

10.12.2020

SAT 8 of 2014

Court No. 02
Item No. SL – 59
snandy

(APPEAL DISMISSED)

Smt. Renu Tiwary @ Smt. Renu Tiwari
Vs.
Dwarka Service Station

Mr. M.M. Verma, Advocate
Mr. Abhishek Verma, Advocate

.....for the Appellant

The concurrent findings of facts are assailed in the instant appeal by the defendant who lost in both the Courts. The suit simplicitor for recovery of money on account of goods sold and delivered, was filed by the plaintiff alleging that the defendant who is in the avocation of a transport business was purchasing the High Speed Diesel on credit. The credit notes were prepared, subsequently, bills were raised but the defendant failed and neglected to discharge her obligation.

The defendant/appellant brought a story that the proprietor of the plaintiff introduced her with the proprietor of Sarkar & Company for supply of the materials and assurance was given for due payment thereof. The story further proceeds that despite materials having supplied for a sum of Rs.7 lakhs, the said purchaser did not make any payment and in fact, the cheque issued for a sum of Rs.3 lakhs was dishonoured and the plaintiff on being approached, restrained her from taking any step for realization thereof.

It is alleged in the written-statement that the High Speed Diesel used to be purchased by the defendant from various service stations including the service station of the plaintiff in cash and denial of purchase of High Speed

Diesel on credit is evident therefrom. The trial Court decreed the suit on admission as the defendant categorically admitted to have purchased the High Speed Diesel and since such admission is unequivocal, unconditional and unqualified, the plaintiff is entitled to have a judgment under Order 12 Rule 6 of the Code of Civil Procedure.

The judgement and decree of the trial Court was carried to an appellate Court who affirmed the same by providing independent reasons/findings. In other words the appellate Court did not squeezed itself within the peripheral provisions contained under Order 12 Rule 6 of the Code of Civil Procedure but also proceeded to consider the evidence of the respective parties and the credibility thereof.

Mr. Verma, the learned Advocate appearing for the appellant strikes on the concurrent findings; Firstly, that both the Courts have miserably failed to take into consideration the evidence of the appellant in true and proper perspective and, therefore, the judgment being lopsided and based on the materials surfaced through the plaintiff, is bad, infirm and liable to be set aside. Secondly, Mr. Verma submits that the appellate Court have held that the husband of the defendant as constituted Attorney, cannot depose on her behalf which is par se illegal and runs contrary to the spirit of the judgment relied upon by the trial Court as well as the appellate Court.

We embarked our journey in quest of truth and to ascertain the involvement of substantial questions of law and invited the counsel for the appellant to produce relevant

excerpts from the deposition of both the witnesses. It is undeniable that credit notes as well as bills were raised by the plaintiff and marked as exhibit without any objection raised by the appellant at such juncture. Certain discrepancies appears in the cross-examination of the first witness of the plaintiff which appears to have taken a front seat for the defendant/appellant to contend that there has been a miserable failure on the part of the plaintiff to prove his case. The defendant has deposed simplicitor on the story made out in the written-statement as narrated hereinabove relating to the supply of materials to a third party on the assurance of the plaintiff and the failure to receive the amount.

We are unable to comprehend the stand of the defendant in this regard in the absence of any cogent material pertaining to fixation of liability of the plaintiff towards such supply of materials. Neither the defendant was in a position to claim any set-off nor any counter-claim as the debt relates to a third party and not the plaintiff. We are not oblivious to the proposition of law that the plaintiff has to prove his own case and shall not take advantage of any lacuna in the defence case or the deposition, if there be any. The plaintiff has proved the credit bills, vouchers and other documents evincing the supply of High Speed Diesel to the defendant on credit and there is no document forthcoming from the defendant's side for its due discharge but as indicated above, the entire written-statement runs for several pages containing the story of the supply of the materials to a third party who might have been remotely related with the plaintiff without establishing any direct nexus or privity of contract.

It is vociferously urged that the credit note does not bear the signature of the defendant though it contains the seal, appears to have been of the defendant. We do not find from the recitation of the evidence by Mr. Verma on virtual mode that there is any whisper relating to the genuinity, authenticity and the sanctity of the seal appended on the credit note. The factum of receiving the said credit note has been evasively denied by the defendant as to find out the link and balance the evidence adduced by the respective parties and preponderance of probability in usual course of business.

There is no denial on the part of the defendant that the High Speed Diesel was never purchased from the plaintiff. However, it is the stand of the defendant that the goods were purchased in cash and not on credit. There is no attempt shown by the defendant to challenge the genuinity and authenticity of the rubber seal, which represents the defendant's business establishment. The entire tenet of the deposition of the first witness of the defendant does not lead an express denial of any contractual relationship and both the Courts have disbelieved the veracity of such statements. We do not find any difficulty and/or infirmity in accepting the truthfulness of the statements made by the plaintiff's first witness.

So far as the deposition of the husband as the constituted Attorney of the defendant is concerned, it would be a mere academic on the observations and/or finding recorded hereinabove. There is no impediment on the constituted Attorney to depose on behalf of the Principal provided the facts which are within the personal knowledge

of the Principal cannot be proved through constituted Attorney. The constituted Attorney who is in the helm of transaction since the inception may be regarded as a competent witness to depose on behalf of the Principal. However, the converse may not be true. There is no deterrent on behalf of the constituted Attorney to depose on behalf of the Principal nor absolute embargo can be seen in cases depending on the facts of each case.

Even if we accept and considers the deposition of the constituted Attorney as indicated hereinabove, we do not find that the defendant has been able to place a convincing material to negate the claim of the plaintiff nor have been able to prove with cogent evidence which may disentitle the plaintiff's claim in the suit.

We do not find any substantial question of law involved in the instant appeal.

The appeal being **SAT 8 of 2014** is **dismissed**.

Let the urgent certified copy of this order be given to the appellant, if applied for, on priority basis.

(Harish Tandon, J.)

(Kausik Chanda, J.)

