

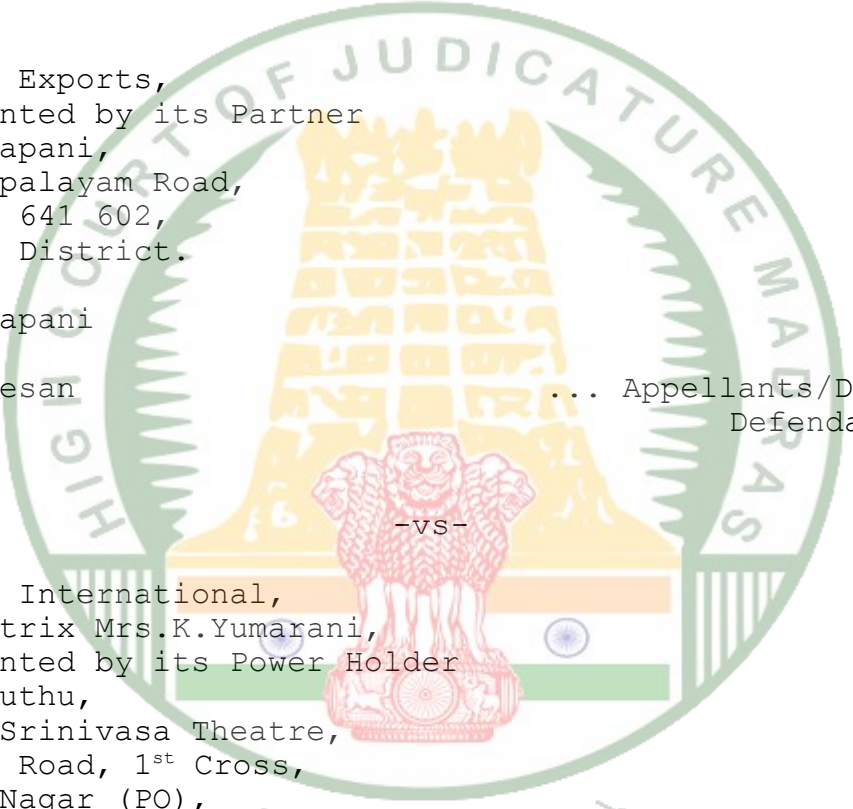
IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED 02.03.2021

CORAM

THE HONOURABLE MR.JUSTICE T.RAJA
and
THE HONOURABLE MR.JUSTICE G.CHANDRASEKHARAN

A.S. No.990 of 2020 and C.M.P. No.14506 of 2020

- 
1. M/s.DMJ Exports,
represented by its Partner
M.Dhandapani,
Pitchampalayam Road,
Tirupur 641 602,
Tirupur District.
2. M.Dhandapani
3. P.Murugesan ... Appellants/Defendants/
Defendants
- vs-
1. M/s.UPK International,
Proprietrix Mrs.K.Yumarani,
represented by its Power Holder
M.Kalimuthu,
9-Near Srinivasa Theatre,
60 Feet Road, 1st Cross,
Gandhi Nagar (PO),
Tirupur - 641 603,
Tirupur District. ... 1st Respondent/Plaintiff
2. M/s.Viram Impex,
represented by its Proprietor,
Rajesh Shah,
23-J.K.Ind.Estate,
Off Mahakali Caves Road,
Andheri (East),
Mumbai 400 093. ... 2nd Respondent/
4th Defendant
- सत्यमेव जयते
- WEB COPY

3. M/s.Indian Overseas Bank,
represented by its Branch Manager,
Velampalayam Branch,
Tirupur - 641 652,
Tirupur District.

... 3rd Respondent/
5th Defendant

Prayer: Appeal Suit filed under Section 96 of Civil Procedure Code to set aside the judgment and decree of the II Additional District Judge of Tiruppur made in O.S. No.203 of 2013 dated 26.08.2020 and allow the appeal and dismiss the above suit.

For Appellants : Mr.N.Ramesh for
Mr.J.Franklin

For Respondents : Mr.Sriram for
Mr.B.Tirunavukkarasu

JUDGMENT

(Judgment of the Court was made by T.RAJA,J.)

M/s.DMJ Exports, represented by its Partner M.Dhandapani and others, who are defendants 1 to 3 before the Trial Court, having suffered the impugned judgment and decree dated 26.08.2020 passed by the II Additional District Judge, Tiruppur in O.S. No.203 of 2013, directing defendants 1 to 4 to pay a sum of Rs.18,94,875/- with subsequent interest at the rate of 12% per annum from the date of suit till the date of realisation on the principal amount of Rs.13,95,000/-, have come to this Court by way of filing this appeal.

2.Learned counsel appearing for the appellants submitted that defendants 2 and 3 are the partners of the first defendant and the fourth defendant is the buying agent. The plaintiff/first respondent placed a work order to the first defendant firm for the value of Rs.46,50,000/- by paying Rs.13,95,000/- as an advance on 12.06.2010. After making 30% of the amount towards advance, the plaintiff/first respondent has breached the condition No.10 mentioned in the work order with regard to terms of payment of 40% at the time of shipment and balance 30% by post-dated cheques with covering letter for payment within 3 - 4 days. Though the terms and conditions mentioned in the work order dated 12.06.2010 have been accepted by the plaintiff, he has made only the first advance payment of 30% namely, a sum of Rs.13,95,000/-, as a result, to execute the orders, by manufacturing the goods, the appellants spent their own money namely, Rs.32,55,000/-. Although the plaintiff informed the appellants that he will come and pay the remaining

balance amount and take the delivery of the goods, he has not come forward to make the further payment, after seeing the goods in packed condition. When he has confirmed that he would make the payment of Rs.10,00,000/- and he would give a cheque for the balance amount, the appellants agreed for the same, but the plaintiff never turn up with the further payment as he promised. Though the plaintiff made a promise for the second time stating that he would bring the total payment in 7 days time, the plaintiff never proved himself with the payment. In view of the delay caused by the plaintiff and not acted on the terms and conditions mentioned in the work order, the plaintiff requested for the extension of the L/C from the fourth defendant and the same was extended till the end of August 2010. Even after extending the L/C, the plaintiff did not come forward to make the payment, as a result, the appellants were put to huge prejudice.

3.Learned counsel appearing for the appellants further submitted that it was the claim of the appellants that after the work order dated 12.06.2010 was issued, the goods shall be supplied on payment of balance amount, but the plaintiff, after making 30% of the amount towards advance, has not come forward to make the payment of 40% at the time of shipment and the balance amount within 3 - 4 days after shipment. Without making the payment as per terms and conditions of the work order, the plaintiff has filed the above suit seeking a direction to defendants 1 to 4 to pay a sum of Rs.13,95,000/- towards the advance amount and interest at the rate of 12% per annum and for further direction.

4.Learned counsel appearing for the appellants further submitted that though a detailed written statement has been filed stating that the plaintiff sought extension of time citing a reason that they were not able to make the payment for various reasons and the same could be evidentially seen from the records, which clearly shows that the delay had occurred only on the part of the plaintiff, but not on the part of the appellants, the Trial Court, after taking the matter for trial, surprisingly, without considering the fact that the time is the essence of the contract, has wrongly reached a conclusion that the appellants have failed to act on the terms and conditions mentioned in the work order dated 12.06.2010. Such findings are wrong, hence, this appeal deserves to be allowed, it is pleaded.

5.On the other hand, learned counsel appearing for the respondents, in an effort to affirm the impugned judgment and decree passed by the Trial Court, pleaded that when it is an admitted case that the terms and conditions mentioned in the work order dated 12.06.2010 were accepted and adopted by both

parties, only two things are to be fulfilled from the side of the plaintiff. Firstly, the plaintiff has to make the advance payment of 30% of the contract and this has been admittedly made by the plaintiff and the same has been accepted by the appellants. The second issue requires adjudication before the Trial Court was that on receipt of the advance amount of 30% of the contract amount, since the appellants were not ready within 60 days from the date of the work order and failed to perform the contract, the Trial Court has rightly gone against the appellants and decreed the suit in favour of the plaintiff.

6.The Trial Court, on the basis of the above pleadings, framed the following issues:

- 'i)Whether the plaintiff is entitled for a decree directing the defendants 1 to 4 to pay Rs.13,95,000/- to the plaintiff?
- ii)Whether the plaintiff is entitled to claim interest on the amount claimed? If so, what is the rate of interest?
- iii)Whether the 5th defendant is a necessary party?
- iv)To what relief, the parties are entitled for?'

7.On the side of plaintiff, P.W.1 is examined and Exs.A1 to A14 were marked. On the side of defendants, D.W.1 and D.W.2 were examined and Exs.B1 to B8 were marked.

8.On a consideration of the oral and documentary evidence, the Trial Court, on the basis of Exs.B6 and B7 stating that defendants 1 to 4 are claiming that they have sustained loss of Rs.14,95,000/- and that there is no pleading in the written statement, decreed the suit in favour of the plaintiff. Aggrieved thereby, the present appeal has been filed.

9.We have heard Mr.N.Ramesh, learned counsel appearing for the appellants and Mr.Sriram for Mr.B.Tirunavukkarasu, learned counsel appearing for the respondents. The following points arise for determination in this appeal:

- '1.Whether the impugned judgment and decree passed in favour of the plaintiff is sustainable.
- 2.Whether the plaintiff is entitled to claim interest as ordered by the Trial Court.'

10.It is seen from the records that the plaintiff is the manufacturer of T-Shirts. Defendants 2 and 3 are the partners of the first defendant firm. The fourth defendant is M/s.Viram Impex, who are carrying on business at 23, J.K.Industrial Estate, Andheri, Mumbai. The fifth defendant is the Indian Overseas Bank. For the sake of convenience, parties are addressed as they were arrayed before the Trial Court.

11.The plaintiff received an export order from M/s.SKIVA INTERNATIONAL, INC through the fourth defendant M/s.Viram Impex and to that effect, on 13.05.2010 for a value of USD 92,950, they received a letter of credit bearing No.L557647 through Bank of India, Mumbai and the same has been transferred to the plaintiff on 19.05.2010 by the request of the second defendant with their banker M/s.Bank of India, Mumbai. Based on the export order received from the fourth defendant, it was claimed that the plaintiff could not manufacture the same, due to heavy order was in progress. Therefore, the same was intimated to the fourth defendant and they received intimation to place the same as merchant order to one M/s.DMJ Export, Tirupur i.e. the first defendant herein. The plaintiff placed a merchant order of contract dated 12.06.2010 with the first defendant firm, vide purchase order No.VI-004 for Ladies Long SLVS T-Shirt Styles as per plaintiff's Tech Packs (5 styles) made out of 100% cotton semi-combed verigated rib as original swatch - 170 GSM with main lable, wash-care lable, hangtag, polybag. Agreeing to the same, the plaintiff and the first defendant have signed the order of contract.

12.While so, on 17.06.2010, the plaintiff issued a cheque bearing No.508542 dated 17.06.2010 drawn on Andhra Bank, Tirupur Branch for a sum of Rs.13,95,000/- as advance in favour of the first defendant and the same has been honoured and given credit to the defendants' account. The Bank statement dated 11.10.2010 for a period from 17.06.2010 to 26.06.2010 reflects that the cheque has been honoured and the cheque amount has been given credit in favour of the 1st defendant's firm.

13.It is also the claim of the plaintiff before the Trial Court that after availing the advance facilities, having executed the order, instead of delivering the goods to the plaintiff, defendants 1 to 3, in connivance with the fourth defendant, sent the consignment to one firm by name, M/s.Kewal Impex, Mumbai and the same had been delivered to the abroad importer M/s.Skiva International Inc. Newyork. The plaintiff, came to know the fact on perusal of the bill of lading sent to the buyer in New York. The shipping documents reveal that the goods were sent to the original buyer, who has opened the letter of credit in favour of the fourth defendant and in turn, the fourth defendant transferred the L/C in favour of the plaintiff's firm by M/s.Kewal Impex at Mumbai. Therefore, it is the claim of the plaintiff that defendants 1 to 4 played fraud on the plaintiff's firm.

14.It is the further case of the plaintiff that since the first defendant received the amount i.e. Rs.13,95,000/- under a cheque dated 17.06.2010 bearing No.508542 drawn on Andhra Bank, Tirupur Branch and the said transaction between the plaintiff

and defendants is purely a commercial one, defendants 1 to 4 have to repay the advance amount with interest at the rate of 12% per annum. Therefore, a suit was filed for a direction to defendants 1 to 4 jointly and severally to pay a sum of Rs.13,95,000/- towards the advance amount and interest at the rate of 12% per annum and Rs.5,02,200/- from 17.06.2010 to 03.06.2013 totalling a sum of Rs.18,97,200/- with subsequent interest at the rate of 12% per annum on a sum of Rs.13,95,000/- till the date of realisation.

15.A Written Statement has been filed by defendants 1 to 4 stating that the plaintiff placed an order to the 1st defendant firm for the value of Rs.46,50,000/- and as an advance in the said amount, the plaintiff paid Rs.13,95,000/-. On 12.06.2010, to execute the orders by manufacturing the goods, defendants 1 to 3 spent their own money of Rs.32,55,000/- and also as per the terms and conditions of the order, defendants 1 to 3, completed the order within a time stipulated. At the time of executing the order, defendants 1 to 3 informed the plaintiff over the phone and mail to pay the remaining balance amount and take delivery of the goods. Though the plaintiff visited the first defendant's firm and seen the goods in packed conditions, he has not come forward to make payment and also for the delivery of the goods. Due to non arrangement of funds, the plaintiff requested for the extension of the L/C from the fourth defendant and the same was extended till the end of August 2010. Even after extending the L/C, the plaintiff has not paid the amount. It is the case of defendants 1 to 3 that once the L/C was ended, the goods cannot be sent to the same buyer and the orders placed by the buyer will get cancelled. By the reasons of non payment, the total goods got hanged and defendants 1 to 3 were pushed to meet the loss of Rs.32,55,000/-.

16.It is an admitted fact by both parties that the plaintiff had received an export order from M/s.Skiva International through the fourth defendant and on 13.05.2010 in respect of the same, they have also received a letter of credit for a value of USD 92,950. It is not in dispute that the plaintiff placed merchant order of contract dated 12.06.2010 with the first defendant firm wherein defendants 2 and 3 are partners. The plaintiff and the first defendant have signed the order of contract and agreed to give the consignment as per the schedule. The plaintiff also admittedly issued a cheque for Rs.13,95,000/- as advance in favour of the first defendant on 17.06.2010 and the same has also been honoured and given credit to the first defendant's account. Therefore, when a sum of Rs.13,95,000/- was paid by the plaintiff and the same was also received by the first defendant on 17.06.2010 and 60 days time has been given for making the goods ready by the first defendant, it has to be seen whether the terms and conditions mentioned in the merchant

order dated 12.06.2010 have been fulfilled by both parties. When the plaintiff said to have made 30% of payment of the contract amount on 17.06.2010 within 60 days, the goods should have been made ready by the first defendant, but they have not done so. Therefore, the appellants have committed breach of the terms and conditions mentioned in the merchant order dated 12.06.2010.

17.It was the claim of the appellants that since the balance amount as admitted by the plaintiff was not paid within the time stipulated, they suffered a loss and consequently, they were forced to sell the goods made ready with them in favour of the third party for lesser amount. But the same has not been substantiated with any evidence whatsoever produced before the Trial Court and also before us. When both the parties let in oral and documentary evidence, P.W.1 has stated about the amount paid by the plaintiff in favour of defendants 1 to 3. Ex.B1/letter of credit, marked during the cross examination of P.W.1, shows that as per the conditions mentioned in the merchant order, the plaintiff has made the payment on 17.06.2010. Further terms of the merchant order shows that the plaintiff had to make 40% at the time of shipment and the balance 30% within 3-4 days from the date of shipment. When the plaintiff has proved the fact that they have made 30% of the contract amount on 17.06.2010, there is no communication or documentary evidence placed by the appellants before us or before the Trial Court to show that they have made the goods ready within 60 days.

18.It is an admitted case of the appellants that they have sold away the goods to third party for lesser amount. Therefore, the Trial Court, after going through the written statement filed by defendants 1 to 4, found that the goods were sold for a sum of Rs.31,55,000/- and that they have faced loss of Rs.6,00,000/-. But in the oral evidence, it has been found that they have suffered a loss of Rs.14,00,000/-. As per Exs.B6 and B7 namely, the Debit note allegedly given by Kewal Impex Company, defendants 1 to 3 have suffered a loss of Rs.14,00,000/-. But to prove the said document, no person connected with the said documents have been examined. Moreover, the plaintiff was not a party to Exs.B6 and B7. Therefore, in the absence of proving Exs.B6 and B7, the Trial Court has not accepted the defence taken by appellants that they had suffered loss. Such findings, in our considered opinion, does not call for any interference for the simple reason that in respect of Exs.B6 and B7/Debit note, there was no pleading made in the written statement stating that the appellants have sustained loss of Rs.14,00,000/-. On the other hand in the written statement they had pleaded only a loss of Rs.6,00,000/-. Therefore, this Court is able to see that as per merchant order dated 12.06.2010, the plaintiff has performed his contract, but

the appellants, on receipt of the money paid by the plaintiff, have not made the goods ready within the stipulated time. Hence, we are unable to find any infirmity in the judgment passed by the Trial Court. Accordingly, the appeal fails and the same is dismissed with costs, thereby the judgment of the Trial Court is confirmed.

19. With regard to the portion of interest, defendants 1 to 4 are hereby directed to pay 9% of interest from the date of filing the suit till the date of decree and to pay 6% of interest from the date of decree till the date of realisation and 12% interest from the date of transaction till the date of filing the suit. Consequently, C.M.P. No.14506 of 2020 is closed.

Sd/-
Assistant Registrar (CS VIII)

//True Copy//

Sub Assistant Registrar

VGA

To

1. The II Additional District Judge,
Tiruppur.
2. The Section Officer,
V.R. Section,
High Court, Madras.

+1cc to Mr. J. Franklin, Advocate, S.R.No.12886

+1cc to Mr. B. Thirunavukkarasu, Advocate, S.R.No.12839

सत्यमेव जयते

A.S. No.990 of 2020 and
C.M.P. No.14506 of 2020

RD (CO)

TE (28/04/2021)

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