



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 27.07.2017

CORAM

THE HONOURABLE MRS.JUSTICE PUSHPA SATHYANARAYANA

SECOND APPEAL (MD) No.2 of 2014

and

M.P. (MD) .No.1 of 2014

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Chettinadu Cements & Co.,  
Limited through its Managing Director,  
Thiru. M.A.M.R.Muthaiah,  
now represented through its  
Assistant Manager of Firm,  
S.Suresh,  
S/o.A.Subramanian,  
John Royal Residency,  
D.No.24, Rajarajeswari Nagar,  
Tirunelveli.

... Appellant /  
Appellant/ 1<sup>st</sup> Defendant

Vs.

1. Rose Mary Matriculation Higher Secondary  
School, through its Chairman (Administrator),  
Jeyaraj, S/o.Pacianathan,  
No.1, Sivanthipatti Road,  
Maharajan Nagar,  
Tirunelveli -11.

... 1<sup>st</sup> respondent /  
1<sup>st</sup> respondent/Plaintiff

2. M/s.Jeyalaxmi Stores,  
Now R.R. Corporation,  
Through its Proprietor No.2,  
Municipal Corporation Building,  
Sankarankovil Road, Thatchanallur,  
Tirunelveli.

...2<sup>nd</sup> respondent /  
2<sup>nd</sup> respondent/2<sup>nd</sup> Defendant

**PRAYER:** Second Appeal filed under Section 100 of C.P.C., against the judgment and decree, dated 22.01.2013, made in A.S.No.43 of 2010 on the file of the III Additional District and Sessions Judge, Tirunelveli, confirming the judgment and decree, dated 18.02.2010, made in O.S.No.10 of 2008 on the file of the Additional Sub Court, Tirunelveli.

For petitioner

... Mr.T.Antony Arul Raj,  
for Mr.D.Rajkumar

For 1st respondent

.... Mr.V.Meenakshi Sundaram,  
for Mr.D.Nallathambi

**JUDGMENT**

The first defendant, who has suffered a decree for recovery of money before the Courts below, is the appellant herein. The first respondent herein / plaintiff had filed the suit for recovery of money against the appellant/1<sup>st</sup> defendant and the second respondent/2<sup>nd</sup> defendant.

2.The plaintiff, which is an educational institution, was purchasing cement bags from the first defendant for the construction of a hospital. The second defendant was a dealer of the first defendant and he used to collect the cheque from the plaintiff and sent the same to the first defendant / manufacturer. Originally, for the purchase of 1000 bags of cement, the plaintiff had issued two cheques, dated 02.12.2006, to the first defendant. However, the first defendant had delivered only 990 bags. Later, on the same day, the plaintiff had paid a sum of Rs.1,72,000/- by another cheque and placed orders for another 1000 bags of cement. The said cheque was also encashed by the first defendant on 04.12.2006. But, the first defendant did not deliver the cement bags. Therefore, the plaintiff had sent a notice dated 29.08.2007, which was responded by the first defendant with false averments. As the defendants did not deliver the 1000 cement bags, the suit was filed for recovery of the money paid.

3. In the written statement, the first defendant had admitted the receipt of Rs.1,72,000/- for the purpose of supply of 1000 bags of cement and also the encashment of the same. It is the further case of the first defendant that as the second defendant is the dealer of the first defendant, the orders placed by the plaintiff were supplied to the second defendant and the second defendant had not delivered the same to the plaintiff. Further, the first defendant contended that there was no privity of contract between the plaintiff and the first defendant. Before the trial Court the second defendant remained *ex parte*.

4. Before the trial Court, on the side of the plaintiff, P.W.1 was examined and Exs.A.1 to A.5 were marked, and on the side of the defendant, DW.1 was examined and Exs.D.1 to D.3 were marked. Both the Courts have concurrently held that both the defendants are jointly and severally liable to repay the amount to the plaintiff with 12% interest.

5.This second appeal was admitted on the following substantial questions of law:

"1)Whether the Courts below were justified in fastening the liability on the 1<sup>st</sup> defendant when admittedly there was no privity of contract

between the plaintiff and the 1<sup>st</sup> defendant?



2) Whether the lower appellate Court having rightly held that the 2<sup>nd</sup> defendant was only a dealer and not the agent of the 1<sup>st</sup> defendant ought to have reversed the decision of the trial Court?

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3) Whether the Courts below misread and misconstrued the evidence on record?

4) Whether the Courts below failed to note that the 1<sup>st</sup> defendant having delivered 1000 bags of cement to the 2<sup>nd</sup> defendant following the order placed by the plaintiff had discharged their contractual obligation in full?

5) Whether the Courts below failed to apply the elementary principle of law of contract that liability can be fastened on a party only if breach of contract is established and not otherwise?"

6. Heard the learned counsel for the appellant and the learned counsel for the first respondent and perused the records carefully.

7. Before the lower appellate Court, the plaintiff had filed I.A.No.40 of 2012 and marked Ex.A6, which was the cheque given by the plaintiff to the first defendant through the second defendant. As the first defendant/appellant herein had denied any privity of contract between themselves and the plaintiff, the said cheque was produced by the plaintiff to show that the said cheque was issued only in the name of the first defendant and to show that there was a privity of contract between the first defendant and the plaintiff. Though the second defendant was a dealer through whom the supplies were made, the money was paid directly in the name of the first defendant. As stated earlier, the first defendant also has admitted the receipt of the payment from the plaintiff. Therefore, it is the duty of the first defendant to supply the required cement bags to the plaintiff.

8. The evidence of DW1 has supported the case of the plaintiff, as he has admitted in his cross examination that the cheque was received from the plaintiff in the name of the first defendant. Besides the said cheque, two other cheques for a sum of Rs.1,03,200/- and Rs.68,800/- were also received by the second defendant from the plaintiff for the supply of another 1000 bags of cement. Though the first defendant had received money for the supply of a total number of 2000 bags of cement, it had supplied only 1000 bags to the plaintiff. Though the cheque, dated 02.12.2006, issued by the plaintiff in favour of the first defendant for a sum of Rs.1,72,000/- for the supply of another



1000 bags of cement was encashed by the first defendant, the supply was not made by it.

9. The first defendant, who is the manufacturer and supplying cement bags, is the best person to speak about the supply of cement. Though it is alleged by the first defendant that another 1000 bags of cement were also supplied to the plaintiff, there is no iota of evidence produced by the first defendant. The second defendant though may be an agent or even a dealer, it has been acting only on behalf of the first defendant. In Ex.A4, the first defendant referred the second defendant only as a dealer. But, the fact remains that the first defendant had collected the cheque issued by the plaintiff only through the second defendant and encashed the same. For the reasons best known, the second defendant remained *ex parte* before the trial Court as well as before the first appellate Court. When the transaction viz., receipt of money is admitted, the first defendant is liable to pay the money back to the plaintiff.

10. When the initial burden of proof is discharged by the plaintiff by establishing that the cheque was given to the first defendant and the same was realised by it, automatically the burden shifts on the first defendant. It is the first defendant, who has to establish that the cement bags were delivered to the plaintiff. As stated earlier, the first defendant being a manufacturer will have several documents at each stage about the movement of the cement bags, upto the gate when it exists for delivery. The first defendant could have easily produced even the gate-pass issued for the supply of another 1000 bags of cements due to the plaintiff. However, there is no document produced by the first defendant to correlate that for the money received from the plaintiff, 1000 bags of cement was supplied. The first defendant/appellant, having failed to produce any document to show the supply of materials and having admitted the receipt of the suit claim, is liable to repay the same to the plaintiff with interest. The lower appellate Court being a final Court of fact also elaborately discussed the same and held that the defendants are jointly and severally liable to repay the amount to the plaintiff. In the absence of any evidence, the above questions of law are answered against the appellant/first defendant.

11. In the result, this Second Appeal fails and accordingly, the same is dismissed, confirming the judgment and decree passed by the Courts below. No costs. Consequently, connected miscellaneous petition is also dismissed.

Sd/-

Assistant Registrar(CO)



To

1. The III Additional District and Sessions Judge,  
Tirunelveli.

2. The Additional Sub Judge, Tirunelveli.

3. The Section Officer,  
VR Section,  
Madurai Bench of Madras High Court,  
Madurai.

+1cc to Mr.D.Rajkumar, Advocate Sr.No.68528

+1cc to Mr.D.Nallathambi, Advocate Sr.No.68488

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VB/KK/SAR4/01.09.2017/5P/6C

**S.A. (MD) No.2 of 2014**  
**27.07.2017**