



Reserved On: 07.12.2016
Delivered On: 09.12.2016

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 09.12.2016

CORAM:

THE HONOURABLE MR.JUSTICE M.DURAISWAMY

S.A. (MD) No.590 of 2011

and

M.P. (MD) No.1 of 2013

M/s Madras Cements Ltd.,
having Corporate Office at
Auras Corporate Centre,
V Floor, 98-A, Dr.Radhakrishnan Road,
Mylapore, Chennai-4
represented by
The General Manager(sales)
at Factory Office,
Ramaswamy Raja Nagar,
Virudhunagar District.

.. Appellant/Appellant/Plaintiff

Vs.

Manivannan

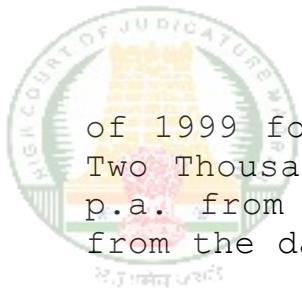
.. Respondent/Respondent/Defendant

Prayer: Second Appeal filed under Section 100 of the Civil Procedure Code against the judgment and decree dated 07.12.2010 made in A.S.No.24 of 2007, on the file of the District Judge, Kanyakumari at Nagercoil confirming the judgment and decree dated 29.07.2004 made in O.S.No.187 of 1999 on the file of II Additional Subordinate Judge, Nagercoil.

For Appellant : Mr.G.R.Swaminathan
For Respondent : Mr.T.Arul

JUDGMENT

The above Second Appeal arises against the judgment and decree passed in A.S.No.24 of 2007, on the file of the District Court, Kanyakumari at Nagercoil, confirming the judgment and decree passed in O.S.No.187 of 1999, on the file of II Additional Subordinate Court, Nagercoil.



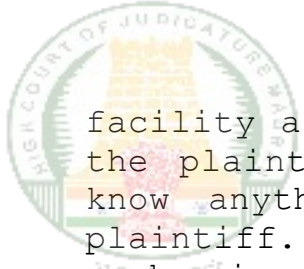
of 1999 for realisation of Rs.2,72,656/- (Rupees Two Lakhs Seventy Two Thousand Six Hundred and Fifty Six only) with interest at 18% p.a. from the date of plaint till the date of decree and at 6% from the date of decree till the date of recovery.

3. The brief case of the plaintiff is as follows:

According to the plaintiff, the defendant is one of the dealers appointed in Kanyakumari District for the sale of the cement manufactured by the plaintiff Company. The supply of the cement has been on credit basis with the understanding that the value of each quantity delivered will have to be paid on the date of supply or within ten days of the date of delivery of cement. The defendant was regularly supplied cement on credit basis for retail sale by him. The defendant did not pay the price of the cement purchased regularly. As per the accounts as on 31.03.1996, a sum of Rs.2,72,656/- was due from the defendant towards the value of the cement supplied by the plaintiff and received by him. Since the balance amount due to the plaintiff was increasing and because of the continuing pressure for payment of the value of cement supplied to the defendant, the father of the defendant, who is the lorry owner and businessman to ease the burden of the defendant, issued two cheques dated 26.02.1996 and 16.03.1996 for the amounts of Rs.30,000/- and Rs.60,000/- respectively drawn in favour of the plaintiff. However, the cheques issued by the father of the defendant was dishonoured. A notice was issued to the defendant's father on 10.09.1996 intimating the dishonour of the cheques issued by him. The plaintiff also issued a notice dated 10.09.1996 to the defendant calling upon him to pay the sum of Rs.2,72,565/- as on 31.03.1996 as per the accounts. The defendant sent a reply dated 26.09.1996 through his advocate stating that he had paid all the dues and no amount is due as mentioned in the notice. In these circumstances, the plaintiff filed the suit.

4. The brief case of the defendant is as follows:

According to the defendant, the value of the cement supplied will be paid to the field Officer Mr.Sivakumar, who used to collect the amount from the defendant. The defendant admitted that the value of each quantity of cement delivered will be paid on the date of supply or within 10 days from the date of delivery. In these circumstances, the defendant has stated that there will be no possibility of credit basis of any understanding for the supply of cement. Further he has stated that he was regularly receiving cement and the payments were made regularly. Further the defendant has stated that he was regular in payment and when any default has arisen even for a single load, the plaintiff will stop supply. The defendant has also stated that there is no understanding that when the price mentioned in the invoice of the cement sold has to be paid within 10 days or when the payment was not paid, the said amount will be debited in the account of the defendant. The defendant did not avail any credit



facility as alleged by the plaintiff. The accounts maintained by the plaintiff are not fair and proper. The defendant does not know anything about the cheques issued by his father to the plaintiff. The defendant is not liable to pay any amount. Under such circumstances, the defendant prayed for dismissal of the suit.

5. Before the trial Court, on the side of the plaintiff, four witnesses were examined and 17 documents viz., Exs.A.1 to A.17 were marked and on the side of the defendant, D.W.1 was examined, however no document was marked. The trial Court, after taking into consideration the oral and documentary evidences let in by both sides, dismissed the suit.

6. Aggrieved over the judgment and decree passed by the trial Court, the plaintiff preferred an appeal in A.S.No.24 of 2007 and the lower Appellate Court also confirmed the judgment and decree of the trial Court and dismissed the appeal.

7. Aggrieved over the concurrent findings of the Courts below, the plaintiff has filed the above Second Appeal.

8. Heard Mr.G.R.Swaminathan, learned Counsel appearing for the appellant and Mr.T.Arul, learned Counsel appearing for the respondent.

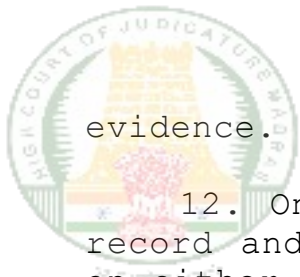
9. At the time of admission of the above Second Appeal, the following Substantial Questions of Law arose for consideration.

"1. Whether the judgments of the Courts below are perverse for having failed to note that the burden of proof has shifted to the defendant in view of the admission made by the defendant with regard to purchase of cement from the plaintiff?

2. Whether the defendant has discharged the burden of proof on him following his admission that he has discharged the suit liability by making payment to one Sivakumar?"

10. Mr.G.R.Swaminathan, learned Counsel appearing for the appellant submitted that when the defendant had admitted that the plaintiff had supplied cement to him, the burden of proof, as to whether he had paid the value of the cement supplied, is on the defendant and the Courts below have erroneously fixed the burden of proof on the plaintiff.

11. Countering the submissions made by the learned Counsel appearing for the appellant, Mr.T.Rahul, learned Counsel appearing for the respondent submitted that the defendant had made all payments to the plaintiff towards the value of the cement supplied to him and the Courts below have concurrently and rightly found that the plaintiff had failed to establish his case by acceptable



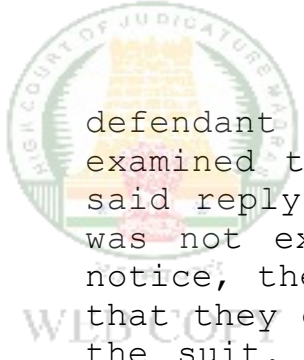
evidence.

12. On a careful consideration of the materials available on record and the submissions made by the learned Counsel appearing on either side, it could be seen that under Exs.A.10 to A.17, the invoices/despatch advise, the plaintiff supplied cement to the defendant. Ex.A.1 is the accounts maintained by the plaintiff. As per Ex.A.1, the plaintiff claimed a sum of Rs.2,72,656/- from the defendant. It is the case of the defendant that he paid all the dues through one Sivakumar, who was an employee of the plaintiff's Company. It is not in dispute that the said Sivakumar was working in the plaintiff's Company as field Officer. P.W.1 in his evidence has stated that the said Sivakumar was dismissed from service and further stated that he alone is responsible for the collection of cheques, demand drafts etc.. When the defendant has taken a plea that he has been making payment only to the said Sivakumar, the proper witness who can speak about the collection of the amount is only the said Sivakumar. When the defendant had contended that he was making the payments to the said Sivakumar, the plaintiff could have given the particulars of the said person for examining him on the side of the defendant. Otherwise, even the plaintiff could have taken subpoena for the examination of the said Sivakumar on their side.

13. In the plaint, the plaintiff has specifically stated that for each quantity delivered to the defendant, the value has to be paid on the date of supply or within 10 days of the date of supply of the cement. Further the plaintiff has stated that they supplied cement regularly to the defendant. That apart, the plaintiff has also stated that when the payment is not duly made, the amount will be debited to the account of the defendant. According to the defendant, in the case of default in paying the amount, even after 10 days, the plaintiff would stop the supply of the cement to him. As per Ex.A.1, as on 31.03.1996, a sum of Rs.2,72,656/- was due and payable by the defendant.

14. It is pertinent to note that Ex.A.2, the alleged notice, was not issued to the defendant at all. In fact Ex.A.2 notice was sent to the defendant's father. However, the plaintiff has not produced the acknowledgment for the service of notice. When the cheques were issued by the defendant's father, the plaintiff could have initiated legal action against the defendant's father. In the written statement, the defendant has specifically stated that he was not aware of the transaction between the plaintiff and his father.

15. With regard to the alleged reply notice dated 26.09.1996, the defendant has stated that he did not give instructions to his advocate one Mr.R.Radhakrishnan for causing reply notice. When the plaintiff had produced Ex.A.3, the alleged reply and when the



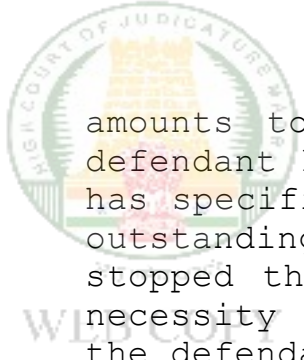
defendant disowned the said document, the plaintiff could have examined the Counsel viz., Mr.R.Radhakrishnan, to prove that the said reply was sent only by the defendant. However, the advocate was not examined on the side of the plaintiff. Except, Ex.A.2 notice, the plaintiff has not produced any other document, to show that they claimed the suit amount from the defendant even prior to the suit. As already stated that Ex.A.2 notice was not sent to the defendant and it was sent only to his father, Ex.A.2 notice cannot be construed as a suit notice.

16. Though the plaintiff contended that the monthly statements with regard to the quantity of cement supplied to the defendant was sent to the defendant, they failed to produce a copy of the monthly statements sent to him. The trial Court also recorded that even after posting the case for judgment, the trial Court had reopened the suit and gave sufficient time to the plaintiff for filing the monthly statement, however the plaintiff did not produce the copy of the acknowledgment for serving monthly statements to the defendant. As already stated, the plaintiff could have examined their erstwhile filed Officer Sivakumar on their side to establish that the defendant has not paid any amount to him or they could have given the particulars to the defendant for taking subpoena to the said Sivakumar. Further, the plaintiff failed to examine Mr.R.Radhakrishnan, advocate to prove that Ex.A.3 reply was sent only by the defendant. Even for the return of cheques issued by the defendant's father, the plaintiff has not initiated any legal action against him.

17. P.W.1 in his cross-examination has stated that the field Officer was dismissed from the service and a suggestion was also made to P.W.1 that the said Sivakumar was dismissed from service for misappropriation of the amounts. Further the defendant contended that the said amounts paid to Sivakumar could have been misappropriated by him and for the misdeeds committed by the said Sivakumar, the defendant cannot be made liable. When the plaintiff themselves admitted that the said Sivakumar used to collect cheques and demand drafts, the proper witness to speak about the suit transaction is only the said Sivakumar.

18. Admittedly the cheques were returned in the year 1996, however, the plaintiff kept quiet for more than two years and filed the suit in the year 1998 which was numbered in the year 1999. When the defendant has specifically stated that he had made payments to the said Sivakumar and discharged his burden, the plaintiff could have established their case either by examining the said Sivakumar on their side or could have given the details to the defendant for examining him on the side of the defendant.

<https://hcservicescourts.gov.in/hcservices/> field Officer was in charge of collecting the cheques and demand drafts as admitted by P.W.1 and when the defendant has specifically stated that they had paid all the



amounts to him, it is for the plaintiff to establish that the defendant has not paid the amounts to their staff. The defendant has specifically denied his liability to pay the amount. When the outstanding amount is at Rs.2,72,656/-, the plaintiff could have stopped the supply of the cement to the defendant. There is no necessity for supplying the cement to the defendant, inspite of the defendant committing default for more than 10 days.

19. It is settled position that the burden of proof lies on the plaintiff to establish his case. Even in the plaint, Ex.A.2 notice dated 10.09.1996, has been mentioned as suit notice. The defendant is disputing the reply dated 26.09.1996. Hence, the plaintiff had miserably failed to establish their case by oral and documentary evidences. Hence, the Courts below have rightly dismissed the suit.

20. In these circumstances, I do not find any ground much less any substantial question of law to interfere with the concurrent findings of the Courts below. The Second Appeal is liable to be dismissed. Accordingly, the same is dismissed. There shall be no order as to costs. Consequently, the connected Miscellaneous Petition is closed.

Sd/-

Assistant Registrar(CO)

/True Copy/

Sub Assistant Registrar

ssl

To

1. The District Court, Kanyakumari at Nagercoil

2. II Additional Subordinate Court, Nagercoil.

+1cc to Mr.G.R.Swaminathan, Advocate Sr.No. 80578

JAM/24.01.2017/GSV-SV /6p-4c

Pre-Delivery Judgment made in
S.A. (MD) No.590 of 2011
and
M.P. (MD) No.1 of 2013
09.12.2016