
(2011) 01 MAD CK 0149
In the Madras High Court
Case No : S.A. No. 95 of 2006

Colgate Palmolive India Ltd.	Vs	APPELLANT
T.J. George, Proprietor, South India Roadways		RESPONDENT

Date of Decision : 06-01-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100
Contract Act, 1872 — Section 62

Citation : (2011) 01 MAD CK 0149

Hon'ble Judges : G. Rajasuria, J

Bench : Single Bench

Advocate : P. Ranganatha Reddy, for the Appellant; No appearance, for the Respondent

Judgement

G. Rajasuria, J.—This second appeal is filed by the defendant, inveighing the judgment and decree dated 26.9.2003 passed by the Fast

Track Court-II, Chennai, in A.S. No. 312 of 2001 confirming the judgment and decree dated 31.7.2001 passed by the VII Asst. Judge, City Civil

Court, Chennai, in O.S. No. 12235 of 1996, which was filed for damages.

2. Despite notice having been served on the Respondent and his name also appearing in the cause list, he has not chosen to appear either in person

or through an advocate.

3. The parties, for the sake of convenience, are referred to here under according to their litigative status and ranking before the trial Court.

4. The epitome and the long and short of the relevant facts absolutely necessary and germane for the disposal of the second appeal would run thus:

(a) The plaintiff, who is the Respondent herein, filed the suit seeking the following reliefs:

(a) to direct the defendant to pay to the plaintiff a sum of Rs. 2,46,248/- with interest at the rate of 24% per annum on the said amount from the date of plaint till date.

(b) to direct the defendant to pay the cost of the suit." (extracted as such) on the main ground that there emerged, as per Ex.A1, an agreement between the plaintiff and the defendant, whereby the former agreed to transport the goods of the latter on certain conditions.

(b) Subsequently, all of a sudden, holus-bolus, the defendant, during the year 1994, for extraneous reasons, simply committed breach of the contract and even without giving a months' notice, as contemplated under the said agreement, it stopped availing the service of the plaintiff.

(c) It is the contention of the plaintiff that he, owing to the defendant's breach of contract, sustained loss for three months in conducting his business and accordingly, he claimed damages from the defendant.

(d) Written statement was filed refuting and impugning the allegations/averments in the plaint.

(e) Whereupon issues were framed by the trial Court. The plaintiff, on his side examined himself as P.W.1 and marked Exs.A1 to A5. On the defendant's side, its official was examined as D.W.1 and marked Ex.B1.

(e) Ultimately the trial Court decreed the suit.

(f) Being aggrieved by and dissatisfied with the judgment and decree of the trial Court, the appeal was filed for nothing but to be dismissed by the appellate Court confirming the judgment and decree of the trial court.

5. Challenging and impugning the judgments and decrees of the Courts below, the second appeal has been filed on various grounds, inter alia to the effect that the very agreement, as contained in Ex.A1, was not in vogue during the year 1994; no bank guarantee was extended covering the period during 1994; the cost of the freight was enhanced and all those actors were not in accordance with Ex.A1, but on mere oral arrangement, and in such a case, the Courts below failed to take into account all those salient features, but simply decreed the suit.

6. At the time of admitting the second appeal, my learned predecessor framed the following substantial questions of law:

(i) Whether the judgment and decree of the lower appellate Court is in conformity with Section 62 of the Indian Contract Act, 1872?

(ii) Whether the lower Courts justified in granting a relief of compensation for three months loss when there is no pleading to substantiate that prayer and no evidence has been adduced?

(iii) Is the lower Courts justified in coming to the conclusion that average monthly loss is Rs. 20,000/- when there is no evidence has been adduced to that effect ?

(extracted as such)

7. Heard the learned Counsel for the Appellant/defendant, who would put forth and set forth his arguments, which could tersely and briefly be set out thus:

(i) Section 62 of the Indian Contract Act is clear on the point that once there is novation, rescission and alteration of contract, then the parties cannot place reliance on the earlier contract.

(ii) There is no whisper at all on the side of the plaintiff that in letter and spirit, so to say, in strictosensu, Ex.A1 was adhered to even during the year 1994, the year in which allegedly the breach of contract, as contemplated in Ex.A1, occurred.

(iii) The burden of proof is on the plaintiff to prove that during the year 1994, so to say, the year in which the alleged breach of contract occurred, Ex.A1 was very much in existence.

(iv) The defendant while cross-examining P.W.1 clearly suggested to him that there was only oral agreement, under which the plaintiff was transporting the goods of the defendant. Ex.A1 got lapsed long ago and there was no extension of the bank guarantee.

(v) The extension of bank guarantee, as per Clause 4 of Ex.A1 was sine quo non for the existence of the very agreement between the plaintiff and the defendant.

(vi) Throwing to winds Clause 4, strangely Clause 8 alone in Ex.A1 cannot be insisted upon and tried to be pressed into service unilaterally by the plaintiff.

(vii) The Courts below did not take into consideration those facts at all.

(viii) Even though, the Courts below gave concurrent finding that no evidence was adduced on the side of the plaintiff as to the quantum of damage sustained by him, yet notionally the Courts arrived at the conclusion as though

per month a sum of Rs. 20,000/- might have been sustained as a loss by the plaintiff, which cannot be countenanced under law, warranting interference in second appeal.

Accordingly, the learned Counsel prays for setting aside the judgments and decrees of the Courts below.

8. Substantial Question of Law (i): I would like to, at the out set, extract here u/s 62 of the Indian Contract Act. "Section 62. Effect of novation,

rescission, and alteration of contract - If the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original

contract need not be performed. It would obviously and axiomatically exemplify and portray that if parties to the contract agreed to substitute a

new contract, in view of novation, rescission or alteration, then the parties cannot fall back to the terms and conditions as contemplated in the

original contract. In fact, the trial Court should have framed a very important issue as to whether as in the alleged year of breach of contract, i.e. in

1994, Ex.A1 was in vogue at all, but to that extent, no issue was framed.

9. The burden was on the plaintiff to prove that during the year 1994, Ex.A1 was in vogue and that was sine qua non for contending that there was

breach of Clause 8 of Ex.A1. In the written statement as well as during trial, the defendant contended that the parties had already started doing

business based on the understanding which was not strictly in accordance with Ex.A1, and in such a case the core question arises as to how the

Courts below failed to take note of the said crucial fact.

10. Ignoring all other clauses in Ex.A1, the Courts were not justified in placing reliance on Clause 8 alone therein, which contemplates a month's

prior notice on either side for putting an end to the agreement, as contained in Ex.A1.

11. I could see considerable force in the submission made by the learned Counsel for the Appellant/defendant that the contents of Ex.B1-the

advocate notice sent by the defendant, in the wake of the oral and other documentary evidence available on record, were not considered by the

Courts below, but they simply took it for granted wrongly as though Ex.A1 was in vogue during the year 1994 and that the defendant unilaterally

committed breach of Clause 8 of Ex.A1.

12. Indubitably and indisputably, the rate contemplated in Ex.A1 was Rs. 1 per

pocket/parcel, but subsequently, it was enhanced up to Rs. 3.75

and that itself is in variation of the agreement as contemplated in Ex.A1. Even though the trial Court referred to bank guarantee, it assumed and

presumed as though the plaintiff might have given bank guarantee for unlimited point of time.

13. It is common knowledge that bank guarantees are furnished only for limited periods and every now and then they should be renewed

periodically. Even clause 4 of Ex.A1 contemplates such a course. But in this case, it is quite obvious and axiomatic that the plaintiff did not extend

the bank guarantee. In such a case, I am at a loss to understand as to how the Courts below were justified in holding that Ex.A1 was in vogue

during the year 1994. While deciding the civil cases preponderance of probabilities would govern the adjudication.

14. The case of the defendant sounds probable for the reason that even several years anterior to 1994, both the parties arrived at some

understanding orally and started doing business and accordingly, the plaintiff was transporting the goods of the defendant.

15. It is the documentary and the oral evidence on the side of the defendant that negotiations went on relating to price and there was no consensus

arrived at between them and that alone paved the way for the cessation of business transaction between the plaintiff and the defendant and these

salient features have not been considered by the Courts below. Hence, I am of the considered view that without taking into account the ingredients

of Section 62 of the Indian Contract Act and also the onus of proof as contemplated under law, the Courts below decided the lis.

16. At this juncture, my mind is reminiscent and redolent of the following maxims:

(i) Affirmati sest probare - He who affirms must prove.

(ii) Affirmanti, non neganti incumbit probatio - The burden of proof lies upon him who affirms, not upon one who denies. The above maxims would

indicate that it is the person who affirms should prove it.

17. The plaintiff affirmed a case of its own in the plaint, but it was not established before the Court, even then the Courts below took into account

only one aspect, i.e. the defendant allegedly failed to hand over its goods to the plaintiff for transporting. In my considered opinion, such an

approach was nothing but one fraught with perversity and illegality, warranting interference in second appeal.

18. I recollect and call up the following decisions of the Supreme Court.

(i) Hero Vinoth (minor) Vs. Seshammal, .

(ii) Kashmir Singh Vs. Harnam Singh and Another, .

(iii) 2009 (1) L.W. 1 State Bank of India and Ors. v. S.N. Goya:

A plain reading of those precedents would reveal and demonstrate that u/s 100 of the Code of Civil Procedure, a Second Appeal cannot be

entertained, unless there is a substantial question of law is involved in it.

19. Here my discussion supra would exemplify and highlight that the finding of facts arrived at by the Courts below were fraught with perversity

and illegality and they have not even taken into account the very absence of existence of the agreement Ex.A1 in the year 1994, which the plaintiff

projected as the year in which the defendant committed breach of Ex.A1.

20. Accordingly, substantial question of law (i) is decided in favour of the Appellant/defendant to the effect that the Judgment and decree of the

lower appellate Court were not in conformity with Section 62 of the Indian Contract Act. Consequently, the Judgments and decrees of the Courts

below are liable to be set aside.

21. In view of the ratiocination adhered to above in deciding the substantial question of law (i) in favour of the Appellant/defendant, the second

could be allowed, nonetheless, in order to comprehensively decide the second appeal, I would like to discuss further as under:

22. Substantial Question of law Nos. (ii) and (iii) are taken together for discussion, as they are interwoven and interlinked, interconnected and

entwined with each other.

23. Unarguably and unassailably, pellucidly and palpably it is clear that the plaintiff failed to adduce evidence relating to the quantum of loss

sustained by him. In such a case, at the most, if other facts are clear and proved, only nominal damages could be awarded and not a sum of Rs.

20,000/- per month for a period of three months. The Courts are expected to quantify damages on solid facts and evidence and not on

conjunctures and surmises.

24. Here one pertinent point deserves to be considered. The plaintiff should have

adduced evidence that certain number of vehicles, which were put into use for the purpose of transporting the goods of the defendant, remained idle in the depot itself, but such an evidence is not there, even though in the plaint he simply pleaded so and that remained only the ipse dixit of the plaintiff. As such, I am of the view that substantial question of law Nos. (ii) and (iii) have to be decided in favour of the defendant and as against the plaintiff, as the findings of the Courts below are fraught with perversity and illegality.

25. In the result, the second appeal is disposed of by setting aside the Judgments and decrees of the Courts below and ultimately dismissing the suit filed by the plaintiff. However, there is no order as to costs.

26. The learned Counsel for the Appellant/defendant would make an extempore submission that the Appellant/defendant may be permitted to withdraw the sum of Rs. 65,988/- (Rupees sixty five thousand nine hundred and eighty eight only) deposited by him, which was directed to be deposited while granting interim relief, by this Court.

27. I would like to point out that since the second appeal is decided in favour of the Appellant/defendant, the aforesaid amount deposited shall be returned to the Appellant/defendant forthwith, with accrued interest, if any.