

Exh . A.44

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Decided on: 31.12.18

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11 00 19

**IN THE COURT OF PRINCIPAL DISTRICT JUDGE,  
KACHCHH AT BHUJ.**

**Regular Civil Appeal NO. 113/2007**

1. Legal heirs of Late Bipinbhai M. Chandarana,
- 1/1 Binaben Bipin Chandarana, Age : Adult,
- 1/2 Maulik Bipin Chandarana, Age : 30,
- 1/3 Ketki Bipin Chandarana, Age 32,

All R/o. Above G. T. Road,  
Mandvi – Kachchh.

2. Bharat Songhela, Age 50,  
R/o. Azad Chowk, Mandvi.
3. Nehal Harish Ganatra, Age : 33,  
R/o. Ganatra Chambers, Mandvi.

...Appellants

(Org. Defendants No.3/ 1 to  
3/3, 5 & 6)

V/s.

1. Mangaldas Damji Thacker, Age 59,  
R/o. 50/2 Kabutar Khana,  
Kalupur, Ahmedabad.
2. Hitesh Jethalal Atha, Age 45,  
R/o. K. T. Shah Road, Mandvi.

... Respondents

(Org. Plaintiff & Def. No.4)

**An appeal u/s.96 of the Code of Civil Procedure.**

**ADVOCATES:–**

For the appellants No.1 & 2 : L.A. Mr. D. K. Buch.

For the appellant no.3 : L.A. Mr. K. M. Ganatra.

For the respondent no.1 : L.A. Mr. M. D. Thacker.

For the respondent no.2. : L.A. Mr. B. M. Dholakia.

**J U D G M E N T**

1. The present appeal has been preferred by the appellants – original defendants No.3/ 1 to 3/3 and 5 and 6 against the respondents – original plaintiff and defendant no.4 challenging the judgment and decree dated 25.10.2007 passed by Ld. Principal Senior Civil Judge, Bhuj – Kachchh in Special Civil Suit No.63/1997 whereby the suit filed by the plaintiff – present respondent No.1 has been decreed by the Trial Court, therefore, the aggrieved defendants as above have preferred this appeal.

2. Being aggrieved by and dissatisfied with the impugned judgment and decree dated 25.10.2007 of the Trial Court allowing the suit of the plaintiff and directing the defendants to pay Rs.1,45,000/– to the plaintiff together with interest at the rate of 06% p.a. from the date of filing of the suit till realization of the same, the aggrieved

defendants have preferred this appeal challenging the said order. At this juncture, it is pertinent to note that the aggrieved defendant no.4 has also filed appeal against the said impugned judgment and decree against the plaintiff as well as the other defendants being C.R.A. No.112/2007.

3. The facts in brief are such that the plaintiff knows the defendant no.1 to 6 and the defendant no.1 is the manufacturer and distributor of cooking gas cylinder in the name and style of Divine Enterprise whereas, the defendant no.2 is the distributor of the defendant no.1 for Gujarat Territory and the defendant no.3 to 6 are distributors for Kachchh region and all four are partners of Maruti Gas Agency. The plaintiff had filed the suit against the defendants alleging that the appellants as well as the other defendants were the partner of Maruti Gas Agency. They invited offers to appoint their agent at Bhuj. Hence, the plaintiff had paid Rs.20,000/- towards deposit and obtained Gas Agency from the defendants. The plaintiff also deposited Rs.5,000/- as deposit with the defendant no.2 in the name of "Kamal Agency" on 22.06.1994. Accordingly, the plaintiffs got agency for Bhuj Taluka under

the defendant no. 1 to 6 and started the business in the name of "Jay Gas Agency" at Bhuj. Thereafter, the plaintiff had placed order for 100 sets of gas cylinders and paid Rs.2,00,000/-. It was alleged that 40 Cylinders were supplied and 60 Cylinders were not supplied. Therefore, the plaintiff had filed the above suit against the defendants for the recovery of Rs.1,45,000/- with interest.

4. The suit was opposed by the present appellants before the Ld. Trial Court by submitting written statement at Exh.86 contending inter alia that the original defendant no.1 and 2 were the main producer and the distributor of Gas cylinders and entire monetary transactions were also done by the plaintiff with the defendant no.1 and 2. That the suit was not filed against the company and the partnership firm had not been joined and hence the suit was not maintainable. The suit was barred by limitation and the jurisdiction is also ousted from the pleadings itself.

5. It is contended that the Trial Court has committed a serious mistake in allowing the suit of the plaintiff in which the original principal and agent are deleted and the appellants and respondent no.2 who are

held individually liable to pay the amount, giving clean chit to the original defendant no.1 and 2. That the trial court has erred in believing it to be a concluded contract. That there is no iota of evidence to link the original defendants in absence of principal and agent without joining the partnership firm. That there is no appreciation of oral and documentary evidence in its true, correct and legal perspective. Hence, the Ld. Advocate for the appellants has prayed to allow the appeal by setting aside and reversing the impugned judgment and decree.

6. It is strongly argued by Ld. Advocate Mr. Ganatra for the appellant that this is a suit for recovery of due amount from defendants. That during pendency of the suit before commencement of the suit, the defendant no.1 and 2 have been deleted. That as per the plaint, Rs.2,00,000/- were deposited by the original plaintiff with defendant no.1 and 2. The defendant no.3 to 6 were distributors and decree is passed for recovery of Rs.1,45,000/- jointly and severally. The appellant is only distributor and not manufacturer or seller as per the plaint. It is averred in the plaint that the appellants were partners of the partnership

firm Maruti Gas therefore, as per Order 32 of C.P.C. partnership firm is required to be joined as party. Therefore, the suit is suffering from defect. It is further argued that as per the plaint Para 5 the respondents gave Rs.2,00,000/- towards advance to the original defendant no.2 at Bharuch. The respondent resides at Ahmedabad. The Demand Draft for the alleged transaction was given at Bharuch and a receipt was also issued which is very much on the record as Mark 3/6. The plaintiff has intentionally not got exhibited this receipt because it is clearly mentioned thereon that in case of dispute the jurisdiction should be of Jalgaon. This receipt has been admitted by defendants and therefore it ought to have been exhibited but the trial court had not slightly discussed this. It is argued that the entire judgment is without evaluation of evidence. The trial court has not discussed any evidence and given findings which shows that the entire judgment is very pervert. There are no cogent reasons appreciating or discarding the evidence. When the defendants raised contention regarding limitation, the trial court should have discussed it but there is no any slightest discussion on the

issue of limitation. That the alleged Demand Draft was given to the defendant no.1 and 2 at Bharuch on 02.07.1994 and therefore, the limitation period would expire on 01.07.1997 and that way the suit is time barred. But the plaintiff has intentionally not stated the period of limitation. Moreover, the Civil Court at Bhuj has no jurisdiction. The defendant no.1 was paid the money and he should have been joined again but the suit has been dismissed against the defendant no.1 and 2. The defendants have satisfactorily raised the dispute regarding limitation and jurisdiction. The plaintiff has failed to discharge his burden. Ld. Advocate has relied upon the judgment of the Hon'ble Gujarat High Court in F.A. No.2894/2008, Punjab National Bank Asset Recovery Management Vs. Happy Exhibitors Through Hasmukh Visanji, which I have considered.

7. It is submitted that the trial court should have given findings on the issue on law though the issue no.1 relates to the defendant no.1 and the defendant no.1 has been deleted even then the decree has been passed against rest of the defendants. The trial court has nowhere

in its judgment mentioned as to how the said contract could be said to be a concluded contract. No contract in writing has been produced and no oral contract has been produced. Whereas, Ld. Advocate Mr. Buch has adopted the arguments of Ld. Advocate Mr. Ganatra.

8. The appeal is opposed by Ld. Advocate for the respondent – original plaintiff by submitting written arguments who has stated that so far the arguments regarding non impleading partnership firm is concerned, as per Order 30, the respondent has joined all the four partners as defendants and therefore it does not cause any defect. That the defendants have not produced registration number of the firm. Not only that they have not produced any written partnership deed therefore, it is maintainable. It is also argued that this dispute has not been raised in the suit before the Trial Court and therefore, at the stage of appeal it cannot be raised. It is also argued that so far as deletion of defendant no.1 and 2 pending the suit is concerned, it is the clear case of the respondents that in this matter the defendant no.3 to 6 i.e. the present appellants were given agency by the defendant no.1 and 2

and upon their advertisement the respondent – plaintiff contacted them and paid Rs.20,000/– towards deposit. That despite due efforts they could not served with notice and therefore, they were deleted. Therefore, this dispute cannot sustain. It is also argued that so far as arguments regarding out of Rs.2,00,000/–, Rs.1,20,000/– were given to the defendant no.1 and 2 for which the present appellants are not liable to repay is concerned, that upon instruction of the present appellant i.e. defendant no.3 to 6 the plaintiff – respondent has deposited the amount with the defendant no.2 for which the receipt at Exh.59 is produced. That the plaintiff paid the money for 100 connections and against that only 40 connections were given, for which, a letter at Ex.115 was written by the defe no.2 to the present appellants rebuking them. Thus the defendant no.2 had released 100 connections. Thus the cost of 60 connections i.e. Rs.1,20,000/– plus Rs.20,000/– deposit vide receipt Exh.107 issued by the defendant no. 3 to 6 total amount Rs.1,40,000/– and Rs.5,000/– deposited with the defendant no.2 vide receipt Exh.108, total Rs.1,45,000/– are to be recovered and the trial court has

rightly believed it from the evidence on record. It is also argued that the defendants have failed to prove payment of Rs.20,000/-. Hence, it is prayed to reject the appeal.

9. Heard Ld. advocates for the parties and perused the record. The questions which fall for consideration of this Court are as under:

- (1) Whether the impugned judgment and order passed by the Ld. Lower Court is capricious, illegal, unjust and hence requires interference at the hands of this Appellate Court ?
- (2) What order and decree ?

10. My findings to the above points for the reasons given below are as under.

- (1) As per final order.
- (2) As per final order.

**—: REASONS :—**

**ISSUE No.1:**

11. I have carefully gone through the entire judgment and the evidence on record. At this juncture, I would like to go through the judgment of the Hon'ble High Court in F.A. No.2895/2008 (supra) as relied upon by the

appellant side. Wherein, it is observed by the Hon'ble High Court as under;

4. *It appears from the perusal of the judgment that by paragraph in slipshod manner, without considering the evidence available on record, the learned Judge has allowed the suit and passed the decree. The reasons, if any, to be described are only at paragraph 11, running into about 6 to 7 lines only. It is hardly required to be stated that when the suit is tried before the trial court and the evidence is led by the parties, it is required for the Court to consider the evidence, if not, very elaborately, but with the relevancy to the extent touching to the issues and leading the Court to record conclusion upon the issues....*

5. *It appears to us that no reasons have been recorded dealing with the evidence, leading the Court to record the conclusion on the issues framed by the Court...."*

12. At this juncture, I would like to quote Para 8 of the judgment of the trial court verbatim, which is as under;

૮). આમ, રેકર્ડ ઉપરની હકીકતો જોતા વાદી તેનો દાવો પ્રતિવાદી સામે રૂા.૧,૪૫,૦૦૦/- નો સાબીત કરી શકે છે. જ્યારે પ્રતિવાદીની દલીલ મુજબ તથા પુરાવાથી તેઓ તે જણાવવા માંગે છે કે, રૂા.૨૦,૦૦૦/- ડિપોઝિટના તેઓએ પરત આપેલા છે તેવું તે જણાવે છે, પરંતુ પ્રતિવાદી તેમની જુબાનીથી કે પુરાવાથી એ સાબીત કરી શકતા નથી કે, રૂા.૨૦,૦૦૦/- ડિપોઝિટના પરત આપેલા છે તે માટેનો કોઈ પુરાવો પ્રતિવાદી પક્ષે રજુ કરેલો નથી તેમજ તેમના જણાવ્યા મુજબ પ્રતિવાદી છુટા થઈ ગયેલ છે અને તે વખતે તેઓ ભાગીદાર ન હતા તેવું જણાવે છે, પરંતુ વાદીના પુરાવાથી તે સ્પષ્ટપણે સાબીત થાય છે કે, આ લેણા બાબતે જ્યારે લખાણ થયેલું તે વખતે પ્રતિવાદીઓ ભાગીદાર હતા તેવું સ્પષ્ટપણે સાબીત થાય છે અને આ લેણા પછી તેઓ છુટા થયા હોય તો તે હકીકત માની શકાય નહીં અને તે જવાબદારીમાંથી છટકી શકે તેમ નથી. આમ, રેકર્ડ પર વાદી પક્ષે જે પુરાવો રજુ કરેલ છે તે જોતા વાદી તેનો દાવો સ્પષ્ટપણે પ્રતિવાદીઓ સામે સાબીત કરી શકેલ છે તેથી વાદીની દલીલ સાથે હું સંમત થાઉં છું અને પુરાવા સાથે સંમત થાઉં છું. જ્યારે પ્રતિવાદીની દલીલ સાથે હું સંમત થતો નથી અને સંમત થવાનું કોઈ કારણ નથી તેથી હું મુદા નં.૧,૨,૨અ,૩ અને ૬ નો અંશતઃ હકારમાં આપું છું અને મુદા નં. ૨ બ, ૩અ, ૩બ, ૩ક, નો ઉત્તર નકારમાં ઠરાવું છું. જ્યારે મુદા નં.૫ નો ઉત્તર વાર્ષિક ૬% લેખે વ્યાજ વાદી મેળવવા હકકદાર છે તેમ ઠરાવું છું.

13. At the outset, it is required to be noted that the plaintiff has to prove his case by oral or documentary

evidence by leading satisfactory evidence. If the documents are produced the same are required to be proved in the manner as laid down in the Evidence Act. But merely referring the documents, its contentions do not automatically proved. It appears from the judgment of the trial court that trial court has heavily relied upon the oral evidence of the plaintiff. In this matter, the contract between the parties is very much important but the trial court has not discussed how the contract was concluded.

14. From perusal of the judgment of the trial court, it appears that the trial court has written the judgment in a very slipshod manner without considering evidence on record and allowed the suit. Only in Para 8 concluding part is mentioned. It is hardly required to be stated here that when the suit is tried before the trial court and the evidence led by the parties, it is required by the trial court to consider the evidence with relevancy to the extent touching to the issue and leading to the extent touching to the issues and leading to the court to record conclusion upon the issues. No reasons have been recorded dealing with the evidence leading the Court to record conclusion on

the issues framed by the Court. The plaintiffs are required to prove their case by leading oral or documentary evidence by leading satisfactory evidence. If any document is produced the same is required to be proved in the manner provided in the Evidence Act. Its contentions are required to be proved. Here the suit is based on the contract and it is necessary that contract and its terms are proved and for which the evidence must be referred to.

15. Hence, in above view of facts and circumstances, the impugned judgment of the trial court is without appreciating evidence on record in proper perspective therefore, the matter is required to be remanded back to the trial court for just decision of the matter to give findings on the issues as per the law and to decide the matter afresh without being influenced by any findings of this Court. I have sought guidance from the judgment of the Hon'ble Gujarat High Court in case of Punjab National Bank Asset Recovery Management Vs. Happy Exhibitors Through Hasmukh Visanji (supra); wherein the Hon'ble High Court observed that no reasons have been recorded dealing with the evidence leading the

Court to record the conclusion on the issues framed by the Court and since the Hon'ble High Court was not satisfied with the manner in which the judgment was delivered by the Court by short-circuiting the exercise of considering the evidence and dealing with various issues, which otherwise were required to be decided after consideration of the evidence and hence, the impugned judgment of the trial court was quashed and set aside and the matter was remanded to the Trial Court to decide the same after giving opportunity of hearing to both the sides. Therefore, as discussed above, the impugned judgment and decree of the trial court are required to be quashed and set aside and the matter is required to be remanded back to the trial court for decision afresh after giving opportunity of hearing to both the sides. Hence, I pass the following final order in the interest of justice.

**—: ORDER :—**

The impugned judgment and decree of the Trial Court are hereby quashed and set aside.

The matter is hereby remanded back to the Trial Court for decision afresh after giving opportunity of hearing to

both the sides in accordance with law as early as possible most probably within three months since the matter is very old.

No order as to costs.

Decree shall be drawn accordingly.

Pronounced and signed in the open Court on today 31<sup>st</sup> day of December, 2018 at Bhuj.

Sd/ –  
( **Mehul M. Gandhi** )  
Principal District Judge,  
Kachchh at Bhuj

Code GJ 00210

BUCH