
(2014) 02 MAD CK 0242

In the Madras High Court

Case No : Appl. No. 4434 of 2011 in C.S. No. 789 of 2010

Guangxi Liugong Machinery Company Ltd.

APPELLANT

Vs

Rais Equipment Private Ltd.

RESPONDENT

Date of Decision : 05-02-2014

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 37 Rule 1, Order 37 Rule 37, Order 37 Rule 5

Citation : (2014) 3 CTC 290 : (2014) 3 MLJ 873

Hon'ble Judges : R.S. Ramanathan, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

R.S. Ramanathan, J.—The applicant/plaintiff filed a Civil Suit, viz., C.S. No. 789 of 2010, on the file of this Court, under Order XXXVII, Rule 1 of the Code of Civil Procedure, for recovery of a sum of Rs. 2,37,94,970/- with future interest at the rate of 3% per annum. In the said suit, the respondent/defendant filed an application, viz., A. No. 7446 of 2010, for the grant of unconditional leave to defend the suit. The learned Master, by order, dated 09.04.2011, allowed the said application by granting leave. Challenging the said order, the present application is filed by the applicant/plaintiff. Mr. Anirudh Krishnan, the learned counsel appearing for the applicant submitted that the learned Master, without properly appreciating the fact that no triable issues have been raised by the respondent; that the respondent has not made out any good defence in the affidavit filed in support of A. No. 7446 of 2010, granted unconditional leave to defend the suit filed by the applicant. Therefore, the order, dated 09.04.2011, passed by the learned Master, is liable to be set aside.

2. The learned counsel for the applicant further submitted that the applicant-Company filed the suit on the basis of 12 purchase orders (as detailed in the plaint), placed by the respondent/defendant. As per the purchase orders, the applicant/plaintiff supplied the machineries and they were also taken delivery by

the respondent. After taking delivery of the machineries, the respondent made only partial payment of Rs. 15,000/- USD by telegraphic transfer on 26.02.2009, and failed to pay the balance of Rs. 4,88,857.94, despite repeated request and reminders made/sent by the applicant. Moreover, the respondent themselves agreed that they were liable to pay Rs. 4,87,129/- as USD to the applicant and worked a repayment schedule. As per the said schedule, repayment started from April, 2010, and it was spread over, till September, 2011. Nevertheless, the respondent did not make any payment as per the schedule. Therefore, the suit was filed for recovery of Rs. 2,37,94,970/-, as stated above.

3. The learned counsel for the applicant furthermore submitted that in the affidavit filed in support of A. No. 7446 of 2010, viz., the application seeking unconditional leave to defend the suit, the respondent has just made certain allegations against the plaintiff and contended that triable issues were involved in the suit, but, no specific defence was taken by the defendant to defend the suit. Hence, the learned Master ought not to have granted leave and the essential ingredients of Order XXXVII, Rule 5 of CPC was not properly appreciated by the learned Master, and therefore, the leave granted is liable to be revoked. The learned counsel also took me through the Minutes of Meeting, dated 16.02.2010, wherein, the respondent admitted their liability and also the repayment schedule, but, there is no reciprocal promise to be performed by the applicant as per the memorandum of agreement, or, the Minutes of Meeting, dated 16.02.2010, and the various clauses, viz., E, F, G and I are independent clauses and they have nothing to do with the repayment schedule agreed by the respondent. Therefore, the respondent has not shown any triable issues or substantial defence, and having agreed to pay the amount, the respondent should not have been granted unconditional leave. Hence, the learned counsel prayed for allowing this Application.

4. The learned counsel for the applicant relied upon the following reported judgments, in support of his case:

i) in the case of M/s. Sunil Enterprises and Another Vs. SBI Commercial and International Bank Ltd., .

ii) in the case of Southern Sales and Services and Others Vs. Sauermilch Design and Handels GMBH, .

iii) in the case of Madhusudan Gordhandas and Co. Vs. Madhu Wollen Industries Pvt. Ltd.,

and

iv) in the case of Sify Ltd. Vs. First Flight Couriers Ltd., .

5. Though the respondent was served and their name is printed in the cause list, there is no representation on behalf of the respondent. Hence, the respondent is set ex parte.

6. Taking into consideration the facts of the case, as narrated supra, the only point to be decided in this Application is,

Whether the unconditional leave granted by the learned Master is liable to be set aside or not?

7. In the supporting affidavit filed by the respondent in connection with A. No. 7446 of 2010, seeking to grant unconditional leave, the respondent has raised the following pleas:

a) The Minutes of Meeting, dated 16.02.2010, clearly stipulates certain terms and conditions to be performed by, both the plaintiff and the defendant. But, the plaintiff has failed to perform their part of the obligation, thereby, violated the terms agreed therein.

b) As the plaintiff violated the clauses E, F, I and J contained in the Minutes of Meeting, the defendant could not perform their part of the commitments stated in the repayment schedule.

c) As per Clause E of the Minutes of Meeting, the plaintiff agreed to support the defendant in their sales services and service business activities to facilitate funds and liquidate their dues. The plaintiff also agreed to support the defendant in their service campaign for business generation. But, they failed to provide necessary service supports, which resulted in loss of customer base to the defendant.

d) As per Clause I of the Minutes of Meeting. out of the sales generation and business execution, the plaintiff would reimburse the sales commission in the ratio of 70 : 30, that is to say, 70% would be adjusted towards the repayment (overdue) and remaining 30% would be paid to the defendant for their expenses. But the plaintiff failed to make any of the payments.

e) The respondent/defendant placed orders for the purchase of machineries and equipments, and as per the Minutes of Meeting, the plaintiff has to provide not only the machineries, but also warranty service. But, due to the poor quality of machineries and parts supplied by the plaintiff, the defendant incurred loss, and to compensate the loss, the defendant raised debit notes to a tune of Rupees One Crore, which was not cleared by the applicant.

8. According to the respondent, the aforesaid allegations, viz., a) to e) are the triable issues, which are to be decided and the applicant/plaintiff is not entitled to claim the amount on the basis of Clause A of the Minutes of Meeting alone, and entire Minutes of Meeting has to be read as a whole and the respondent/defendant agreed to repay the amount, only if the applicant/plaintiff fulfills the other conditions, stated in the Minutes of Meeting and the applicant/plaintiff failed to fulfill the other conditions and therefore, those matters are to be decided by adducing evidence, and hence, triable issues are there and prayed for granting unconditional leave.

9. According to me, the learned Master considered the pleas raised by the respondent/defendant in A. No. 7446 of 2010, and by relying upon the judgment reported in the case of SIFY Ltd. v. First Flight Couriers Ltd. (supra) he was of the opinion that the respondent has substantial defence, which is neither frivolous nor vexatious and granted unconditional leave. As per Order XXXVII Rule 5 CPC, leave to defend the suit shall not be refused, unless, the Court is satisfied that the facts disclosed by the defendant do not indicate that he has substantial defence to raise, or, that the defence intended to be put up by the defendant is frivolous or vexatious.

10. Therefore, whenever, a suit is filed under Order XXXVII CPC, the defendant has to apply to the Court seeking unconditional leave to defend the suit and the unconditional leave should not be refused, and, it should be granted. Leave can be refused only when the Court is satisfied that no substantial defence has been raised by the defendant, or, the defence raised by the defendant is frivolous or vexatious.

11. In the judgment reported in the case of Sunil Enterprises and Another v. S.B.I. Commercial & International Bank Ltd. (supra), the Hon''ble Supreme Court, after referring to its intra Court judgments, viz., the judgments reported in I) in the case of Santosh Kumar Vs. Bhai Mool Singh, in the case of Milkhiram (India) Private Ltd. and Others Vs. Chamanlal Bros., in the case of Mechelec Engineers and Manufacturers Vs. Basic Equipment Corporation, , wherein, a law has been laid down under what circumstances leave can be granted, summarized the law as follows:

a) If the defendant satisfies the court that he has a good defence to the claim on merits, the defendant is entitled to unconditional leave to defend.

b) If the defendant raises a triable issues indicating that he has a fair or bona fide or reasonable defence, although not a possibly good defence, the defendant is entitled to unconditional leave to defend.

c) If the defendant discloses such facts as may be deemed sufficient to entitle him to defend, that is, if the affidavit discloses that at the trial he may be able to establish a defence to the plaintiff's claim, the court may impose conditions at the time of granting leave to defend - the conditions being as to time of trial or mode of trial but not as to payment into court or furnishing security.

d) if the defendant has no defence, or if the defence is sham or illusory or practically moonshine, the defendant is not entitled to leave to defend.

and

e) If the defendant has no defence or the defence is illusory or sham or practically moonshine, the court may show mercy to the defendant by enabling him to try to prove a defence but at the same time protect the plaintiff imposing the condition that the amount claimed should be paid into court or otherwise secured.

12. The very same principles, as quoted above, has been reaffirmed in the judgment reported in SIFY Ltd. v. First Flight Couriers Ltd. (supra).

13. In the judgment rendered in Madhusudan Gordhandas and Co. v. Madhu Woollen Industries Pvt. Ltd. (supra), the Hon''ble Supreme Court dealt with winding up proceedings and reiterated two rules to defend the winding up petition and they are as follows:

First, if the debt is bona fide disputed and the defence is a substantial one, the court will not wind up the company. The court has dismissed a petition for winding up where the creditor claimed a sum for goods sold to the company and the company contended that no price has been agreed upon and the sum demanded by the creditor was unreasonable, (see *In re London and Paris Banking Corporation*, (1874) L.R. 19 Eq. 444). Again, a petition for winding up by a creditor who claimed payment of an agreed sum for work done for the company when the company contended that the work has not been done properly was not allowed, (see *In re Brighton Club and Norfolk Hotel Co. Ltd.*, (1865) 35 Beav. 204).

Where the debt is undisputed, the court will not act upon a defence that the company has the ability to pay the debt but the company chooses not to pay that particular debt, [see *In re A Company*, (1894) 94 S.J. 369)). Where, however, there is no doubt that the company owes the creditor a debt entitling him to a winding up order but the exact amount of the debt is disputed the court will make a winding up order without requiring the creditor to quantify the debt precisely, (see *In re Tweeds Garages Ltd.*, (1962) Ch. 406).

The principles on which the court acts are first that the defence of the company is in good faith and one of substance, secondly, the defence is likely to succeed in the point of law, and, thirdly, the company adduces prima facie proof of the facts on which the defence depends.

14. On a perusal of the principles, as quoted above, it is clear that leave can be granted only when the defendant raised triable issues indicating that he has a fair, or, bona fide or, reasonable defence, although not a possibly good defence and the facts disclosed by the defendant are sufficient to entitle him to defend, which leads to an inference that at the trial of the action he may be able to establish a defence to the plaintiff's claim. Therefore, it is not necessary for the defendant to positively prove that he has got a case or defence to the plaintiff's claim, and, it is enough, if the defendant is able to make out a case, or, probable defence on which, the suit filed by the plaintiff may be defeated or dismissed. It is also on the principles that the plaintiff has to prove his case and he cannot depend upon the frailty of the defendant's case. On the contrary, if the defendant admitted his liability without any qualification and the defence raised by the defendant appears to be frivolous or vexatious, ill-founded, the defendant is not entitled to defend the suit. It has also been made clear that if the defendant has no defence, or, the defence set up by him, is illusory, or,

practically moonshine, then, the defendant is not entitled to the leave to defend the suit.

15. Therefore, while deciding the application filed by the defendant seeking unconditional leave to defend the suit, the Court has to find out whether the defence is illusory, sham, or, practically moonshine. If the court is satisfied that the defence raised by the defendant appears to be a reasonable defence, or, bona fide one, or requires evidence to be let in or interpretation of document, or the defendant raised triable issues, the Court is justified in granting unconditional leave.

16. As stated supra, when all the clauses agreed upon by the parties and recorded in the Minutes of Meeting held on 16.02.2010 read together, it cannot be held that the defendant agreed to pay the outstanding unconditionally, and having regard to the clauses E, F and I, the defence raised by the defendant that there are reciprocal promises to be performed by the plaintiff to enable the defendant to make the payment as per the schedule agreed appears to be prima facie acceptable. At this juncture, it is pertinent to point out that it is not the case of the plaintiff that it has performed its obligation under the Minutes of Meeting, and the defence raised by the plaintiff is that there is no reciprocal promise to be performed by the plaintiff and the defendant has admitted the liability, therefore, the leave ought not to have been granted.

17. In my opinion, whether the Minutes of Meeting, dated 16.02.2010, contained the reciprocal promise or not, whether the respondent/defendant unconditionally admitted the payment made without reference to Clause E, F and I, whether the applicant is liable to perform its obligation as per Clause E, F and I, are the triable issues and the defendant has made out the reasonable defence to the claim made by the plaintiff. Considering all these aspects, the learned Master has rightly allowed the application filed by the respondent/defendant and granted unconditional leave. Further, as per the judgment reported in *Southern Sales & Services and Others v. Sauermilch Design & Handles GmbH* (supra), if a reasoned order is passed by the Court having jurisdiction to pass such order, the appellate Court will not interfere with such order, unless, a jurisdictional error is pointed out by the person, who questions such order. The question as to whether the leave to defend the suit can be granted or not, is within the discretionary powers of the Court, and, when it does not appear that such discretion has been exercised erroneously, or, with any irregularity, such order does not warrant interference by this Court.

18. Therefore, I am of the considered view that the learned Master has properly exercised his discretion and therefore, it does not warrant interference. In the result, the impugned order, dated 09.04.2011, passed by the learned Master, in A. No. 7446 of 2010 is confirmed and this application is dismissed.