

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 14.11.2018

Delivered on : 16.11.2018.

CORAM

THE HON'BLE MS.JUSTICE P.T.ASHA

A.S.No.468 of 2018
and
C.M.P.No.11917 of 2018

M/s.Tech-Sharp Engineers (P) Ltd.,
"Celebrity", T-59, Old No.T-95,
3rd Avenue, Anna Nagar,
Chennai 600 040.
rep. by its Project Director
Mr.U.Sanjeev Kumar ... Appellant/Defendant

vs.

M/s.G.R.Infrastructure Pvt. Ltd.,
Poonam Chambers,
A-Wing, 2nd Floor,
Dr.A.B.Road, Worli,
Mumbai 600 040.
rep. by its Authorised Signatory,
Mr.Kiran A.Gujarathi Respondent/Plaintiff

Appeal Suit filed under Section 96 of the Code of Civil Procedure against the judgment and decree dated 1.7.2017 in O.S.No.4840 of 2016 on the file of the XVIII Additional Judge, City Civil Court, Chennai.

For appellant : Mrs.Rita Chandrasekaran for
M/s.Aiyar and Dolia

For Respondent : Mr.P.Giridharan

JUDGMENT

The defendant in an 'Under Chapter Suit' is the appellant before this Court.

2. The brief facts necessary for disposing of the above first appeal are as follows:-

The respondent herein had filed a suit in O.S.No.4840 of 2016 on the file of the XVIII Additional Judge, City Civil Court at Chennai for recovery of sum of Rs.12,20,340/- together with interest at the rate of 18% per annum on the above sum from the date of the suit till the date of realization. The basis on which the above claim was laid was the contract that the plaintiff/respondent herein and the defendant/appellant herein had entered into in the month of May 2014, wherein, the respondent had agreed to supply 250 MT capacity Crane (Kobelco CKE), on a hire basis, at the appellant's project site at Lepetkata, Assam at the factory of one of the appellant's clients namely M/s.Brahmaputhra Craker and Polymer Ltd., hereinafter referred to as BCPL. The parties entered into a Work Order dated 19.05.2014 and the Work Order contained various terms like hire chargers, jurisdiction of operation, payment terms, contract duration, etc. It was agreed that the appellant would clear the invoices raised by the respondent herein within a period of 15 days from the date of invoices. The respondent would contend that between the period from 12.5.2014 to 23.7.2014, the appellant was due and liable to pay a total sum of Rs.22,08,333/- and as on 26.7.2014, the appellant had paid a sum of Rs.12,50,000/- leaving a balance of Rs.9,58,333/-.

3. The respondent would further submit that acknowledging its outstanding, the appellant had, vide their letter dated 14.1.2015 (marked as Ex.A3), informed their client M/s.BPCL to make payment of Rs.9,58,000/- directly to the respondent. However, this instruction was observed in the breach by the appellant as well as BPCL. Despite various reminders in the form of email and personal visits, the appellant had failed and neglected to pay the outstanding. In fact, by their email dated 18.3.2016, the appellant had admitted its liability to the tune of Rs.12,20,340/-. In view of such admission, the suit was filed as an 'Under Chapter Suit'.

4. On receipt of summons from the court, the appellant herein had come forward with an application in I.A.No.1 of 2017 seeking unconditional leave to defend the suit by raising the following defence:-

(a) The provisions of Order XXXVII Rule 2 would not apply to the instant case since it does not come into any of the categories listed under Order XXXVII Rule 2 of the Code of Civil Procedure.

(b) The two documents of admission that have been relied on by the respondent are nothing but communication, one dated 14.1.2015 addressed to BPCL by an employee of the appellant Company and another, is an email addressed to one of the officials of the respondent, which cannot be deemed as acknowledgment on the part of the appellant.

(c) The cranes were used by the appellant as well as JPL, however, the dues of JPL has been mulcted on the appellant. The appellant would, therefore, contend that they have triable issues in the suit and therefore, leave to defend be granted.

5. The respondent herein had resisted the above application, inter alia, contending that the appellant cannot deny the admission made by his own Project Officer and there is a clear admission of liability in the said email dated 14.1.2015 exhibited as Ex.A3 as also the email dated 18.3.2016 which is exhibited as Ex.A5. The respondent had contended that the defence is not a substantial defence and there was no triable issue and therefore, leave could not not be granted.

6. The learned XVIII Additional Judge, City Civil Court, Chennai, by its order dated 1.7.2017, had proceeded to dismiss the Leave Petition and consequently decreed the suit in O.S.No.4840 of 2016. The learned Judge has clearly held that the suit was maintainable under the provisions of Order XXXVII Rule 2 of the Code of Civil Procedure and he had also come to the conclusion that there is a categorical admission on the part of the appellant to repay the amount to the respondent and therefore, they were bound by the said admission. In view of the dismissal of the leave to defend application and taking note of various Exhibits filed on the side of the respondent, the learned Judge had proceeded to pass the above orders. Challenging the said judgment and decree in O.S.No.4840 of 2016, the appellant is before this court.

7. Mrs.Rita Chandrasekar, who appeared on behalf of M/s.Aiyar & Dolia, learned counsel for the appellant, made the following submissions:-

(a) The suit was clearly outside the ambit of the provisions of Order XXXVII Rule 2 of the Code of Civil Procedure.

(b) The amount of Rs.12,50,000/- was paid on behalf of the appellant as well as M/s.JPL and the appellant had paid the entire amount and was under the impression that any extra amount would be adjusted towards next bill.

(c) The Project Manager V.Somasekharan had colluded with the respondent and as a result of such collusion, Exs.A3 and A5 were created and the appellant cannot be made liable for the admission which has been made by a person not authorised by the appellant.

(d) The log sheets which had been enclosed with Ex.A2 would clearly show that the crane was also being operated by the said JPL.

8. The learned counsel for the appellant would, therefore, argue that all these give rise to triable issue and the learned Judge has totally ignored the above. She would also rely on the judgment of the Supreme Court in NEEBHA KAPOOR v. JAYANTILAL KHANDWALA AND OTHERS ((2008) 3 SCC 770) to contend that the documents which have been filed are all xerox copies and the court below had not gone into the question of admissibility of the same. She would also rely on Para 14 of the above judgment, and submit that it clearly demonstrates that a decree in a summary suit is not automatic and contend that the court can always refuse to exercise its discretionary power as the original documents have not been produced.

9. The learned counsel for the appellant would also place reliance on the judgment in M/S.SRIKRISHNA TEXTILES v. M/S.HARIPRIYA TEXTORIUM (1993 SCC ONLINE AP 440) in support of her arguments that the present suit does not come within the ambit of Order XXXVII Rule 1 of the Code of Civil Procedure. In the said judgment, the Honourable Andhra Pradesh High Court has observed that the provisions of Order XXXVII Rules 1 and 2 contemplates a debt or liquidated demand arising on a written contract or on an enactment or on a guarantee and they are only covered by this sub-rule apart from suits upon bills of exchange, hundies and promissory notes.

10. Per contra, Mr.P.Giridharan, learned counsel appearing for the respondent would invite this court's attention to the Work Order, Ex.A1, in which the appellant had clearly stated that the supply of cranes to the appellant were for its project at BPCL at Lepetkata, Dibrugarh, Assam. He also brought to the notice of this court the fact that the agreement itself provides for the payment of the dues directly by BPCL and that the payments would be made within 15 days from the submission and certification of the invoices.

11. He would further point out the email series exhibited as Ex.A5 wherein, by email dated 16.2.2016 and 10.3.2016, the respondent had reminded the appellant about the outstanding of Rs.12,20,340/- as on 27.1.2016. For those emails, there is a reply on 18th March 2016, wherein the appellant had confirmed the fact that they were in the midst of getting their dues cleared by EIL and that it was only after the money payable by them was received, they could settle the other contractors. He also drew this court's attention to an email ID to which that email was addressed viz., 'vsomasekharan@techsharp.com' who was

the author of the letter dated 14.1.2015, Ex.A3. He would, therefore, contend that the said V.Somashekaran had, in very clear terms, acknowledged the liability to the tune of Rs.9,58,000/- as on that date and that the said amount had not been paid. He also brought to the notice of the court the email that was attached which included the ID used 'vsomashearkan@techsharp.com', who was one of the addressees of the email and who was also one of the Directors of the appellant company. He would further contend that the letter, Ex.A3 was attached to the email exhibited as Ex.A5 and since there was no demur from the appellant, it was clear that they had acknowledged the liability.

12. The learned counsel for the respondent would further contend that the court, in an 'Under Chapter Suit' has to test the defence on the touchstone as to whether the defence is an illusory one, a moonshine, a vague one and in case, the test answers the above, it is a case where the leave has to be definitely rejected. In support of his arguments, he had relied on the judgment in IDBI TRUSTEESHIP SERVICES LIMITED v. HUBTOWN LIMITED ((2017) 1 SCC 568), wherein, the Honourable Supreme Court, relying upon the earlier judgment in MILKHIRAM (INDIA) (P) LTD. v. CHAMANLAL BROS. (AIR 1965 SC 1698), had listed out various principles which had to be considered while dealing with the application for leave. Relevant portion of the said judgment is extracted hereinbelow:-

"17. Accordingly, the principles stated in paragraph 8 of Mechelec's case ((1976) 4 SCC 687) will now stand superseded, given the amendment of Order XXXVII Rule 3, and the binding decision of four judges in Milkhiram's case (AIR 1965 SC 1698), as follows:

17.1. If the defendant satisfies the Court that he has a substantial defence, that is, a defence that is likely to succeed, the plaintiff is not entitled to leave to sign judgment, and the defendant is entitled to unconditional leave to defend the suit;

17.2. If the defendant raises triable issues indicating that he has a fair or reasonable defence, although not a positively good defence, the plaintiff is not entitled to sign judgment, and the defendant is ordinarily entitled to unconditional leave to defend;

17.3. Even if the defendant raises triable issues, if a doubt is left with the trial judge about the defendant's good faith, or the genuineness of the triable issues, the trial judge may impose conditions both as to time or mode of trial, as well as payment into

court or furnishing security. Care must be taken to see that the object of the provisions to assist expeditious disposal of commercial causes is not defeated. Care must also be taken to see that such triable issues are not shut out by unduly severe orders as to deposit or security;

17.4. If the Defendant raises a defence which is plausible but improbable, the trial Judge may impose conditions as to time or mode of trial, as well as payment into court, or furnishing security. As such a defence does not raise triable issues, conditions as to deposit or security or both can extend to the entire principal sum together with such interest as the court feels the justice of the case requires.

17.5. If the Defendant has no substantial defence and/or raises no genuine triable issues, and the court finds such defence to be frivolous or vexatious, then leave to defend the suit shall be refused, and the plaintiff is entitled to judgment forthwith;

17.6. If any part of the amount claimed by the plaintiff is admitted by the defendant to be due from him, leave to defend the suit, (even if triable issues or a substantial defence is raised), shall not be granted unless the amount so admitted to be due is deposited by the defendant in court. "

13. The learned counsel appearing for the respondent would, therefore, submit that the defence put forward by the appellant is an improbable and illusory one and therefore, the order of the learned XVIII Additional City Civil Judge has to be upheld. He had also made his submission regarding the levy of interest by stating that the invoice, Ex.A2 would clearly state that in the event of there being a delay, the same would attract interest at the rate of 18% per annum. Therefore, he would submit that the order passed by the Trial Court with regard to interest also has to be confirmed.

14. Heard either parties and perused the documents. It is seen that the appellant has come forward with two objections viz.,

(a) that the provisions of Order XXXVII Rule 2 would not apply to the instant case ; and

(b) that the acknowledgments under Exs.A3 and A5 would not bind the appellant since the same were made by a person, who had left the services of the appellant.

15. From a perusal of Ex.A1, it is clear that the contract had been entered into between the parties to supply cranes to BPCL, Lepetkata, Dibrugarh, Assam. It is also seen that the charges for the supply of cranes had been fixed at Rs.12,50,000/-. It is also seen from the agreement that the appellant would provide for payment being effected on behalf of the appellant by BPCL and such payments be made within 15 days from the date of submission and certification of the invoices. The respondent herein has also based the entire suit on the two Exhibits viz., Exs.A3 and A5. In Ex.A5, the signatory of the appellant had, in clear terms, directed BPCL to pay a sum of Rs.9,58,000/- to the respondent on account of the usage of 250 MT crane at the BPCL site. The email to which this letter has been attached would also reflect the outstanding of Rs.9,58,000/-. The Director of the appellant Company is one of the recipients of this email and it is further seen that the signatory of Ex.A5, whom, the appellant states, is no longer in their service and not authorised to issue such letters, has been marked in each of the emails and therefore, the contention of the appellant that the said V.Somasekharan did not have the authority to acknowledge the debt cannot be countenanced.

16. Coming to the next point with regard to maintainability of the suit under the provisions of Order XXXVII Rule 2 of the Code of Civil Procedure, it is seen that under Order XXXVII Rule 2(b)(i), an 'Under Chapter Suit' can be filed on the basis of a written contract. In the instant case, the entire contract emanates from Ex.A1 Work Order. Invoices have also been raised on the basis of such contract. Therefore, the contention of the appellant that the suit is not maintainable under the provisions of Order XXXVII Rule 2 fails.

17. In view of the above, I find no infirmity in the judgment and decree passed by the learned XVIII Additional City Civil Judge and accordingly, the same is confirmed. In the result, the appeal suit is dismissed. No costs. The connected miscellaneous petition is also dismissed.

Sd/-
Assistant Registrar(CS IV)

//True Copy//

Sub Assistant Registrar

ssk.

To

The XVIII Additional Judge,
City Civil Court, Chennai.

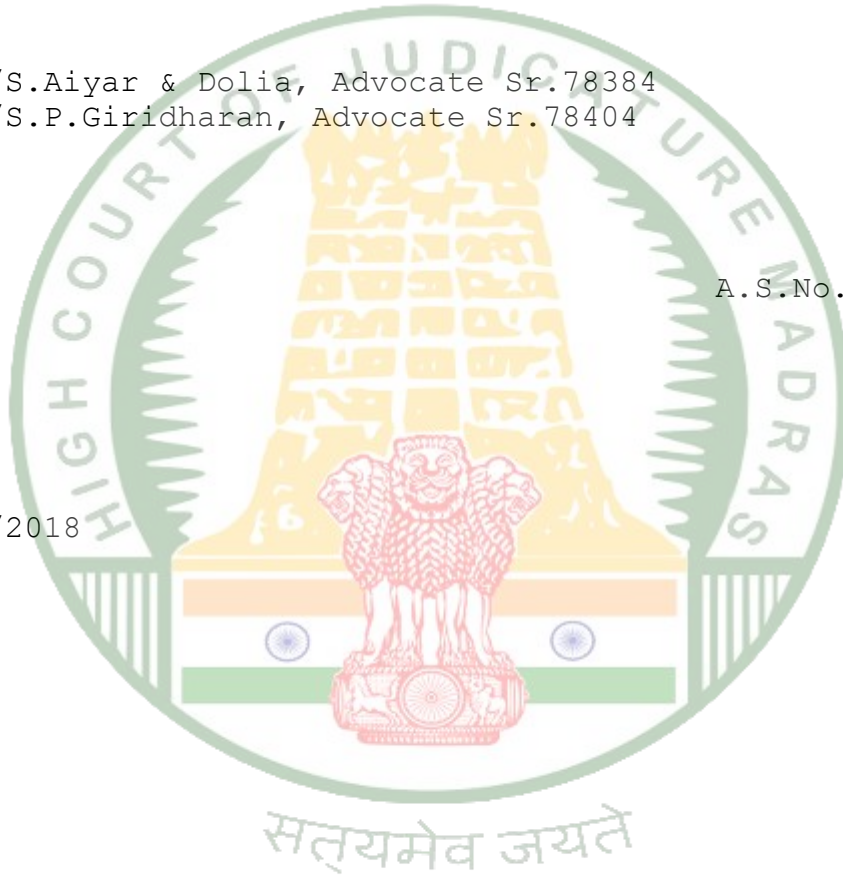
Copy to

The Section Officer,
VR Section, High Court,
Chennai.

+1cc to M/S.Aiyar & Dolia, Advocate Sr.78384
+1cc to M/S.P.Giridharan, Advocate Sr.78404

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