 25.02.2004, no payment was made. Since the defendant failed to pay the dues despite reminders, the plaintiff issued a legal notice on 24.09.2004, which was received by the defendant on 25.9.2004, but no reply was made by the defendant.

(d) Hence, the plaintiff filed the suit for recovery of Rs.7,46,751.19 with interest at 24% per annum from the date of plaint till the date of realisation and for costs.

3. Resisting the suit, the defendant filed written statement denying the allegations made in the plaint as under:-

(a) According to the defendant, the suit on a Statement of Account referring to specific bills cannot be maintained.

(b) As regards the agreement dated 23.02.1999, it is stated by the defendant that since it is only a letter unilateral in nature, the terms and conditions contained therein cannot be said to have been accepted by them. It is further averred by the defendant that the services rendered by the plaintiff were not of standard quality and only when the same were brought to their notice, the services came to be terminated. Besides denying the allegation of the financial constraints, it is stated by the defendant that since the services provided by the plaintiff were inadequate and unsatisfactory, they sought for restriction of the same only to certain shops and hence, according to the defendant, the question of payment of service charges for two months as claimed the plaintiff, does not arise. It is further stated that the Debit Notice raised for this purpose was withdrawn by the plaintiff by letter dated 05.3.2002.

(c) The defendant, while denying the allegation of irregularity in payment, averred in paragraph 11 that the suit is partially barred by limitation as the claim that was sent, was for respective bills in accordance with the statement of account.

(d) As regards the settlement of dues, it is averred by the defendant that since the plaintiff did not produce any bills or proof of service, the same does not arise.

On these grounds, the defendant sought for dismissal of the suit.

4. The trial Court / learned IV Additional Judge, City Civil Court, Chennai, on the basis of the above pleadings, framed two issues and proceeded with the trial of the suit. Before the trial Court, one S.Ravikumar, Manager of the plaintiff firm was examined as P.W.1 and Exs. A.1 to A.12 were marked. To nullify the evidence adduced on behalf of the plaintiff, the executive of the defendant Company one Balachandran was examined as D.W.1 and Exs. B.1 to B.4 were marked.

5. The learned trial Judge, on appreciation of the pleadings as well as scanning the materials, finding that though the amount to the tune of Rs.2,97,264/- due under the Debit Note was not denied by the defendant, no material was produced on their side to prove that Debit Note payment was paid by them, held that the plaintiff is entitled for a sum of Rs.2,97,264/- and accordingly, decreed the suit, by judgment dated 31.10.2007. The learned trial Judge also directed for payment of interest at 12% per annum from the date of plaint till the date of decree and 6% thereafter with costs. Aggrieved by the same, the defendant has projected the present appeal.

6. Heard Mr. Prakash Gokulaney, learned Counsel appearing on behalf of the appellant / defendant and Mr. Ajoykumar Gnanam, learned counsel appearing for the respondent / plaintiff and perused the records.

7. The points for determination in this appeal are:-
(i) Whether the defendant had accepted the terms and conditions of the plaintiff for availing its services;
(ii) Whether the defendant defaulted in payment?; and
(iii) Whether the decree of trial Court is correct?

8. Learned counsel appearing for the appellant / defendant would mainly contend that the respondent / plaintiff cannot base their claim on Ex. A.2 Letter of agreement dated 23.02.1999 as the same was unilateral in nature and the plaintiff cannot take advantage of their own document. According to the learned counsel, there was no document to show that the terms and conditions in Ex. A.2 were accepted by the defendant. As regards the Debit Note issued by the plaintiff, learned counsel submitted that there could be no claim as the same was withdrawn by the plaintiff subsequently. Issue No. (i):-

9. The first issue to be decided is whether the defendant had accepted the terms and conditions of the plaintiff for availing its services. In this context, it would be relevant to refer to the following passage from the deposition of P.W.1:-

“,,,, வா.சா.ஆ. 2ல் கண்ட உடரத்துக்களை ஒப்புக்கொண்ட பிரதிவாதி தரப்பில் கடிதம் எதுவும் கொடுக்கவில்லை. வாய்மொழியாக ஒப்புக்கொண்டார்கள். வா.சா.ஆ.2 ல் கிளாஸ் 12ல் கண்ட உடரத்தின்படி பிரதிவாதி எந்த ஒப்புதல் கடிதமும் கொடுக்கவில்லை. வா.சா.ஆ. 2ல் வட்டி பற்றிய விவரத்தை குறிப்பிடவில்லை....”

10. The said aspect has been admitted by D.W.1 also in his cross-examination and the relevant passage of the deposition of D.W.1 is usefully reproduced below:-

“,,பி.சா.ஆ. 4ல் குறிப்பிட்டுள்ள ஒப்பந்தமானது வாய்மொழியான ஒப்பந்தம் தான். வா.சா.ஆ. 2ல் 3வது பக்கத்தில் குறிப்பிட்டுள்ளது வாய்மொழியான ஒப்பந்தம் தான்....”

11. From the above admission by the respective parties, it is amply clear that there was no express agreement between the parties and impliedly, the terms as found in Ex. A.2 had been accepted as per Ex. B.4 letter dated 26.7.2002. The trial Court had also considered Ex. B.4 which refers to the terms of contract and found that the agreement was oral and the parties have acted upon only based on the same. Issue No. (i) is answered accordingly.

Issue No. (ii):-

12. The next question that has to be considered is regarding the default committed by the defendant and entitlement of the plaintiff. From a mere reading of the impugned judgment, it is clear that the trial Court had decreed the suit for Rs. 2,97,264/- only though the claim made by the plaintiff was to the tune of Rs.7,46,751.19. At this juncture, it is pertinent to note that the plaintiff has not preferred any appeal against the disallowed portion.

13. The crux of the case revolves around the Debit Note dated 13.02.2002 issued by the plaintiff / respondent to a sum of Rs.2,97,264/-. Though there is no quarrel on the issue that the same is due from the defendant, the defence taken by the learned counsel for the defendant is that the said sum was already withdrawn by the plaintiff under Ex. B.3 dated 05.3.2002.

14. I have given my anxious consideration to Ex. B.3 which clearly reads that the plaintiff has withdrawn the claim made under the Debit Note dated 13.02.2002. The learned counsel appearing for the defendant / appellant would argue that the said admission of the plaintiff is sufficient to dismiss the claim of the plaintiff. But the said argument was objected to by the learned counsel for the plaintiff. It is a settled principle that any admission should be clear and unambiguous. As rightly argued by the learned counsel for the plaintiff, the said document cannot be said to be admission in clear terms as it ends with a caveat that the Debit Note may be returned along with the cheque.

15. The learned counsel appearing for the plaintiff / respondent further submitted that the said amount was agreed to be given by cheque and in that understanding alone, the Debit Note in question, was withdrawn.

16. Per contra, the learned counsel appearing for the defendant contended that the withdrawal of Debit Note Ex. B.2 for Rs.2,97,264/- was unconditional and that the cheque referred to in Ex. B.3 related to some other amount and not to the amount referred in Ex. B.2 Debit Note. According to him, the question of payment on a withdrawn Debit Note or in other words, in the absence of a fresh Debit Note, cannot be the basis for the claim.

17. For better appreciation of the case, it would be worthwhile referring to the deposition of D.W.1, who, in his cross-examination, has deposed, in the following words, which is in support of the above statement of the learned counsel for the plaintiff:-

“,,பிசா.ஆ. 3ல் காசோலை வாயிலாக தொகை கொடுத்ததற்கு எந்த ஆவணமும் தாக்கல் செய்யவில்லை....”

18. Be that as it may, from the above admission of D.W.1, it is clear that there is no evidence on the side of defendant to prove the payment of money either for the amount referred to in Ex. B.2 Debit Note or for other payment as claimed by the defendant / appellant. If the contention of the defendant is true, he would have filed the proof of the same. Hence, this Court has to draw adverse inference against the defendant for not producing any evidence to disprove the case of the plaintiff. In view of the above discussion, it is clear that the defendant is liable to pay the plaintiff the amount mentioned in the Debit Note Ex. B.2.

19. It is well settled principle that the initial burden of proof would be on the plaintiff. In terms of Section 101 of the Evidence Act, the burden of proving the fact rests on the party who substantially asserts the affirmative issues and not the party who denies it. In the instant case, the defendant / appellant having not admitted or acknowledged the liability, it has to be decided on the pleadings and evidence. The defendant / appellant, having not denied the amount due on the Debit Note, got the onus of proof shifted on them to prove the circumstances, if any, which would disentitle the plaintiff of the claim. Having failed to establish that there was no amount payable on the Debit Note, the appeal by the

defendant has to fail.
defendant.

Issue No. 2 is answered against the

Issue No. (iii):-

20. In view of the discussion supra and the findings arrived at, I am of the opinion that the well-considered judgment of the trial Court requires no interference by this Court. As the transaction is commercial in nature, the plaintiff is entitled for costs.

Resultantly, the First Appeal fails and the same is dismissed with costs confirming the judgment and decree dated 31.10.2007 passed by the learned IV Additional Judge, City Civil Court, Chennai, in O.S. No. 3713 of 2005. Consequently, connected Miscellaneous Petitions in M.P. Nos. 1 to 3 of 2008 are closed.

gri

12.01.2015

This appeal having been posted 'For Being mentioned' on Tuesday the twenty eighth day of April 2015, in the presence of Mr. Prakash Goklaney, Advocate for the appellant, this Court made the following order;

This first appeal has been listed today under the caption 'for being mentioned'.

2. Heard the learned counsel for the appellant.

3. Considering the submission made by the learned counsel for the appellant, this court is of the view that no further order is necessary in the appeal.

DP

28.04.2015

Sd/-

Assistant Registrar (CS-II)

//True Copy//

Sub Assistant Registrar

gri

To

1. The IV Additional Judge
City Civil Court, Chennai

2. The Record Keeper
V.R. Section High Court, Chennai

1 CC to Mr. Ajoykumar Gnanam, Advocate SR.No. 2464

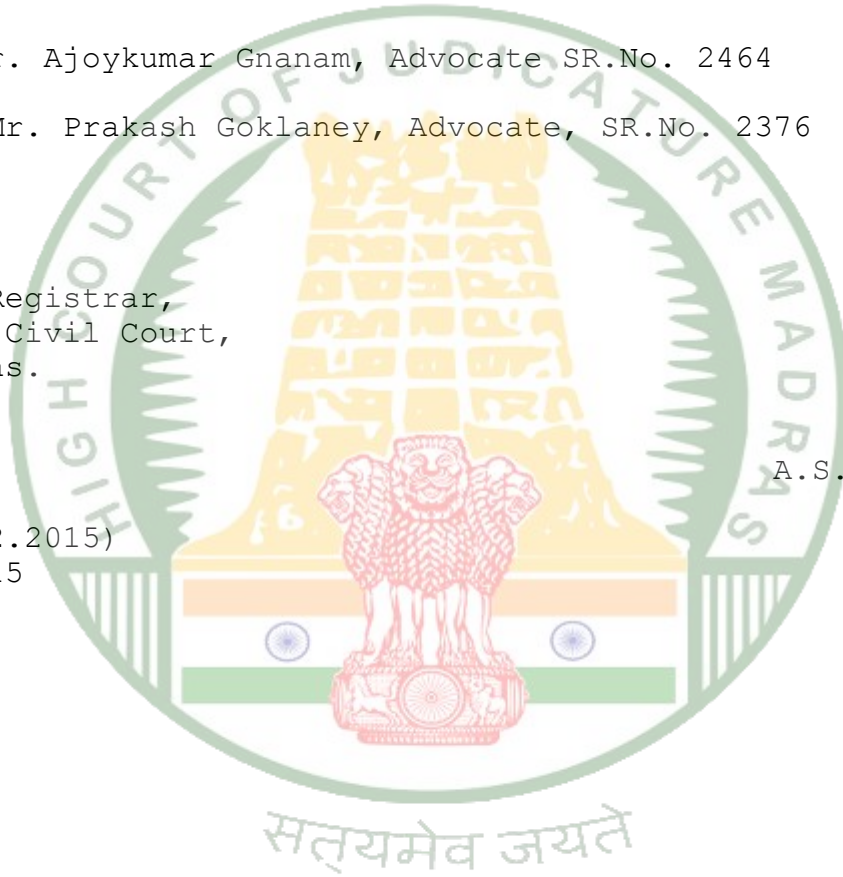
2 CCs to Mr. Prakash Goklaney, Advocate, SR.No. 2376

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The Registrar,
City Civil Court,
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KSJ (CO)
PSI (25.02.2015)
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A.S. No. 635 of 2008



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