

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 14.11.2017

CORAM

THE HONOURABLE MR.JUSTICE M.V.MURALIDARAN

C.R.P.(NPD)No.2029 of 2009 and
M.P.Nos.1 of 2009 and
M.P.No.1 of 2010

Grind Master Machines Pvt. Ltd.
Plot No:B-11/B
MIDC Area,
Aurangabad - 431 005.

.. Petitioner

Vs.

Sunraj System Pvt. Ltd.
No.6, Arundale Beach Road,
Kalashetra Colony,
Chennai - 600 090.

.. Respondent

Prayer: Civil Revision Petition filed under Section 115 of Civil Procedure Code, against the order of the learned XV Assistant Judge, City Civil Court, Chennai, dated 04.08.2008 in I.A.No.8799 of 2008 in O.S.No.1793 of 2008.

For Petitioner : Mr.P.Elayarajakumar
for M/s.Ramalingam Associates

For Respondent : Mr.T.K.Ramkumar
for M/s.Ram & Rajan Associates

ORDER

The question has arisen in the instant Civil Revision Petition is as to whether the order of dismissal passed by the learned trial Court that is the XVI Assistant Judge, City Civil Court, Chennai in I.A.No.8799 of 2008 dated 04.08.2008 is justifiable or not?

2.The brief facts of the instant case is that the petitioner who is the Defendant in the original suit has filed above I.A.No.8799 of 2008 under Order 37 Rule 1 and 2 in the Summary Suit filed by the respondent for the recovery of a sum of Rs.2,50,486/- as due payable by the Defendant to the Plaintiff . The dues payable by the defendant are pleaded in the plaint itself. Whereas, the Defendant has taken out an application under Order 37 Rule 3(5) of the Code of Civil Procedure for the reason that he has to be allowed to defend the suit proceedings. The learned trial Court after appraised the contents of the affidavit and counter affidavit, by its order dated 04.08.2008 dismissed the Interim Application in I.A.No.8799 of 2008. Against the order of dismissal the instant Civil Revision Petition is filed.

3.The learned counsel for the Revision Petitioner would submit

that the learned trial judge has not appreciated the contents of the affidavit filed along with the petition to defend the suit proceedings and without appreciated the totality of the case, the learned trial judge has dismissed the application. Hence, the order of dismissal is liable to be set-aside.

4. However, the learned counsel for the Respondent / Plaintiff would submit that the dismissal order passed by the learned trial judge is in accordance with law and to support his case he has relied on the following judgments:

2006(2) CTC 146 – SC wherein it is held that rules of procedures are meant to further the cause of justice and not prove hindrance thereto. Provisions contained in order 6 and order 7 are procedural in nature and any omission in respect thereof will not render plaint invalid. Such omission or defect is curable and plaint once cured in such manner will date back to date on which plaint was originally presented. Plaint filed in original side of High Court should be in conformity with order 6 or order 7 of C.P.C. – Rules of procedure are made to further cause of justice and not proved hindrance thereto.

1985 (2) MLJ 256 where it is held that Suit filed under order 37 – defendant filed vakalath and entered appearance before serving of summons is treated as valid compliance of order 37 Rule 2.

(2004) 2 MLJ Page 391 wherein it is held in Para 20: Whether, it is a suit filed under summary procedure under order 37 or order 7 Rule 1 of CPC or not is the question to be answered. It is also stated that in paragraph 6 of the plaint "no relief, which does not fall under order 37 CPC is included in the above suit" and as such, it is made clear that the suit has been filed under O.37, CPC and therefore, the objection taken by the defendant is unsustainable.

AIR 1989 J & K 25 wherein it is held in Para 15: The defendant has now become fully aware about the provisions of order 37 and has full knowledge of the case he has to meet. He is also represented by a counsel, and therefore, no fresh notice in Form 4 needs to be issued to him, it shall be deemed now that notice under order 37 in Form 4 has been issued to him, and he has received the same, and also that he has entered his appearance within time prescribed therein.

2006(5) CTC 186 – SC where it is held that C.P.C. 1908 order 37 Rule 2 & 3 – Summary suit and leave to defendant principles governing grant of leave – unconditional leave should ordinarily be granted to defend if the Court is of opinion that case raises triable issue – Court would refuse leave to defend altogether if it is satisfied that facts disclosed by defendant do not indicate substantial defense to suit or when defense intended to be raised is frivolous or vexatious.

AIR 2001 Bom 116 where it is held that Order 37 Rule 2 – Summary suit – Maintainability – Defendants

themselves writing three letters to plaintiff – pointing out amount stated in their book to be their liability towards plaintiff – summary suit for recovery of amount in question – Maintainable

AIR 2003 Bom 168 where it is held Suit for recovery of amount – Balance confirmation letters found to be signed by defendant – Letters also showing that interest was also agreed to be paid and in fact paid by the defendant at specified rate – Absence of mention of agreement between parties that no interest was payable, in reply to notice of demand sent by plaintiff – Balance confirmation letters accepted unconditionally by defendants would amount to account stated and imply promise to pay – Summary suit maintainable.

5.All the above citations would show that they are applicable to the circumstances of the instant case. Further this Court keeps in mind that the suit was filed in the year 2008 and no finality is arrived at even after the lapse of more than 7 years. The suit is filed under Order 37 Rule 1 and 2 wherein summary procedure is dealt with. The instant petition is found filed under Order 37 rule 3(5) to defend the proceeding of the suit.

6.At this juncture, it is for this Court to peruse the provision under Order 37 Rule 3(5), wherein it is held that:

"the defendant may, at any time within 10 days from the service of such summons for judgment, by affidavit or otherwise disclosing such facts as may be deemed sufficient to entitle him to defend"

7. Whereas, the affidavit filed by the Revision Petitioner before the learned trial Court does not disclose any facts by adverted or met out the pleadings of the plaintiff. It is simply stated in Para No.3 of the affidavit as follows:

"I submit that the entire contention of the plaintiff is a created story and there is no amount due from the defendant".

8. The respondent/plaintiff has stated in the plaintiff as follows:

"11. The defendant having defaulted in payment of incentive and commission based on concluded contract by exchange of E-mails and having acknowledged and admitted the fixing of the sales target at Rs.96 lacs for 2004-2005 and also having acknowledged that the plaintiff has in fact achieved the turnover of Rs.124 lacs, the plaintiff is entitled to institute the suit as a summary suit under Order 37 Rule 1 and 2 of C.P.C. for recovery of its dues. The plaintiff has entitled to receive from the defendant a

sum of Rs.1,24,000/- towards unpaid incentives and Rs.1,36,486/- towards unpaid commission totaling in all Rs.2,60,486/-. The plaintiff states the no relief which does not fall within the ambit of Rule 1 of Order 34 C.P.C. has been claimed in the plaint."

9. When the plaintiff has issued the summons under ordinary summon suit which is at the first instance, the defendant was called for to answer of the material questions relating to the suit and the said summon sent by the respondent/plaintiff and the ordinary suit cannot be treated as summon issued under Order 37 Rule 1 and 2 of CPC. When the respondent/plaintiff has filed a suit and the summary suit he must have in vigilant and should issue the summons under the summary suit summon. Therefore, when the respondent/plaintiff himself has called for this petitioner/defendant to answer all his queries to made his said plaint by issuing the ordinary suit summon. The defendant must have been given opportunity to put forth his case before the Court below by answering his queries.

10. Apart from this, the plaintiff has claimed the said amount towards the unpaid incentives at the rate of Rs.1,24,000/- and towards

the unpaid commission at the rate of Rs.1,36,486/- by totally Rs.2,60,486/- should be dealt with by way of trial and evidence. This suit is not in suited based on the documents of pronote or other documents, but it is the only claim of unpaid incentives and also the unpaid commission which required evidence and documents. Therefore, the learned Judge has without gone into all these things had simply passed the order in this leave to defend application and dismissed the same. When the payment itself is in the said suit which has been filed under summary suit under Order 37 Rule 1 and 2 of CPC by claiming the plaintiff towards the unpaid incentives and towards the unpaid commission. How the Court below has taken in a manner like pronote, the Court must have gone through the averments made in the plaint when the suits like the case in hand filed, they must have gone through the averments made in the plaint and should be decided the leave to defend application. The Court below cannot say that the defendant has not complied with the Order 37 Rule 1 and 2 of CPC in simplicity manner, but that can be used sparingly in case for suit like summary suit based on the pronote.

11. In the above circumstances, this Court warranting necessary interference in the order passed by the learned Judge in I.A.No.8799

of 2008 in O.S.No.1793 of 2008, dated 04.08.2008 and the same is liable to be set aside for the simple reason is the very claim made by the plaintiff itself that the unpaid incentives and unpaid commission is required evidence and documents by way of trial.

12.In the result:

(a) this Civil Revision Petition is allowed by setting aside the order passed in I.A.No.8799 of 2008 in O.S.No.1793 of 2008, dated 04.08.2008, on the file of the learned XV Assistant Judge, City Civil Court, Chennai;

(b) the petitioner/defendant is directed to file his written statement within a period of 30 days from the date of receipt of a copy of this order;

(c) on filing of the written statement, the learned XV Assistant Judge, City Civil Court, Chennai, is directed to take up the suit, without giving any adjournments to either parties and dispose the same within a period of four months thereafter. No costs. Consequently, connected miscellaneous petitions are closed.

14.11.2017

Note:Issue order copy on 14.12.2018

vs

Index: Yes

Speaking order

M.V.MURALIDARAN.J.,

VS

To

The XV Assistant Judge,
City Civil Court, Chennai.



**Pre-Delivery order made in
C.R.P.(NPD)No.2029 of 2009
and
M.P.Nos.1/2009 & 1/2010**

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