(2017) 01 KL CK 0013

In the High Court Of Kerala

Case No : A.S. No. 374 of 2000 (E) (Against the decree and judgment in OS 566 of 1994 of I Addl.Sub Court, Ernakulam Dated 15-10-1999)

Kerala State Civil Supplies Corporation Ltd. APPELLANT

Vs

Sri. Siva Polymers RESPONDENT

Date of Decision : 18-01-2017

Acts Referred:
Civil Procedure Code, 1908 (CPC) — Order 8 Rule 6

Citation : (2017) 172 AIC 535 : (2017) 1 KerLJ 568 : (2017) 1 KLT 398

Hon'ble Judges : Mr. V. Chitambaresh and Mr. Sathish Ninan, JJ.

Bench : Division Bench

Advocate : Sri. Joseph Markose (Sr.), Sri. Abraham Joseph Markose and Sri. Liji J. Vadakedom, (Amicus Curiae), for the Respondent; Sri. George Poonthottam, SC, KSCSC, Sri. V.R. Kesava Kaimal, Sri. Lakshmi Narayan, SC, Supplyco and Shri N.D. Premachandran, SC, Supplyco, for the Appellant/Defendant

Final Decision : Allowed

Judgement

Mr. V. Chitambaresh, J. - There was a short supply of polythene bags (intended for the retail sale of rice, pulses etc.) by the plaintiff to the defendant contrary to the tender specifications. The defendant therefore had to invite fresh tenders for the supply of the requisite polythene bags which was responded to of course at a higher rate. The loss suffered by the defendant on account of the retender was deducted while settling the bills of the plaintiff for the polythene bags supplied. The sum of Rs. 1,92,131/- so deducted by the defendant has been claimed in the suit along with interest on the amount already released.

2. The defendant contended that Ext.B1 tender conditions itself provide for the set off of liquidated damages consequent to the breach of the contract. Unliquidated damages were sustained by the defendant on account of retender for the supply of polythene bags at a higher rate solely because of the breach of the plaintiff. The damages to the tune of Rs. 1,92,131/- were adjusted towards the loss and the balance including the security deposit was paid by the

defendant. The court below has decreed the suit for the sum of Rs. 1,92,131/- with interest thereon and interest on the amount already released was however declined.

3. The defendant has come up in appeal contending inter alia that the plea of adjustment should have been considered notwithstanding the absence of counter claim. We heard Mr. N.D. Premachandran, Advocate on behalf of the appellant and Mr.Abraham Joseph Markose, Advocate on behalf of the respondent. We also heard Mr. Liji. J. Vadakedom, Advocate as amicus curiae who has done a commendable job with his usual calm, composed and sober approach.

4. Clauses 16 and 14 of Ext.B1 tender conditions providing for the liquidated damages and set off govern the parties to the contract and are extracted below:-

16. Liquidated Damages: In case the supplier fails to supply the ordered quantity within the stipulated period or the extended period, the Corporation reserves the right to purchase stock at the risk and cost of the defaulted supplier from any source and recover the damages excess expenses caused thereby from the defaulted supplier.

14. Set Off: Any sum of money due and payable to the contractor (including the Security deposit returnable to them) under this contract may be appropriated by the Civil Supplies Corporation and set off against any claim of the Corporation for the payment of any sum of money arising from or under any other contractor made by the contractor with the Corporation.

(emphasis supplied)

A conjoint reading of clauses 14 and 16 of Ext.B1 tender conditions reveal that liquidated damages sustained by the defendant could be set off against the claim by the plaintiff. Liquidated damages is a genuine pre-estimate fixed by the parties and found to be such by the court to be awarded to the party complaining of breach. No such pre-estimate can be found in Ext.B1 tender conditions and the damages allegedly sustained by the defendant on account of retender is unliquidated. Only an ascertained sum of money legally recoverable by the defendant from the plaintiff could be set off in a suit for recovery of money. This is evident from a plain reading of Order 8, Rule 6 of the Code of Civil Procedure, 1908 [''CPC'' for short] which has been glossed over by the court below.

5. Unliquidated damages stand on a different footing and does not give rise to a debt until the liability is adjudicated and assessed by a decree of court. The Supreme Court in Union of India v. Raman Iron Foundry [AIR 1974 SC 1265] held as follows:-

"Now the law is well settled that a claim for unliquidated damages does not give rise to a debt until the liability is adjudicated and damages assessed by a decree or order of a court or other adjudicatory authority. When there is a breach of contract, the party who commits the breach does not eo-instanti incur any pecuniary obligation, nor does the party complaining of the breach becomes entitled to a debt due from the other party. The only right which the party aggrieved by the breach of the contract has is the right to sue for damages."

The defendant in the instant case would get compensation as a result of the fiat of the Court after assessment of the damages and fixation of the pecuniary liability on the plaintiff.

6. The next question is as to whether a counter claim under Order 8, Rule 6A of the CPC is necessary to adjudge unliquidated damages after having ruled out the case of set off. The pleadings reveal that the defendant has adjusted the loss suffered by it from the amount due to the plaintiff and disbursed the balance. The loss suffered on account of retender to the tune of Rs. 1,92,131/- has been adjusted well before the suit (for the realisation of which the suit is filed). We may in this context advert to the dictum in Subramoniam v. Subramoniam and others [1977 KLT 293] wherein it is held as follows:-

4. .... Whether on the particular facts of a case the claim of the defendant is to be treated as a plea of adjustment or as a set off or a counter claim, is first to be determined and judged by reference to the pleadings in the case and then also by reference to the nature and character of the plea."

7. The settlement of the amount towards the dues of the plaintiff has taken place before the institution of the suit which is an indication that the plea is one of adjustment. A Division Bench of this Court in Cheria Elias v. Surendra Chit Fund [1989 (1) KLT 449] held as follows:-

3. ...... Payment of adjustment refers to a satisfaction or extinguishment of a debt effected prior to the raising of defence in the written statement. The question of set off can arise only in respect of dues which are outstanding and which have not already been adjusted. Thus, a plea of payment or adjustment is definitely and essentially a different plea and can be pressed into service only if the same was raised before the institution of the suit and not afterwards. To determine whether a plea raised in defence is a plea of set off or of payment by adjustment it has to be ascertained as to whether a separate action could be maintained by the defendant on the basis of his claim. If he could institute a separate suit for realisation of the amount due to him, it is a case of set off. If the adjustment was made prior to the filing of the suit by the plaintiff and a plea is taken to that effect, it would be a plea of adjustment by payment. In such a case no court fee would be payable on the amount as it stood adjusted prior to the institution of suit.

(emphasis supplied)

The above decisions have been followed in Khanna v. A. Tosh & Sons India Ltd. [2001 (1) KLT 801 (DB)] and it is surprising that the court below has deviated from the settled law.

8. The court below has refused to countenance the plea of adjustment on the premise that no counter claim was filed by the defendant in the claim for

damages on account of retender. It is for the amount adjusted by the defendant has the plaintiff filed the suit paying court fee thereon for which counter claim is unnecessary. The court below was obliged to assess the damages sustained by the defendant and determine the compensation to test whether the same is available for adjustment. The grant of a decree to the plaintiff for the amount adjusted by the defendant with interest consequent to the failure to adjudge the damages is unsustainable in law. The impugned judgment is hence set aside and the suit is remanded to the court below for a de novo consideration in the light of the observations above. The parties will appear in the court below on 20.2.2017 and the court fee paid on the memorandum of Appeal Suit shall be refunded to the appellant.

9. The Appeal Suit is allowed. No costs.

