

(2018) 02 MAD CK 0167
In the Madras High Court
Case No : 1094 of 2009

M/s. International Clothing House & Anr.	APPELLANT
Vs	
M/s. Gowtham Tex & Ors.	RESPONDENT

Date of Decision : 14-02-2018

Acts Referred:

Citation : (2018) 02 MAD CK 0167

Hon'ble Judges : A.Selvam, G.Jayachandran

Bench : Division Bench

Advocate : K.V.Subramanian, R.Kannan, T.Sundarrajan

Final Decision : Allowed

Judgement

1. This appeal suit is directed against the judgment and decree passed by the Additional District Court-cum-Fast Track Court in O.S.No.109 of

2005. The substance of the plaint is that, the first plaintiff firm is manufacturer of Hosiery Garments. The first defendant firm represented by the

second defendant used to collect orders from foreign buyers and transfer the order to the manufacturers like plaintiffs and get commission at the

rate of 5% of the total value of the order placed and executed. While so, a sum of Rs.18,65,279/- had been paid over and above the commission

payable to the defendant which is to be returned. When, notice was sent to the defendant to repay the money paid in excess, the defendant replied

making counter claim. Therefore, the present suit for recovery of money with interest.

2. Per contra, in the written statement, it is contended by the defendants that the first defendant firm is in the trade of procuring orders from

intended purchasers of Hosiery Garments outside the country. As per the trade

practice, the first defendant used to procure orders for supply of Hosiery Garments from intended purchaser and transfer the purchase advice to the manufacturers like first plaintiff by way of "transfer advice". The difference between the "Vendor price" and "buyer price" will be the remuneration/commission. The payment to the defendant will be paid by the manufacturer on realisation of the sale consideration. In this case, as per the trade practise, the plaintiffs have paid the commission after being satisfied on the debit notes raised by the defendants. As per the account maintained by the first defendant a sum of Rs.20,72,028/- is still due from the plaintiff to the first defendant. Thus, the counter claim for the said is made in the written statement.

3. Based on the pleadings, the trial Court has framed following issues;

- (i). Whether the plaintiff is entitle to the suit claim?
- (ii). Whether the defendants are entitled to the counter claim?
- (iii). For what relief the plaintiffs and defendants are entitled?

4. To prove the case, on behalf of the plaintiffs, 2 witnesses examined and 57 exhibits marked. On behalf of the defendants, 1 witness examined and 22 Exhibits marked.

5. The trial court after considering the rival submissions has held that the plaintiff are entitled for a decree of Rs.18,65,279/- with interest at the rate of 12% from the date of the suit; till the date of realization and rejected the counter claim of the defendants.

6. In the course of the judgment, the trial Court has relied upon Ex.A.33 (TDS certificate) Form-16A, reflecting the tax deducted at the source of payment to the defendant by the plaintiff for the period of 14.04.2003 to 31.03.2004 and Ex.A.9 which is the e-mails copy addressed to the defendants wherein it is stated by the plaintiff only 3% commission is payable to the agents for canvassing orders for them. However they are ready to pay 5% on FOB value. Therefore the money paid in excess has to be refunded.

7. Aggrieved by the judgment and decree, the present appeal is preferred on the ground that the trial Court has failed to frame the vital issue, whether the commission payable by the plaintiff to the defendant is 5% of FOB value or on piece rate basis. Further, the Trial Court has come to wrong conclusion that as if trade practice prevail between manufactures and the

agent to pay only 5% pro-rata commission and not at piece rate.

The finding of the trial Court that the money paid over and above to the defendants is in excess and liable to be repaid is without considering the

counter claim of the defendant, which is clearly established through the plaintiff documents itself. The debit notes relied by the plaintiff itself will

show piece rate commission is to be paid to the defendant and same duly paid. Hence, the claim of excess payment is only an after thought, to

deny the defendant his commission in the subsequent transactions. The Trial Court without properly considering the deposition of the plaintiff, it had

picked evidence here and there to defeat the lawful claim of the defendant. When there is a specific admission by the plaintiffs that towards

commission debit notes were raised and paid to the defendants, the Trial Court had erroneously relied upon Ex.A.16, a self serving statement of

account which is not a record kept in the normal course of business but manufactured for the purpose of the suit. The transfer advices along with

debit notes will clearly disprove the plaintiff case. But, the Trial Court has erroneously allowed the plaint and dismissed the counter claim. The

documents relied upon by the defendants and marking as B series exhibits were not at all been considered by the Trial Court.

8. The commission to the defendant was the difference between ""Vendor's price"" and ""buyers price"". While the vendor's price is fixed by the

plaintiff/Manufactures, the buyer price is negotiated by the defendant with the buyer at foreign. The defendant for getting orders will make sample

piece, either will send the samples through courier or other mode, travel abroad and confirm the order from the customers for the price negotiated.

The price fixed at the buyers end will be higher than the vendors price. The difference in price is the remuneration the defendant get.

9. In one such order relating to ""Anchor Blue"" and ""Academic"" the plaintiff failed to get letter of credit open and get quota from Apparel Export

Promotion Council which is allotted on first cum first basis. Hence it lost the business in spite of transfer advice issued. For the default of the

plaintiffs, the defendants cannot be held liable. For the alleged loss incurred due to failure in supply, the plaintiffs cannot lay suit for return of the

money paid as commission towards the concluded and completed contract.

Points for consideration

Whether the judgment of the trial court holding the plaintiff had proved the money paid to the first defendant under various debit notes is over and above the agreed commission payable is based on admissible evidence??

10. The plaintiff herein is manufacture in Hosiery Garments. It is a registered firm represented by 2nd and 3rd plaintiff as partners. Plaintiff is also the member of AEPC with import and export code. These facts are not disputed and also proved through Ex.A.1 to Ex.A.8. Admittedly, there is no written contract between the parties. Except their conduct and documents pertaining to the transactions no other evidence available to infer any special trade practise. For the first time, it appears from the record that on 03.01.2004, the plaintiff has raised the issue of fixation of commission for the orders canvassed by the defendants and transferred to the plaintiffs. This e-mail is marked as Ex.A.9 which has been allowed to be marked without any objection.

11. Reading of this Exhibit, it is clear that there was no consensus between the parties in respect of working out the remuneration for the service rendered by the defendants. While the plaintiffs has stated that the agent commission payable by exporters for the buying houses is usually 3% of the FOB value of the exported goods, however they agree to pay 5% commission instead of 3% for the order which they executed for the defendants. In the same e-mail Ex.A.9, the plaintiff has also mentioned about the loss incurred by them due to sudden cancellation of ""Anchor Blue"" and ""Academic"", orders which was first placed by the defendants and later cancelled. For the said email, the defendants has responded saying that, they are not buying agent who work for fixed commission. The vendor rate was negotiated with the plaintiff and only after confirmation of the vendor rate, the sale was negotiated with the buyer. After a year the plaintiff is talking about percentage, which is against business ethics. Thereafter, the plaintiff has issued notice Ex.A.10 to the defendants through lawyer along with statement of accounts. On the part of the plaintiffs the statement of accounts marked as Ex.A.16 is relied. As pointed out by the counsel for the appellants, the statement is only an extract and it is not proved to be statement of accounts kept in the regular course of business. Further, except the statement no documents to substantiate the entries in the statement produced for the Court to appreciate the veracity of the

entries found in Ex.A.16

12. The learned counsel appearing for the appellant referring Ex.A.17 to Ex.A.29 which are debit notes raised by the defendants in the name of

plaintiff firm M/s.Gowtam Tex, the invoice of Air way bill and transfer advices filed as Ex. B series contended that all along the plaintiffs were

aware of the fact that the difference between the ""vendors price"" and ""buyers price"" was the commission payable to the defendants. This could be

seen by the conduct of the plaintiff who had acknowledged the debit notes and paid the commission periodically to the defendants by way of

cheques. The Tax at source was also deducted. Because the plaintiff failed to get quota from AEPC in respect of the orders placed by the

defendants in respect of ""Anchor Blue"" and ""Academic"" the order ended in cancellation. After period of one year, the plaintiff has woken up and

claim as if the commission paid to the defendants is over and above the agreed rate of commission i.e., 5%. Whereas the claim not only includes

the difference in commission but also the alleged loss incurred in cancellation of ""Anchor Blue"" and ""Academic"". In the absence of specific

pleadings and documents to prove when those orders were place. Why the orders were cancelled and how the alleged loss occurred? The finding

of the trial Court solely based on Ex.A16 statement is totally baseless.

13. The transfer advice Ex.A.34 series which are relied by the plaintiff indicates that the defendants herein has acted as middle man between

manufacturer/vendor and the foreign Buyer. The name of the defendant find place in the transfer advices. While so, it is certain that the defendants

are entitled for remuneration whatever name is called, whether it is commission at pro-rata or difference between the Vendor price or Buyer price.

Admittedly, there is no written contract in this respect and the plaintiff himself is not certain about the percentage of commission. The tenure of the

email Ex.A.9 which say the prevailing practice is only 3% but ready to pay 5% indicates the uncertainty and not certainty.

14. If one go by the claim of the defendants, the difference between the ""Vendor price"" and ""Buyer price"" used to be the commission. The debit

notes raised by the defendants and accepted by the plaintiffs also indicates that the remuneration is not percentage basics but for piece rate. Both

the parties rely upon the documents generated by them and deny the documents

emanated from the otherside. While the defendant/appellant relies on the entries found in the debit notes and the transfer advices, it is the case of the plaintiff that by misleading the plaintiff, excess commission has been collected by the defendants. When on the face of the debit notes which is marked as Ex.A.17 to Ex.A.29 and Ex.A.37 to Ex.A.55 and the transfer advices which is marked as Ex.A.34 series it is very specifically mentioned the commissioner is per piece, the averment that excess money was paid by mistake finds no substance worth consideration. If commission is to paid on percentage basics, there is no necessity to make detailed description under the head ""Particulars"" in the Debit notes. It would have been suffice to mention merely the percentage and the FOB value. When debit notes are raised at piece rate and the same being acknowledged and paid by the plaintiff, after lapse of one year they cannot take a plea that the defendant has been paid in excess and it should have been only on percentage basis. Such a plea is quite contrary to the debit notes pertaining to the transactions. If it is percentage basis, then specific rate of commission should have been agreed by the parties and it should have found place in the documents. Ex.A.9, the communication between the parties through email indicates that the plaintiff admits though the trade practice is only 3% they are ready to pay 5%. This concession to pay higher percentage is not before completion of transaction but after the completion of transaction and after the payment of commission on piece rate. The plain reading of Ex.A.9 we find it is concentrated more on the cancellation of the subsequent order (""Anchor Blue"" and ""Academic""). Unfortunately, the Trial Court has carried away by certain entries found in Ex.A.33 which is ""Form 16-B"" given to the Income Tax Department wherein the rate at which tax deducted and paid to Income Tax department mentioned as 5%. The Trial Court has erroneously construed that this 5% refers to the commission payable or paid to the defendant.

15. M/s. Gowtam Tex plaintiff herein has issued Form 16A certificate in favour of the defendant M/s. International Clothing House which is marked as Ex.A.33 wherein it is stated that during the period from 01.04.2013 to 31.03.2004 a sum of Rs.18,34,899/- had been paid to International Clothing House for which a sum of Rs.91,745/- is deducted as Tax at source at the rate of 5%. The trial Court has mistakenly,

arrived at a conclusion that the commission payable is only 5% whereas the plaintiff has paid commission over and above 5% to the defendants for

the order they have placed with the plaintiff on behalf of the foreign buyers. Misreading of the said Form-16 A (Ex.A.33) has led to erroneous

conclusion which is to be interfered in this appeal. Hence, the judgment of trial Court is liable to be set aside.

16. The plaintiff firm through Exhibits has failed to establish, that the commission payable to the defendants is on pro-rata basis. In the absence of

written contract, only through the conduct of the parties the term of contract could be inferred. In this case, peculiarly, the parties have completed

the contract, money also been paid. After lapse of one year a plea has been raised alleging excess money paid contrary to the trade practice. He

who pleads trade practice contrary to the content of documents has to prove the existence of such trade practise. The debit notes and Transfer

Advices in this case speaks about commission at piece rate. In the absence of evidence contra to written documents, the content of the document

shall prevail. When the documents speaks for itself, fact contrary to the content of the documents in the name of trade practise has to be proved

through unassailable evidence. The plaintiffs/respondent have failed to place before the Court material evidence to support their plea. Except the

self serving documents, no other external evidence is available for the Court to hold the preponderance of probability in favour of the plaintiffs.

Equally the appellant as defendants have not come out with material evidence in support to their counter claim.

17. In the result, this Appeal Suit is allowed without costs. The judgment and decree passed in O.S.No.109 of 2006, by the Additional

District/Fast Track Court, Coimbatore, are set aside and O.S.No.109 of 2006 is dismissed without costs. Connected miscellaneous petition is

closed.