
(2017) 03 KAR CK 0200
In the Karnataka High Court
Case No : 4094 of 2013

M K R Poultry Farm

APPELLANT

Vs

M/s.Tinna Agro Industries Limited

RESPONDENT

Date of Decision : 13-03-2017

Acts Referred:

[Code of Civil Procedure, 1908](#), [Order 41Rule 27](#), [Order 8Rule 6](#)

Citation : (2017) 03 KAR CK 0200

Hon'ble Judges : Anand Byrareddy, K.Somashekar

Bench : DIVISION BENCH

Advocate : Harsh Desai, S.Sreevatsa, M.Sampath Kumar, Harish S.Maigur, M.G.Naganuri

Judgement

1. Heard the learned counsel for the appellant - defendant No.1 and the learned Senior Advocate, Shri Srivatsa S. appearing for the counsel for the respondent No.1 - plaintiff.

2. The brief facts of the case are as follows: The suit was one for recovery of money. The amount claimed was a total sum of Rs.38,48,761/-. The plaintiff is said to be engaged in procuring oil seeds from growers, traders and to process the same for the manufacture of various kinds of edible oils and was marketing the same. The first defendant used to purchase soya de oiled cake and sunflower seed de oiled cake as per the invoices raised by the plaintiff. The first defendant is a partnership firm and so are defendants No.2 and 3. The partners of these three firms are closely related. The first defendant did not dispute the purchase of goods from the plaintiff. The suit was contested only by defendant No.1 and though defendants 2 and 3 were represented, they did not choose to file any pleadings. The first defendant denied the plaint averments. Apart from admitting that the defendant had infact received supplies of the goods and admitted the exchange of notices making the demand for the amount claimed under the suit, the defendant claimed that he had discharged the liability and had called upon

the plaintiff to furnish books of accounts. The plaintiff, however, did not choose to do so. It was the plaintiff's case that though the defendants are shown as independent entities, they were all managed by the Managing Partner of the first defendant and that the transactions between the plaintiff and the defendants dated back to the year 2004 and supplies were made normally on a 30 days" credit basis and any default in payment, attracted interest at the rate of 24% per annum.

3. It was claimed in the plaint that as between the dates 14.08.2010 to 15.10.2010, the plaintiff had supplied goods under 12 invoices, totally worth of Rs.28,96,986/- and the defendant in discharge of this liability, had paid a sum of Rs.1,34,529/- and had sought time to settle the remaining amount and in spite of repeated demands, no payments were made. The defendants 2 and 3 had issued cheques as security for due payment in a sum of Rs.15,31,627/- on a cheque dated 27.12.2010 drawn on the State Bank of India, Munirabad Branch and for a sum of Rs.12,30,344/- respectively, both of which when presented for realization had been dishonoured. It is in this background that the suit was filed.

4. At the trial, the plaintiff had produced and marked documents at Exhibits P.125 to P.139 to counter the claim of the defendant that payments had been made over time which adequately covered the liability and as per the accounts maintained, there was no outstanding amount. In that, it was sought to be established by production of Exhibits P.125 to P.139, that there was an agent of the plaintiff who canvassed the business and on instructions from defendant No.1, payments made by defendant No.1 from time to time had been apportioned against the dues of defendants 2 and 3 and therefore, if such adjustments are taken into account, the defendant No.1 was found due of the amount as claimed under the suit. The defendant No.1 merely having claimed in the written statement that payments had been made against the supplies, some in advance and some after the supply of goods, had not chosen to firmly claim a set-off. Therefore, the Court below has chosen to zero in on the circumstance that the dispute was in relation to supplies made between the dates 17.08.2010 to 16.10.2010 and since normally payments should be made against supplies only after the event, any payments made by defendant No.1 prior to 17.08.2010 would not be taken into account and since Exhibits P.125 to P.139 indicated that there were adjustments made against payments already made by defendant No.1, it could not be said that the liability had been discharged, is the reasoning on which the trial Court has proceeded and has accordingly decreed the suit. It is this, which is canvassed before us as being an erroneous presumption and it is brought to the attention of the Court that PW.1 has admitted in so many words that there was no authorization in writing either to the plaintiff or its agent, namely, Sai Raghvendra Agencies, to appropriate payments made, to the accounts of defendants 2 and 3, apart from defendant No.1, as well. It is this, which is emphasized in also seeking to contend that as per the application now filed before this Court on I.A.No.1/2017 seeking to produce additional evidence would fortify the stand of the appellant, that as per the statement of accounts,

the payments made by the defendant No.1 against the supplies for the accounting year 2010-11 would indicate that there was no outstanding against supplies made and that therefore the Court was in error in holding that the appellant had failed to demonstrate that payments had been made against the supplies when admittedly the transactions between the plaintiff and the defendants was on credit basis and was a long standing relationship, where the transactions ran into crores of rupees and if the accounts had been matched, it would be evident that appellant was not due in any sum of money to the plaintiff and in fact had paid amounts in excess of the so-called liability.

5. In this regard, the learned counsel for the appellant would take us through the record as well as the additional documents now sought to be produced to demonstrate this aspect of the matter.

6. The learned Senior Advocate, Shri S. Sreevatsa appearing for the counsel for the respondent No.1 - plaintiff would argue that the contentions now canvassed by the appellant - defendant No.1 are entirely alien to the pleadings before the trial Court and any such argument is impermissible. The appellant is precluded from setting up a whole new defence before this Court. The appellant had neither pleaded a set off before the trial Court nor was seeking a counter claim and in the absence of which the contentions now raised are at best a set off that is claimed and a half-hearted counter claim that is also sought to be slipped in, which are impermissible. He would further contend that even if Exhibits P.125 to 139 are eschewed, it would not dilute the case of the plaintiff whatsoever as it is the straightforward case of the plaintiff that supplies have been made for which payments are not received. It was for the defendants to establish that payments had been made. The contention that payments had been made in advance which have not been taken into account or have been unauthorizedly adjusted, is not the pleading in the written statement. Except the bare denial of the liability, there is no such foundation laid and therefore, the appellant seeking to improve upon his case by seeking to produce additional evidence is impermissible under Order XLI Rule 27 of the Code of Civil Procedure, 1908, unless the appellant can assign reasons to support the grounds on which such additional evidence could be permitted. The appellant is precluded from adducing any such so-called additional evidence. It is not the case of the appellant that such material was not available or within its reach at the trial and therefore, any such improvement of the defence cannot be permitted at this stage and would submit that the trial Court has by a reasoned judgment and on the basis of material evidence has arrived at its conclusions which cannot be faulted and therefore, the appeal is misconceived and seeks dismissal of the same.

7. In the light of the above contentions and on a perusal of the record, it is indeed a fact that the plaint does not contain any averment as to payments made by the defendant No.1 over a period of time having been appropriated towards the outstanding of amounts in transactions between the plaintiff and defendants No.2 and 3. It is, however, sought to be sprung as a surprise, as it

were, by the defendants seeking to produce Exhibits P.125 to 139 to bolster its case that any payments made by the plaintiff have been accounted for. Admittedly, there is no authorization, in writing, provided by defendant No.1 to the plaintiff or its agent to appropriate amounts towards the accounts of defendants 2 and 3 as well, apart from appropriating certain amount to the account of defendant No.1. If those amounts which are appropriated to the accounts of defendants 2 and 3 are taken into account as the discharge of liability of defendant No.1, it would appear that the liability of the defendant No.1 would disappear. This is a circumstance which has been overlooked by the trial Court.

8. We are aware of the strong objection that the defendant No.1 has not claimed a set off or has urged a counter claim. This aspect of the matter cannot be of serious concern. It is seen that under Order VIII Rule 6 of the CPC, though the defendant is required to plead a set off at the first hearing, it is also laid down that the Court could permit the defendant to do so even at a later stage. Therefore, the mandate as regards the plea to be raised by way of set off is flexible and is not so rigid as to attract the bar of limitation which the learned Senior Advocate, Shri Sreevatsa, has emphasized.

9. In other words, when this Court is impressed with a circumstance which requires attention and which could even establish the defence set up, to stand on the formality or the technicality of the bar of limitation or the manner in which the defence might have been urged before the trial Court, ought not to deter the defendants from obtaining fair adjudication. After all the object of adjudication is to arrive at the truth and when there is a circumstance as pointed out above which has passed muster by the trial Court, it would be appropriate that the parties are given full rein to agitate on the said aspect, especially when it involves a large sum of money which could mean the ruin of one and the unlawful gain of the other. The fact that the appellant also seeks to adduce additional evidence though may fail on the ground that the appellant could have produced the material at the appropriate time, but has not done so, would still enable this Court to hold that the evidence is necessary to arrive at the truth of the matter and therefore, would be permissible as laid down under Order XLI Rule 27 of the CPC. In that view of the matter, it is a fit case where the defendant No.1-the appellant herein, should be permitted to plead a set off even without the necessity for the amendment of the pleadings and the Court could address that aspect on a remand. The appellant should also be permitted to adduce additional evidence which is sought to be brought on record by recourse to I.A.No.1/2017 while it is also made clear that the plaintiff should be given free rein as well in countering the defence and to adduce such additional evidence as it may choose.

10. Accordingly the judgment and decree of the trial Court is set aside. The matter is remanded for a fresh trial to supplement the evidence already on record. The Court below shall deal with the matter at its discretion and in

accordance with law. It is also noticed that defendants 2 and 3 had not participated at the trial and the suit has been dismissed as against defendants 2 and 3. It is open for the said defendants to supplement the pleadings, even at this late stage and for the plaintiff to establish by further evidence as to their liability and the adjustments made.

11. In view of the fact that the suit is of the year 2012, the trial Court is requested to expedite the further proceedings and to complete the same within a period of six months from the date of receipt of the record, if not earlier.

12. The registry is directed to remit the records to the trial Court forthwith. In view of the remand by this judgment, 50% of the court fee be paid to M/s. M.K.R. Poultry Farm and the bank guarantee furnished shall stand cancelled and discharged.