

IN THE HIGH COURT OF JUDICATURE AT MADRAS

(ORDINARY ORIGINAL CIVIL JURISDICTION)

MONDAY, THE 23rd DAY OF JANUARY 2017

THE HON'BLE MR. JUSTICE K.KALYANASUNDARAM

C.S. No.343 of 2015

and

A. No. 6760 of 2016

in

A.No.4011 of 2016

M/s.PKM Metal Buildings Company Private Limited
Administrative Office at #24/31, First Main Road,
2nd Cross, Padi, Olympic Colony,
(Near Catholic Syrian Bank),
Chennai - 600 050. Rep. by its Director. ...Plaintiff

-Versus-

1. M/s.EASUN REYROLLE LTD.,
Rep. by its Managing Director
Having their Regd., Office at 6th Floor,
Temple Tower, 6/2, Anna Salai,
Nandanam, Chennai - 600 035.
2. M/s.EASUN REYROLLE LTD.,
Rep. by its Chief Finance Officer
No.389, Rasukumaki, Hulimavu,
Begur Hobli, Bannerghatta Road,
Bangalore - 560 076. ... Defendants.

Civil Suit praying that this Hon'ble Court be pleased
to pass a judgment and decree directing the 1st and 2nd
defendants to pay severally or jointly to the plaintiff :

a) A sum of Rs.35,23,363/- (Rupees Thirty Five Lakhs
Twenty Three Thousand Three Hundred Sixty Three only)
towards the principal and a further sum of Rs.16,11,939/-
(Rupees Sixteen lakhs Eleven thousand nine hundred and
thirteen only) towards the simple interest @ 18% p.a.
from 15.9.2012 to till date of filing of this plaint

totaling to Rs.51,35,302/- and a future interest on of Rs.35,23,363/- at the rate of 18% p.a. from the date of filing to till the date of realization of the amount due.

b) For the cost of the Suit to be paid to the plaintiff by the defendants.

A. No.6760 of 2016 And A.No.4011 of 2016:-

1. M/s.EASUN REYROLLE LTD.,
Represented by its Managing Director
Raj Hari Eswaran,
Having its Registered Office at 6th Floor,
Temple Tower, No.672 (Old No.476), Anna Salai,
Chennai - 600 035.
2. M/s.EASUN REYROLLE LIMITED
Represented by its Chief Finance Officer
No.389, Rasukumaki, Hullmavu,
Begur Hobli, Bannerghatta Road,
Bangalore - 560 076.

...

Applicants/Applicants/Defendants.

-Versus-

M/s.PKM Metal Buildings Company Limited
Administrative Office at #24/31, First Main Road,
2nd Cross, Padi, Olympic Colony,
(Near Catholic Syrian Bank),
Chennai - 600 050. Rep. by its Director.

...Respondent/Respondent/Plaintiff

Application praying that this Hon'ble Court be pleased to set aside the order dated 25.11.2016 passed by the Hon'ble Master Court in A.No.4011 of 2016 in C.S.No.343 of 2015.

This suit alongwith this application coming on this day before this Court for hearing the court made the following order:

The applicants herein are the defendants and the respondent herein is the plaintiff in the suit. The present application has been filed by the defendants under Order XIV Rule 12 of Original Side Rules, against the order dated 25.11.2016 passed by the learned Master in A.No.4011 of 2016 in C.S.No.343 of 2015, in and by which the application filed by the defendants for leave to defend the suit was dismissed.

2.The suit was filed by the respondent herein/plaintiff, for recovery of money. The case of the plaintiff is that pursuant to the Work Order/Contract date 12.08.2010 and subsequent amends to the said Work Order/Contract, the plaintiff has executed the works of the defendants and completed to the satisfaction of the defendants. After certification by the Architects of the Defendants with regard to the work done by the plaintiff, the plaintiff claimed money from the defendants to the tune of Rs.4 crores and odd. The plaintiff requested the defendants to pay the amount by their requisition letter dated 23.08.2014, followed by the Legal Notice dated 15.02.2015. However, the defendants neither replied to the notice nor paid the amount. Hence, the suit.

3.The defendants filed an application in A.No.4011 of

the suit, contending that the suit claim is not covered under the provisions of Order 37 of CPC or Order 7 Rule 1 of Madras High Court Original Side Rules; that the defendants have good case on merits and have fair chance of success in the suit. The said application was resisted by the plaintiff. After hearing both sides, the learned Master by order dated 25.11.2016 dismissed the said application. Aggrieved over the same, the present application has been filed.

4.Mr.S.Elambharathi, learned counsel appearing for the applicants would submit that the suit is based on the Work Order/Contract dated 12.08.2010, but Clause 16 of the Work Order requires further execution of an agreement and therefore, the claim made on the Work Order dated 12.08.2010 itself is not maintainable. The learned counsel for the applicants in support of his contentions relied on the judgment of this Court reported in **AIR 1983 Madras 169 (H.G. Krishna Reddy and Co. Vs. M.M. Thimmiah and another)**.

5.Per contra, Mr.R.Arumugam, learned counsel appearing for the respondent/plaintiff would submit that the defendants are entitled for leave to defend the suit only when they establish substantial defence and raise triable issues; if the defence is illusory, the application for leave to defendant the suit is to be rejected; that in the

instant case, the defendants neither established substantial defence nor raised any triable issue; that though the Work Order dated 12.08.2010 requires further agreement, only based on the work order and the letter of acknowledgement/acceptance dated 08.10.2010, the plaintiff has executed the works of the defendants. Further, as per Clause 7 of the Work Order, the defendants are liable to make the payment within 30 days of certification by their Architects or the Project Manager. Clause 11 of the Work Order states that in all matters of disputes, the Architect's decision will be final and binding.

6. The learned counsel for the respondent/plaintiff would further submit that only as per the Work Order and Certification made by the Architect of the Defendants, the plaintiff has made the claim, but, the defendants have not challenged the work executed by the plaintiff, nor disputed the certificate issued by the Architect, as such they accepted their liability. Under such circumstances, their application for leave to defend the suit cannot be entertained. In support of his contentions, the learned counsel has relied upon the judgments reported in **AIR 1977 SC 577 (Machalec Engineers and Manufacturers Vs. Basic Equipment Corporation)**, **2008 (4) SCC 246 (Sify Ltd Vs. First Flight Couriers Ltd)** and **(2006) 8 SCC 25 (Defiance Knitting Industries (P) Ltd Vs. Jay Arts)**.

7. Heard both and perused the materials available on record.

8. In the decision reported in **AIR 1977 SC 577 (Machalec Engineers and Manufacturers Vs. Basic Equipment Corporation)**, the Supreme Court has observed as follows_

"8. In *Smt. Kiranmoyee Dassi & Anr. v. Dr. J. Chatterjee* (1945) 49 Cal WN 246 at P.253, *Das. J.*, after a comprehensive review of authorities on the subject, stated the principles applicable to cases covered by order 17 C.P.C. in the form of the following propositions (at p. 253):

"(a) If the Defendant satisfies the Court that he has a good defence to the claim on its merits the plaintiff is not entitled to leave to sign judgment and 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 positively good defence the plaintiff is not entitled to sign judgment and 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 to say, although the affidavit does not positively and immediately make it clear that he has a defence, yet, shews such a state of facts as leads to the inference that at the trial of the action he may be able to establish a defence to the plaintiff's claim the Plaintiff is not entitled to judgment and the Defendant is entitled to leave to defend but in such a case the Court may in its discretion impose conditions as to the time or mode of trial but not as to payment into Court or furnishing security.

(d) If the Defendant has no defence or the defence set up is illusory or sham or practically moonshine then ordinarily the Plaintiff is entitled to leave to sign judgment and the Defendant is not entitled to leave to defend.

(e) If the Defendant has no defence or the defence is illusory or sham or practically moonshine then although ordinarily the Plaintiff is entitled to leave to sign judgment, the Court may protect the Plaintiff by only allowing the

defence to proceed if the amount claimed is paid into Court or otherwise secured and give leave to the Defendant on such condition, and thereby show mercy to the Defendant by enabling him to try to. prove a defence".

9. In **(2006) 8 SCC 25 (Defiance Knitting Industries (P) Ltd Vs. Jay Arts)**, the Hon'ble Supreme Court has reiterated the principles in granting leave to defend the suit.

10. In the decision reported in **AIR 2004 Delhi 186 (Dur-Line India Pvt. Ltd Vs. Bpl Broadband Network Pvt Ltd)**, the Delhi High Court has held that even the suit based on running account maintained by the plaintiff would come under Order 37 of CPC.

11. In similar facts, this Court in **Sify Ltd Vs. First Flight Couriers Ltd** reported in **2008(4) SCC 246**), has held as follows_

"18. It is also evident from the record that the respondent did not raise any such claim regarding deficiency of service when the appellant was demanding its past balance/dues for the services rendered. It also appears from the record that the appellant has established that the respondent remitted certain sums against various

invoices raised by it and that the respondent did not raise any question about the deficiency of service earlier. Once the respondent admitted its liability to pay for the services rendered by the appellant, it was not open to it to repudiate the same by taking a stand that the services provided by the appellant were deficient. In any view of the matter, the Division Bench granted unconditional leave to defend to the respondent without considering any of the materials produced by the parties."

12. In **V.K.K.Nair Vs. Mrs.Kanchan Kawar (AIR 2005 Madras 186)**, the defendant had not chosen to give any reply to the demand notice of the plaintiff therein and also he had not placed any material to support his defence in order to establish triable issue and thus, this Court rejected the application sought to defend the suit.

13. In **AIR 1983 Madras 169**, this Court held that a contract contemplating execution of further agreement cannot be construed as an enforceable contract. In the instant case, the suit has been instituted for recovery of money based on the Work Order, dated 12.08.2010, and the subsequent amendments made to it. It is an admitted fact that by a letter dated 08.10.2010, the plaintiff accepted the work order and requested the defendants to make some amendments. Pursuant thereto, work order amendment was

issued on 17.02.2011, which was acted upon. So, the defendants made themselves binding to the terms and conditions of the Work Order. Hence, in my view, the above decision referred by the counsel for the applicant has no application to this case.

14. It must be further seen that the contention now raised by the learned counsel, was not stated in the application filed seeking leave to defend the suit. In the application, what is narrated is that the suit would not come under Order 37 of C.P.C. and they have good chances of success in the suit. So, the defendant cannot be permitted to raise a new plea in this application. Further as stated above, the defendants are not entitled to make the defence due to the reasons, there were subsequent correspondents / communications between them and based on the work order amendment, works were successfully carried out by the plaintiff.

15. It is also not in dispute that C.R.Narayana Rao, Architect appointed by the defendants, issued certificate for payment of money for the service rendered by the plaintiff; accepting the certificate, substantial money has been paid. In the light of the decisions cited above and undisputed facts in this case, I am of the opinion, the defendants are not entitled for grant of leave to defend the suit.

16. It is further seen that the defendants have not chosen to prefer the application seeking leave in time and their application filed to condone the delay of 109 days was rejected by the learned Master. But, the learned counsel for the applicant made submission on the leave to defend the application, has not canvassed the condonation delay application.

17. In fine, the application is dismissed. Consequently, the suit is decreed as prayed for with costs.

sd/.M.K.K.S.J

23.01.2017

//Certified to be a true copy//

Dated this the day of 2017

R.s/22.03.2017

COURT OFFICER

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From 25.09.2008 the Registry is issuing certified copies of the Order/Judgment Decree in this format.

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