

(2013) 10 MAD CK 0188

Madras High Court

Case No: C.R.P. (NPD) No's. 74 and 75 of 2013 and M.P. No. 1 and 2 of 2013

Vidyasagar

APPELLANT

Vs

M/s. Everest India Pvt. Ltd.

RESPONDENT

Date of Decision: Oct. 25, 2013

Citation: (2013) 6 CTC 332

Hon'ble Judges: B. Rajendran, J

Bench: Single Bench

Advocate: N. Thiagarajan, Senir Counsel for Mr. P. Mohanraj, for the Appellant; A. Aravamudan, for the Respondent

Final Decision: Allowed

Judgement

1. Both these Civil Revision Petitions arise out of a common order dated 13.08.2012 passed by the learned XVI Assistant Judge, City Civil Court, Chennai by which the applications in I.A. Nos. 550 and 4091 of 2011 in O.S. No. 9386 of 2010 and O.S. No. 9387 of 2010 respectively filed seeking leave to defend the said suits have been dismissed. The respondents herein have instituted the suit in O.S. Nos. 9386 and 9387 of 2010 for recovery of money. Both the suits were filed under Order XXXVII Rule 1 of CPC. While the suit in O.S. No. 9386 of 2010 was filed for recovery of a sum of Rs. 5,18,150/- with future interest at the rate of 18% per annum, the other suit was filed for recovery of a sum of Rs. 1,09,000/- together with future interest at the rate of 18% per annum.

2. According to the Plaintiff in O.S. No. 9386 of 2010, they are carrying on business as Steamer agents, ship brokers and Charterers. During the course of such business, the defendant entrusted to them a shipment of locomotives for carriage by sea from Chennai, India to Beria, Mozambique. The defendant also agreed to make a lumpsum payment of US \$ 1,00,000/- (equivalent to Rs. 45,82,000/- for such shipment. The Plaintiff also raised an invoice on the defendant for the said sum on 31.03.2010 out of which the defendant made a part payment of Rs. 41,00,000/- vide cheque dated 03.04.2010 leaving a balance of Rs. 4,82,000/-. For the balance

amount, the defendant also issued two postdated cheques, however, on its presentation, the cheques were dishonoured with an endorsement "Exceeds Arrangement". The Plaintiff therefore issued a notice dated 21.06.2010 and called upon the defendant to pay the balance sum of Rs. 4,82,000/-.

In spite of such notice, the defendant did not come forward to pay the amount, which necessitated the plaintiff to file the suit under Order XXXVII Rule 1 of CPC.

3. In the other suit in O.S. No. 9387 of 2010, it is claimed by the Plaintiff that he is working as General Manager in Everest India Private Limited and during the course of such employment, he came into contact with the defendant. According to the Plaintiff, on 25.01.2010, the defendant requested to lend a sum Rs. 1,00,000/- and the plaintiff also paid the same by two cheques. However, in spite of repeated reminders, the defendant issued a cheque for Rs. 1,00,000/- but it was dishonored on its presentation. After issuing a notice dated 21.06.2010, the plaintiff has filed the suit in O.S. No. 9387 of 2010 for recovery of amount.

4. In both the suits, it was contended that the amount sought to be recovered from the defendant is an admitted amount. The defendant also, admitting his liability, issued cheques but they were dishonoured on being presented for encashment. Therefore, the defendant has no defence to offer or there is any triable issue involved in adjudicating the suit. Hence, the Plaintiff has instituted both the suits under Order XXXVII Rule 1 of CPC.

5. On notice, the defendant/revision petitioner herein filed I.A. Nos. 550 and 4091 of 2011 in O.S. No. 9386 of 2010 and O.S. No. 9387 of 2010 respectively seeking leave to defend the suits instituted by the plaintiff. In the affidavit filed in support of the I.A. No. 550 of 2011 in O.S. No. 9386 of 2010, the defendant/revision petitioner would contend that the suit filed under Order XXXVII Rule 1 of CPC is not maintainable inasmuch there is a dispute with respect to the liability to pay the amount by the defendant/revision petitioner. According to the defendant/revision petitioner, as per the "Liner terms" the place where the plaintiff/respondent carries on business alone will have jurisdiction to try the dispute and in this case, the plaintiff/respondent is having his office at Kolkatta and therefore, the Courts at Chennai has no jurisdiction to try the dispute. It was further contended that the plaintiff/respondent ought to have invoked the terms of the contract and approached an arbitrator for resolving the dispute and the suit as filed is not maintainable. It is further contended that the plaintiff/respondent did not load the goods in the ship of the defendant/revision petitioner for 72 days with the result, the defendant/revision petitioner was made to suffer detention and also made liable to pay demurrage for 72 days in loading of 6 trailers with heavy locomotives to the tune of Rs. 8,00,000/- and these loss has to be compensated only by the plaintiff/respondent. It was further contended that these loss incurred by the defendant/revision petitioner should be compensated by the plaintiff/respondent especially for changing the shipment vessel four times during the transaction.

Under those circumstances, the defendant/revision petitioner prayed the Court below to grant leave to defend the suit by filing a written statement so that the defendant/revision petitioner will be in a position to substantiate his defence.

6. In the affidavit filed in support of I.A. No. 4091 of 2010 in O.S. No. 9387 of 2010, the defendant/revision petitioner denied the transaction in which he allegedly received a sum of Rs. 1,00,000/-. According to the defendant/revision petitioner, the plaintiff/respondent as well as the defendant/revision petitioner were agents of Railways and they are engaged in clearing and forwarding. During the course of such business, the defendant/revision petitioner sustained loss owing to the fault of the plaintiff/respondent and the transaction amount is in furtherance of a contract. The defendant/revision petitioner also contends that the plaintiff/respondent has also filed another suit being O.S. No. 9387 of 2010 and the defence sought to be raise in the suit will also be the defence for the present suit. In any event, according to the defendant/revision petitioner, he must be given an opportunity to defend the suit and in such event, he will be in a position to disprove the claim of the plaintiff/respondent herein.

7. The applications filed by the defendant/revision petitioner, seeking leave to defend, were resisted by the plaintiff/respondent by filing a counter. According to the plaintiff/respondent, the transactions are duly covered by cheques issued by the defendant/revision petitioner whereby the defendant/revision petitioner has expressly agreed to pay the amount liable to be paid. While so, there is no dispute with regard to the liability to pay the amount. Therefore, the plaintiff/respondent has filed the under chapter suit under Order XXXVII Rule 1 of CP and prayed the Court to dismiss the applications.

8. The court below, after considering the rival pleadings and the documentary evidence, held that the fact that the defendant/revision petitioner has issued post dated cheque would prove that the defendant/revision petitioner is liable to pay the amount claimed in the suit. Even for the legal notice sent by the plaintiff/respondent, the defendant/revision petitioner has not chosen issue any reply and therefore, the defendant/revision petitioner cannot be granted leave to defend the suits.

9. The learned Senior counsel appearing for the revision petitioner would contend that the Court below ought to have given an opportunity to the defendant/revision petitioner to file a written statement especially when the defendant/revision petitioner has stated that due to the act of the plaintiff/respondent, he has incurred demurrage and loss in the transaction. The defendant/revision petitioner specifically raised a defence that the plaintiff/respondent did not forward the goods at the appropriate time and changed the vessels four times during the contract, which resulted in the revision petitioner incurring loss and damages. Even according to the plaintiff/respondent herein, in O.S. No. 9386 of 2010, out of the sum of Rs. 45,82,000/- being the contracted transaction, the defendant/revision petitioner has

paid a sum of Rs. 41,00,000/- and only the sum of Rs. 4,82,000/- has to be repaid, which amount was disputed by the defendant/revision petitioner herein. In any event, the defence sought to be raised by the defendant/revision petitioner is a plausible defence and unless an opportunity is given, the right of the defendant/revision petitioner will be defeated and his plea for granting leave ought not to have been summarily rejected at the threshold. There is no cause of action for filing the suit and therefore also the leave sought for by the defendant/revision petitioner to defend the suit ought to have been granted. The learned Senior counsel for the petitioner also submitted that to show his bonafide, the defendant/revision petitioner is also ready to deposit some amount

10. Per contra, the learned counsel for the plaintiff/respondent would contend that the court below is justified in dismissing the applications seeking leave to defend inasmuch as the transactions are duly covered by cheque. An Under Chapter suit is therefore maintainable when the transaction is covered by cheque. The court below also rightly held that the defendant/revision petitioner did not issue any reply notice to the notice sent by the plaintiff/respondent herein and therefore, interference of this Court is not warranted.

11. I heard the counsel for both sides. The main contention raised by the defendant/revision petitioner is that the court below ought not to have summarily rejected the applications filed seeking leave to defend especially when there are serious allegations raised by the defendant/revision petitioner as regards their liability to pay the money. It was also contended by the defendant/revision petitioner that there was delay of 72 days in loading the 6 trailers with heavy locomotives and that the ship was made to wait inside the Chennai Port awaiting the vessel. On account of such exorbitant delay attributable on the part of the plaintiff/respondent, the defendant/revision petitioner was made liable to pay damages in the form of demurrage to the tune of Rs. 8,00,000/-. It was further defended that the delay had occurred only because of the fact that the plaintiff/respondent changed the shipment vessel four times during the course of shipment and this led to serious delay. Therefore, according to the defendant/revision petitioner there is a dispute with respect to the very completion of the contract. These issues or disputes have to be tried before the court below by filing a written statement and therefore, the rejection of the applications seeking leave to defend ought not to have been summarily rejected. It was further pointed out that the first suit was filed by the company and that the second suit was filed in the individual name. Furthermore, the question of payment of money for personal expenses does not arise in respect of a company. This is the core dispute raised by the defendant/revision petitioner. According to the defendant/revision petitioner, when such a defence was raised, the Court below is not justified in holding that there are no triable issues involved in the suit and that the suit filed by the plaintiff/respondent under Order XXXVII Rule 1 of CPC is maintainable.

12. No doubt, as per the decisions of this Court as well as the Honourable Supreme Court, in cases of dishonour of cheque, a suit filed under Order XXXVII Rule 1 of CPC is maintainable. But the question is whether the defence raised by the defendant/revision petitioner can be simply brushed aside or such defence raised by the defendant/revision petitioner is a plausible defence or not.

13. The main defence raised by the defendant/revision petitioner is that there was a delay of 72 days on the part of the plaintiff/respondent herein in loading the locomotives and that the plaintiff/respondent had changed his shipment vessel four times during the course of transaction which made the defendant/revision petitioner liable to pay demurrage to the tune of Rs. 8,00,000/-. Therefore, this Court is of the view that a triable issue is in exist and that the defendant/revision petitioner must be given an opportunity to raise such defence by filing a written statement instead of shutting him out from defending the suit.

14. Similarly, in the other suit in O.S. No. 9387 of 2010 filed by the plaintiff/respondent for recovery of money, the defence raised is that already the plaintiff/respondent has filed O.S. No. 9386 of 2010 and the defence to be raised in the present suit is similar with that of the other suit. It was specifically raised that when the relationship between the parties as on that date got strained, no prudent man will receive a hand loan from the plaintiff and that the transaction, styled as loan transaction, is part and parcel of the earlier transaction for which the plaintiff/respondent has filed the earlier suit in O.S. No. 9386 of 2010. By raising such defence, the plaintiff/respondent has denied the very loan transaction and seeks for an opportunity to file a written statement to defend the suit.

15. In the above circumstances, this Court is of the view that the defence raised by the defendant/revision petitioner is a plausible defence and that the defendant/revision petitioner must be given an opportunity to file defend. The observation of the court below that the defendant/revision petitioner shall file a separate suit for adjudication of the dispute will only result in multiplicity of proceedings, instead of permitting the defendant/revision petitioner to defend the present suit instituted by the plaintiff/respondent. At the same time, while granting leave to the defendant/revision petitioner to defend, this Court is of the view that the defendant/revision petitioner must be directed to deposit some amount as a condition precedent for granting him leave to defend the suit. Accordingly, the defendant/revision petitioner is directed to deposit 25% of the claim made by the plaintiff/respondent in both the suits within a period of four weeks from the date of receipt of a copy of this order and on such payment, I.A. No. 550 of 2011 and I.A. No. 4091 of 2011 in O.S. No. 9386 of 2010 and O.S. No. 9387 of 2010 respectively shall stand restored. On failure to deposit the amount within the time stipulated, the revision petitions shall stand dismissed automatically. The trial court is also directed to dispose of the suit as expeditiously as possible. In the result, both the Civil Revision Petitions are allowed. No costs. Consequently, connected miscellaneous

petitions are closed.