

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 01.08.2018

CORAM:

THE HONOURABLE MR.JUSTICE R.SUBBIAH
and
THE HONOURABLE MR.JUSTICE C.SARAVANAN

A.S.No.280 of 2018
and
C.M.P.No.6109 of 2018

1. M/s.DMJ Export
represented by its Partner,
M.Dhandapani,
S/o P.Murugesan,
180, Kamaraj nagar,
Pichampalayam Road,
Tirupur 641 602.
2. M.Dhandapani,
S/o P.Murugesan,
Partner - M/s. DMJ Export,
180, Kamaraj nagar,
Pichampalayam Road,
Tirupur 641 602.
3. M/s.DMJ Export
represented by Partner,
P.Murugesan,
180, Kamaraj nagar,
Pichampalayam Road,
Tirupur 641 602.

सत्यमेव जयते

..... Appellants/
Defendants 1 to 3

Vs.

1. UPK International,
represented by its Proprietor
K.Yumarani,
W/o Kalimuthu,
rep. By its Power Hoder K.Kalimuthu,
S/o Murugasamy,
No.9, Near Srinivasa Theatre,
60 feet Road, 1st cross,
Gandhi Nagar Post,
Tirupur - 641 603.

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2. Viram Impex,
rep. By Proprietor Rajesh Sha,
No.23, JK Industrial Estate,
Off Mahakali Caves Road,
Andheri East,
Mumbai.

3. M/s. Indian Overseas Bank,
Rep. By its Branch Manager,
velampalayam Branch,
Tirupur 641 652.

.... Respondents/Plaintiff/
Defendants 4 & 5

Prayer:-

Appeal Suit has been filed under Section 96 read with Order 41 Rule 1 of C.P.C., against the judgment and decree dated 19.08.2016 made in O.S.No.203 of 2013 by the II Additional District and Sessions Court, Tirupur.

For Appellants : Mr.S.S.Swaminathan

For Respondents : Mr.R.Selvakumar

* * * * *

JUDGMENT

(Judgment of the Court was delivered by R.Subbiah, J.)

This appeal has been filed as against the judgment and decree 19.08.2016 passed in O.S.No.203 of 2013 by the II Additional District and Sessions Judge, Tirupur, decreeing the suit filed by the first respondent herein as against the appellants.

2. The appellants are the 1st, 2nd and 3rd defendants in the suit. The 1st respondent herein is the plaintiff. The 2nd and 3rd respondents herein are the 4th and 5th defendants in the suit. For the sake of convenience, the parties shall be referred to as per their ranking in the suit.

3. The case of the plaintiff /first respondent herein in brief is as follows:

The plaintiff has received an export order from M/s. Skiva International, Inc., 1407, Broadway, Suit 503, New York, N.Y.10018 through the 4th defendant M/s. Viram Impex, No.23, J.K.Ind.Etate, Off Mahakali Caves Road, Andheri East, Mumbai 400 093. To that effect, on 13.05.2010, they received a letter of credit bearing No.L557647 through Bank of India, Mumbai under first beneficiary as M/s. Viram Impex, Mumbai for a value of USD

92,950. The same was transferred to the plaintiff on 19.05.2010 by the request of the 2nd defendant to their banker, M/s. Bank of India, Mumbai. Since heavy order was in progress, the plaintiff was not in a position to meet out the requirements of the 4th defendant. This position had been intimated to the 4th defendant. Consequently, the plaintiff received intimation to place the same as merchant order to one M/s. DMJ Export, Tirupur i.e., the 1st defendant /1st appellant herein. The defendants 2 and 3 are partners of the 1st defendant Firm. Hence, they have placed merchant order of contract dated 12.06.2010 with the 1st defendant firm vide Purchase Order No.VI-004 for Ladies SLVS T-Shirt Styles as per plaintiff's Tech Packs (5 styles) made out of 100% cotton semi-combed verigated rib as original swatch - 70 GSM with main label, wash-care label, hangtag, poly bag as per plaintiff's originals sample. To that effect, the following consignments were required from the defendant:

Style	Qty in Dozen	Qty in Pcs	Colours	Rate in rs./PC	Total amount Rs.
75126DA	300 Dzns	3600 Pcs	10 colours	Rs.79/-	2,84,400
75216DB	200Dzns	2400 Pcs	4 colours	Rs.79/-	1,89,600
752021RA	800 Dzns	9600 Pcs	7 colours	Rs.79/-	7,58,400
752021RB	800 Dzns	9600 Pcs	7 colours	Rs.79/-	7,58,400
75020RA	800 Dzns	9600 Pcs	7 colours	Rs.79/-	7,29,600
75020RB	800 Dzns	6000 Pcs	7 colours	Rs.79/-	7,29,600
75020XR	500 Dzns	3600 Pcs	5 colours	Rs.100/-	6,00,000
75126XDA	300 Dzns	3600 Pcs	10 colours	Rs.100/-	3,60,000
75126DB	200 Dzns	2400 Pcs	4 colours	Rs.100/-	2,40,000
	4700 Dzns	56400 Pcs		Total amount	46,60,000

The plaintiff and the 1st defendant have signed the order of contract as per the schedule mentioned above. On 17.06.2010, the plaintiff issued a cheque bearing 508542 dated 17.06.2010 drawn on Andhra Bank, Tirupur Branch for a sum of Rs.13,95,000/- as advance in favour of the 1st defendant and the same has been honoured and given credit to the defendant's account. The Bank statement dated 11.10.2010 for a period from 17.06.2010 to 26.06.2010 reflects that the cheque has been honoured and the cheque has been given credit in favour of the 1st defendant's firm. Having availed the advance, the first defendant executed the order but at the same time, instead of delivering the goods to the plaintiff, the defendants 1 to 3 colluded with the 4th defendant and sent the consignment at the instigation of the 4th defendant to one firm by name M/s. Kewel Impex, Shop No.3,

Bhagirathi IRLA Lane, Vile Parle west, Mumbai MH 400 058 and the same had been delivered to abroad importer M/s. Skiva International Inc., 1407 Broadway, Suite 508. Newyork NY 10018 USA, by the aforesaid M/s. Kewel Impex. The plaintiff came to know about the fact on perusal of the bill of lading sent by the buyer in New York. The shipping documents revealed that the goods were sent to the original buyer who had opened the letter of credit in favour of the 4th defendant and in turn the 4th defendant transferred the letter of credit in favour of the plaintiff's firm by the aforesaid M/s. Kwewl Impex at Mumbai. Thus, it is clear that the defendants 1 to 3 colluded with the 4th defendant and played a fraud on the plaintiff's firm. When the plaintiff came to know the fraud played by the defendants 1 to 4, they used to avoid meeting the plaintiff to sort out this issue. Inspite of several reminders and phone calls, the defendants 1 to 4, they did not give proper response. The 1st defendant having received the amount of Rs.13,95,000/- under the cheque dated 17.06.2010 bearing No.506542 drawn on Andhra Bank, Tirupur Branch and the same was honoured on 18.06.2010, the defendants are liable to repay the advance amount since they failed to perform the contract. Hence, the plaintiff filed a suit to direct the defendants 1 to 4 jointly and severally to pay a sum of Rs.13,95,000/- towards the advance amount and interest at the rate of 12% per annum on Rs.13,95,000/- is Rs.5,02,200/- from 17.06.2010 to 03.06.2013, totalling a sum of Rs.18,97,200/- to the plaintiff with subsequent interest at the rate of 12% per annum on a sum of Rs.13,95,000/- till the date of realization and to direct the defendant to pay the cost of the suit.

4. Resisting the case of the plaintiff, the 2nd defendants filed a written statement, which was adopted by the defendants 1, 3 & 4 wherein they have denied all the allegations made in the plaint specifically taking the defence that the value of the order is Rs.46,50,000/- and as an advance of the said amount, the plaintiff paid Rs.13,95,000/- on 12.06.2010 to execute the order by manufacturing the goods (T-shirts). The 1st to 3rd defendants spent their own money of Rs.32,55,000/-. As per the terms and conditions of the order, they completed their work within a period of three months. Thereafter, the defendants informed the plaintiff over phone and asked him to pay the remaining balance amount and to take delivery of the goods. The plaintiff visited the 1st defendant firm and confirmed that he would make Rs.10,00,000/- immediately and he would give a cheque for the balance amount. The defendants agreed for the same but the plaintiff never turned up as he promised. The plaintiff visited the defendant's firm again to confirm that the entire amount would be paid within a period of seven days. Due to the non-arrangements of the funds, the plaintiff requested for the extension of Letter of credit from the 4th defendant

Mr. Rajesh Shaw of Vikram Impex and the same was extended till the end of August, 2010. Even after extending the Letter of credit, the plaintiff did not pay the amount. Hence, the defendants were put into trouble. Once the letter of credit comes to an end, the goods cannot be sent to the same buyer and automatically, the orders placed by the buyer will get cancelled. For the reason of non-payment of the buyer, the defendants were pushed to meet the loss of Rs.32,55,000/- The defendant also suffered Rs.6,00,000/- loss. The plaintiff has no rights to claim the suit amount from the defendants. Due to the act of the plaintiff, the defendants have no means and they are indebted to several persons. Hence, the defendants sought for dismissal of the suit.

5. The trial court framed the following issues for consideration:

i) Whether the plaintiff is entitled for the advance amount along with interest from the 1st to 4th defendants as claimed in the suit?

ii) Whether the plaintiff is entitled to claim the suit amount along with interest? If so, at what percentage of interest he is entitled to?

iii) Whether the 5th defendant is the necessary party in the suit?

iv) To what other relief the plaintiff is entitled to?

6. On the side of the plaintiff, he examined himself as P.W.1 and marked 14 documents viz., Exs.P1 to P14. On the side of the defendants, P.W.1 was cross examined in part. Thereafter, the learned counsel appearing for the defendants did not appear to cross examine P.W.1. The cross examination was closed. This fact was not informed to the defendants since the counsel appearing for the defendants was suffering from cancer and he did not attend the Court for a period of more than two years. Based on the available evidence, the trial Court decreed the suit. Aggrieved over the same, the present appeal has been filed.

7. Learned counsel appearing for the appellant submitted that P.W.1 is the Power of Attorney of the Plaintiff. He cannot depose on behalf of the principal since he had no personal knowledge about the transaction in this case. Further more, the respondent herein/plaintiff did not prove the case either by documentary evidence or by oral evidence. P.W.1 was not fully cross examined by the counsel for the appellants/defendants and no defence evidence was adduced by the defendants and only based on the available evidence, the trial Court has decreed the suit erroneously. Learned counsel for the appellants also produced the medical record to show that the learned counsel

appearing for the defendants was suffering from cancer. He further submitted that the appellants are having valid defence to succeed the case and thus, he prayed to remit back the matter to the trial court by setting aside the decree passed by the trial Court.

8. Learned counsel for the respondents/defendants submitted that though sufficient opportunity was given to the appellants/defendants, they did not appear before the trial Court and complete the cross examine of P.W.1 and they did not adduce any oral or documentary evidence. The trial Court, only after giving sufficient opportunity to the appellants, has decreed the suit, based on the available evidence. Therefore, there is no perversity or infirmity in the decree passed by the trial Court and hence, the same need not be interfered with. Therefore, the learned counsel for the respondents seeks for dismissal of the appeal.

9. Considering the facts and circumstances and the submissions made on either side, we are of the opinion that in the interest of justice, the appeal can be allowed and the order of the trial Court can be set aside and the matter shall be remitted back to the trial Court so that the appellant can have a chance of contesting his case on merits. Further, this Court, at the time of admitting the appeal granted interim stay on condition that the appellant shall pay 50% of the decretal amount along with proportionate interest. Now, this Court is of the view that to meet the ends of justice, the matter shall be remitted back to the trial Court on condition, the appellants shall deposit another 25% of the decretal amount.

10. In the result, the Appeal is allowed. The judgment and decree passed by the II Additional District and Sessions Judge, Tiruppur, is set aside and the matter is remitted back to the said Court on condition the appellants deposit 25% of the decretal amount with proportionate interest to the credit of the O.S.No.203 of 2013 on the file of II Additional District and Sessions Judge, Tiruppur, within a period of six weeks from the date of receipt of a copy of this order. On such deposit, the trial Court shall take up the suit and decide the suit on merits by affording an opportunity of hearing to the appellants to cross examine P.W.1. further and also adduce evidence on the side of the defendants/appellants. The entire exercise shall be done by the trial Court and pass orders on or before 31.03.2019. In the event of failure to deposit 25% of the decretal amount by the appellants within the time stipulated as stated supra, the judgment and decree dated 19.08.2016 passed by the II Additional

District and Sessions Court, Tirupur, will stand. No costs.
Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(CS V)

//True Copy//

Sub Assistant Registrar

vsi

To

The II Additional District and Sessions Judge,
Tirupur.

+1cc to Mr.R.Selvakumar, Advocate, S.R.No.52477
+1cc to Mr.S.S.Swaminathan, Advocate, S.R.No.52695

A.S.No.280 of 2018

GJ(CO)
CS/10/09/18



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