

(2006) 06 CAL CK 0012

In the Calcutta High Court

Case No : A.P.O.T. No. 634 of 2005, A.P.O. No. 556 of 2005, G.A. No. 768 of 2004 and C.S. No. 194 of 2003

Dunlop India Ltd.

APPELLANT

Vs

Madura Coats Ltd.

RESPONDENT

Date of Decision : 19-06-2006

Acts Referred:

Citation : AIR 2007 Cal 16

Hon'ble Judges : Tapan Kumar Dutt, J; Pinaki Chandra Ghose, J

Bench : Division Bench

Advocate : S.N. Mukherjee, Ratnanko Banerjee and T. Aich, for the Appellant; Pratap Chatterjee, Ajoy Krishna Chatterjee and Sabyasachi Chowdhury, for the Respondent

Final Decision : Dismissed

Judgement

Pinaki Chandra Ghose, J.—This appeal is directed against an order dated 21st of June, 2005 whereby His Lordship was pleased to allow the appellant/defendant to contest the suit, conditionally, after furnishing a security of a sum of Rs. 3,61,54,627.54 paise with the Registrar, Original Side within two months from the date of communication of the order.

2. It appears that a suit was filed by the plaintiff/respondent before this Hon'ble Court for recovery of the price of goods sold and delivered to the defendant/appellant. During 1996 and 1998 and during April 2000 and May 2001 it appears at the request of the appellant/defendant diverse quantities and qualities of dipped yarn, nylon tyre cord, dipped chafers etc. were sold and delivered to the defendant/appellant. Bills were raised in respect of such sale and were accepted by the appellant/defendant. It further appears that at lime to time part payment was made. After giving credit lo the said part payments it appears that a sum of Rs. 3,61,54,627.54 paise on account of principal and a sum of Rs. 2,48,66,609.75 paise on account of interest due and payable by the defendant/appellant to the respondent/plaintiff. It appears that subsequent thereto and

alter taking into consideration in respect of the sale and supply effected by the plaintiff/respondent to the appellant/defendant during April, 2000 to May, 2001, the dues of the defendant/appellant went up to Rs. 7,51.86,994.27 paise.

3. Winding up petition was filed by the plaintiff/respondent. The said petition could not be proceeded with since the reference was made before the Board for Industrial and Financial Reconstruction (hereinafter referred to as "BIFR") under the Sick Industrial Companies (Special Provisions) Act, 1985 (SICA) by the appellant. Subsequently such reference was dismissed by the BIFR. The matter went up to Appellate Authority for Industrial and Financial Reconstruction (AAIFR) and the revival scheme was allowed by the AAIFR. It further appears that before the BIFR, in the scheme, the defendant/appellant has provided payment of Rs. 2.03 crore and the rest of the balance claim being Rs. 3,61,54,627.54 paise was allowed by granting leave to be recovered in accordance with law. Subsequently suit has been filed by the plaintiff/respondent. In the said suit the plaintiff/respondent filed an application under Chapter XIII A of the Original Side Rules of this High Court and the parties duly filed their affidavits. After considering the facts of the case the Hon'ble First Court was pleased to allow the defendant/appellant to contest the suit after imposing a condition to deposit a sum of Rs. 3,61,54.627 paise with the Registrar, Original Side.

4. It is the case of the appellant before us that the appellant should have been granted leave to defend the suit without imposing any condition since according to the appellant it is submitted before us that there are triable issues which have to be decided by the Court and furthermore, without adducing evidence the Court cannot come to the conclusion in the said matter. It is submitted that the appellant has admitted that a sum of Rs. 2.24 crore is due on account of such sale which forms the subject matter of the proceeding before the AAIFR. By an order dated 20th May, 2003, AAIFR duly gave leave to the respondent to take legal proceeding before the competent Court, The dues over and above the amount of Rs. 2.03 crore, if found due could be recovered through the Court proceedings by the respondent. It is submitted that issue has been raised by the appellant denying the document and questioning the acknowledgment by an Officer of the appellant and therefore the said fact could only be decided after adducing evidence. It is submitted that passing of a decree under Chapter XIII A on the basis of Affidavit Evidence will deprive the appellant/defendant to prove its case. It is further pointed out that the Hon'ble First Court relied upon the acknowledgment which was done by an employee of the defendant/Company and furthermore, it has been stated that the said person had no authority to do so. It is also tried to be pointed out before us, on behalf of the appellant that the acknowledgment in respect of the interest amount in the said document was interpolated. But it appears that the appellant did not deny or dispute the written acknowledgment in respect of the principal claim. It is submitted that the Court in the case of Kiranmoyee Dassi reported in (1945) 49 CWN 246, held that when the defendant has no defence or the defence is illusory or sham or practically

moonshine, then the Court may protect the plaintiff by directing the defendant to furnish security. It is further submitted that the Hon''ble First Court although held upon a plain look on the document there is a difference in typing of two portions of the acknowledgment of the said dues, but His Lordship after relying on the said document, directed the appellant to furnish the said security.

5. It has been submitted before us on behalf of the respondents that no steps were taken against the said concerned Officer and nothing has been put forward by the appellant/defendant in the affidavit so filed before the Hon''ble First Court. There is no denial and dispute as to the recording of the principal amount. It is submitted that his Lordship shifted the burden of proof on the appellant in respect of validity of the acknowledgment on the basis of which the order was passed by His Lordship. It is also submitted that the appellant has no defence in respect of the claim of the plaintiff/respondent.

6. Mr. Banerjee appearing in support of this appeal also relied upon the decision reported in Mechelec Engineers and Manufacturers Vs. Basic Equipment Corporation, , State Bank of Saurashtra Vs. Ashit Shipping Services (P.) Ltd. and Another, . Santosh Kumar Vs. Bhai Mool Singh, , 89 CWN 728 Kapil Deo Pandey v. Vasudeb Devshankar Shukla as well as (1945) 49 CWN 246 Sm. Kiranmoyee Dasi v. Dr. J. Chatterjee. On the contrary it has been submitted on behalf of the respondent that the appellant has failed to make out a case to show that the appellant/defendant should be granted a leave to defend the suit unconditionally.

7. After considering the facts and circumstances of this case and after scrutinizing the decisions cited before us it would be evident that the Court in an application filed under Chapter XIII A laid down the principles governing leave to defend and to furnish security when may be ordered by the Court in an application under Chapter XIII A of the Original Side Rules and Orders, a defendant is entitled to unconditional leave to defend, either if he satisfies the Court that he has a good defence to the claim on its merits or raises triable issue indicating that he has a fair and bona fide or reasonable defence although not a positively good one. The defendant is also entitled to leave to defend without any payment into Court or furnishing any security even if his affidavit does not positively and immediately make it clear that he has a defence to disclose such a state of facts as leads to the inference that at the trial of the action he may be able to establish a defence to the plaintiffs claim in such a case, however, the Court may in its discretion impose conditions as to the time or more of trial.

8. If the defendants have no defence or the defence set up is illusory or sham or practically moonshine the plaintiff is ordinarily entitled to judgment. The Court, however, may in such a case protect the plaintiff by only granting leave to defend and allowing the defence to proceed if the amount claimed is paid into Court or otherwise secured.

9. Applying such tests in the facts and circumstances of this case as it would be evident from the facts that the appellant in fact has no defence in respect of the

claim put forward by the plaintiff/respondent and furthermore in our opinion, the defence so tried to be put forward by the appellant is nothing but illusory, sham and further in our opinion is a moonshine defence. However, since the Hon''ble First Court has already granted a leave to defend allowing the defence to proceed after furnishing the security, we do not intend to interfere with the order so passed by the Hon''ble First Court.

10. After applying the tests in the facts and circumstances of this case we have to uphold the decision of the Hon''ble First Court and we dismiss this appeal so filed by the appellant.

Tapan Kumar Dutt, J.

11. I agree.