
(2008) 06 KAR CK 0062
In the Karnataka High Court
Case No : C.R.P. No. 460 of 2005

Sauermilch Design and Handles GMBH	APPELLANT
Vs	
Southern Sales and Services	RESPONDENT

Date of Decision : 26-06-2008

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 37 Rule 5, 151

Citation : (2009) 1 KarLJ 276

Hon'ble Judges : Arali Nagaraj, J

Bench : Single Bench

Advocate : George Joseph, for the Appellant; Pramod N. Kathavi, for the Respondent

Final Decision : Allowed

Judgement

Arali Nagaraj, J.—The petitioner herein has challenged the legality and correctness of the order dated 2.2.2005 passed on IA under Order 37 Rule 5 r/w. Section 151 CPC filed in O.S. No. 6700/2003 pending on the file of the learned XXXI Addl. City Civil Judge (CCH-14), Bangalore (hereinafter referred to as "the Learned Judge"), granting leave to the respondent-defendants 1 to 3 unconditionally to defend the said suit.

2. the petitioner-company filed the said suit, invoking the provisions of Order 37 of CPC, against the present respondent Nos. 1 to 3 for recovery of a sum of Euro 757,885.42 which is equivalent to Rs. 3,86,52,885.42 in Indian Currency. The said amount was sought to be recovered by the petitioner-plaintiff from the first defendant-firm, of which the other defendants are the partners. In response to the summons issued in the said suit, the respondent-defendant Nos. 1 to 3 appeared in the said suit and filed an application under Order 37 Rule 5 r/w. Section 151 CPC seeking leave to defend the said suit. The said application was seriously contested by the petitioner-plaintiff by filing written objections to it. After hearing both the sides on the said application and after perusing all the documents produced by the plaintiff, the learned Judge allowed the said

application and granted unconditional leave to the respondent-defendants to defend the said suit. The legality and correctness of the said order is challenged in this revision petition.

3. Heard the arguments of Sri George Joseph, learned Counsel for the petitioner and Sri Pramod N. Kathavi, learned Counsel appearing for respondents 1 to 3 and perused all the documents filed in the said suit by the petitioner-plaintiff, the copies of which are furnished by the learned Counsel for the petitioner-plaintiff.

4. Stated in brief, the case of the plaintiff as averred in the plaint are as under:

a) The plaintiff has been a German based Company incorporated and functioning under the laws of Germany. The defendant No. 1 has been a partnership firm of which the defendant Nos. 2 and 3 are the partners. The defendants supplied to the plaintiff-company at Germany the home furnishing products such as curtains, cushion covers, place mats, table cloth etc., as per the contract entered into between the plaintiff and the defendants during May 1999.

b) Pursuant to the said contract, as per the orders placed with it during March 2000 by the plaintiff-company, the defendants supplied the fabrics by shipping them to Poland. It was realised by the plaintiff that the fabrics that were sent by the defendants were not of such standard quality as agreed under the said contract and large portion of the fabrics were faulty and stained and as such the plaintiff utilised only such portion of the fabrics which were according to the standard quality.

c) During December, 2000, the plaintiff's customer took inspection of the goods supplied by the defendants and found that the large portion of the same were defective, faulty, stained and not usable for their purpose. Therefore, through the latter dated 7.12.2000, (Annexure "B") the plaintiff informed the defendants, of the inspection report and brought to the notice of the defendants the faults and defects of the goods. Thereafter, through his letter dated 19.12.2000 (Annexure "C-1"), the plaintiff-company informed the defendants, of the claim being made by its customers and also furnished to the defendants a copy of the inspection report (Annexure "C-2") obtained by the plaintiff in respect of the said goods supplied by the defendants.

d) In response to the above letter (Annexure "C"), the defendants, through the latter dated 21.2.2001 (Annexure "D") admitted their liability to the plaintiff and agreed to pay to the plaintiff a sum of DM 6,80,000.00 in five equal monthly installments of DM 136,000 each. Thereafter, under their two separate letters both dated 20.11.2001 (Annexures "G1" and "G2") addressed to the plaintiff-company, the defendants admitted, acknowledged and confirmed their liability to pay to the plaintiff a sum of euro 211,896.13 as mentioned in Annexure "G1" and another sum of Euro 109,071.38 agreeing to pay the same with interest thereon before December 2002. Accordingly, the defendants made payments of different sums to the plain tiff-company.

e) After adjusting the amounts received from the defendants towards the said amount, the defendants became due to the plaintiff-company, as on 31.3.2003, a sum of Euro 605,607.78 together with interest at the rate of 8.5 per cent p.a from April 1, 2003 till payment. Since the defendants did not make payment of the said amount to the plaintiff, the latter got issued a legal notice dated 9.5.2003 (Annexure "H"). Despite receipt of the said notice, the defendants did not respond to the same by giving a reply to it. Therefore, the plaintiff-company filed the said suit seeking recovery of a sun of Euro 757,885.42 (Rs. 3,86,52,156.42 in Indian currency).

5. Sri George Joseph, learned Counsel for the petitioner-plaintiff placing reliance on the decision of the Hon"ble Supreme Court in the case of Mechelec Engineers and Manufacturers Vs. Basic Equipment Corporation, , which decision is also relied upon by the learned Counsel for the respondents, strongly urged that the learned Judge committed serious error in granting unconditional leave to the defendants to defend the said suit without considering the specific amount of money which the defendants admitted in clear terms in their letters at Annexures D, E, G-1 and G-2. He further submitted that the defence taken by the defendants in their application filed under Order 37 of CPC seeking leave to defend the suit is based on no facts, besides being sham, moonshine and illusory. He further contended that the Learned Judge, without properly applying his mind to the averments, as to the defence of the defendants, made by the 3rd defendant in his affidavit sworn to in support of the said application, granted leave to the defendants unconditionally.

6. Learned Counsel for the petitioner-plaintiff placing reliance on the decision of Bombay High Court in the case of Sicom Ltd. Vs. Prashant S. Tanna and Others, further submitted that if the learned Judge could notice any discrepancy in the amount claimed by the plaintiff-company in its plaint: and the amount admitted by the defendants under Annexures D, G-1 and G-2, he could have granted conditional leave in respect of such portion of the amount as is admitted by the defendants and unconditional leave in respect of the other part of it.

7. AS against the above contentions of the learned Counsel for the petitioner, Sri Pramod N. Kathavi, learned Counsel for the respondent-defendants strongly urged that the defendants have taken proper defence in respect of the document at Annexure "D", based on which the plaintiff-company has sought for a judgment and decree by invoking summery procedure under Order 37 of CPC and therefore, it could not be said that the defence raised by the defendants is either sham, or moonshine, or illusory, or based on no facts, and as such, the order impugned in this revision petition granting unconditional leave to the defendants to defend the said suit cannot be interfered with.

8. On a careful reading of the decision of the Hon"ble Supreme court in the casa of Mechelec Engineers and Manufacturers Vs. Basic Equipment Corporation, , which is also relied upon by the learned Counsel for both sides, it could be seen that the Hon"ble Supreme Court has observed at para 8 of the judgment as

under:

Para 8: In *Sm. Kiranmoyee Dassi v. Dr. J. Chatterjee* (1945) 49 Cal WN 246 at p. 253, Das, J., after a comprehensive review of authorities on the subject, stated the principles applicable to cases covered by Order 37, CPC in the form of the following propositions:

a) If the defendant satisfies the Court that he has a good defence to the claim on its merits the plaintiff is not entitled to leave to sign judgment and the defendant is entitled to unconditional leave to defend.

b) If the defendant raises a triable issue indicating that he has a fair or bona fide or reasonable defence although not a positively good defence the plaintiff is not entitled to sign judgment and 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 to say, although the affidavit does not positively and immediately make it clear that he had a defence, yet, shows such a state of facts as leads to the inference that at the trial of the action he may be able to establish a defence to the plaintiff's claim the plaintiff is not entitled to judgment and the defendant is entitled to leave to defend but in such a case the court may in its discretion impose conditions as to the time or mode of trial but not as to payment into Court or furnishing security.

d) If the defendant has no defence or the defence set up is illusory or sham or practically moonshine then ordinarily the plaintiff is entitled to leave to sign judgment and the defendant is not entitled to leave to defend.

c) If the defendant has no defence or the defence is illusory or sham or practically moonshine then although ordinarily the plaintiff is entitled to leave to sign judgment the Court may protect the plaintiff by only allowing the defence to proceed if the amount claimed is paid into Court or otherwise secured and give leave to the defendant on such condition and thereby show mercy to the defendant by enabling him to try to prove a defence.

The Hon'ble Supreme Court has further observed at para No. 7 of the same judgment as:

Para 7: We need not dilate on the well established principles repeatedly laid down by this Court which govern jurisdiction of the High Courts u/s 115, CPC. We think that these principles were ignored by the learned Judge of the High Court in interfering with the discretionary order after a very detailed discussion of the facts of the case by the learned Judge of the High court who had differed on a pure question of fact - whether the defences could be honest and bona fide. Any decision on such a question, even before evidence has been led by the two sides, is generally hazardous. We do not think that it is fair to pronounce a categorical opinion on such a matter before the evidence of the parties is taken so that its effects could be examined, in the case before us, the defendant had denied, inter

alia, liability to pay anything to the plaintiff for an alleged supply of goods. It is only in cases where the defence is patently dishonest or so unreasonable that it could not reasonably be expected to succeed that the exercise of discretion by the trial court to grant leave unconditionally may be questioned. In the judgment of the High court we are unable to find a ground of interference covered by Section 115, C.P.C.

9. Further, in the case of *Sicom Ltd. Vs. Prashant S. Tanna and Others*, the Bombay High Court has observed at para No. 25 as under:

Para 25: The plaintiff is not bound to abandon a part of its claim so long as the suit is maintainable as a summary suit. So long as the suit is maintainable as a summary suit, even if at hearing of the summons for judgment it is found that the claim is in excess of what is warranted by the contractual document or a statutory provision, it would be open to the court in the exercise of its discretion to pass an order other than an order of unconditional leave to the defendant to defend the suit even if the plaintiff does not abandon his claim in respect of such part of the claim. It would be open to the learned Judge to grant conditional leave or pass a decree in respect of a part of the claim which he believes to be properly quantified, and unconditional leave in respect of that part of the claim which he thinks is excessive. The only caveat he would add here is that in such a case it would logically follow that the consequence of the defendant failing to comply with the condition would entail the defendant being deprived the opportunity of defending the suit only to the extent of the claim in the suit which the learned Judge finds is properly quantified. For it cannot be that a failure to comply with the condition should result in a decree for the entire claim including the claim in respect of which unconditional leave is granted.

10. Keeping in mind, the principles laid down by the Hon'ble Supreme Court and also the Bombay High court in the above said cases, now I have to consider the rival contentions of the learned Counsel for both the sides. It is not the case of the petitioner-plaintiff that the learned Judge ought not to have granted leave at all and he should have decreed the suit of the plaintiff by signing the judgment. On the other hand, the case of the plaintiff is that unconditional leave should not have been granted.

11. As could be seen from the averments in the plaint and the documents Annexures D, E, F, G-1 and G-2, relied upon by the petitioner-plaintiff, there has been discrepancy in the total amount claimed in the suit and the total amount under the said documents which is said to have been admitted by the defendants. The suit of Euro 757,885.42, which is claimed by the plaintiff-company in its suit comprises of a sum of Euro 211,896.13 as found in Annexure G-1, another sum of Euro 109,071.38 which is shown as the net amount due by the defendants to the plaintiff-company (after deducting a sum of Euro 238,607.10 admittedly paid by the defendants, from the total due of Euro 347,678.48). The said total claim is also inclusive of a sum of Euro 284,640.17, which is shown as due by the defendants to the plaintiff-company in the invoice

Annexure "p" dated 28.10.2001. The total of the said three sums of money under Annexures G-1, G-2 and F comes to Euro 605,607.78. But the total amount claimed by the plaintiff-company in the suit is Euro 757,885.42.

12. Thus, it is clear from the above figures that the plaintiff has claimed in the suit about Euro 1,52,277 in excess over the total of sums under Annexures G-1, G-2 and F. During the course of the arguments, learned Counsel for the petitioner-plaintiff tried to explain this discrepancy submitting that this excess amount has been the interest at the rate of 9.5 percent, p.a. on the principal sums due and also other costs. However, he has not been able to point out from any of the documents produced on record by the plaintiff as to there being any agreement between the plaintiff and defendants as to the payment of interest at the said rate. This being so, the plaintiff-company has to prove, by adducing evidence in the said suit during its trial, that it is entitled to interest at the said rate on the respective principal amounts due to it by the defendants.

13. During the course of arguments, the learned Counsel for the petitioner-plaintiff-company fairly submitted that the amount under Annexure-F invoice i.e., a sum of Euro 284,640.10 has not been admitted by the defendants under any of the documents produced on record by the plaintiff. Therefore, it is quite natural that the defendants have got every right to challenge the correctness of the same. However, Learned Counsel for the petitioner-company submitted that the defendants have not denied the document Annexure "F" nor have they said anything in respect thereof in the affidavit sworn to by the 3rd defendant in support of the application for leave to defend the suit and therefore, the said amount has to be taken as the admitted one. This contention cannot be accepted for the reason that even if the said document (Annexure "F") is not denied by the defendants in the said affidavit, the said claim may not be allowed only on that ground inasmuch as the Trial Court may require the plaintiff to prove its contents and the liability of the defendants thereunder despite the non-denial of the same by them. Therefore, I am of the considered opinion that the plaintiff-company could not get Judgment and Decree for the said amount under Annexure-F and the defendants have every right to challenge the correctness of the same. Therefore, applying the principles laid down by the High Court of Bombay in *Sicom Ltd. Vs. Prashant S. Tanna and Others*, I hold that the defendants are entitled to unconditional leave in respect of the amount: under Annexure "F" i.e., Euro 2,84,640.10 and also in respect of other part of plaintiff's claim for excess amount excluding the total of the sums under Annexures G-1 and G-2 (which comes to Euro 3,20,967.51 or Rs. 1,63,69,342.66)

14. On perusal of Annexure "G-1", it could be seen that the 3rd defendant, the partner of the first defendant firm has stated in clear terms in the said letter that they (the defendants) agree that they have to pay to the plaintiff-company in all Euro 211,996.13 and the same would be paid by them with accumulated interest till the end of December, 2002. Further, as could be seen from Annexure "G-2",

the said defendant has stated therein that the defendants owe to the plaintiff a sum of Euro 109,071-38 and the same would be paid by them along with accumulated interest till the end of December 2002.

15. Thus, it is clear from Annexures G1 & G2 that the defendants have accepted under the said documents that they owe to the plaintiff-company the respective amounts mentioned therein, the total of which comes to Euro 320,967.51 which is equivalent to Rs. 1,63,69,342.66 in Indian currency. As to this admission, learned Counsel for the respondent-defendants, while drawing my attention to the averments in the affidavit sworn to by the 3rd defendant in support of the application seeking leave to defend, submitted that Annexures D, E, G-1 and G-2 on which the petitioner has based its claim came into existence "under peculiar circumstances" which involved mutual commitments which could be demonstrated before the trial court, if a full dressed trial is conducted.

16. As could be seen from the said affidavit of 3rd defendant, he has stated therein at para Nos. 4, 5, 6 and 7 as under:

There are serious disputed averments of facts. Consequently, the plaintiff cannot press into service Order 37 of CPC to project his case as if the claim is based on admitted liability. (para 4)

The defendants have supplied the goods as per specification given by the plaintiff. The plaintiff have raised certain disputes regarding the availability of the goods supplied. The document Annexure "D" upon which the plaintiff has placed reliance to bring the above suit within the parameters of Order 37 of CPC is a document contingent upon a continued assured contract and placement of further orders. (para 5)

Annexure "D" cannot be read in isolation, inasmuch as the same came into existence under peculiar circumstances, which involve mutual commitments and covenants which could be demonstrated before the Hon'ble Court if a full dressed trial is conducted. (para 6)

While they (plaintiff) have made a claim towards certain alleged admissions of supply of defective goods, they are also making a claim in respect of value of the goods returned to the defendants in India. This, in effect, means that the plaintiff is claiming twice the value of the goods. Assuming, but not admitting, that the goods supplied are defective, even then, the plaintiff cannot claim the value of the goods twice. (para 7)

17. On careful reading of the above averments in the affidavit of the 3rd defendant sworn to in support of the application for leave, it is clear that in Order to succeed in obtaining the decree for the full amount of claim made by the plaintiff-company in the suit, it has to prove, as rightly observed by the learned Judge in the impugned order, the quantity of the defective goods and cost thereof; the cost incurred by the plaintiff in returning the defective goods to the defendant firm at India. Though it is not stated in the said affidavit in clear terms

the facts which constitute the "peculiar circumstances", "the commitments and covenants", "business strategy" and "the facts contingent" upon which the documents Annexures D, G-1 and G-2 came into existence, nevertheless, the defendants may succeed in proving certain facts which may exonerate them from their liability to pay either the entire amount claimed by the plaintiff-company in excess over the total amount under Annexures G-1 & G-2 which they have agreed to pay to the plaintiff company or any portion thereof or even any portion of the amount under Annexures G-1 and G-2.

18. Having regard to the nature of the defence taken by the defendants in the said affidavit though it appears that the chances of success for the defendants are too remote, yet, it would be hazardous to arrive at a conclusion even before parties could lead evidence, that the said defence of the defendants in respect of the admitted part of the claim of the plaintiff-company under Annexures G-1 and G-2 is sham, moonshine or illusory. I am of the considered opinion that by making the above said averments in the said affidavit, the defendants have raised a triable issue in the said suit which has to be decided after a full fledged trial.

19. I am of the further opinion that though the defendants have raised a triable issue, the defence taken by them in respect of their liability admitted under Annexures G-1 and G-2, besides being vague, is not supported by specific facts sufficient to exonerate them from their liability to pay to the plaintiffs the said amount in its entirety. In view of the clear admission by the defendants under the said documents, though subject to their said defence, that they owe to the plaintiff that much of money and their undertaking to pay the same with interest thereon, though not at the rate of 8.51 p.a as claimed by the plaintiff-company, at some reasonable rate, before the end of December 2002, even if the defendants may succeed in establishing that the plaintiff has claimed twice the value of the defective goods that were returned to the defendants, that much of money would only be a portion of the claim of the plaintiff-company under the documents but not the entire amount. Thus, it is clear that though the plaintiff-company is not entitled to judgment and decree, even for the said amount of the admitted claim under the documents Annexures G-1 and G-2 (which comes to Euro 3,20,967.51), it may be entitled to substantial portion of the said amount. This being so, it is further clear that despite their being an admission on the part of the defendants as to the said amount and their undertaking to pay the same before the end of December 2002, the plaintiff-company has been deprived of the same since more than five and half years by reason of non payment of the same by the defendants.

20. Though it is not the case of the plaintiff-company that the defendants are not financially so sound as to make immediate payment of the said amount or any part thereof to the plaintiff-company in terms of the decree that may be passed in the said suit in its favour, the fact remains that the plaintiff-company may be deprived of the said admitted amount or a substantial portion of it for a further

period during which the trial of the suit has to be concluded. Therefore, placing reliance on the decisions in *Madura Coats Limited Vs. Dunlop India Limited*, ; *Dura-Line India Pvt. Ltd. Vs. BPL Broadband Network Pvt. Ltd.*, ; *R. Kumar and Co. Vs. Chemicals Unlimited*, ; *Sun N Sand Hotel Limited Vs. V.V. Kamat*, HUF, learned Counsel for the plaintiff-company strongly contended that even if this Court holds that the defence of the defendants is not sham, moonshine or illusory and it raises a triable issue, still the defendants deserve to be directed to make deposit in the trial court atleast a substantial portion of the amount which the defendants have admitted under the said documents, if not the entire amount.

21. As against the above contentions, the learned Counsel for the respondent-defendants defence raised by the defendants is not either sham or moonshine or illusory, the only condition that could ha imposed on the defendants would be as to the mode of the trial of the suit but not as to the deposit of any amount of money into the Court pending trial of the suit.

22. As already observed by me supra, the claim of the plaintiff-company is divisible into two components the one, which is admitted by the defendants, though subject to their defence, and the other, which is not admitted by the defendants and which is subject to proof by the plaintiff-company. Therefore, I am of the considered opinion that though the defendants are entitled to unconditional leave in respect of the disputed portion of the claim of the plaintiff-company, nevertheless, the plaintiff-company is entitled to substantial portion of its such claim as is admitted by the defendants under the said documents. Though the defendants cannot be said to be unable to satisfy the decree, if passed in favour of the plaintiff-company, with a view to make the fund available to the plaintiff-company in case the suit is decreed to any extent of its claim, I feel it reasonable to direct the defendants to make soma deposit into the trial court which shall be a portion of the total sum of liability under Annexures G-1 and G-2.

23. For the reasons aforesaid, the present revision petition deserves to be allowed and it is allowed accordingly. The impugned order passed by the learned Judge on the application of the respondent-defendants filed under Order 37 Rule 5 r/w. Section 151 CPC granting unconditional leave to the defendants to defend the said suit is modified as under:

i) The unconditional leave granted to the defendants to defend the said suit shall be restricted to the claim of the petitioner-plaintiff-company to the amount excluding the total amount of Euro 3,20,967.51 covered under the documents Annexures G-1 and G-2.

ii) Leave to defend the suit in respect of the claim of the plaintiff-company for the said amount of Euro 3,20,967.51 which comas to Rs. 1,63,69,342 in Indian currency shall be subject to condition that the first defendant-firm shall deposit into the trial court 55 per cent of the said amount within 8 weeks from the data

of this order. After the said amount is deposited into the Court, the same shall be deposited with any nationalised bank or schedule bank for a short term. The said amount of deposit, with interest accrued thereon or such portion of it as the successful party would be entitled to in terms of the decree that may be passed in the said suit, shall be ordered to be paid to that party immediately after the decree is passed the learned Judge, shall pass suitable Order in this regard as part of his judgment in the said suit.

iii) Since the suit is of the year 2003 and summary procedure is invoked by the plaintiff, the learned Judge shall dispose of the same as expeditiously as possible and both the parties shall co-operate with the court in this regard. No order as to costs.