IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 11.03.2021

Delivered on : 09.04.2021

CORAM

THE HON'BLE MR. JUSTICE **G.K.ILANTHIRAIYAN**

CRP.(NPD).No.3189 of 2015
and
M.P.No.1 of 2015

G.Kalamani
W/o.Kaatchala Govindarajan,
Sole Proprietrix, Kalamani Fabrics,
No.18, Gandhipuram West,
B.Komarapalayam – 638 182,
(via) Erode, Namakkal District. ... Petitioner

vs.

1.P.Srinivasulu
S/o.P.Munirathinam,
Sole proprietor, M/s.Euro Overseas,
No.16/1, 1st Floor, Kariappa Street,
Purasawalkam, Chennai – 600 007.

2.D.Dandapani Mudaliar,
S/o.late V.Darmalinga Mudaliar,
Sole proprietor, M/s.Asoka Handlooms,
Door No.36/99, 2nd Floor, Armenian Street,
Mannady, Chennai – 600 001. ... Respondents

PRAYER: The Civil Revision Petition is filed under Section 115 of the Civil Procedure Code, praying to set aside the fair and decreetal order dated 01.04.2015 in I.A.No.1516 of 2015 in O.S.No.6725 of 2014 on the file of the XII Assistant Judge, City Civil Court, Chennai by allowing this Civil Revision Petition.

For Petitioner	: Mr.V.Lakshminarayan for Mr.R.Marudhachalamurthy
For R1	: Mr.CGP.Yoganand for M/s.Yoganand & Associates

O R D E R

This civil revision petition is directed as against the fair and decreetal order dated 01.04.2015 in I.A.No.1516 of 2015 in O.S.No.6725 of 2014 on the file of the XII Assistant Judge, City Civil Court, Chennai, thereby dismissing the petition filed to grant leave to defend the suit.

2. The petitioner is the first defendant and the first respondent is the plaintiff in O.S.No.6725 of 2014. The first respondent filed a suit under Order XXXVII Rules 1 and 2 of Civil Procedure Code, 1908 (hereinafter referred to as the 'C.P.C.' for short) for recovery of money for which the second respondent is the second defendant. Therefore, the petitioner is being

the first defendant in the suit filed a petition in I.A.No.1516 of 2015 to grant leave to defend the suit. The same was dismissed and aggrieved by the same, the present civil revision petition.

3. Learned counsel for the petitioner would submit that the suit itself is not maintainable under Order XXXVII Rule 1 of C.P.C. When the suit itself is not maintainable, the Court below ought not to have dismissed the application filed by the petitioner and allowed the suit. He further submitted that the petitioner had no privity of contract with the first respondent herein. The Exhibits R24, R25 and R27 would reveal that the petitioner repaid the sum of Rs.10,00,000/- by way of two cheques to the first respondent herein. Ex.R27 invoice raised by the first respondent without any acknowledgment by the petitioner herein. The suit for recovery of money is not maintainable on the invoice based contract or transaction under Order XXXVII Rule 1 of C.P.C.

4. The petitioner categorically mentioned in his affidavit filed in support of the petition to grant leave to defend the suit that the present suit is not maintainable. When there is no privity of contract between the

petitioner and the first respondent herein, unless the first respondent prove the existence of the alleged contract between them. He further submitted that the petitioner is a power loom textile manufacturer and supplier of textile materials to various countries based on orders. The second respondent is one of the Job Work customer of the petitioner engaged in service of inspection of materials, processing, labeling, stitching, folding and packaging works. They are doing business from the year 2013.

5. Accordingly, the petitioner had sent 102 bales of lungies worth about Rs.21,42,000/- through parcel lorry service to the second respondent herein for the Job Work. The entry bill was duly received and acknowledged the same by the second respondent herein. All the textile materials are export quality, should be sent to various customers in overseas by their respective orders. The second respondent without completing his Job Work simply returned the goods.

6. While being so, the first respondent had sent a forged and fabricated bills claiming the suit amount. Therefore, there is absolutely no privity of contract between the petitioner and the first respondent. The entire

suit claim is devoid of merits and the suit is not maintainable under Order XXXVII Rule 1 of C.P.C. In support of his contention, he relied on the following judgements:-

(i) In ***Firm Gwalior Distributing Co., vs. Mrs.Kanta Gupt*** reported in ***AIR 1978 Madhya Pradesh 199***.

(ii) In ***M/s.West Bengal Decorating Co vs. M/s.Damodar Das Dag*** reported in ***AIR 1982 Calcutta 386***.

(iii) In ***M/s.Srikrishna Textiles vs. M/s.Haripriya Textorium*** reported in ***1993 SCC Online AP 440***.

(iv) In ***Jyotsna K. Valia vs. T.S.Parekh & Co.*** reported in ***2007 (4) Mh.L.J***.

(v) In ***State Bank of Hyderabad vs. Rabo Bank*** reported in ***(2015) 10 SCC 521***.

(vi) In ***IDBI Trusteeship Services Ltd., vs. Hubtown Ltd.,*** reported in ***(2017) 1 SCC 568***.

(vii) In ***Sudin Dilip Talaulikar vs. Polycap Wires (P) Ltd.,*** reported in ***(2019) 7 SCC 577***.

7. Per contra, learned counsel for the first respondent submitted that the invoice bearing No. KBDUR/0135 dated 20.01.2014 for a sum of Rs.2,53,450/- was raised in the name of the petitioner herein and delivered on 06.02.2014. It concluded written contract between the petitioner and the

first respondent and as such, the suit filed for recovery of money based on the written contract namely the invoice dated 20.01.2014 is very much enforceable under summary proceedings as contemplated under Order XXXVII of C.P.C.

8. He further submitted that the first respondent is engaged in the business of export of textiles, made ups and allied handloom and power loom materials to various countries based on the orders placed by his overseas customers. The petitioner is engaged in the business of manufacture and sale of polyester cotton blended lungies called as payadi lungies in running lengths called as thaans. The second respondent herein is engaged in Job Work in the field of handloom and power loom lungies and other textile materials suiting the requirements and stipulations of his customers.

9. In the course of business, the first respondent placed orders with the petitioner for supply of 100 bales of polyester cotton blended lungies called as payadi lungies in the month of February of 2013. On the basis of orders, the petitioner supplied and delivered 102 bales of the said materials

directly to the second respondent in the usual course of business. The second respondent, who was regularly engaged by the first respondent herein for Job Work. Accordingly, the second respondent processed the Job Work in respect of 101 bales and the remaining 1 bale was left out due to production damages. The processing and labeling charges for the 101 bales worked out to Rs.2,53,450/- and the same was incurred by the first respondent herein which includes labour and processing charges. Due to ill-health of the buyer, the finished materials could not be exported and it is directly informed to the petitioner herein. Therefore, the petitioner requested the first respondent to send the finished materials of 101 bales back to her for the purpose of pledging the same with the bank for obtaining a loan. Accordingly, the first respondent returned the finished materials to the petitioner on 25.09.2013 and the same was duly received by the petitioner herein. Upon receipt of the finished export packed materials, the petitioner evaded the payment of processing and labeling charges to the tune of Rs.2,53,450/-.

10. In fact, at the request of the petitioner, the first respondent also arranged funds from the overseas customers and paid Rs.9,00,000/- and

even before that the first respondent initially paid for a sum of Rs.1,00,000/- to the petitioner vide RTGS money transfer. Unfortunately, the petitioner returned the said amount which was received by her, when the overseas customers are very much ready to take the export packed materials. Thereafter, the petitioner also sold out the export packed materials to the third party in the month of November-2013 itself without any permission or intimation to the first respondent herein. Therefore, the petitioner is liable to pay the processing and labeling cost of the aforesaid materials including labour charges to the tune of Rs.2,53,450/- incurred by the first respondent herein. Therefore, the first respondent raised invoice bearing No. KBDUR/0135 dated 20.01.2014 for the said sum and the same was duly delivered to the petitioner herein. Thereafter, the first respondent also issued demand letter dated 06.03.2014 and the same was also duly received by the petitioner on 08.03.2014. Thereafter, the petitioner failed to pay the same and as such, the first respondent cause legal notice dated 09.06.2014 which was returned with the postal remarks as "intimation delivered; not claimed" on 14.06.2014.

11. He further submitted that after knowing the fact that the first respondent issued legal notice demanding the said sum, the petitioner issued a letter pre-dated as 03.06.2014 vide Speed Post that was posted on 17.06.2014 and the same was delivered to the first respondent on 18.06.2014. In fact, the first respondent also replied by the reply dated 16.07.2014. Therefore, the first respondent filed a suit for recovery of Rs.3,00,446/- with interest.

12. He further submitted that the petitioner now took a stand that he had direct business links with the second respondent herein from the year 2013. Even then, there is absolutely no proof to show that the petitioner paid at least a single paisa to the second respondent herein for the Job Work done by him. Therefore, there is a privity of contract between the petitioner and the first respondent. Only on the basis of orders from the overseas customers, the first respondent placed orders to the petitioner herein in turn the materials as per the order directly will be sent to the second respondent who is the Job Worker. After finishing his Job Work, it will be sent to the godown and as per the orders, the first respondent sent to the respective customers. Therefore, the Court below rightly dismissed the petition filed to

grant leave to defend the suit.

13. Heard Mr.V.Lakshminarayan learned counsel represented Mr.R.Marudhachalamurthy counsel for the petitioner and Mr.CGP.Yoganand, learned counsel for the first respondent and perused the materials placed on record, apart from the pleadings of the parties.

14. The first respondent filed a suit for recovery of money as against the petitioner as well as the second respondent herein. The case of the first respondent herein is that the petitioner is a power loom textile manufacturer and supplier of textile materials to various countries based on orders. The second respondent herein is engaged in the Job Work in the field of handloom and power loom lungies and other textile materials suiting the requirements and stipulations of his customers. Further, the second respondent, who was regularly engaged by the first respondent herein for such job work/services, inspected the materials for damages, processed and labeled the same, that is, after inspection, cut each thaan into 4 (four) lungies, stitched each lungies by folding both the ends, inserted a small yellow label with brand name while stitching, manually folded each lungie, affixed 4(four) labels including brand name label on the top portion, put

each lungie inside a printed poly bag with brand name, packed 20 (twenty) such lungies into small bundles using brown sheet, (A bundle containing 20 lungies is called as 1 (one) Kodi) packed 12 such Kodi bundles as bale with water proof polythene material, pressed each bale tightly, manually wrote the names of the consignor and consignee and the bale numbers on each such bale, etc.

15. Accordingly, on the basis of the orders placed by the first respondent, the petitioner had sent 102 bales directly to the second respondent herein. The first respondent also made initial payment of Rs.1,00,000/- to the petitioner through RTGS money transfer towards part payment of the materials supplied. The first respondent paid a sum of Rs.2,53,450/- to the second respondent for the Job Work includes labour and processing charges. Thereafter, the overseas buyer fell sick due to cancer as a result he was unavailable for communication for several days. Therefore, the petitioner requested the first respondent to send back the finished materials of 101 bales of textiles.

16. Accordingly, the first respondent returned the finished materials to

the petitioner on 25.09.2013. In fact, the first respondent also made part payment of Rs.9,00,000/- for the materials supplied by the petitioner herein on 19.12.2013 through RTGS money transfer. Thereafter, when the buyer was very much ready to receive the export packed materials, the petitioner had sent two cheques for the sum of Rs.1,00,000/- and Rs.9,00,000/- respectively towards the amount received from the first respondent. Both the cheques were encahsed by the first respondent herein and thereafter, raised invoice for the Job Work done by the second respondent which was already paid by the first respondent herein. Thereafter, the first respondent made demand by way of notice and the petitioner did not pay the amount and as such, the first respondent filed a suit for recovery of money under Order XXXVII Rule 1 of C.P.C.

17. Learned counsel for the petitioner raised a ground that the suit itself is not maintainable under Order XXXVII Rule 1 of C.P.C, since no privity of contract between the petitioner and the first respondent.

18. As stated supra, the petitioner is being the manufacture and sale

of textiles and based on the orders placed by the first respondent, the petitioner directly sent 101 bales of textiles to the second respondent who is the processor of the textiles. In turn, the first respondent paid the processing and labeling charges. The petitioner admitted everything and disputed the payment of labour and processing charges to the second respondent herein. Admittedly, the petitioner did not pay even single paisa to the second respondent for the Job Work done by him for 101 bales of textiles. Further, no quarrel about the receipt of 101 processed export packed materials by the petitioner and thereafter, the same was also sold out to the third party. Therefore, there is a contract between the petitioner and the first respondent and the suit is very much maintainable under Order XXXVII Rule 1 of C.P.C.

19. On perusal of records shows that the Exhibits 24 and 25 are the cheques issued by the petitioner to the first respondent herein for the sum of Rs.10,00,000/-. Both the cheques were credited in the account of the first respondent herein. Therefore, it proved the contract between the petitioner and the first respondent and in fact the first respondent had sent the finished export materials to the petitioner herein which was duly acknowledged by

the petitioner. Thereafter, she also sold out the same to the third party.

20. Learned counsel for the petitioner relied upon the following judgements:-

(i) In ***Jyotsna K. Valia vs. T.S.Parekh & Co.*** reported in ***2007 (4) Mh.L.J*** in which paragraph No.12 held as follows:-

12. ...An implied promise is not a written contract and, therefore, the implied promise to pay is not a written contract. This becomes clearer on considering the provisions of section 9 of the Contract Act which reads as under:

"9. Promises, express and implied :- In so far as the proposal or acceptance of any promise is made in words, the promise is said to be express. In so far as such proposal or acceptance is made otherwise than in words, the promise is said to be implied."

Section 9 makes it clear that there are basically two types of contract, express and implied. Express contracts can be further divided into written and oral contracts. Since implied *contracts are not express contracts, they are neither written nor oral contracts. Reference is made to various judgments which will be referred to the extent necessary. It is, therefore, submitted that phrases like "balance due", "balance to be paid", baki deva", "baki dena rahe", "I remain liable", "I admit my liability", "amount due", etc., were mere acknowledgements of liability carrying an implied promise to pay and did not amount to express promises/promises in writing."*

(ii) In ***State Bank of Hyderabad vs. Rabo Bank*** reported in ***(2015) 10 SCC 521*** in which paragraph Nos.15, 16 and 17 held as follows:-

"15. As regards the entitlement of a defendant to the grant of leave to defend, the law is well settled long back in the year 1949 in Sm. Kiranmoyee Dassi Vs. Dr. J. Chatterjee, AIR 1949 Cal 479, in the form of the following propositions:

If the defendant satisfies the Court that he has a good defence to the claim on its merits, the plaintiff is not entitled to leave to sign the judgment and the defendant is entitled to unconditional leave to defend.

If the defendant raised a triable issue indicating that he has a fair or bona fide or reasonable defence although not a *positively good defence the plaintiff is not entitled to sign judgment and the defendant is entitled to unconditional leave to defend.*

If the defendant discloses such facts as may be deemed sufficient to entitle him to defend, that is to say, although the affidavit does not positively and immediately made it clear that he has a defence, yet, shows such a stage of facts as leads to the inference that at the trial of the action he may be able to establish a defence to the plaintiff`s claim, the plaintiff is not entitled to judgment and the defendant is entitled to leave to defend but in such a case the court may in its discretion impose conditions as to the time or mode of trial but not as to payment into court or furnishing security.

If the defendant has no defence or the defence set up is illusory or sham or practically moonshine then ordinarily the plaintiff is entitled to leave to sign judgment and the defendant is not entitled to leave to defend.

If the defendant has no defence or the defence is illusory or sham or practically moonshine then although ordinarily the plaintiff is entitled to leave to sign judgment, the court may protect the plaintiff by only allowing the defence to proceed if the amount claimed is paid into court or *otherwise secured and give leave to the defendant on such condition, and thereby show mercy to the defendant by enabling him to try to prove a defence.*

16. It is also noticed that the law as enunciated above, has been followed by the Courts in several cases [see also Santosh Kumar v. Bhai Mool Singh, AIR 1958 SC 321, Milkhiram (India) (P) Ltd. v. Chamanlal Bros, AIR 1965 SC 1698, Mechelec Engineers & Manufacturers v. Basic Equipment Corpn., (1976) 4 SCC 687 and Sunil Enterprises & Anr. v. SBI Commercial & International Bank Ltd. (1998) 5 SCC 354].

17. An analysis of the above principles makes it clear that in cases where the defendant has raised a triable issue or a reasonable defence, the defendant is entitled to unconditional leave to defend. Leave is granted to defend even in cases where the defendant upon disclosing a fact, though lacks the defence but makes a positive impression that at the trial the defence would be established to the plaintiff's claim. Only in the cases where the defence set up is illusory or sham or practically moonshine, the plaintiff is entitled to leave to sign judgment."

(iii) In ***IDBI Trusteeship Services Ltd., vs. Hubtown Ltd.,*** reported in ***(2017) 1 SCC 568*** in which paragraph Nos.16 and 17.1 to 17.3 held as follows:-

"16. It is thus clear that Order 37 has suffered a change in 1976, and that change has made a difference in the law laid down. First and foremost, it is important to remember that Milkhiram case is a direct authority on the amended Order 37 provision, as the amended provision in Order 37 Rule 3 is the same as the Bombay amendment which this Court was considering in the aforesaid judgment. We must hasten to add that the two provisos to sub-rule (3) were not, however, there in the Bombay amendment. These are new, and the effect to be given to them is something that we will have to decide. The position in law now is that the trial Judge is vested with a discretion which has to result in justice being done on the facts of each case. But Justice, like Equality, another cardinal constitutional value, on the one hand, and arbitrariness on the other, are sworn enemies. The discretion that a Judge exercises under Order 37 to refuse leave to defend or to grant conditional or unconditional leave to defend is a discretion akin to Joseph's multi-coloured coat – a large number of

baffling alternatives present themselves. The life of the law not being logic but the experience of the trial Judge, is what comes to the rescue in these cases; but at the same time informed by guidelines or principles that we propose to lay down to obviate exercise of judicial discretion in an arbitrary manner. At one end of the spectrum is unconditional leave to defend, granted in all cases which present a substantial defence. At the other end of the spectrum are frivolous or vexatious defences, leading to refusal of leave to defend. In between these two extremes are various kinds of defences raised which yield conditional leave to defend in most cases. It is these defences that have to be guided by broad principles which are ultimately applied by the trial Judge so that justice is done on the facts of each given case.

17. Accordingly, the principles stated in paragraph 8 of Mechelec's case will now stand superseded, given the amendment of 37 Rule 3 and the binding decision of four Judges in Milkhiram case, 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."

(iv) In ***Sudin Dilip Talaulikar vs. Polycap Wires (P) Ltd.,*** reported in ***(2019) 7 SCC 577*** in which paragraph No.15 held as follows:-

"15. But the defence raised by the appellant in the aforesaid background was certainly not a sham or a moonshine much less frivolous or vexatious and neither can it be called improbable. The appellant had raised a substantial defence and genuine triable issues. The failure both by the trial Judge and the High Court to notice and consider the

aforesaid issues as discussed by us hereinbefore leaves us satisfied that there was no justification to grant conditional leave to defend. The fact that there may have been commercial relations between the parties was the ground for the institution of the summary suit but could not per se be the justification for grant of conditional leave sans proper consideration of the defence from the materials on record."

21. The Hon'ble Supreme Court held that if the Court is satisfied of a plausible or probable defence and which defence is not considered a sham or moonshine, but yet leaving certain doubts in the mind of court, it may grant conditional leave to defend. Further held that if the defendant satisfies the Court as 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 defendant is entitled to unconditional leave to defend the suit. 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.

22. Learned counsel for the first respondent relied upon the judgement in ***Uma Shankar Kamal Narain vs. M.D. Overseas Ltd.,*** reported in ***(2007)***

AIR (SCW) 1665 in which paragraph No.6 held as follows:-

"6. *The position in law has been explained by this Court in Milkhiram (India) Private Ltd. & Ors. Vs. Chamanlal Bros., and Mechelec Engineers and Manufacturers Vs. Basic Equipment Corporation. In Sunil Enterprises and Another Vs. SBI Commercial & International Bank Ltd., the position was again highlighted and with reference to the aforesaid decisions it was noted as follows:*

(a) If the defendant satisfied the Court that he has a good defence to the claim on merits, the defendant is entitled to unconditional leave to defend.

(b) If the defendant raises a triable issue indicating that he has a fair or bona fide or reasonable defence, although not a possibly good defence, the defendant is entitled to unconditional leave to defend.

(c) If the defendant discloses such facts as may be deemed sufficient to entitle him to defend, that is, if the affidavit discloses that at the trial he may be able to establish a defence to the plaintiff's claim, the Court may impose conditions at the time of granting leave to defend the conditions being as to time of trial or made of trial but not as

to payment into Court or furnishing security.

(d) If the defendant has no defence, or if the defence is sham or illusory or practically moonshine, the defendant is not entitled to leave defend.

(e) If the defendant has no defence or the defence is illusory or sham or practically moonshine, the Court may show mercy to the defendant by enabling him to try to prove a defence but at the same time protect the plaintiff imposing the condition that the amount claimed should be paid into Court or otherwise secured."

23. In the case on hand, as stated supra, there is a privity of contract between the petitioner and the first respondent herein only on the basis of orders placed by the first respondent, the petitioner sent the materials directly to the second respondent who is none other than the Job Worker to complete the process for export. Accordingly, the second respondent had completed the process in which a sum of Rs.2,53,450/- paid by the first respondent herein.

24. Unfortunately, due to unavoidable circumstances, the overseas

customers failed to take the materials and as such, at the request of the petitioner it was returned to her. In turn, she also sold out to the third party. Therefore, whatever the expenditures occurred by the first respondent for processing and labour charges for the materials, the petitioner is liable to pay the same.

25. On receipt of the invoice, letter and legal notice, the petitioner did not make any payment and also failed to reply for the same. Instead she had sent pre-dated letter for which also the first respondent duly replied. Therefore, the above judgements relied by the learned counsel for the petitioner are not helpful to the case on hand. Since the first respondent categorically proved its claim as against the petitioner herein.

26. In the case on hand, the petitioner is liable to pay the amount incurred by the first respondent towards the Job Work done by the second respondent. The first respondent also proved his claim as against the petitioner and as such, the petitioner has no defence and her defence is sham and practically moonshine.

27. In view of the above, this Court finds no irregularity or infirmity in the order passed by the Court below. Accordingly, the Civil Revision Petition is dismissed. No costs. Consequently, the connected miscellaneous petition is closed.

09.04.2021

Speaking/Non-speaking order
Index : Yes/No
Internet : Yes/No

dm

To

The XII Assistant Judge,
City Civil Court, Chennai.

G.K.ILANTHIRAIYAN,J.

dm

CRP.(NPD).No.3189 of 2015

09.04.2021