

(2009) 10 CAL CK 0001**Calcutta High Court**

Case No: G.A. No.4167 of 2008, A.P.O.T. No. 500 of 2008, G.A. No. 3637 of 2006 and C.S. No. 145 of 2006

Director of Supply and Disposal
and Another

APPELLANT

Vs

Vijay Shree Ltd. and Others

RESPONDENT

Date of Decision: Oct. 28, 2009

Hon'ble Judges: Sankar Prasad Mitra, J; Pinaki Chandra Ghose, J

Bench: Division Bench

Advocate: L.K. Chatterjee and Mr. R. Sinha, for the Appellant; Utpal Majumdar and Mr. Sanjoy Bose, for the Respondent

Final Decision: Dismissed

Judgement

Pinaki Chandra Ghose, J.

This appeal is directed against an order and/or judgment dated 28th February, 2008, wherein the Hon"ble First Court was pleased to allow an application under Chapter XIII A of the Original Side Rules (hereinafter referred to as the said Rules) of this Court filed by the respondent on the Original Side of this Court.

2. The Hon"ble First Court was pleased to grant the summary judgment as prayed for against the appellant for a sum of Rs.9,83,700/-.

3. From the facts it appears that the plaintiff/respondent pursuant to an order dated 2nd June, 2003, issued by the Jute Commissioner, supplied 395 bales of gunny bags to the appellant. The appellant did not pay the value of 395 bales of gunny bags (hereinafter referred to as the said goods). The respondent as a result whereof filed a writ petition in this Court and prayed for a direction on the respondent authorities to pay the value of the said goods to the respondent. The said writ petition was allowed by the Hon"ble single Judge. Being aggrieved, the appellant herein filed an appeal from the said order. The appeal was disposed of by an order dated 6th May, 2005 dismissing the writ petition inter alia on the ground that disputed question of

fact cannot be decided in the writ jurisdiction. SLP was also filed before the Hon'ble Apex Court on 5th August, 2005. The same was also disposed of without any fruitful result to the respondent. The instant suit was filed thereafter and in the said suit the present Chapter XIIIIA application has been filed by the respondent/plaintiff.

4. It appears from the facts that in the pleadings the appellant/defendant admitted that 107 bales of gunny bag were "sound in condition". In the writ petition also the appellant confirmed that out of 395 bales of gunny bags, 107 bales of gunny bags were found to be fit and in sound condition for consumption. The plaintiff on the basis of such admission and relying on the said pleadings as made by the defendant/appellant herein in their affidavit filed before the Hon'ble First Court under Chapter XIIIIA application as well as the affidavit filed in the writ jurisdiction, held in favour of the plaintiff/respondent and a summary judgment was passed in favour of the plaintiff/respondent.

5. Being aggrieved, this appeal has been preferred by the appellant on the ground that Chapter XIIIIA application is not maintainable.

6. Mr. L.K.Chatterjee, learned Advocate, appearing on behalf of the appellant contended before us that the application under Chapter XIIIIA is not maintainable since the application is hit by Rule 3 of Chapter XIIIIA and further the application cannot be made under Chapter XIIIIA since it is not fulfilled the provisions of this Chapter XIIIIA which is applicable to the suit. He further contended that the application is not maintainable on the ground that the summons is taken out must be within 10(ten) days after receipt of notice of entering appearance by the defendant/appellant herein.

7. He further contended that although this point was not urged before the Trial Court, the point of law can be urged at any stage of a proceeding and he relied on a decision in the case of [Santosh Kumar Vs. Bhai Mool Singh,](#) .

8. The point which has been urged on behalf of the respondent/plaintiff, Mr. Chatterjee relied upon that the suit cannot come within the purview of the said rules and the application cannot be filed under Chapter XIIIIA of the said Rules, but Mr. Utpal Majumdar, learned counsel appearing on behalf of the respondent drew our attention to Rule (1)(a) of the said Rules and submitted that the suit which has been filed by the plaintiff/respondent herein, satisfy the criteria mentioned therein and therefore, the plaintiff has a right to file such application under Rule (1) (a) of Chapter XIIIIA application where a suit which is based on a contract expressed or implied, can come within the purview of the said Rules.

9. It was further pointed out by Mr. Majumdar that the point which has tried to be a right now, was never urged before the Trial Court and not even taken in the pleadings either before the Trial Court or before the Appeal Court in the Memorandum of Appeal. The application was filed within the time since in the application itself the appellant did not mention the publication of the service or

receipt of notice of entering appearance in the suit nor it would be evident from the documents which are lying in the Court and he submitted that the appellant once to rely upon on the technical grounds which should not be entertained by the Court since they cannot come within the purview of Rule 3 of the said Chapter XIIIIA and furthermore, they themselves have admitted the amount and the plaintiff is entitled to the value of the said goods.

10. Mr. Majumdar further relied upon a decision of the Hon'ble Division Bench of this Court in the case of M/s. Agritrico Agencies v. M/s. Chroma Business Ltd., reported in 2003(2) CLJ 660.

11. After considering the facts and circumstances of this case and the decisions cited by the learned counsel appearing for the parties, it appears to us that Mr. Chatterjee has not been able to make out a case since it would be evident from the facts that the suit has come within the purview of Chapter XIIIIA(1)(A)(i) of the Original Side Rules and further the Rule 3 of Chapter XIIIIA of the said Rules cannot be a help to the appellant since there is no mentioning of any service or receipt of notice of entering appearance in the papers before us or in the records of the Court below which were produced before us and, therefore, in our considered opinion, the said technical defence of Mr. Chatterjee cannot be a help to him.

12. On the contrary, we find that the facts given in the application are clear and precise. The defence could hardly have any role to play and it is difficult for us to accept the contention of Mr. Chatterjee.

13. We find that the Hon'ble First Court has correctly come to the conclusion and in our considered opinion, with regard to the claim mentioned in Chapter XIIIIA application the defendant/appellant has no defence at all and, therefore, we affirm the order so passed by the Hon'ble First Court and dismiss this appeal.

Urgent Xerox certified copy of this order, if applied for, be supplied to the parties subject to compliance with all requisite formalities.

Sankar Prasad Mitra, J.

14. I agree.