
(2011) 01 MAD CK 0143
In the Madras High Court
Case No : Suit No. 1088 of 2007

Hariharan Poly Packs and M. Hariharan	APPELLANT
Vs	
The National Small Industries Corporation Limited, N. Jothinathan and Rajeshwari	RESPONDENT

Date of Decision : 03-01-2011

Acts Referred:

Bankers Books Evidence Act, 1891 — Section 4
Evidence Act, 1872 — Section 34

Citation : (2011) 01 MAD CK 0143

Hon'ble Judges : R. Mala, J

Bench : Single Bench

Advocate : S. Gunalan, for the Appellant; Ajoy kumar gnanam, for R1 (RR2 and 3), for the Respondent

Final Decision : Dismissed

Judgement

R. Mala, J.—This appeal has been arising out of the judgment and decree dated 19.06.2007 in O.S. No. 2683 of 2001, on the file of VII

Additional Judge, City Civil Court, Chennai.

2. The averments made in the plaint are as follows:

(i)The Plaintiff is carrying on business for manufacturing of plastic strings vide registration certificate dated 10.09.1987 issued by District Industrial

Centre. The Defendants applied to the Plaintiff for supply of one extruder machine on hire purchase basis for use in their business on 20.11.1987.

(ii) On consideration of the request from the Defendants, the Plaintiff offered to make available one unit of "SED" brand extruder on hire purchase

basis as per standard terms and conditions. The Defendants accepted this offer and paid Earnest Money Deposit on 20.08.1991. The said

equipment was received, approved, accepted and used by the Defendants in their business.

(iii) The first Defendant executed the hire purchase agreement on 20.11.1991, prior to the delivery of the equipment. The hire purchase value of the equipment was Rs. 5,32,122/-. The repayment was to be made in 13 half yearly installment. The first installment was due on 01.10.1993 and the last installment fell due on 01.10.1999. The interest was charged at 15% per annum. The first Defendant is the company with second and third Defendant as its partners. The fourth and fifth Defendants are guarantor. So all are jointly liable to pay that amount. Since the fifth Defendant is died, his legal heir was impleaded as a sixth Defendant.

(iv) The Plaintiff initiated steps for disposal of the equipment by inviting tenders through newspaper advertisement. But there is no response for such advertisement. Hence he come forward with this suit for recovery of Rs. 5,71,409/-together with interest at the rate of 17% per annum from the date of the plaint till realisation. Hence, he prayed for a decree.

3. The gist and essence of the written statement filed by the first and second Defendant, which was adopted by the third Defendant, are as follows:

(i) The averments in paragraphs-8 to 10 in the plaint are true. The Plaintiff has not properly accounted for the payments made by the Defendant, as it is only stated that some amount was paid.

(ii) This Defendant was applied for an hire purchase loan as long back as on 20.11.1987 itself, the Plaintiff took full four years to sanction the loan.

By the time, the competition in the industry has been increased and the very conducting of the business became inviable. However, the Defendant

was doing his level best to conduct the enterprise at lease without loss, when the business was slowly picking up, the Plaintiff has sealed the

business premises on 07.07.1994. The Defendant with a great difficulty persuaded the Plaintiff to remove the seal. However, again the Plaintiff was

sealed the business premises on 19.11.1998. So this Defendant was unable to conduct the business profitably and suffered heavy loss. The Plaintiff

after having repossessed the machinery, has not taken any steps to dispose of the machinery in a fair manner.

(iii) The hire purchased equipment was subject to insurance coverage. The Plaintiff does not deliberately state that whether insurance was claimed

or not, if not why?. There is no cause of action for the suit. Hence he prayed for the dismissal of the suit.

4. The trial Court, after considering the averments both in the plaint and the written statements and arguments of both the counsel, has framed two

issues and considering the oral evidence of P.W.1 and Exs.A1 to A6, decreed the suit as prayed for in the plaint. Against which, the present

appeal has been preferred by the

5. After hearing the arguments of both sides counsel, the following points for determination are framed:

1. Whether the trial Court is correct in held that the Defendants/Appellants have not proved the payment made towards hire purchase agreement?

2. Whether the trial Court is correct in disbelieving the by the Defendants and granted a decree?3. Whether Ex.A6, the statement of accounts is

reliable?4. Whether the judgment and decree passed by the trial Court is sustainable? 5. To what relief, the Appellants are entitled to?

6. Points No. 1 and 3:

(i) The first Respondent as a Plaintiff filed a suit for recovery of money due on hire purchase agreement, which was entered into between the

Plaintiff and the Defendants 1 to 3 on 20.11.1991. The Defendants were admitted to repay the amount in 13 half yearly installment commencing

from 01.10.1993 to 01.10.1999. The value of equipment was Rs. 5,32,122/-is also admitted. The interest was charged at 15% per annum is also

admitted. Since the Appellants/Defendants 1 and 2 have not repaid that amount advanced, the Plaintiff has come forward with the suit.

(ii) The learned Counsel for the Appellants mainly focussing upon Ex.A6- Statement of Accounts and questioning the genuineness of the same. He

relied upon Section 34 of Indian Evidence Act and submitted that the statement of accounts has not been proved in accordance with law to

substantiate the same, he also relied upon the decision of this Court as well as the Apex Court.

(iii) At this juncture, it is appropriate to consider the arguments advanced by the learned Counsel for the first Respondent/Plaintiff that in the plaint

itself, the first Respondent herein has pleaded the materials in paragraphs-8 to 10, which were admitted by the Appellants/Defendants 1 and 2 in

paragraph-4 of their written statement. Furthermore, the learned Counsel for the

first Respondent/Plaintiff has submitted that the

Appellants/Defendants 1 and 2 did not get into the box or produced the document to show that the amount given by them, was not given credit to

under Ex.A6-statement of accounts. He has also relied upon some clauses of Ex.A2 and submitted that the trial Court has considered all the

aspects in proper perspective and decreed the suit and hence, the judgment and decree passed by the trial Court does not warranted any

interference and he prayed for the dismissal of the appeal.

(iv)Considered the rival submissions made on both sides.

(v)In paragraphs-8 to 10 of the plaint, the first Respondent/Plaintiff has narrated the material facts, which are fairly conceded by the

Appellants/Defendants 1 and 2 in paragraph-4 of their written statements. So it is appropriate to reproduce the paragraphs-8 to 10 in the plaint

and paragraph-4 of the written statement of the Appellants/Defendants 1 and 2, which was adopted by D3.

8. The first Defendant is a registered partnership firm with second and third Defendant as its partners. These Defendants set up a small scale

industrial unit for manufacture of plastic strings vide registration certificate dated 10.09.1987 issued by District Industrial Centre. These Defendants

applied to the Plaintiff for supply of one extruder machine on hire purchase basis for use in their business on 20.11.1987. The fourth and fifth

Defendant offered to be guarantors for the repayment of facilities sanctioned to the Defendants by the Plaintiff.

9. On consideration of the request from the Defendants as above the Plaintiff offered to make available one unit of "SED" brand extruder on hire

purchase basis as per standard terms and conditions.

The Defendants accepted this offer and paid Earnest Money Deposit on 20.08.1991. Thereupon, the Plaintiff placed order for supply of

equipment on the fabricator identified by the Defendants. The said equipment was received, approved, accepted and used by the Defendants in

their business.

10. The first Defendant executed the hire purchase agreement, in respect of above equipment favouring the Plaintiff on 20.11.1991, prior to the

delivery of the equipment. The hire purchase value of the equipment was Rs. 5,32,122/-. The repayment was to be made in 13 half yearly

installment. The first installment was due on 01.10.1993 and the last installment fell due on 01.10.1999. The interest was charged at 15% p.a.

However in the event of default in payment of installments the Defendants were liable to pay interest at 17% p.a. It was also agreed that for any

differences or disputes arising under the said agreement the Courts in Madras alone will have jurisdiction exclusively. The Memorandum of

agreement is filed with the plaint for fuller particulars. Besides the guarantee deeds executed by fourth and fifth Defendants dated 20.11.1991,

separately by each of them are also filed with the plaint.

4. The Defendant submits that averments in para-8,9 and 10 as true and do not advert to them any comments.

It shows that the transaction has been admitted and executed the hire purchase agreement under Ex.A2. The statement of accounts mentioned in

paragraph-5 of the written statement filed by the Appellants/Defendants 1 and 2 stated that ""the Plaintiff has not properly accounted for the

payments made by the Defendant."" It is a well settled proposition that a person, who pleaded the payment and discharge must prove the same.

Admittedly neither the Appellants/Defendants 1 and 2 get into the box to depose and to fortify the defence raised in the written statement nor a

single scrap of paper is filed to show that the Appellants/Defendants 1 and 2 repaid that amount and made the payment. So the Appellants herein

have miserably failed to prove the payment.

(vi)At this juncture, it is appropriate to consider Section 34 of Indian Evidence Act, which states as follows:

Entries in books of accounts, including those maintained in an electronic form, regularly kept in course of business, are relevant whenever they

refer to a matter into which the Court has to inquire, but such statements shall not alone be sufficient evidence to charge any person with liability.

(vii) The learned Counsel for the first Respondent/Plaintiff submitted that the first Respondent is a Public Limited Company incorporated under

Indian Companies Act, 1913. So Section-4 of Bankers' Books Evidence Act, 1891, is applicable to the case of the first Respondent/Plaintiff's

company herein. After the electronic media came into effect, the value of ledgers and original ledgers are not necessary. Here, the competent

authority, the joint manager has given statement of accounts under Ex.A6. As

per Section 4 of the Bankers' Books Evidence Act, the statement of accounts under Ex.A6 is sufficient and the ledgers are not necessary. Furthermore, it is appropriate to consider the decision relied upon by the

learned Counsel for the Appellants reported in 2001 (2) CTC 736, in Mettur Beardsell Limited, a Public Limited Company by its Secretary v.

Salem Textiles Limited, a Public Limited Company and 2 Ors. 2001 (2) CTC 736, in which, the paragraph-9 states as follows:

9. . . . No doubt, except the assertion in the written statement, first Defendant has not let in oral or documentary evidence in support of their

defence. However, it is settled law that inasmuch as the Plaintiff has laid the suit claiming certain amount due from the Defendants it is for the

Plaintiff to prove its case by placing acceptable evidence. The only witness examined on the side of the Plaintiff is P.W.1 who is a Secretary of its

company. He deposes that as per Folio No. 8 of Ledger accounts, the first Defendant has to pay a sum of Rs. 3,30,258/-. A Ledger has been

marked as Ex.A-1 through P.W.1. No doubt, there is a reference in Ex.A-1 regarding liability of the first Defendant. Except the production of

Ledger (Parade) and marking a portion therein as Ex.A-1, the Plaintiff has not substantiated their business transaction with the first Defendant. Mr.

G. Subramaniam, learned senior counsel for the Appellant, relying on a decision in Deluxe Road Lines v. S.K. Palani Chetty 1992(1)L.W.262,

would contend that on the basis of mere entry in the ledger Ex.A-1, it cannot be presumed that there was a supply of yarn and the first Defendant

is liable to pay the value of the yarn supplied. In the said decision, Srinivasan, J., (as he then was) has held that it is well settled proposition of law

that mere production of account books will not be sufficient, to charge a person with any liability. His Lordship has further held that the

requirements of Section 34 of the Evidence Act will not be satisfied by the production of accounts simpliciter. Further, the person who wrote the

accounts has not been examined. Likewise, the person who is said to have made the payments mentioned in the accounts has not been examined.

It is only the Secretary who had nothing to do with either the payment or the writing of the accounts, has been examined. There is no explanation

for not examining the others. In such a circumstance, His Lordship has rightly held that mere production of accounts will not be sufficient to charge

any person with any liability and the requirement of Section 34 of the Indian Evidence Act will not be satisfied by the production of accounts

simpliciter. I have already stated that except the ledger, no other account book or books containing similar entries was filed before the Court. The

account books by themselves are not sufficient to charge any person with liability and the party has to show by some independent evidence that the

entries in his books represented the real and honest transactions and that the moneys paid or the transactions took place, in accordance with those

entries. Inasmuch as none connected with the account was examined, I am of the view that entry in the Ledger under Ex.A-1 is not sufficient to

accept the case of the Plaintiff.

There is no quarrel over the proposition laid down in the above citation. But the above citation is not applicable to the facts of the present case.

Because in the above citation, the first Defendant raised plea that no orders were placed on Plaintiff for supply of goods during relevant period and

that first Defendant's thread division had been taken over by third Defendant. But the case on hand, the Appellants/Defendants 1 and 2 themselves

admitted that they applied for an hire purchase loan and they deposited earnest money deposit and then they received the machinery and

manufactured the goods. In such circumstances, the liability has been accepted by the Appellants/Defendants 1 and 2 and execution of hire

purchase agreement has also been accepted in paragraph-4 of their written statement. In such circumstances, I am of the view that the above

citation is not applicable to the facts of the present case.

(viii) At this juncture, the learned Counsel for the Appellants relied upon the decision reported in Ishwar Dass Jain (Dead) Thr. Lrs. Vs. Sohan Lal

(Dead) By Lrs., , in which, the paragraphs-23 and 25 are held as follows:

23. Now u/s 34 of the Evidence Act, entries in ""account books"" regularly kept in the course of business are admissible though they by themselves

cannot create any liability. Section 34 reads as follows: ""Section-34: Entries in books of account when relevant - Entries in books of account,

regularly kept in the course of business, are relevant whenever they refer to a matter into which the Court has to inquire, but such statements shall

not alone be sufficient evidence to charge any person with liability.

It will be noticed that sanctity is attached in the law of evidence to books of

account if the books are indeed "account books i.e. in original and if they show, on their face, that they are kept in the "regular course of business". Such sanctity, in our opinion, cannot attach to private extracts of alleged account books where the original accounts are not filed into Court. This is because, from the extracts, it cannot be discovered whether accounts are kept in the regular course of business or if there are any interpolations or whether the interpolations are in a different ink or whether the accounts are in the form of a book with continuous page numbering. Hence, if the original books have not been produced, it is not possible to know whether the entries relating to payment of rent are entries made in the regular course of business.

25. In the recent judgment of this Court in Central Bureau of Investigation Vs. v.C. Shukla and Others, , it has been laid down that for purposes of

Section 24, "Book" ordinarily means a collection of sheets of paper or other material, blank, written or printed, fastened or bound together so as

to form a material whole. Loose sheets of paper or scraps of paper cannot be termed as "book" for they can be easily detached and replaced. It

has also been held that the rationale behind admissibility of parties' books of account as evidence is that the regularity of habit, the difficulty of

falsification and the fair certainty of ultimate detection give them in a sufficient degree, a probability of trustworthiness.

15 When that is the legal position extracts of alleged account books, in our view, were wrongly treated as admissible by the Courts below though

the original books were not produced for comparison nor their non-production was explained nor the person who had prepared the extracts was examined.

The extracts from accounts are not "account books" fall within Section 34 of the Indian Evidence Act and are inadmissible. There is no quarrel

over the proposition laid down in above citation. Considering the above citation along with the facts of the present case, the Appellants/Defendants

1 and 2 herein have stated in paragraph-4 of their written statement, they accepted the averments in paragraphs-8 to 10 of the plaint. As per the

Bankers' Books Evidence Act, 1891, the certified copies are allowed. But here also, the first Respondent/Plaintiff herein is entitled to the benefit

of Section 4 of the Bankers' Books Evidence Act. As already stated that the

Appellants herein have fairly conceded that they had paid earnest money deposit of Rs. 59,318/-has been given credit to. In such circumstances, I am of the view that the above citation is not applicable to the facts of the present case. As already stated, it is the duty of the Appellants to prove that what are the payments they made, which were not given credit to. As already stated that they have not filed any scrap of paper for the alleged payments. In such circumstances, I am of the view that Ex.A6-the statement of accounts is true and genuine. It is not hit by Section 34 of Indian Evidence Act.

(ix) The learned Counsel for the Appellants culled out some portions of oral evidence of P.W.1-the Development Officer of the Plaintiff's

company and argued that P.W.1 is not a competent person to give deposition. But the above argument does not merit acceptance. Because the

Appellants/Defendants 1 and 2 herein are fairly conceded the averments in paragraphs-8 to 10 in paragraph-4 of their written statement. Since the

payment of earnest money deposit and delivery of the machinery was accepted, non issuance of notice does not shake the case of the first

Respondent/Plaintiff as per clause-2(v)(a) of Ex.A2. Since the Appellants/Defendants 1 and 2 herein have admitted the payment of earnest money

deposit and also the delivery of the goods purchased under hire purchase agreement, the Appellants herein have not raised any defence in respect

of delivery as well as execution of hire purchase agreement. In such circumstances, I am of the view that Ex.A6-statement of accounts is true and

genuine. Therefore, the Appellants/Defendants 1 and 2 have not proved their alleged payments. Points 1 and 3 are answered accordingly.

7. Points No. 2 and 4:

(i) The learned Counsel for the Appellants submitted that the trial Court has committed an error in disbelieving the defence raised by the

Appellants/Defendants 1 and 2 and granted a suit in favour of the first Respondent/Plaintiff. He further submitted that since the suit is filed for

recovery of money due on hire purchase agreement, if the hirer made a default in payment of the amount, the owner-cum-financier has every right

to seize the materials and sold the same in auction and appropriate the sale proceeds. But here, the first Respondent/Plaintiff has made paper

publication for re-sale of the machinery, but there was no response for such

advertisement. Hence, the first Respondent is not able to sell the machinery.

(ii) At this juncture, the learned Counsel for the first Respondent culled out the following clause in Ex.A2-the hire purchase agreement. ""2(v)(a)

Without prejudice to any claim for arrears of hire rent or damages for breach of this agreement forthwith and without notice or demand terminate

the hiring and retake possession of the property."" So, non filing of the notice or demand to the Appellants is not fatal to the case of the first

Respondent. Considered the above argument, I am of the view that without issuance of notice to the Appellants, the first Respondent has every

right to terminate the hiring and retake possession of the property.

(iii) He also culled out the clauses-4 and 8 of Ex.A2, in which, it is stated as follows:

4. The hirer may determine the hiring at any time by notice in writing to the owner at his address mentioned in Clause-1 above and by actually

returning the said property to the owner at the hirer's risk and cost at its place of business in the same condition and order as when delivered to

him (fair wear and tear alone being expected) and paying to the owner all his dues and moneys under this agreement and charges and expenses of

and incidental to the original delivery and to the returning of the said property. Further before returning of the said property in the manner aforesaid

the hirer shall, if so required by the owner, at his expense get the property duly examined in his premises by a technician so deputed by the owner,

or if so desired by the owner to have the said property examined by a technician at the premises of the owner, and obtain a Fitness Certificate

regarding the same. In any event, if the technician finds that the machinery is not in the same condition (subject to fair wear and tear as when

delivered to the hirer) he shall assess compensation for damages and/or depreciation in value of the property caused due to any reason whatsoever

(except fair wear and tear). The said certificate shall be binding on both the parties and the hirer shall be bound to pay the amount of compensation

so assessed by the technician in addition to the amount due by way of hire, interest on overdue installments or any other amount under this

agreement.

In the event the property being withdrawn by the owner from the hirer due to

hirer's default in payment of the due installment(s) or poor maintenance of property by him or breach of any of terms of the agreement on his part or the property being returned by the hirer voluntarily the owner may sell the property by private negotiations or public auction or by any other means at its sole discretion without any notice to the hirer and if the proceeds in the sale of the property fall short of the sum total of the hire purchase price. Interest on the defaulted installments, if any and all other dues, if any, payable by the hirer under this agreement, less all payments made by the hirer towards installments of hire, interest on defaulted installments, or any dues under this agreement, if any, paid by him, the hirers shall make good the resultant loss. If, however, the sale proceeds of such sale exceed the hire purchase price of the property, interest on defaulted installments of hire and any other dues payable by the hirer, such excess amount shall belong to and be retained by the owner exclusively and the hirer shall not have any claim thereon.

As per clauses-4 and 8 of Ex.A2, the owner is entitled to withdraw or retake the property and sold the same in the public auction. It is his sole discretion. But here, extruder machinery has been, even today, in the possession of the Appellants. So I am of the view that the argument advanced by the learned Counsel for the Appellants, without issuance of notice to them, the first Respondent has taken steps to seize the machinery for public auction is against law, is not acceptable one.

(iv) The learned Counsel for the Appellants submitted that the first Respondent herein has not filed any documents to show that the properties were insured for repayment of debt. But clause-2(X) of Ex.A2, which states as follows: 2(X). Besides the above said hire purchase referred to in Clause 1 hereof and all other hirer's liabilities under this agreement it has also been agreed between the owner and hirer that during the 7 1/2 years terms of this agreement within which the hirer is supposed to pay all sorts of dues in full recoverable from him under this agreement; the owner shall get the property insured against the risk of fire, riot, strike and civil commotion and on that account the hirer hereby stipulates to pay a total sum of Rs. 15,610.00 (Rupees fifteen thousand six hundred and ten only) calculated at the uniform rate of 5% of Rs. 3,12,200.00 (Rupees three lakhs twelve thousand and two hundred only) which is cost price of the property. But

such insurance charges shall be recoverable from the hirer in installments along with the installments of hire as and when the installment of hire

become payable by the hirer under this agreement. The amount of the first installment of the said insurance charges will be Rs. 1,210.00 (Rupees

one thousand two hundred and ten) and the quantum of all the subsequent installments of the said insurance charges Rs. 14,400/-(Rupees fourteen

thousand and four hundred only) non-payment of these insurance charges will be considered as a breach of very material terms of this Agreement.

Further if the hirer fails to restore the possession of the property in response to the appropriate notice issued by the owners calling upon him to do

so, his liability to pay towards insurance charges as above shall remain unaffected and he shall be liable to pay such insurance charges till the date

he actually restores possession of the property to the owner. Besides this if the hirer fails to pay all the hire purchase dues payable under this

agreement during the above mentioned term of this agreement and even then he continuous to remain in possession of

22 the property after expiry of the said term of this agreement, he is not only liable to pay to the owners compensation for the use and occupation

of the property at the same very rate of six monthly hire rent as mentioned in Clause (1) hereof but he shall also be liable to pay to the actual

insurance charges incurred by the owners for insuring the property during the period the period continuous to remain in the possession of the hirer

even after expiry of the above mentioned term of the said agreement.

As per the above clause, the insurance coverage is only for fire, riot, strike and civil commotion. So the argument advanced by the learned Counsel

for the Appellants does not merit acceptance. Hence the trial Court has considered all the aspects in proper perspective and rejected the defence

raised by the Appellants/Defendants 1 and 2 and granted a decree. It is pertinent to note even though the Appellants herein have raised plea that

the amount was not given credit to as already stated in the earlier paragraph, they have not filed any scrap of papers and no oral evidence let in for

the same.

(v) In such circumstances, I am of the view that the Appellants have not proved their defence. Hence the trial Court has correctly decreed the suit.

So the judgment and decree passed by the trial Court is sustainable. Points No. 2

and 4 are answered accordingly.

8. Point No. 5:

In view of the answers given to Points No. 1 to 4, the judgment and decree passed by the trial Court is sustainable and it does not warranted any interference. Hence the Appellants are not entitled to any reliefs. This appeal deserves to be dismissed. Point No. 5 is answered accordingly.

9. In fine,

¶½ The appeal suit is dismissed with costs.

¶½ The judgment and decree passed by the VII Additional Judge, City Civil Court, Chennai, in O.S. No. 2683 of 2001 dated 19.06.2007 is hereby confirmed.