

HON'BLE SRI JUSTICE A. SHANKAR NARAYANA

I.A. No.2 of 2008 (CCCAMP No.312 of 2008)

IN/AND

C.C.C.A. No.135 OF 2008

COMMON JUDGMENT:

Heard Sri G. Subash, learned counsel representing Mrs. A. Anasuya, learned counsel for the appellant - defendant No.1, and Sri Babuji Tenneti, learned counsel, would, in fact, seeks time on behalf of Sri Subrahmanyam Kurella, learned counsel for respondent No.1 - plaintiff.

2. In a suit for recovery of Rs.13,16,221/- with subsequent interest and costs laid by respondent No.1 herein in O.S. No.223 of 2003, learned XI Additional Chief Judge (Fast Track Court), City Civil Court, Hyderabad, decreed it on 05.02.2008 for the suit claim with subsequent interest at the rate of 6% per annum from the date of suit till realization.

3. Aggrieved over the same, defendant No.1 preferred the present appeal.

4. The appellant herein is defendant No.1 and respondent No.2 is defendant No.2, while respondent No.1 is the plaintiff.

5. For the sake of convenience, the parties hereinafter referred to as they were arrayed in the suit before the trial Court.

6. Brief facts of the case are that the plaintiff used to manufacture UPS and allied power systems and used to sell them to various concerns, while defendant No.1 is one of the proprietary concerns engaged in sale of computer equipments and one Smt. G. Neelima was its proprietrix and her husband is also arrayed as defendant No.2 in the suit on the premise that he used to take active part in day-to-day activities of defendant No.1's concern in the course of business.

i) According to the plaintiff, the material, worth Rs.12,05,264/- under invoices though, delivered under delivery challans, only an amount of Rs.1,50,304/- was paid and default was committed by the defendants. When a notice was got issued by the plaintiff demanding for repayment it stood unanswered.

7. Defendant Nos.1 and 2 filed their separate written statements resisting the request.

i) The written statement of defendant No.1 was of total denial throwing burden on defendant No.2 attributing that he used to look after its concern and transact the business and she never participated in the business at all and, therefore, defendant No.1 is not liable to pay any amount, and it is defendant No.2, who dealt with it, is answerable.

ii) Defendant No.2, in fact, denied that he is liable to pay any amount. Of course, his defence is that no amount is due even by defendant No.1.

8. Basing on the said issues, as many as three issues were settled for trial thus:

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1. Whether defendants 1 and 2 are liable to pay the suit amount?
2. Whether defendant no.2 deceived defendant no.1, if so to what effect?
3. To what relief? ”

9. To substantiate their respective cases, on behalf of the plaintiff, PWs.1 and 2 were examined, but, however, the evidence of PW.1 was eschewed, perhaps, he did not come forward for facing cross-examination, and Exs.A-1 to A-18 were marked, which are mostly invoices and delivery challans, besides office copy of legal notice, its acknowledgment card and postal cover and authorization letter. On behalf of defendants, proprietrix of defendant No.1 examined herself as DW.1 and her husband as DW.2, and no documents were filed.

10. What all could be seen from the evidence let in by the defendants is that, there appears to be some sort of family dispute between both of them and some part of cross-examination relates to that dispute rather than the civil dispute that is in vogue in the present

suit. However, the trial Court, on appreciation of evidence, held both issues No.1 and 2 in favour of the plaintiff, recording a finding that as if DW.1 admitted the liability and PW.1 has denied certain crucial answers given by him in his cross-examination which in the present context require no advertence, for the reason the application in I.A. No.2 of 2008 (CCCAMP No.312 of 2008) is filed by the appellant under Order XLI, Rule 27 read with Section 151 of the Code of Civil Procedure, 1908, to receive bank statement from Vijaya Bank in Account No.135; stop payment letter, dated 06.04.2001; letter from Vijaya Bank, Marredpally informing the plaintiff about forwarding the letter of credit for Rs.8,00,000/- on behalf of defendant No.1 and also copy of letter of credit, as additional evidence and to permit the plaintiff to mark them as exhibits B-1 to B-4. That application is also heard.

i) The answers given by PW.2 in his cross-examination is nothing but exhibiting his ignorance or unawareness of certain crucial facts in this case. So far as the adjustment letter of credit to the tune of Rs.8,00,000/- is concerned, he does not give positive answer to the suggestion. Therefore, it is invariable that defendant No.1 has to adduce further evidence and in that direction, the application in I.A. No.2 of 2008 (CCCAMP No.312 of 2008) is filed to receive the documents as additional evidence filed by defendant No.1. Document No.3 relates to the letter from Vijaya Bank, Marredpally informing the

plaintiff about forwarding the letter of credit for Rs.8,00,000/- on behalf of defendant No.1 becomes relevant. It is no doubt true, these documents ought to have been filed at the appropriate time though, DWs.1 and 2 were examined, but, however, now they are coming up with the aforesaid application. The way, in which PW.2 has given answers in his cross-examination touching the letter of credit and other two payments, which were suggested to PW.2, certainly, ignorance would not amount to either admission or a specific denial. Again it gives rise only to a probability which probability can only be considered in an aid of documentary evidence but not against. In such an event, it is relevant to exhibit the letter of credit, more particularly, when other documents now filed along with the application for receipt of additional evidence, the said application has to be invariably allowed and accordingly, I.A. No.2 of 2008 (CCCAMP No.312 of 2008) is allowed.

ii) The consequence is, to remit the matter to the trial Court with a direction to afford an opportunity to the plaintiff as well as the defendants to lead further evidence, more particularly, to exhibit the documents now received subject to proof and relevancy by the trial Court. That has been the reason what is mandated by Order XLI, Rule 31 CPC is not observed.

11. Accordingly, the appeal is allowed setting aside the judgment and decree, dated 05.02.2008, passed by the trial court in O.S. No.223 of 2003. But, however, remitting the matter to the trial Court, directing it to restore the suit to its original number and permit the plaintiff and defendants 1 and 2 to lead further evidence by affording opportunity to both sides. However, the entire exercise be completed within six (6) months from the date of receipt of a copy of the judgment. In the circumstances, both the parties are directed to bear their own costs.

12. Since it is represented by the learned counsel for the appellant - defendant No.1 that as directed by this Court, 1/4th of the decretal amount has already been deposited, which is lying to the credit of the suit, the same shall be put in interest yielding deposit, in case it is not done so and it would be subject to result of the suit.

As a sequel thereto, miscellaneous applications, if any, pending in the present appeal, stand closed.

A. SHANKAR NARAYANA, J

March 07, 2018.

Mgr