



Appeal (CAD).No.6 of 2023

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

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Reserved on : 27.11.2023

Pronounced on: 29 .01.2024

CORAM:

**THE HONOURABLE MR.JUSTICE D.KRISHNAKUMAR
AND
THE HONOURABLE MR.JUSTICE P.DHANABAL**

Appeal (CAD).No.6 of 2023

M/s.Golden Communication,
Represented by its Proprietor,
Mr.T.Satheesh Kumar

.. Appellant

Versus

M/s.Yapay Payments Fanatical-
Technologies Private Limited,
represented by its Director,
Mr.P.Prem Kumar

.. Respondent

Appeal filed under Section 13(1) of the Commercial Courts Act, 2015 read with section 96 of Code of Civil Procedure 1908 praying to set aside the judgment and Decree dated 08.09.2022 passed by the learned Judge, Commercial Court, Chennai passed in C.O.S.No.1106 of 2022.

For Appellant	:	Mr. S.Dhayaleswaran
For Respondent	:	M/s.A.M.Amutha Ganesh



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JUDGMENT

P.Dhanabal.J

This appeal has been preferred as against the decree and judgement passed in C.O.S.No.1106 of 2022 on the file of the Commercial Court at Chennai dated 08.09.2022. Wherein the respondent herein has filed a suit as against the appellant herein for the relief of recovery of money under Order 37 Rule (1) of CPC in summary proceedings. The trial Court has decreed the suit by adopting the procedures for summary trial cases. As against the decree and judgment passed by the trial Court, the present appeal has been preferred by the unsuccessful defendant.

2. The brief averments made in the plaint are as follows:

(i) The plaintiff is carrying on the business in the name and style of M/s.Yapay payments (A unit of Fanatical Technologies Private Limited) and deals with recharges and bill payment business and other businesses as a web service provider to the clients and to develop their company according to the need and requirements. Originally the said company formed in the name of M/s.SM AGILE COPIOUS Private Limited dated 13.05.2016 and due to some sort of changes, the same has been changed into the name and style of M/s.Fanatical Technologies Private Limited dated 11.01.2019.

(ii) The defendant is running his business in the name and style of M/s.Golden

<https://www.mhc.tricourt.in/judgments> communication (Trade Name-Recharge Desk), and running his recharge business



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in various level and also with yet another activities of bills and payments therein. On 21.06.2017 the business between the plaintiff and defendant had been started by way of setting up of "Recharge Portal" and have been registered with his GST certification dated 17.09.2017. Further the invoice No.21/17 has been generated for a value of Rs.36,000/- dated 21.06.2017 and another transaction in bearing invoice No.59/17 for a value of Rs.2,360/- and sent to the defendant and for which this defendant have paid a part payment dated 04.08.2017 for a sum of Rs.15,000/-. Thereafter, the plaintiffs have sent a reminder mail dated 08.08.2017, seeking for balance payment of Rs.23,360/-.

(iii) The defendant started his first time service for recharge dated 07.09.2018 for a value of wallet top up of Rs.10,000/-. On that period there was cash and carry business was taken place between the plaintiff and the defendant. Thereafter, based on the business relationship, the plaintiff have accepted orally and started providing credits to the defendant and the same was continuous process without any issues thereon. All of a sudden from 01.02.2020, the defendant failed to repay the payments dues as promised by him. The staff of the defendant namely Dhanasekar informed the plaintiff that the old due payments will be repaid on 04.02.2020. As on 04.02.2020, there was a due of Rs.35,70,237.78 but out of the old balance the defendant have only paid Rs.25,00,000/-. As on 04.02.2020, credit service was acquired for a value of Rs.6,47,658.68/- Therefore, the total balance is Rs.17,17,896.36/-. The defendant has failed to repay the above said amount, thereby the plaintiff has sent a notice through mail dated 14.02.2020 to the defendant for repayment of money. The defendant has communicated the plaintiff



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for retrieval of the service back and he also promised to repay the entire amount on or before 16.03.2020. The defendant has deposited an outstanding acceptance letter dated 27.02.2020 along with a cheque dated 27.02.2020. The said cheque was presented for collection on 17.03.2020 in the ICICI Bank, Thiruvottiur Branch and the same was returned as "funds insufficient" through memo dated 18.03.2020.

(iv) The defendant apart from the daily usage payment, he repaid a sum of Rs.20,000/- on 05.08.2020 and again paid a sum of Rs.20,000/- on 19.07.2021 towards the old outstanding repayment. Thereafter, the defendant defaulted to pay the repayment of old balance as well as current balance amount of Rs.62,636.12/- in total he has to pay a sum of Rs.17,40,532.58/- (16,77,896.46+62,636.12). The defendant failed to fulfil his promise and did not repay the said amount. Hence, this suit.

3. Since the plaint has been filed under Order 37 Rule (1) of CPC under summary procedure, the defendant failed to seek leave to defend the case and thereafter, belatedly filed a petition in I.A.No.2 of 2022 to reopen the case and to direct the plaintiff to serve the copy of the plaint and other documents and the same was dismissed. Thereafter, the trial Court has passed judgment as against the defendant. As against the decree and judgement, the present appeal has been preferred by the defendant.

4. The grounds raised in this appeal are that the judgment of the trial court is erroneous, contrary to facts and law and against the weight of evidence. The trial



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Court failed to consider that the mandatory procedure under Order 37 of CPC, the summons for judgment of the suit has not been served to the defendant and the plaint and suit documents were not served on the defendant. The learned trial Judge, failed to consider that the suit under order 37 Rule (1) of CPC is not maintainable, since it is without jurisdiction. The trial Court misconstrued the facts of the petition in I.A.No.2 of 2022 that it was filed for the relief of leave to defend the suit under Order 37 Rule (3) instead of it was filed for re-open the case. The trial Court erred in directing the defendant to pay the plaintiff a sum of Rs.17,40,532/- together with interest at the rate of 24 % per annum from the date of plaint till the date of realization.

5. The learned counsel appearing for the appellant/defendant would contend that the plaintiff has filed the original suit under Order 37 Rule (1) and (2), but the copies of plaint and other documents were not served to the appellant/defendant. Thereby, the appellant/defendant was unable to file appropriate application before the trial Court seeking leave to defend the suit. Thereafter he filed an application to convert the summary trial suit to ordinary suit, but the same was also dismissed. Thereafter, the appellant has filed another application to re-open the case, But the same was dismissed by observing that the petition was filed Order 37 Rule (3) seeking leave to defend the suit. According to the learned counsel, fair opportunity was not given to the appellant/defendant to defend the suit. The trial Court, without examining any witness and marking documents, passed the judgment as against the appellant/defendant to pay a sum of Rs.17,40,532/-. Therefore, the trial Court has not followed the procedures contemplated under CPC. Hence, the judgement



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and decree of the trial Court are liable to be set aside by allowing this appeal.

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6. The learned counsel appearing for the respondent/plaintiff would contend that the appellant/defendant failed to file application under Order 37 Rule (3) praying to grant leave to defend the suit within the stipulated time, instead, he filed two applications, one is for converting the summary suit to an ordinary suit and another one is for re-opening the case. The said petitions were dismissed by the trial Court, but no appeal was filed as against those orders passed by the trial Court. Since, the appellant/defendant has not filed any application praying leave to defend the case under Order XXXVII Rule (3), the trial Court has proceeded further and decreed the suit. The respondent/plaintiff has duly served the notice to the appellant/defendant with copies of plaint and documents and thereafter, the appellant/defendant has also filed two applications. Further, the appellant/defendant has not taken any steps to get the copies of documents in accordance with law. Therefore, the appellant/defendant failed to avail the opportunity, thereby the trial Court decreed the suit. Hence the appeal is liable to be dismissed.

7. This Court heard both sides and perused the records. Upon hearing both sides and perusing the records, the points for determination in this appeal are;

1. Whether the plaintiff is entitled for the suit amount.
2. Whether, the appeal has to be allowed or not.

Point No.1 and2:

8. In this case, there is no contravention that the respondent/plaintiff has filed



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the suit under Order XXXVII Rule (1) and (2) by invoking summary procedures. The appellant/defendant also received summons and entered into appearance before the trial Court. But, the appellant/defendant failed to file appropriate application within the stipulated time seeking leave to defend the suit. Thereafter, the appellant/defendant filed applications one is for converting the suit from summary proceedings to ordinary suit and another is for re-opening the case. Both the petitions were dismissed by the trial Court. As against the dismissal order passed by the trial Court, the appellant/defendant has not preferred any appeal or revision. Further, the appellant/defendant failed to file application to leave to defend the suit. As per Order XXXVII Rule 3, the appellant/defendant within 10 days from the receipt of summons, has to file application before the trial Court seeking leave to defend the suit but failed to file any application. The appellant also admitted that he has not filed any application praying leave to defend the suit before the trial Court.

9. Per contra the judgment passed by the trial Court would show that the appellant filed application under Order 37 Rule (3) praying to grant leave to defend belatedly and the same was also dismissed by the trial Court.

10. In this context, the learned counsel appearing for the appellant brought to the knowledge of this Court that originally he has filed I.A.No.2 of 2022 to re-open the case, but the learned trial Judge without considering the averments made in the application, misconstrued the said application, as if it was filed praying leave to defend the suit under Order 37 Rule (3).



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11. This Court also perused the petition filed by the appellant/defendant before the trial Court and the order passed by the learned trial Judge. On perusal of I.A.No.2 of 2022, it reveals that it was filed under section 151 to re-open the case on the ground that respondent/plaintiff has not served the copy of the plaint and other documents thereby he was unable to file petition leave to defend and make a written statement. But the learned trial Judge has passed order dated 15.07.2022, by holding that the petition has been filed under section 151 CPC to re-open the case and the appellant/defendant has not filed any affidavit in support of his petition and it was filed only by advocate on record. Further, the trial court has passed reasoned order by holding that the similar petition with same reasons filed by the petitioner was dismissed on 23.02.2020, and thereafter, the case was posted for judgment on 28.04.2022, and the reasons stated by the petitioner that he was not served with the copy of the plaint and documents was already discussed in the previous order. While so, again making same allegations, the petitioner cannot filed any application and the same was dismissed. Therefore, the contention of the appellant/defendant that the learned judge has passed order in re-open petition, as if the same was filed under Order 37 Rule (3) is not acceptable one. Infact in the judgement para No.7, the learned judge has observed as under:

" 7. The defendant had filed the petition in I.A.No.2 of 2022 under Order 37 Rule 3 of CPC seeking unconditional leave to defend the suit which was dismissed by this Court on merits. therefore, the defendant does not have any defence in the present suit as against the defendant and accordingly, the



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plaintiff is entitled for decree."

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A careful perusal of the above extracted paragraph would go to show that there is an error that order XXXVII Rule 3 of CPC seeking unconditional leave to defend the suit', which was dismissed by the Court on merits instead of I.A.No.2 of 2022 was filed for re-opening the case. Therefore, the above said error shows that the trial Judge was under the impression that the I.A.No.2 of 2022 was filed for leave to defend the suit.

12. The main contention of the appellant/defendant is that the copies of the plaint and other documents have not been served to him. Already, he filed application in I.A.No.1 of 2022, by stating the same reasons, but the said order was not challenged by the appellant/defendant, even assuming that, plaint and other documents were not furnished to the appellant/defendant, he ought to have filed copy application to get those copies of documents and then, he is entitled for the cost for the above said copies of documents. Without obtaining the certified copies, the appellant/defendant waited for a long time and not even filed any application to get the certified copies. More over the appellant/defendant has filed two applications before the trial Court, even at that time also, he did not chose to file any application to get that copies. Without copies of plaint and other documents, how the appellant/defendant filed those applications has to be explained by him, but no proper explanation, and thereby, the contention of the appellant/defendant that the copies of the plaint and other documents have not served to him and thereby, he was unable to file application praying leave to defend the suit is not



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acceptable one. However, the appellant/defendant has not filed any application to leave to defend under Order XXXVII Rule 3, the trial Court also misconstrued the petition filed by the appellant/defendant under 151 of CPC to re-open the case as filed under Order XXXVII Rule 3 of CPC. Under the said circumstances, it is for the appellant/defendant to approach the trial Court by filing appropriate application for fresh consideration of the trial Court.

13. The trial Court has passed judgment in favour of the respondent/plaintiff and the appellant/defendant was directed to pay a sum of Rs.17,40,532/- without referring any documents and evidences.

14. The other contention raised by the defendant is that the trial Court failed to examine any witnesses to substantiate the claim of the plaintiff. On seeing the case diary, it reveals that earlier, the case was posted for marking of documents, but thereafter without examining any witnesses and without marking any documents, the trial Court has passed the judgment. Though the case is filed under Order XXXVII Rule (1) CPC for summary procedures, it is the duty of the Court to pass judgment based on the oral as well as documentary evidences. Even as per Order XXXVII Rule (7) of CPC, the procedures in suits shall be the same as the procedures in suits instituted in the ordinary manner. Therefore, there is no any exemption under CPC to dispense the marking of documents and examining the witnesses. But the trial Court failed to mark the documents and examine the witnesses. Further, in the trial Court judgement, there is no whisper about as to how the plaintiff is entitled to the suit amount and there is no proper adjudication. As per



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Commerical Courts Act, the Court can pass summary Judgment on application filed by the petitioners as per Order XIII-A, of amended CPC. But in this case there was no any petition filed for summary judgment and further the order XIII-A, will not be applicable to the suits were already instituted under Order XXXVII Rule (1) and (2) of CPC.

15. In this context, it is relevant to refer the Order XIII-A CPC, which refers the summary judgment. As per order XIII-A Rule 4 are as follows:

"4. Procedure:- (1) An application for summary judgment to a Court shall, in addition to any other matters the applicant may deem relevant, include the matters set forth in sub-clauses (a) to (f) mentioned hereunder:

(a) the application must contain a statement that it is an application for summary judgment made under this Order,

(b) the application must precisely disclose all material facts and identify the point of law, if any; (c) in the event the applicant seeks to rely upon any documentary evidence, the applicant must,

(i) include such documentary evidence in its application, and

(ii) identify the relevant content of such documentary evidence on which the applicant relies;

(d) the application must state the reason why there are no real prospects of succeeding on the claim or defending the claim, as the case may be;

(e) the application must state what relief the applicant is seeking and briefly state the grounds for seeking such relief."



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Therefore, from the above said Rule 4 of Order XIII-A, it is clear that the application must be precisely disclose all material facts and identify the point of law, if any, (c) in the event of applicant seeks to rely upon any documentary evidence, the application must include such documentary evidence in its application and identify the relevant content of such documentary evidence on which the applicant relies. Therefore, even assuming that the trial Court has proceeded under Commercial Courts Act, no documents were produced and no application was filed to that effect. This case will not come under the purview of summary judgment under Order XIII-A of Commercial Courts Act.

16. As per Rule (1) sub class 3 of Order XIII-A C.P.C., the procedures under the summary judgment will not be applicable to the suits originally filed as a summary suit under Order XXXVII Rule 1 and 2 of CPC. Order XIII-A Rule (1) (3) reads as follows:

"(3) Notwithstanding anything to the contrary, an application for summary judgment under this Order shall not be made in a suit in respect of any Commercial joispute that is originally filed as a summary suit under Order XXXVII."

Therefore, the suits already filed as a summary suit under Order XXXVII CPC, the summary judgment procedure, under Order XIII-A of Commercial Courts Act, CPC will not be applicable. Therefore, the trial Court has to follow the procedures under the CPC in Order XXXVII. As per Order XXXVII Rule (7), save as provided by this order the procedures here under shall be the same as procedure in suits instituted in the ordinary manner. In the case on hand, commercial suit was filed under Order XXXVII, but the trial Court has failed to record evidence on the side of plaintiff and also failed to mark any documents. Without filing any documents and examining the



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witnesses, the Court cannot pass judgment. Further, the trial Court has not even discussed about the claim of the plaintiff as to how he is entitled to decree for the amount claimed by him. As per order XX Rule 4(2), Judgments of other Courts shall contain a concise statement of the case the points for determination, the decision thereon and the reasons for such decision. But in the present case, the judgment is not in accordance with Rule 4 (2) of Order XX of C.P.C.

17. Further according to the pleadings, balance amount was Rs.16,77,896/- and thereafter, second phase of business, the balance amount due was Rs.62,636.14/-. While so, in order to prove those payments, the plaintiff ought to have produced documents, but the trial Court has failed to mark those documents. Therefore, the plaintiff has not proved the claim.

18. Moreover, on careful perusal of the pleadings, it reveals that the claim amount is for a sum of Rs.17,40,532/-. As per the list of documents the cheque was issued for a sum of Rs.18,00,000/- and the plaint also does not contained the cheque amount and only the plaint contains the particulars of cheque without mentioning the value of the amount. These aspects have not been considered by the trial Court. Therefore, the plaintiff has failed to prove his claim for the suit amount of Rs.17,40,532/-.

19. This Court has already in the previous para decided that in the trial Court, the plaintiff failed to mark the documents and adduce any evidence.



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Previously trial Court posted the case for marking documents, but thereafter, the case was transferred to the Commercial Court at the stage of making of documents and after transfer to Commercial Court, the trial Court failed to follow the stage of the case and without marking the documents, pronounced the judgment.

20. Therefore, the judgment and decree passed by the trial Court without marking the documents is unsustainable and the same is liable to be set aside. At the same time, the suit cannot be dismissed on the said ground and the plaintiff has already filed documents along with the plaint and thereby, it is appropriate to remand the case to the trial Court for taking evidence. The defendant is at liberty to workout his remedy by filing appropriate application before the trial Court and if any application filed by the defendant, it is for the trial Court to decide the case in accordance with law on merits. With the above said observations, the appeal is liable to be allowed by setting aside the decree and judgment of the trial Court.

21. In the result, this Appeal is allowed and the decree and judgment passed by the trial Court in COS.No. 1106 of 2022 on the file of the Commerical Court, Chennai is set aside and the suit is remanded back to the trial Court for fresh consideration. No cost.

[D.K.K., J.,] [P.D.B., J.,]

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To

The Commercial Court, Chennai.



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Appeal (CAD).No.6 of 2023

D.KRISHNAKUMAR,J.

and

P.DHANABAL,J.

mpa

Pre-Delivery Judgment in

Appeal (CAD).No.6 of 2023



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