

IN THE HIGH COURT OF JUDICATURE AT MADRAS

(ORDINARY ORIGINAL CIVIL JURISDICTION)

WEDNESDAY, THE 21st DAY OF FEBRUARY 2018

THE HON'BLE MR. JUSTICE M.SUNDAR

A. Nos.1544 & 1545 of 2018
in
C.S. No.1311 of 1994

**M/s.Salem Stainless Steel Suppliers
Private Ltd., rep. by its Director,
P.Shantilal Jain,
No.33, Lawyer Chinna Thambi Street,
Kondithope, Chennai-79. (*)**

... Plaintiff

-Versus-

M/s.Sumeet Machines Limited,
rep. by its Managing Director,
Mr.Ajay Mathur,
office at No.603, Poonam Chambers,
Shivanagar Estate, Worli,
Bombay-400 018. ... Defendant
(*)Amendment carried out as per order
dated 08.07.2013 in A. No.2655 of 2013
extended by order dated 16.07.2013

A. Nos.1544 & 1545 of 2018:-

M/s.Sumeet Machines Limited,
No.603, Poonam Chambers,
Shivannagar Estate, Worli,
Mumbai-400 018
rep. by its Managing Director,
Mr.Ajay Mathur, ... Applicant/Defendant

-Versus-

M/s.Salem Stainless Steel Suppliers
(Pvt.) Ltd.,
having office at No.33,
Lawyer Chinna Thambi Street,
Kondithope, Chennai-600 079
rep.by its Director, P.Shantilal Jain...Respondent/Plaintiff

A. No.1544 of 2018:-

Application praying that this Hon'ble Court be pleased to recall PW1 for cross examination by the applicant's counsel.

A. No.1545 of 2018:-

Application praying that this Hon'ble Court be pleased to reopen the plaintiff's evidence in the above suit.

These applications coming on this day before this court for hearing the court made the following order:-

This common order will dispose of both these applications i.e., A.Nos.1544 and 1545 of 2018 in C.S.No.1311 of 1994.

2. Sole defendant in the main suit is the lone applicant in these two applications. Sole plaintiff in the main suit is the lone respondent in both these applications. For the sake of convenience and clarity, parties in these two applications are referred to by their respective ranks in the main suit.

3. The case of the plaintiff is that they are dealing with stainless steel sheets, coils etc, they supplied goods to the defendant under various invoices during the period 14.09.1991 to 01.04.1992, defendant after receiving the goods committed default in payment resulting in this suit.

4. In short, it is a commercial transaction between plaintiff and defendant both of which are commercial entities. Plaintiff is a Private Limited Company and defendant is a Public Limited Company. Transaction is based on goods sold and delivered. Almost half a decade ago, pleadings were completed in the main suit, issues were framed and trial commenced. It is also seen from the suit file placed before me that the first witness on the side of plaintiff i.e., P.W.1 has been examined, cross-examined and plaintiff's side evidence has been closed on 28.04.2014.

5. Immediately, thereafter, defendant has filed a reopen petition qua P.W.1, vide S.R.No.3974 of 2015, but the same did not see the light of the day, though the matter was listed before learned Additional Master-II several times. Ultimately, learned Additional Master-II directed the suit to be listed before Court, but, thereafter, the suit was not listed for a very long time.

6. Ultimately, the suit was listed, nearly four years later, on 04.01.2018 before this Commercial Division, on a letter being circulated by the learned counsel for plaintiff.

7. As the aforesaid reopen petition was not readily

traceable in the suit file, defendant was permitted to file fresh reopen and recall petitions, which has resulted in the instant two applications.

8. To be noted, these two applications have now been filed with prayers to recall P.W.1 for cross examination and reopen plaintiff's side evidence. *Inter alia* provisions of Order XVIII Rule 17 of Code of Civil Procedure , 1908 (hereinafter referred to as 'CPC' for brevity) has been invoked.

9. The plaintiff has filed a common counter affidavit in these two applications. Common counter affidavit of plaintiff in these two applications is dated 12.02.2018. Mr.Rahul K Jain, learned counsel, representing the counsel on record for plaintiff opposed these applications. It was his specific submission that a prayer under Order XVIII Rule 17 of CPC should not be granted for the asking and more so nearly four years later.

10. In support of his submission, he pressed into service two judgments. One is ***S.V.Matha Prasad Vs. Renuka Devi*** reported in **2014 (6) CTC 670 (Mad.)**, which is a Division Bench judgement of our High Court. The other judgment is a judgment of the Hon'ble Supreme Court of India in ***Gayathri Vs. M.Girish***, reported in **2017 (4) CTC 321 (SC)**.

11. With regard to S.V.Matha Prasad's case, learned counsel drew my attention to paragraph 9 of the said judgment and I deem it appropriate to extract the same:

"9. On this legal issue, the learned Counsel for the First Respondent/Plaintiff referred also to the Judgment of the Hon'ble Supreme Court in **Bagai Construction thr. its Proprietor v. Gupta Building, Material Store**, 2013 (1) MWN (Civil)573 (SC): 2013 (2) Scale 769, which, in turn, has referred to the aforesaid Judgment. The Court expressed with a view that it was desirable that the recording of evidence should be continuous and followed by arguments and decision thereon within a reasonable time. Applications to overcome lacuna in the *Plaint, pleadings and the evidence* ought not to be entertained."

12. With regard to Gayathri's case, learned counsel drew my attention to paragraph 5 of the said judgment, wherein a portion of the judgment in **K.K.Velusamy Vs. V.N.Palanisamy** reported in **2011 (3) CTC 422 (SC)** has been extracted. The relevant portion of K.K.Velusamy's case is paragraph 19 (as extracted in Gayathri's case) and I deem it appropriate to extract paragraph 19, which reads as follows:

"19. We may add a word of caution. The power under Section 151 or Order 18, Rule 17 of the Code is not intended to be used routinely, merely for the asking. If so used, it will defeat the very purpose of various amendments to the Code to expedite trials. But where the application is found to be bone fide and where the additional evidence, oral or documentary, will assist the Court to clarify the evidence on the issues and will assist in rendering justice,

and the Court is satisfied that non-production earlier was for valid and sufficient reasons, the Court may exercise its discretion to recall the witnesses or permit the fresh evidence. But if it does so, it should ensure that the process does not become a protracting tactic. The Court should firstly award appropriate costs to the other party to compensate for the delay. Secondly, the Court should take up and complete the case within a fixed time schedule so that the delay is avoided. Thirdly, if the Application is found to be mischievous, or frivolous, or to cover up negligence or lucrae, it should be rejected with heavy costs."

13. With regard to S.V.Matha Prasad's case, there can be no two views or opinions that ideally, recording of evidence should be continuous and followed by arguments and decision thereon is given within a reasonable time.

14. I respectfully follow the principle as would be evident from the calendar I intend to draw up for the main suit.

15. However, on facts, S.V.Matha Prasad judgment is distinguishable as pointed out by Mr.S.Raghunathan, learned counsel for defendant. S.V.Matha Prasad's case is one which arose out of proceedings for issue of Letters of Administration. It is a case of an individual seeking grant of Letters of Administration in respect of a Will, 26 years after the death of the Testator. Obviously, the parties were relatives and it was more of a family affair. Unlike S.V.Matha Prasad's case, as would be evident from

the narration supra, this is a commercial transaction between two commercial entities. Furthermore, S.V.Matha Prasad's case is one where the Single Judge had dismissed the applications. While Single Judge exercises his discretion and dismisses an application of this nature, the scope of an appeal in an intra Court appeal of this nature, particularly under Clause 15 of Letters Patent, is well settled. To be noted, S.V.Matha Prasad's case was one where the judgment was rendered in a Intra Court appeal, wherein a Single Judge has exercised his discretion in a particular manner. This is evident from paragraph No.5, which reads as follows:

"5. The learned Single Judge, vide the impugned Order dated 15.04.2014, dismissed the Applications filed by the Appellant/Second Defendant, aggrieved by which, the present Appeals have been filed."

16. With regard to Gayathri's case, that is again a case between two individuals, where it arose out of a suit for recovery of possession. Therefore, it is distinguishable on facts is the submission made by Mr.Raghunathan. A perusal of the case law reveals that submissions of Mr.Raghunathan are correct. The principle laid down in K.K.Velusamy's case as followed in Gayathri's case is that applications under Order XVIII Rule 17 of CPC are not intended to be allowed routinely, merely for the asking. There can also be no two opinions about the fact

that it should be ensured that such a process is not used as protracting tactics.

17. Most importantly, in Gayathri's case, it appears to be a case where a series/barrage of applications were filed repeatedly. Hon'ble Supreme Court specifically refers to this as 'incurable habit'. The relevant portion is contained in paragraph 1, which reads as follows:

"Thereafter, the Defendant filed an Interlocutory Application under Order 17, Rules 1 & 2 of the Code of Civil Procedure seeking adjournment of the matter for one month on the ground that the mother of the Senior Counsel was unwell. The matter stood adjourned. As the facts would further unfold, the Defendant filed I.A. No.9 under the very same provision seeking adjournment on the ground that the Counsel engaged by him was not keeping well. I.A. No.10 was filed seeking adjournment for one month on the ground that the Senior Counsel was out of station. I.A.No.11 was filed on the plea that the Defendant was unable to get certified copies of 'P' series documents. The Fifth Application, i.e., I.A.No.12 was filed on the similar ground. The incurable habit continued and I.A.No.13 was filed seeking adjournment on the ground that the Counsel was busy in the marriage ceremony of a relative. And, the matter stood adjourned. The proceedings in the Suit got arrested as if 'time' had been arrested. Despite filing of so many Interlocutory Applications, the Defendant remained indefatigable with obsessed consistency and again filed I.A.No.14 on the ground that certified copies were required by her. Thereafter, I.A.No.15 was preferred to recall PW1 for cross-examination on the foundation that on the previous occasion, the Senior Counsel, who was engaged by the Defendant was busy in some other Court. The learned Trial Judge, hoping that all his owe

would be over and the disease of adjournment affecting the marrows of litigation would be kept at bay, allowed the said Application on 27.05.2013 subject to payment of Costs of Rs.800."

18. Now, turning to the facts of the instant case, as would be evident from the narration supra, immediately after plaintiff's side evidence was closed on 28.04.2014, the defendant did file an application under S.R.No.3974 of 2015, but the same is not readily traceable. Therefore, these may not be seen as applications filed four years later in that sense of the matter.

19. The reasons given in support of this reopen and recall application are articulated in paragraph 5 of the affidavit, I deem it appropriate to extract the same:

"5. It is submitted that, the above Suit had been earlier handled by an Associate in the office of the Applicant Counsel, who had during which time, left the office of the Applicant Counsel and had joined another firm. As a result of which the said matter had been allotted to another Associate at the same office, who due to certain medical reasons was unable to represent the matter before this Hon'ble Additional Master and continue with the cross examination of PW1. Considering that the Applicant had not proceeded with the examination of the Additional Master of this Hon'ble Court had closed the evidence and had posted the matter for the Defendant's evidence."

20. Plaintiff's counsel submits that they have no

witness other than P.W.1. Defendant's counsel also submits on instructions that they have only one witness. Defendant's counsel also submits that he may not have been more than 10 documents in all to be marked. Defendant's counsel also, as mentioned supra, submits that defendant has only one witness.

21. Defendant's counsel undertakes to complete cross examination of P.W.1 within two days and let in defendant's side evidence, within a fortnight thereafter.

22. I shall set out the mutually agreed calendar infra:

i) Suit file will be placed before the learned Additional Master-II, on 05.03.2018. On that day, plaintiff undertakes to make P.W.1 available for cross examination. Learned Additional Master-II is requested to complete recording of cross examination on the same day and in any event on or before 07.03.2018.

ii) Defendant shall, thereafter, let in evidence a fortnight later on 21.03.2018. Cross examination of defendant's lone witness, through whom not more than 10 documents are to be marked (I am informed), shall be completed on or before 28.03.2018.

iii) Thereafter, the suit will be listed under the caption 'For arguments' before this Commercial Division on 05.04.2018.

iv) Between 28.03.2018 and 05.04.2018 plaintiff shall prepare a compilation of pleadings, issues, documents, deposition and exhibits which shall be used for arguments.

23. The aforesaid calendar will make it clear that in this case, in the light of the stand taken by both the counsel with regard to the suit, protraction nor procrastination stand eliminated.

24. Therefore, owing to all that have been set out supra, these two applications will stand allowed subject to payment of costs of Rs.10,000/- (Rupees Ten Thousand only) by the defendant in the main suit i.e., applicant herein (at the rate of Rs.5,000/- in each application) on or before 01.03.2018 to Blue Cross of India, No.72, Velachery Road, Guindy, Chennai -32. Proof of payment of costs shall be filed into Court on or before 02.03.2018. To be noted a single payment of Rs.10,000/- (Rupees Ten Thousand only) shall be accepted by Registry as proof in both the applications.

25. To be noted, the aforesaid calender will start operating on 05.03.2018, subject to the aforesaid condition being complied with. Though obvious, if the condition is not complied with, these applications will stand dismissed.

Sd./-M.S.J

21/02/2018

//Certified to be true copy//

Dated at Madras this the day of 2018.

JJ 26/02/2018

COURT OFFICER(O.S.)

From 25th Day of September 2008 the Registry is issuing certified copies of the Orders/Judgments/Decrees in this format.