



IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on: 26.02.2018	Pronounced on: 07.03.2018
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Coram

The Honourable Dr.Justice G.Jayachandran

Second Appeal No.607 of 2011

1. M/s.G.M.Vyas & Company
a Partnership firm,
 2. Mr.Manish M.Vyas
 3. Mr.M.G.Vyas ... Defendants/Respondents/Appellants
- /versus/

M/s. National Textile Corporation
(Tamil Nadu & Pondicherry Ltd),
NTC House, Somasundaram Mills Road,
Coimbatore , Unit:Cambodia Mills,
P.B.No.3504, Ondipudur,
Coimbatore. Plaintiff/Appellant/Respondent

PRAYER: Second Appeal is filed under Section 100 of the Civil Procedure Code, to set aside the Judgment and decree dated 01.07.2010 of the First Additional District Judge of Coimbatore, in A.S.No.118 of 2008, reversing the decree and Judgment passed by the Principal subordinate Judge, Coimbatore dated 07/07/2006 passed in OS.No. 1456 of 1998.

For Appellants : Mr. K.Bijai Sundar

For Respondent : Mr. C.V.Vijayakumar

J U D G M E N T

The appellants are the defendant in this suit O.S.No.1456 of 1998 on the file of the Principal Sub Court Coimbatore. While the trial Court has dismissed the suit filed for recovery of money arising out of damages towards breach of contract, the First Appellate Court in A.S.No.118 of 2008 [On the file of District Judge Coimbatore on The First Additional District Judge] allowed the appeal and decreed the suit with interest at the rate of 6 % per annum with costs.

2. Aggrieved over the reversal judgment, the present Second

appeal is preferred by the defendants.

Brief facts leading to the appeal

3. For the sake of brevity the parties are referred as per their description and ranking in the suit. The plaintiff who is the respondent herein is a Public Limited Company incorporated under the Companies Act 1956. Many of the sick Textile mills throughout India had been taken over by this Plaintiff in order to rehabilitate and reconstruct the units. One such unit is Cambodia Mills at Coimbatore. During the month of January 1996, the plaintiff company invited tenders for sale of cotton waste/blended waste for the quarter year from January to March 1996. To tender notice dated 09.01.1996, the first defendant firm M/s.G.M.Vyas & Co. represented by its Managing partner Manish M.Vyas and partner Mr.M.G.Vyas, who arrayed as 2nd and 3rd defendants respectively participated in the tender and given the best offer. The plaintiff firm accepted the quotation submitted by the first defendant and entered into contract with the first defendant firm. On 01.02.1996 the acceptance of the tender was informed to the defendants. As per terms of tender, as and when stocks get accumulated between January to March 1996, same will be intimated to the defendants. The first defendant should pay the value and take delivery of the accumulated stocks within 30 days of the intimation. Accordingly, on 06.02.1996 the plaintiff intimated the first defendant about the availability of cotton waste / blended waste valued at Rs.4,59,130.52 for the month of January 1996 and requested the first defendant to effect the payment and take delivery of the goods on or before 21.02.1996.

4. On receipt of the said letter, the first defendant requested the plaintiff to split up this supply into three invoices. Accordingly the plaintiff split the performa into three invoices and forwarded the same to the defendant on 14.02.1996. The defendant took delivery of first two items and for the third item, the first defendant did not effect the payment and the stocks was laying over with the plaintiff. While so, for the month of February 1996 stocks got accumulated and the plaintiffs send three performa invoices to the first defendant on 05.03.1996 for total value of Rs.4,14,421.33 and requested the defendant to take delivery of accumulated stocks as per terms of contract. The First defendant again neglected to perform its obligation. Defendant neither effected payment as per performa invoice nor made any attempt to pay and take delivery of the goods in the month of March 1996. The third set of performa invoices for total sum of Rs.3,60,337.22 was sent to the defendants on 05.04.1996 and requested them to take delivery of the accumulated stocks on payment. Since, the defendants did not show any interest, letter was sent on 18.03.1996, 10.04.1996 and 19.04.1996 to the first defendant to take delivery of the

goods and remit the payment. In the said letters it was informed to the first defendant that if they fail to pay and took delivery of the accumulated stocks, the same will be sold at the first defendant risk and the Earnest Money Deposit of Rs.10,000/- will be forfeited and the loss, if any, result in re-sale, will be recovered from the first defendant. Since the first defendant did not respond to any of the communication sent to them, accumulated goods were sold to third parties namely (i) M/s.Jaganath Textile Co. (P) Ltd., Coimbatore (ii) M/s.K.G.S.Mills Coimbatore. (iii) M/s.Pradeep Transers, Tiruppur (iv) M/s Raj Bros, Coimbatore and (v) M/s.Sri Murugan Traders, Tiruppur. The resale effected due to breach of contract committed by the defendants as lead to a total loss of Rs.3,27,000/- to the plaintiff. Hence, after causing pre-suit notice on 27.11.1996, the suit for recovery of Rs.3,54,148.40/- along with Court fees of Rs.26,561.75 with interest at the rate of 21% per annum was laid.

5. In the written statement the defendants contended that the contract is not a concluded contract. Participation in the tender process was an offer made by the plaintiff inviting tender for which the first defendant responded by making an offer for purchase of cottage waste/blended waste. It is only an offered to purchase by quoting the rate. The signing of tender document cannot be construed as acceptance.

6. Clause 11 of the tender makes it clear that the General Manager of the plaintiff Mills reserves the right to accept or reject an offer in whole or in part. Again in clause 18, rate were invited for the goods excepted to be collected but was not in existence. On the day of tender the tender was in respect of future goods, so it is only a forward contract and not a ready delivery contract. When there is no certainty of quantity of the goods and there is no existence of the goods on the day of contract, such a contract cannot be construed as concluded contract.

7. It is also contended that there is no certainty of supply under the terms of contract. The plaintiff had reserved the right of disposal of the stocks accumulated as per its wish. In the absence of proper appropriation the goods there can be no certainty in respect of alleged damages incurred by the plaintiff due to re-sale. When there is no sale at all in favour of the defendant, the question of re-sale does not arise and the claim of damage is without any cause of action.

8. It is disputed by the defendant that though they fail and neglect to take delivery, a sum of Rs.50,000/- was remitted to the plaintiff by way of two pay orders of Rs.25,000/- each on 25.06.1996, towards cost of third performa invoice raised for

the month of January. The defendant returned the pay orders refusing to give delivery of goods. It neither returned the money nor supplied goods proportionate to the amount. Hence, a counter claim of Rs.91,413/- which includes principal of Rs.50,000/- and interest at the rate of 21 % per annum is made.

9. The plaintiffs has filed the rely statement denying the averments made in the written statements and counter claim made by the defendants. Subsequently on 08.10.2004 additional written statement was filed by the defendant questioning the maintainability of the suit on the ground, the authorisation by the Board empowering the persons who has signed the plaintiff to institute the suit against the defendants not obtained. It was contended that the plaintiff being a Public Limited Company, registered under Company's Act 1956, it can maintain a suit in Civil Court only when there is specific authority conferred on the persons who files it by a duly passed resolution by the board of Directors. Without such resolution suit filed is an ab initio void and not maintainable. The Trial Court based on the pleadings framed the following issues.

- (i). Whether the plaintiff is entitled for recovery of amount as prayed for?
- (ii). To what relief;
- (iii). The following additional issue is framed on 07.07.2006.
- (iv). Whether the defendant is entitled to the relief of counter claim as pleaded in the written statements?

10. The Trial Court, after considering the evidence, of PW.1 and PW.2 examined on behalf of the plaintiff and 38 documents exhibited by the plaintiff vis a vis the evidence of DW.1 and 8 exhibits marked on behalf of the defendants has dismissed the suit holding that the plaintiff has failed to prove the value of the goods re-sold and also the plaint is not filed with authorisation of the Board of Directors.

11. Aggrieved by the same, the plaintiff preferred the Appeal Suit No.118 of 2008 wherein the First Appellate Court allowed the appeal, decreed the suit as prayed. Holding the suit is maintainable, the Lower Appellate Court had observed that the suit has been filed on behalf of the company owned by the Government. Ex.A.2 the extract of the minutes of 119th meeting of the Board of Directors, National Textile Corporation held on 09.05.1988 discloses the Power of Sub delegation to subordinate Official has been extended to Managing Director. Further under Ex.A.4 Board of Directors of NTC has resolved to confirm and rectify the action taken in filing the suit by the General Manager of Combodia Mills against the defendant and relying upon the communication between the plaintiffs and the

defendants, the First Appellate Court has held that the contract between the parties is a concluded contract and having breached the terms in contract, and put to noticed about the damages caused by them due to breach, the defendants are liable to pay the damages.

12. Aggrieved by the Lower Appellate Court judgment, the present Second appeal is preferred by the defendants rising the following question of law.

a) Whether the Appellate Court was correct in holding that there was proper authority for filing the suit by the respondent in the light of the provisions of Section 291 of the Indian Companies Act 1956?

b) Whether the Appellant Court is correct in presuming and holding that since the respondent is a Government of India undertaking every act has been done in accordance with the statutory rules?

c) Whether the provisions of the Indian Contract Act of 1872 would be applicable or the provisions of Forward Contracts (Regulation) Act 1952 would be applicable for the suit contract exhibit A6?

13. The learned counsel for the appellant would submit that the plaint in OS.No.1456 of 1989 which is the subject matter of the Second Appeal has been signed by Thiru.S.Raj Kumar, General Manager of the plaintiff Corporation. The seal of Combodia Mills for National Textile Corporation [Tamil Nadu and Pondicherry] limited is affixed upon which Thiru.S.Raj Kumar has put his signature as General Manager. The plaint is verified by Raj Kumar on 12th July 1998. Along with the plaint, the resolution of Board of Directors, National Textile Corporation [Tamil Nadu and Pondicherry] limited is not enclosed.

14. Objection by way of Additional written statement was filed by the defendants that a Public Limited Company registered under the Indian Company Act 1956 can maintain a suit in a civil Court only when there is a specific authority conferred on it by duly passed resolution by the Board of Directors for the institution of a suit. In the absence of such a Board resolution passed prior to filing of the suit, the suit filed is a void ab initio and is not maintainable.

15. In this regard, the first appellate Court has relied upon; (i) Ex.A.1 which is a certified true copy of National Textile Corporation [Tamil Nadu and Pondicherry] Limited

delegation of powers to Chairman cum Managing Director. This Exhibits in Clause 2.2 confers full power to Chairman cum Managing Director to institute, defendant or refer claim to arbitration and Execute Power of Attorney and vakalatnama, Muthanama, plaint, written statement and all other documents and papers in connection with cases in law courts on behalf of the Company.

(ii) Ex.A.2, the extract of the 119th meeting of the Board of Directors of National Textile Corporation held on 5th September 1998, wherein it has been resolved by the Board of Directors to empower the Chairman cum Managing Director in the exercise of power under serial No.14.1 to sub delegate such of those power and to the extent necessary to the subordinate officers subject to the ultimate control and authority being retained by Chairman cum Managing Director and Sub delegation by the Chairman cum Managing Director would be reported to the Board.

(ii) The Office order dated 15.11.1998 regarding sub delegation to sign plaint and Vakalat by the General Manager of the Unit mills which is marked as Ex.A.3.

16. Since, absence of authorisation being raised in the additional written statement, the Board of Directors of the plaintiff company has passed a resolution resolving to rectify the action of the General Manager of the Unit Mills of the Corporation filing civil suit in respect of claims dues payable to the mills.

17. No doubt in Ex.A.4, the resolution of the Board of Directors also indicates that it confirms the action taken in filing the civil suit by General Manger of Murugan Mills Coimbatore against G.Vyas Mills Coimbatore. According to the learned counsel appearing for the appellant, Ex.A.4 is not in respect of the suit which is subject matter of the appeal since it is filed by the Unit of Combodia mills and not by Murugan Mills.

18. A close reading of Ex.A.4 reveals, it consists of two parts; First part is resolution regarding ratifying the action of the General Mangers of all the unit mills filing Civil Suit on behalf of National Textile Corporation. Whereas 2nd part is the extract of confirming the action of filing suit against G.M.Vyas & Co., by Murugan Mills. The first part of the resolution is suffices to prove that the Board of Directors have ratified the action of filing suits by unit General Managers.

19. On combined reading of Ex.A.1 to Ex.A.4, it is clear as crystal that the power to file a suit which has been delegated to the Chairman cum Managing Director had been further sub delegated in the Board meeting held on 05.09.1998. The same has been communicated to all the General Managers of units vide office order dated 15.11.1988 which specifically states under Clause 2.2, the General Manger of Unit Mills is delegated the power to sign vakalatnama, plaint, written statement and all other papers in connection with cases in law Court on behalf of the Company. Therefore, factually the contention raised by the defendants that there was no authorisation to the General Manager to file the suit itself is incorrect. Hence there is no question of law to be decided.

20. The learned counsel appearing for the appellant referring the judgment of Hon'ble Supreme Court reported in State Bank of Travancore versus M/s.Kingston Computers(I) P.Ltd. Contended that Hon'ble Supreme court referring Nibro Ltd. Vs National Insurance Co.Ltd were it is held that;

"The suit is liable to be rejected for want of resolution passed by the Board of Directors of the Company authorising the company to filed a suit."

And also referring the Judgment of Hon'ble High Court of Madras reported in M/s. Schmenger GMBH and Company Leder vs M/s. Saddler Shoes Private Limited submitted that in view of Section 291 of Companies Act 1956 and Order 29 Rule 1 of Civil Procedure Code wherein it is held that;

"In the suit for recovery of money filed by the plaintiff-Company, it should be filed by the person authorised by the Board of Directors of the plaintiff-Company, who shall verify and institute the suit. The suit should have been filed by the competent person. To institute a suit on behalf of the plaintiff-Company, it can only be filed by the Directors, specifically empowered by the Board of Directors to file the suit, and in this case, only the Liaison Officer has filed the suit. Even the Director is not competent to file the suit on behalf of the Company, unless the specific power is conferred on him. The Power of Attorney should have been issued to the Director to file the suit on behalf of the Company on the basis of the Resolution passed by the Board of Directors in their meeting held in that regard. The suit is only then held to be validly instituted by the competent person who has been authorised by the Company and when once the Resolution is passed, authorising the Managing Director by giving

Power of Attorney in favour of the Director of the Company and then no further Resolution in that regard is necessary. The Company can always authorise some person to sign on behalf of the Company and if the Company does not chose to do so, it can act in accordance with Order 29 Rule 1 CPC and it can rely on the Order 29 CPC, as in fact, a constituting agent to sign if necessity of giving an express authority. In that way, Order 29 CPC is read only merely as a permissive and not mandatory. In some cases, if the suit is filed by the Company, even the Secretary is competent person to sign and verify the pleadings. As per the Memorandum/Articles of Association of the Company, if the Directors who were jointly authorised to decide to institute the suit, and when the Directors have passed no Resolution deciding to initiate the suit, binding the institution with the result of the suit, and the suit having been filed without there being any Resolution and as the Corporation/Company could only file the suit, if there is any Resolution for the same, the suit is not maintainable. In the present case, the suit is not filed by the authorised person under Order 29 Rule 1 CPC and suit as such is not maintainable and in the case on hand, there is no proof to show that the Liaison Officer was so authorised by the Board of Directors in their meeting, authorising him to initiate the suit."

21. Per contra, the learned counsel appearing for the respondent would submit by referring the judgment of Bombay High Court in Alcon Electronics Pvt.Ltd vs Celem S.A reported in 2015 [1] Mh.L.J, wherein it is observed that;

"The essential requirement of this provision is that the Company which is a juristic person must itself decide to sue. Once that is done, it would authorise one of its Directors who is the agent of the Company or its principal officers the Secretary of the Company or the Managing Director to file the Suit. The suing in each case is a separate act. The Company acts only through its meetings. Hence the Board of Directors in the day to day management of the company must decide and resolve to sue or not to sue. A blanket authority cannot be given to a particular Managing Director or Director to sign the papers and document/s, including the power to sue. The power to sue requires application of mind upon the particular cause of action. It requires the Company to pay the requisite Court fee. It requires the Company to be represented by a legal officer being an Advocate of the Court. It is an act which, therefore, is not a part of the day to day management of the Company. A Company would decide in a given case upon legal advice or

otherwise whether or not it would sue upon a given cause of action. Such exercise is imperatively required to be performed if the intention of the Company, which is only a juristic person, is to be deciphered. That act, of course, may be undertaken even after the filing of the Suit and ratified by the Board as all other acts of management. However, the seminal requirement is to see the act of the Company through its Board or members (dependent upon whether the resolution is passed in the Board meeting or a general meeting) or is given by the Company itself (under its Articles of Association).

22. In this case as discussed above the Board resolution, delegation of power, sub delegate of power and ratification of the action taken by General Manager is proved through Ex.A.1 to Ex.A.4. Therefore, it cannot be construed as an action without authorisation. Furthermore, the provisions of law has to be interpreted in order to give a meaningful purpose and not to defeat a legitimate claim. In this case, the fact reveals that the plaintiff is Unit of Textile Corporation a Public Limited Company and its General Manager is authorised to file suit.

Order 3 rule 1 of C.P.C provides any appearance, application or act in any Court, require or authorized by law can be made or done by the party in person or by its recognized agents.

Order 29, Rule 1 CPC In suits by or against a corporation, any pleading may be signed and verified on behalf of the corporation by the secretary or by any director or other principal officer of the corporation who is able to depose to the facts of the case.

23. Section 291 of C.P.C of Indian Companies Act nowhere it is explicitly stated that for filing a suit the authorisation must be given by Board of Directors. However, the judgments of the Court indicates such a requirement. In so far as the present case is concerned since the said requirement is found to be complied with, the contention of the appellants raised by way of substantial law is answered against them.

24. In the light of the above facts, the lower appellate Court has rightly considered these Exhibits and the judgment cited by the representing counsels has held that the plaint does not suffer from any illegality for want of authorisation.

25. In the said context the observation made by the First

Appellate Court that the plaintiff being a Government undertaking company it has to be presumed to have acted in accordance with the statutory rules, may be out of context it is no bearing in the decision. The evidence let in by the plaintiff proves the authorisation conferred on General Manager of the units through the office communication dated 15.11.1998.

26. Yet another question of law raised by the plaintiff is that the Contract being a forward contract the provisions of Indian Contract Act will not apply and only forward Contract Regulation Act 1956 would apply to the suit Contract Ex.A.6.

27. Perusal of Ex.A.6 reveals the rate offered by the defendants in respect of cotton waste / blended waste had been accepted by the plaintiff on 01.02.1996 and had communicated the tender confirmation and allotment letter for the month of January, February and March 1996. The defendants have quoted the price for the various items and based on the price quoted by them, allotment letter had been issued in favour of the defendant. The stocks accumulated during the relevant point of time had been intimated to the defendant vide letter dated 06.02.1996. In response to the letter the defendant as the written letter dated 08.02.1996 which is marked as Ex.A.8 wherein the defendant had acknowledged the receipt of the letter advising them to take delivery of the waste by 21.02.1996 on payment of Rs.4,56,000/-

28. The defendant has requested to split up the above performa into three separate performas to enable them to take delivery of the goods. They have further requested extension of time up to 21.02.1996 to complete the delivery of the goods. The plaintiff company had accepted the said request and has issued three separate split up performa for the cotton waste allotted to the defendant company. The letter for the split up performa is marked as Ex.A.9 and the said facts are not disputed by the defendant.

29. The performa invoice raised for the sale of waste cotton and the notice dated 09.05.1996 mentioning the quantity of waste accumulated for the month of January, February and March but not taken delivery by the defendant is mentioned in the said letter. The defendant has been informed that the defendant has not taken delivery of the goods allotted to them by 25.04.1996, So they have left with no alternative than to forfeit the EMD and re-sale the entire, quantity allotted to them. The loss, if any, occur on account of re-sale should be

borne by them. The actual amount of loss and interest will be intimated to them in the course the EMD of Rs.10,000/- will also be forfeited.

30. The letter Ex.A.20 dated 07.08.1996 indicates the quantity re-sold to various parties and price fetched. The quantity found in the letter is same as the quantity mentioned in Ex.P.19. In the said circumstances, the contention of the appellant that it is a forwarding contract and the goods were not available at the time of contract is not sustainable because the cause of action for the suit arose on the failure of the defendant from taking delivery of the accumulated goods which was periodically informed to them by the plaintiff. The letter which is marked as Ex.A.19 provides the break up figure for the accumulated stocks every month. Ex.P.20 indicates the price fetched in re-sale. The defendant is found on comparing the performa invoice raised against the defendant and the invoices raised by the Cambodia mills for the re-sale. The invoices of the re-sale are marked as Ex.A.21 to Ex.A.28. Therefore, the contention of the appellant that contract for a non existing goods, the suit for damages not maintainable, is not based on the facts. Even at the time of raising performa invoice for the stocks accumulated during the month of January to March, the goods were in existence and quantity was also ascertained. Hence it is simple and pure breach of contract committed by the defendant.

31. Despite reminders and notice to the defendants has not taken care to clear the goods and pay the price. Even after intimating that goods will be re-sold and the different will be collected from him, if any and EMD will also be forfeited, the defendant has not cared to respond. After filing the suit, he has taken plea for counter claim based on the very same contract Ex.A.6. Now having lost the suit contends that it's a forwarding contract and suit for damages is not maintainable. Since the facts of the case does not support the said argument, the third question of law raised in this appeal is also not sustainable.

32. In the result, this Court holds that both the sustainable questions of law answered as above, does not favour the appellants. Hence, the Second Appeal No.607 of 2011 is dismissed with costs.

Sd/-
Assistant Registrar (CS VI)

//True copy//

Sub Assistant Registrar

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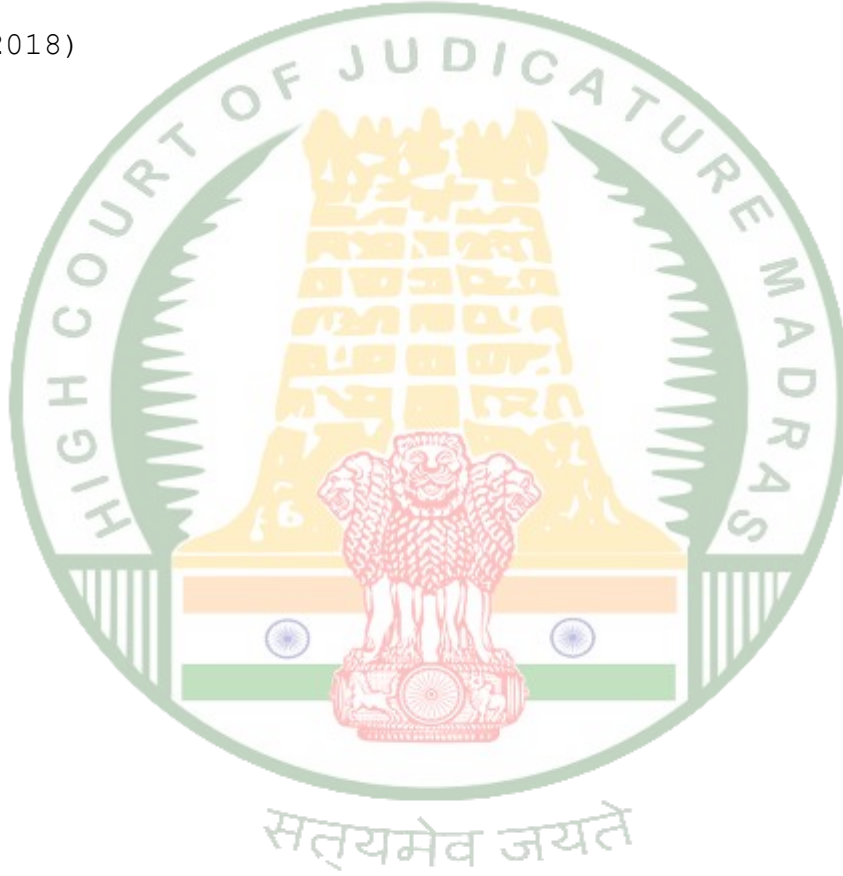
To

1. The First Additional District Judge, Coimbatore.
- 2.The Principal Sub Court, Coimbatore.

+2cc to Mr.C.V.Vijaya Kumar, Advocate SR.No.17339
+1cc to Mr.K.Bijai sundar, Advocate SR.No.17244

Second Appeal No.607 of 2011

VSN(CO)
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