<u>Application Nos.7889 & 7890 of 2014 and 1759, 1760 & 1173 of 2015</u>
<u>in</u>
<u>C.S.No.491 of 2014</u>
<u>and</u>
<u>Application Nos.6410 & 6411 of 2014 and 1757, 1758 & 1172 of 2015</u>
<u>in</u>
<u>C.S.No.496 of 2014</u>

<u>R.SUBBIAH, J.</u>

There are two suits, one is C.S.No.491 of 2014 and another is C.S.No.496 of 2014. Both the suits have been filed by two different partnership firms represented by the same partner Mr.M.Ponnusami.

2.In C.S.No.491 of 2014, the plaintiff is M/s.Color Chemicals, a partnership firm, and in C.S.No.496 of 2014 the plaintiff is M/s.Color Chemicals and Dyes LLP, another partnership firm. Both the suits have been filed for recovery of money as against the Defendant No.1-M/s.Match Point, a partnership firm, and the defendants 2 to 10, its partners. The suit in C.S.No.491 of 2014 has been filed for recovery of money of Rs.1,62,88,063/- together with interest at the rate of 24% pm on Rs.76,14,756/- from 23.07.2014 till the date of realization. Similarly, the suit in C.S.No.496 of 2014 has been filed for recovery of money of Rs.26,78,028/- together with interest at the rate of 24% per annum on Rs.12,29,551/- from 23.07.2014 till the date of realization.

3.Since the defendants 1 to 10 are residing at Tirupur, outside the jurisdiction of this Court, the plaintiffs had filed applications under Order XIV Rule 8 of Original Side Rules r/w Order XXXVIII Rule 5 of CPC, in A.No.4713 of 2014 (in C.S.No.491 of 2014) and A.No.4714 of 2014 (in C.S.No.496 of 2015), seeking leave of the Court to sue the defendants. In both the suits, this Court had granted leave by order dated 25.07.2014. Thereafter, the suits have been numbered as C.S.No.491 and 496 of 2014 respectively.

4.Since there are number of applications, for the sake of convenience the parties are referred to as per their rankings in the suits.

5.In both the suits, the plaintiffs have also taken out applications in ie., A.Nos.5337 & 5338 of 2014 in C.S.Nos.491 & 496 of 2014 respectively, seeking to direct the defendants to furnish security for the suit claims of Rs.1,62,88,063/- and Rs.26,78,028/- respectively, and on failure to furnish security, to attach the immovable properties mentioned in the schedule of the respective applications viz., A.No.5337 & 5338 of 2014. In the said applications, by orders dated 28.08.2014 this Court has given directions to the defendants to furnish security for the suit claim amounts.

6.After appearance, the 6th defendant-P.Ravichandran has filed two applications; one in Application No.1759 of 2015 in C.S.No.491 of 2014 and another in Application No.1757 of 2015 in C.S.No.496 of 2014, on behalf of himself and also on behalf of the defendants 1, 7 & 9, seeking to revoke the leave granted by this Court on 25.07.2014. That apart, the Defendants 1, 6, 7 & 9 have also filed applications in A.No.1760 & 1758 of 2015 in C.S.No.491 & 496 of 2014 respectively, seeking to stay the further proceedings in the suits.

7.Similarly, the Defendants 1, 6, 7, 8, 9 & 10 have taken out the following applications also_

i)A.Nos.7889 & 6411 of 2014 in C.S.Nos.491 & 496 of 2014 have been filed by the defendants 1, 6, 7 & 9 seeking to set aside the orders dated 28.08.2014 passed in A.Nos.5337 & 5338 of 2014 respectively, directing the defendants to furnish security.

ii)A.Nos.7890 & 6410 of 2014 in C.S.Nos.491 & 496 of 2014 have been filed by the defendants 1, 6, 7 & 9 seeking to stay the operation of the orders dated 28.08.2014 passed in A.Nos.5337 & 5338 of 2014 respectively, directing the defendants to furnish security.

iii)A.Nos.1173 & 1172 of 2015 in C.S.Nos.491 & 496 of 2014 have been filed by the defendants 8 & 10 seeking to set aside the orders dated 28.08.2014 passed in A.Nos.5337 & 5338 of 2014 respectively, directing the defendants to furnish security.

8.Since the issues involved in all these applications are inter-related to each other, it would be appropriate to dispose of the present applications by way of this common order.

9.For better understanding, it would be appropriate to extract the averments made by the plaintiffs in both the plaints, which are in brief as follows_

9(1)The plaintiffs in both the suits are partnership firms viz., M/s.Color Chemicals and M/s.Color Chemicals and Dyes LLP respectively. The 1st defendant – M/s.Match Point, a partnership firm, represented by its partners being the defendants 2 to 10, approached the plaintiffs at Chennai to purchase chemicals and solvents (hereinafter referred to as 'goods') for its business in textile processing – dyeing, bleaching, washing and processing of hosiery fabrics, woven fabrics, garments & yarn. In the said process, the 1st defendant, represented by its partners (D2 to D10), used to place orders to the plaintiffs' administrative offices at Chennai and supplies were made by raising Invoices at plaintiffs' administrative offices at Chennai and delivery of goods under the said invoices were duly acknowledged by the defendants.

9(2)The 1st defendant-partnership firm is a family concern of the 7th defendant – S.Periasamy Gounder. The 7th defendant is the husband of the 8th defendant, father-in-law of the defendants 2 & 9, father of the defendants 3 & 6, uncle of the 4th defendant and grandfather of the defendants 5 & 10. Therefore, the 1st defendant-Partnership firm is a family concern with the defendants 2 to 10 as partners.

9(3)So far as the avements made in the plaint in C.S.No.491 of 2014 is concerned, it is the case of the plaintiff that the defendants were purchasing dyes and chemicals from the plaintiff for several years till 11.01.2011. So far as the suit in S.C.No.496 of 2014 is concerned, the defendants were purchasing dyes and chemicals from the plaintiff for several years till 22.12.2010. The defendants started committing default in payment from February-2009 onwards. However, the plaintiffs supplied goods on the repeated assurance and undertaking given by the defendants that the payments would be made shortly. Since the defendants are highly irregular in making the payments, as on 12.01.2010 the defendants are due and liable to pay a sum of Rs.76,03,107.81 to the plaintiff in C.S.No.491 of 2014 and a sum of Rs.12,29,551/- as on 12.01.2015 in respect of C.S.No.496 of 2014.

9(4)All the goods supplied by the plaintiffs were duly received and acknowledged by the 1st defendant and through its original delivery challan / invoices. The goods were supplied by the plaintiffs under various invoices to the 1st defendant on the following terms and conditions_

1.Goods once sold cannot be taken back

2.Goods sold under this bill are not for medicinal use

3.Subject to Chennai jurisdiction only

4.Interest @ 24% will be charged on the amounts overdue.

The 1st defendant acknowledged its liability to the plaintiffs by confirming the balance amount payable as on 31.03.2010 vide confirmation letter dated 09.05.2010 and confirmation of balance amount payable as on 31.03.2011 vide confirmation letter dated 21.07.2011, confirmation of balance amount payable as on 31.03.2012 vide confirmation letter dated 16.05.2012 and confirmation of balance amount payable as on 31.03.2013 vide confirmation letter dated 24.06.2013. The confirmation letters dated 16.05.2012 & 24.06.2013 were issued by the 1st defendant represented by its Partner - 6th defendant herein.

9(5)When that being the position, the 6th defendant – P.Ravichandran with a fraudulent intention to cheat the plaintiffs from not making the payment for the goods supplied by the plaintiffs to the 1st defendant-partnership firm represented by the defendants 2 to 10, has chosen to issue a Legal Notice dated 23.01.2014 to the partners and employees of the plaintiffs as if they are threatening him to pay the outstanding amount. But, whereas according to the 6th defendant the plaintiffs are not eligible to receive any money from the defendants.

9(6)In the above circumstances, the plaintiffs issued a Legal Notices on 20.05.2014 calling upon the defendants to pay a sum of Rs.26,23,052/-, together with interest @ 24% p.a. on Rs.12,29,551/- from 16.04.2014 until the date of actual payment, in respect of C.S.No.496 of 2014, and a sum of Rs.1,57,96,942/- together with interest @ 24% p.a. on Rs.76,14,756/- from 16.04.2014 until the date of actual payment, in respect of C.S.No.491 of 2014.

9(7)All the defendants had duly acknowledged the receipt of the legal notices issued by the plaintiffs on 20.05.2014. However, the 6th defendant alone, as partner of the 1st defendant, issued an interim reply on 06.06.2014 denying all the averments and allegations baldly in the legal notice dated 20.05.2014 and by contending that a detailed reply would be sent after going through the records. But, till date the plaintiffs have neither received the said amounts due and payable by the defendants nor any reply to the legal notice dated 20.05.2014. Hence, after obtaining the leave of the Court, as the defendents are residing outside the jurisdiction of this Court, the plaintiffs have filed the present two suits for recovery of money.

10.Since the present suits have been filed after obtaining the leave, the defendants 1, 6, 7 & 9 have filed applications viz., A.Nos.1759 & 1757 of 2015 in C.S.Nos.491 & 496 of 2014 respectively, to revoke the leave granted by this Court in A.Nos.4713 & 4714 of 2014 on 25.07.2014. They also filed A.Nos.1760 & 1758 of 2015 in C.S.Nos.491 & 496 of 2014 respectively seeking to stay the proceedings in the suits.

11.Similarly, since this Court has issued order/notice to the defendants to furnish security for the suit claim amounts by orders dated 28.08.2014 in A.Nos.5337 & 5338 of 2014, the defendants 1, 6, 7 & 9 have filed the applications being A.Nos.7889 & 6411 of 2014 and the defendants 8 & 10 have filed the applications being A.Nos.1773 & 1172 of 2015, in C.S.Nos.491 & 496 of 2014 respectively, seeking to set aside the said orders dated 28.08.2014 directing them to furnish security. That apart, Application Nos.7890 & 6410 of 2014 have been filed by the defendants 1, 6, 7 & 9 seeking to stay the operation of the said order dated 28.08.2014 directing them to furnish the security.

12.Since the all the above said applications are pending in these two suits, I am of the opinion that it would be appropriate to discuss all the applications in seriatim.

13.At first, it would be appropriate to deal with the applications filed in respect of the leave of the Court to file the suit against the defendants.

Leave of the Court

14.The sum and substance of the averments made by the plaintiff in A.Nos.4713 & 4714 of 2014, filed for grant of leave, are extracted herein_

14(1)So far as the Application No.4713 of 2014 filed in C.S.No.491 of 2014 is concerned, it is stated by the plaintiff that during the course of business, the 1st defendant, represented by its partners being the defendants 2 to 10, used to place orders at plaintiffs' administrative offices at Chennai and supplies were made by raising invoices at plaintiff's administrative offices at Chennai and delivery of goods under the said invoices were duly acknowledged by the defendants. The account of the defendants with the plaintiffs is a running account, as the defendants were making payments for the goods received by them in lump sums, now and then and not the entire amount mentioned in the invoice. The amounts paid by the defendants were adjusted towards the old invoice arrears. The defendants started committing default from February-2009 onwards. When the plaintiffs requested the defendants to pay the outstanding amounts, the defendants not only promised to pay the amount in due course, but also undertook to take delivery of goods in future against payment. The plaintiffs supplied the goods to the defendants between 16.03.2010 & 11.01.2011 only against the payment, except the amount mentioned in the Invoice No.685, dated 28.04.2010. The last payment made by the defendants was on 11.01.2011 under the Receipt No.4783 relating to the goods supplied by the plaintiff under Invoice No.6331, dated 11.01.2011.

14(2)Similarly, as regards the Application No.4714 of 2014 filed C.S.No.496 of 2014, it is averred by the plaintiff in the affidavit that the plaintiff supplied the goods to the defendants between 03.11.2009 & 22.12.2010 only against the payment. The last payment made by the defendants was on 22.12.2010 under the Receipt No.2728 relating to the goods supplied by the plaintiff under Invoice No.1882, dated 22.12.2010. The defendants had paid only a sum of Rs.38,37,494/- towards various invoices, leaving the balance amount of Rs.12,29,551/- due and payable to the plaintiff by the defendants.

14(3)According to the plaintiffs, the suits are well within the limitation. In fact, the 1st defendant has admitted its liability under various balance confirmation letters. The goods supplied by the plaintiffs were duly received and acknowledged by the defendants. Further, one of the conditions in the delivery challan/invoice is ***'subject to Chennai jurisdiction only'.*** Thus, the plaintiff sought for leave of the Court.

15.The sum and substance of the applications viz., A.Nos.1757 & 1759 of 2014 filed by the 6th defendant, on behalf himself and also on behalf of D1, D7 & D9, to revoke the leave granted by this Court are as follows_

(i)suits are filed without jurisdiction;

(ii)the so-called claim of jurisdiction mentioned in the suits is not maintainable;

(iii)the suits are filed beyond the period of limitation;

(iv)there is no legal liability on the part of the defendants to pay any money to the plaintiffs;

Further, the mandatory procedure incorporated in the Original Side Rules of this Court warrants that summons after the grant of leave to be granted in Form No.9 as prescribed in Appendix-II of the Original Side Rules; but the same have to be followed and sent over to the defendants to comply with the requirement of Order III Rule 1 of Original Side Rules, failing which the defendants are having right to file application to stay the suit and also to question the grant of leave. But, the plaintiffs have not complied with the above said mandatory procedure as contemplated under Order III Rule 1 of Original Said Rules. Hence, the leave granted by this Court is liable to be vacated.

16.Consequently, the defendants 1, 6, 7 & 9 have filed Applications viz., A.Nos.1760 & 1658 of 2015 in C.S.No.491 & 496 of 2014 respectively, seeking to stay all further proceedings in the said suits, till the disposal of the applications for revocation of the leave to sue.

17.The plaintiffs have also filed joint counter to the applications filed by the defendants to revoke the leave granted by this Court.

18.It is the main submission of the learned senior counsel appearing for the defendants that the present suits have been filed deliberately with false averments and without having any cause of action either to file the suit as against the defendants or to file the suit before this Court. It is further submission of the learned senior counsel for the defendants that the defendants 1 to 10 are residing at Tiruppur; the plaintiff is having their godown at Tiruppur and entire goods were supplied only from the godown at Tiruppur. In this regard, the learned senior counsel for the defendants has also invited the attention of this Court to the delivery challans/invoices issued from the plaintiffs and submitted that the delivery challans/invoices contain only the address at Tiruppur, which would go to show that the goods were supplied to the defendants by the plaintiffs only from the godown at Tiruppur. Thus, the learned counsel for the defendants submitted that the entire cause of action of filing the suits arose only within the jurisdiction of the Courts at Tiruppur and not at Chennai.

19.Further, the learned senior counsel for the defendants submitted that the suit is also hit by limitation. In this regard, it is the submission of the learned senior counsel for the defendants that even according to the plaintiffs, the last supply of the goods was made on 11.01.2011 in respect of C.S.No.491 of 2014 and on 22.12.2010 in respect of S.C.No.496 of 2014; but, the suits were filed only in the year 2014; as such, the suits are hit by limitation. Hence, apart from the fact that no cause of action has arisen within the jurisdiction of this Court, the suits are also hit by limitation. The learned senior counsel for the defendants has also relied upon the judgment reported in **2006(1) CTC 178 [The State of Tamil nadu, rep by the Superintending Engineer, P.W.D/W.R.O Periyar Vaigai basin Circle, Madurai and another Vs. R.Sundaram, Contractor, Erode and antoher],** and submitted that objection regarding lack of inherent jurisdiction goes to the root of matter. Further, by relying upon the judgment reported in **2009(4) CTC 635 [S.Palaniappan Vs. PL.Sethuraman Chettiar and 16 others],** the learned senior counsel appearing for the defendants has also submitted that when all the parties are residing outside the jurisdiction of the Court, the Court has to consider the convenience of the parties. In the instant case, all the defendants are residing at Tiruppur; but, without considering the convenience of the parties, leave has been granted. It is further submission of the learned senior counsel appearing for the defendants that the suit properties, which are sought to be attached in the applications in the event of failure to furnish the security, are situated out side the jurisdiction of this Court. Hence, according to the learned senior counsel for the defendants, since the properties sought to be attached are situated outside the jurisdiction of this Court, this Court will not have jurisdiction and the leave granted by this Court is liable to be revoked. In this regard, the learned senior counsel for the defendants relied upon the judgment reported in ***2002(1) CTC 134 [Parameswari Veluchamy and 2 others Vs. T.R.Jayaraman and 7 others]*** wherein it has been held that consideration of convenience is also relevant for grant of leave and when almost all properties are situated outside the Jurisdiction of the Court, leave need not be granted. The learned senior counsel for the defendants has also relied upon the judgment reported in ***2007-I.L.W. 970 [Andhra Bank Financial Services Limited, Hyderabad Vs. Tamil Nadu Newsprint and Paper Ltd., Chennai]*** wherein it has been held that where no part of cause of action arose within the jurisdiction of this Court and where all defendants are not residing within the territorial jurisdiction of this Court in original side at the time of institution of the suit, leave cannot be granted.

20.That apart, the learned senior counsel for the defendants has also submitted that after obtaining orders of leave to sue on 25.07.2014, the plaintiffs have not complied with the mandatory procedures as contemplated under Order 3 Rule 1 of Original Side Rules, by serving notice to the defendants under Form-9 Appendix-II of Original Side Rules. Therefore, on this ground also leave is liable to be revoked.

21.Per contra, the learned senior counsel appearing for the plaintiffs submitted that the part of cause of action for filing the present suits arose within the jurisdiction of this Court. The plaintiffs are having their administrative offices only at Chennai. The defendants placed orders only at Chennai, where the delivery challans/invoices were issued. In fact, the plaintiffs and the defendants, under the terms and conditions of delivery challens/invoices, had categorically fixed the jurisdiction at Chennai, within the jurisdiction of this Court. The 1st defendant has given various balance confirmation letters to the offices of the plaintiffs at Chennai. In this regard, the learned senior counsel for the plaintiffs has also invited the attention of this Court to the various balance confirmation letters issued by the defendants.

22.With regard to the ground of limitation, the learned senior counsel appearing for the plaintiffs submitted that the goods were supplied only on running account. In fact, the 1st defendant has acknowledged the liabilities in both the suits by various confirmation letters. In this regard, the learned senior counsel invited the attention of this Court to the various confirmation letters issued by the 1st defendant, dated 09.05.2010, 21.07.2011, 16.05.2012 and 24.06.2013 and also the plaintiffs' debtor's ledger for the period from 01.04.2009 to 31.03.2010 and from 01.04.2010 to 31.03.2011, and submitted that since there are confirmation letters issued by the 1st defendant and moreover, the goods were supplied on running account, the suits are very well within the limitation period.

23.With regard to the other submission made by the learned counsel for the defendants in respect of non-serving of summons under Form-9 Appendix II of Original Side Rules, it is the reply of the learned senior counsel appearing for the plaintiffs that the object or intention of service of summons under Form-9 Appendix II of Original Side Rules, on the defendants, are to put them on notice about the order of leave to sue granted by the Court. In the instant case, though the summons were not served as contemplated under Form-9, the suit summons were served under Form-13, Appendix-II, in terms of Order 4 Rule 5 of Original Side Rules. Therefore, non-serving of notice under Form-9 will not be a ground to revoke the leave. Thus, the learned senior counsel for the plaintiffs sought for dismissal of the applications filed by the defendants to revoke the leave.

24.With regard to the submission made by the learned senior counsel for the defendants that since the properties sought to be attached are situated out side the jurisdiction, this Court will not have jurisdiction to try the suit, it is the reply of the learned senior counsel for the plaintiffs that the suits have been filed only for recovery of money and that only if the defendants fail to furnish the security by way of interim measure, the properties are sought to be attached. Therefore, according to the learned senior counsel for the plaintiffs, even if the properties, which are sought to be attached in case of failure to furnish security, are situated outside the jurisdiction of this Court, the suits are very well maintainable within the jurisdiction of this Court. In this regard, the learned senior counsel appearing for the plaintiffs has also relied upon the judgment reported in **2002 A I H C 837 [Gidya Singh Vs. M/s.Programme Support Unit Foundation]**, wherein it has been held that order of attachment can be passed in respect of property outside local limits of jurisdiction of Court.

25.By way of reply, the learned senior counsel for the defendants submitted that though in the delivery challans/invoices, it has been stated that **'subject to Chennai jurisdiction only',** absolutely there is no agreement between the parties to confer the jurisdiction at Chennai. Therefore, the suit is not maintainable before this Court. Thus, the learned senior counsel for the defendants reiterated his stand that this Court will not have jurisdiction to entertain the suit.

26.Keeping the submissions made on either side, I have carefully gone through the entire materials available on record. The applications for revocation of leave have been filed mainly on following the grounds_

(1)the suits are filed without the jurisdiction;
(2)the suits are filed beyond the period of limitation;
(3)there is no legal liability to pay any money to the plaintiffs;
(4)after obtaining the leave, sending summons under Form-9, Appendix-II of Original Side Rules is mandatory, which gives right to the defendants to file application to question the grant of leave or to stay the suit. In the instant case, after obtaining leave, the plaintiffs failed to serve summons as required under law. Hence, the leave is liable to be revoked;

But, so far as the jurisdiction is concerned, it is the submission of the learned senior counsel for the defendants that all the defendants are residing outside the jurisdiction of this Court and the plaintiffs are having godown at Tiruppur and goods were supplied only from the godown at Tiruppur; under such circumstances, no cause of action arose within the jurisdiction of this Court. Similarly, with regard to the limitation, it is the submission of the learned senior counsel for the defendants that the entire transaction took place between 2009 and 2011, but the suits have been filed in the year 2014, after a lapse of three years limitation period and last payment was made on 11.01.2011 in respect of C.S.No.491 of 2014 and on 22.12.2010 in respect of S.C.No.496 of 2014; therefore, according to the learned senior counsel for the defendants, the suits are also hit by limitation.

27.But, it is the reply of the learned senior counsel for the plaintiffs that the defendants herein placed orders only at Chennai and the goods were supplied on running account and every year, the defendants have acknowledged their liability through their balance confirmation letters produced at the office of plaintiffs at Chennai; since there is acknowledged of liability by the defendants at the office of the plaintiffs at Chennai, the suits are very well within the jurisdiction of this Court as well as within the period of limitation.

28.But, considering the submission and counter submission made on either side, I am of the opinion that there are disputed questions of facts, with regard to the jurisdiction of this Court. When there are disputed facts, this Court cannot revoke the leave at this stage. The entire grounds raised by the learned senior counsel for the defendants can be considered only at the time of trial. Only if there is sufficient material before this Court to come to the conclusion that absolutely there is no cause of action has arisen within the jurisdiction of this Court, the leave granted by this Court could be revoked. But, that is not the state of affairs so far as the present case is concerned. It is well settled legal principle that each and every case has to be decided based on the facts and circumstances of each case. In the instant case, the plaintiffs have produced materials to show that the defendants have approached the plaintiffs for supply of goods and under delivery challans/invoices the jurisdiction was fixed at Chennai. Therefore, I feel *prima facie* that this Court has got jurisdiction to entertained the suits.

29.Similarly, with regard to limitation, there is acknowledgment by the defendant till 2013; therefore, at this juncture, so far as the case on hand is concerned, the entire issues raised by the learned senior counsel for the defendants can be considered only at the time of trial.

30.It is yet another submission of the learned senior counsel for the defendants that after obtaining leave, no summons were served to the defendants under Form-9, Appendix-II of Original Side Rules. Since the plaintiffs failed to comply with the mandatory requirement as contemplated under Order 3 Rule 1 of Original Side Rules, the leave granted by this Court is liable to be revoked, for non-compliance of mandatory requirement. But, in my considered opinion, as contended by the learned senior counsel for the plaintiffs, though summons were not served as contemplated under Order 3 Rule 1 of Original Side Rules, suit summons were served on the defendants under Form-13, Appendix-II, as per Order 4 Rule 5 of Original Side Rules. Therefore, the non-service of notice under Form-9, Appendix-II, after obtaining leave, definitely will not serve as a ground to revoke the leave. The questions of jurisdiction and limitation are mixed questions of facts and law. Only if it is apparent on the record that the suit is hit by jurisdiction and limitation, the same can be considered in the application to revoke the leave; otherwise, the same have to be decided only at the time of trial. Further, in my considered opinion, non-service of Form-9 Appendix-II, after obtaining leave, could be considered only as a curable error. On the whole, the entire grounds raised by the learned senior counsel for the defendants, are matters of trial. Therefore, the judgments relied upon by the learned senior counsel for the defendants cannot be made applicable to the present facts of the case. Absolutely, I do not find any valid reason to revoke the leave granted by this Court.

31.*Hence****, the applications viz., A.Nos.1759 & 1757 of 2015 filed to revoke the leave, are liable to be dismissed and accordingly, the same are dismissed. Consequently, the Application Nos.1760 & 1758 of 2015 filed by the defendants 1, 6, 7 & 9 seeking to stay the***

proceedings of the suits are also liable to be dismissed and the same are dismissed accordingly.

Applications filed with regard to furnishing security

32.Since this Court has come to the conclusion that the applications filed by the defendants to revoke the leave granted by this Court are not maintainable, it is necessary to deal with the other applications filed by the plaintiffs to furnish security viz., the Application Nos.5337 & 5338 of 2014 in C.S.Nos.491 & 496 of 2014.

33.In respect of Application No.5337 of 2014 in C.S.No.491 of 2014, it is stated by the plaintiff that the defendants are jointly and severally liable to pay the balance amount of Rs.76,14,755.81 due and payable to the plaintiff by the defendants towards the Invoices raised during the years 2009 & 2010, together with interest thereon @ 12% per annum, from the date of expiry of 90 days of the date of invoice. While so, the 6th defendant, who was the sole and absolute owner of the schedule mentioned property in A.No.5337 of 2015, had settled the said properties in favour of his daughter/D10, sister/D3 & wife/D9 under Settlement Deeds dated 20.04.2011 bearing Doc.No.1837 to 1839 of 2011 respectively, on the file of the Sub-Registrar, Tiruppur. Subsequently, the 9th defendant settled her share in the schedule mentioned property in favour of her daughter/D10 under Settlement Deed dated 19.11.2012 bearing Doc.No.4450 of 2012 on the file of the Sub-Registrar, Tiruppur.

34.Similarly, as regards Application No.5338 of 2015, it has been stated by the plaintiff that the defendants are jointly and severally liable to pay a sum of Rs.12,29,551/- towards the supply of the goods duly acknowledged by the defendants together with interest @ 24% pa from the date of 90 days from the date of delivery of goods till the date of payment. As on 22.07.2014, the defendants are liable to pay a sum of Rs.26,78,028/- inclusive of interest. The 7th defendant-S.Periyasamy Gounder, who is the head of the family, consisting of defendants 2 to 10, is the absolute owner of the schedule mentioned properties in A.No.5338 of 2014. With a view to escape from the liability, the 7th defendant transferred Schedule A mentioned property in favour of his grand-daughter/D10 under Settlement Deed dated 04.04.2013 bearing Doc.No.1296 of 2013 on the file of the Sub-Registrar, Uthukuli. Similarly, lands in Schedule-B mentioned property in A.No.5338 of 2014 originally belonged to the 7th defendant. The 7th defendant again with a view to escape from the liability transferred Schedule-B mentioned property in favour of his grand daughter/D10 under Settlement Deed dated 04.12.2012 registered on 27.02.2013 bearing Doc.No.780 of 2013 on the file of the Sub-Registrar, Uthukuli.

35.Now, the plaintiffs reliably understand that all the said transfers of the properties were made by the defendants in both the applications not only to save their properties, but also to defeat the interest of the persons like the plaintiffs, who are entitled to get their money due and payable by the defendants.

36.Further, the plaintiffs reliably understand that the defendants 3 & 10 are now jointly taking urgent steps to alienate the immovable properties mentioned the schedule mentioned properties in the applications, with an intention to obstruct or delay the execution of any decree that may be passed against them and to deprive the plaintiffs of the fruits of the decree that may be passed. Hence, the application in A.No.5337 of 2015 has been filed for directing the defendants to furnish the suit claim of Rs.1,62,88,063/- and similarly, A.No.5338 of 2015 has been filed by the plaintiff to direct the defendants to furnish security for the suit claim of Rs.26,78,028/- and on failure to furnish security, to attach the immovable property mentioned in the schedule to the applications.

37.In both the applications, this Court has passed an exparte order dated 28.08.2014 directing the defendants to furnish security.

38.On appearance, the defendants 1, 6, 7 & 9 have filed A.Nos.7889 & 6411 of 2014 in C.S.Nos.491 & 496 of 2014 respectively seeking to set aside the said order dated 28.08.2014. They have also filed applications being A.Nos.7890 & 6410 of 2014 in C.S.No.491 & 496 of 2014 respectively seeking to stay the operation of the said order dated 28.08.2014. Similarly, the defendants 8 to 10 have also filed application being A.Nos.1173 & 1172 of 2015 in C.S.Nos.491 & 496 of 2014 respectively to set aside the exparte order dated 28.08.2014.

39.The sum and substance of the averments made by the defendants applications filed by them to set aside the exparte order dated 28.08.2014, directing them to furnish security for the suits claim amounts, are as follows_

39(1)The suits have been filed with false averments and with wrong information and based on the false and fabricated documents. In fact, the defendants 8 & 10 had never been the partners of the 1st defendant-company. The defendants 8 & 10 have been unnecessarily added as a party to the suits.

39(2)With regard to the averments made in the affidavits filed in support of the applications to direct the defendants to furnish security, it is the reply of the defendants 1, 6, 7 & 9 that the 1st defendant-company when took delivery of the Dyes & Chemicals from the Plaintiff, the plaintiff had supplied poor and defective, substandard quality of dyes & chemicals, which resulted in the poor output of the products, due to which the 1st defendant-firm lost prospective orders and suffered loss. The 1st defendant-firm was prompt in payment of their amounts towards invoices. However, during 2009, the 1st defendant-firm noticed that the goods supplied by the plaintiffs were not as per the specified standard, especially it is very old stock, poor and defective quality of supply and the same cannot be used for its purpose. Therefore, the 1st defendant-firm had reported the same to the plaintiffs-companies at Tiruppur, where the goods were taken delivery. In fact, in the Legal Notice dated 23.01.2014, which is prior to the suit and the suit notice, these defects were pointed out in a detailed manner. Since the plaintiffs promised to replace the defective goods, the defendants were under the impression that the same will be done by the plaintiffs, but later it was stated by the plaintiffs that they adjust the said amount and wipe out the dues, but the plaintiffs have not done so.

39(3)Further, when the 6th defendant, who is managing the 1st defendant-firm, requested the person incharge of the plaintiffs-companies namely one Mohan to arrange to refund the payments for the defective supply, the said Mohan along with one Suriya Prakash, SriKumaran and Ram Kandan came to the place of residence of the 6th defendant and threatened with dire consequences by stating that if the 1st defendant-firm do not pay Rs.30 laksh to them, the 1st defendant-firm should execute the documents transferring property in their names, otherwise they will go to any extreme to collect the money. Under such situation, the 6th defendant immediately sent Lawyer's Notice dated 23.01.2014 to the plaintiffs. Subsequently, the defendants were shocked to receive the notice on 17.09.2014 from the counsel for the plaintiff and thereafter on 25.09.2014 received summons through the Bailiff of the Munsif Court, Tiruppur regarding the pendency of the above suits and interim applications. Thus, the defendants are disputing their liability and they sought for setting aside the order dated 28.08.2014 and for dismissal of the applications filed by the plaintiffs to direct the defendants to furnish security.

40.The plaintiffs have also filed common counter to the applications filed by the defendants, denying the averments made by the defendants in the affidavits filed in support of the applications to set aside the orders dated 28.08.2014 directing them to furnish security.

41.It is the submission of the learned senior counsel appearing for the defendants that the properties sought to be attached in A.No.5337 of 2014 in C.S.No.491 of 2014 were already settled by the 6th defendant in favour of the defendants 3, 9 & 10 in the year 2011 itself. Subsequently, the 9th defendant settled her share in the schedule mentioned property in favour of her daughter/D10 under Settlement Deed dated 19.11.2012 bearing Doc.No.4450 of 2012 on the file of the Sub-Registrar, Tiruppur. The defendants 8 & 10 had never been partners of the 1st defendant-firm and the defendants 2, 3, 4 & 5 were seized to be partners of the 1st defendant-firm from 01.04.2010 as they resigned from the partnership; thus, the defendants 2, 3, 4, 5, 8 & 10 were not partners on the date of suit notice. Presently the defendants 6, 7 & 9 alone are partners of the 1st defendant-firm. But, the property sought to be attached are not standing in the name of the defendants 6, 7 & 9. Therefore, the properties cannot be attached.

42.Similarly, insofar as the Application No.5338 of 2014 is concerned, the properties mentioned in schedule to the application originally belonged to the 7th defendant-Periyasamy Gounder and he settled the properties in favour of the 10th defendant by way of settlement deeds dated 04.04.2013 and

27.20.2013. The 10th defendant had never been the partner of the 1st defendant-firm. Therefore, the properties cannot be attached.

43.The learned senior counsel appearing for the defendants has also produced the documents viz., Registration of Firms to show that only the defendants 6, 7 & 9 are the partners of the 1st defendant-firm. In this regard, the learned senior counsel for the defendants has also relied upon the judgment reported in ***AIR 1993 Madras 246 (V.Bhujanga Rao Vs. Ch.Venkateswara Rao & others)*** and submitted that in the absence of adequate materials and in the absence of valid ground to furnish the security, attachment cannot be granted. In the instant case, the plaintiffs have not given proper particulars about the properties and necessary particulars in the affidavit. Hence, the applications filed by the plaintiffs are liable to be dismissed. For the same proposition, the learned senior counsel for the defendants also relied upon the judgment reported in ***AIR 1985 Madras 269 (T.Srinivasan and another Vs. V.Srinivasan).***

44.It is yet another submission of the learned senior counsel for the defendants that though this Court has passed the orders dated 28.08.2014 directing the defendants to furnish securities, in the said order no specific amount was mentioned for providing security and in the schedule no valuation was given. In fact, in the order dated 28.08.2014 a direction was given to the defendants to furnish security without mentioning the exact amount. Since the notice issued to the defendants was not in conformity with Sub- Rule 1 of Order 38 Rule 5 of CPC, the applications filed by the plaintiffs for furnishing security are liable to be dismissed. In this regard, the learned senior counsel for the defendants has also relied upon the judgment in ***AIR 1984 MADRAS 70 (V.Papammal Vs. L.Chidambaram).***

45.The learned senior counsel for the defendants had also disputed the liabilities to pay the suit claim stating that the plaintiffs have supplied defective materials and when the same was brought to the notice of the plaintiffs, they have promised to replace the same, but they have not done so. Thus, the learned senior counsel for the defendants submitted that no satisfactory materials were placed before this Court for ordering attachment.

46.Per contra, the learned senior counsel appearing for the plaintiffs submitted that the defendants 2 to 10 are very much partners of the 1st defendant-firm. It is incorrect to state that except the defendants 6, 7 & 9, other defendants are not partners of the 1st defendants-firm. The properties were settled in favour of the 10 defendant by the defendants 6, 7 and 9, only with an intention to escape from the liability. Though the learned senior counsel for the defendants denied their liability, in both the cases they have acknowledged the liabilities by letters of confirmation dated 09.05.2010, 21.07.2011, 16.05.2012 and 24.06.2013; only for the sake of defence, after filing the suit, they are disputing the liabilities only as an afterthought.

47.With regard to the submission made by the learned senior counsel for the defendants that in the notice sent from the Court to furnish security, no particulars were given with regard to the exact value of the properties, the learned senior counsel for the plaintiffs submitted that if the notice substantially fulfils its work of intimating the parties concerned generally of the nature of the suit intended to be filed, it would be sufficient compliance of the section. In support of his contention, the learned senior counsel for the plaintiffs has also relied upon the judgment reported in ***1984(3) SCC 46 [Ghanshyam Dass and others Vs. Dominion of India and others]*** wherein it has been held that the substantial justice should not be sacrificed for hypertechnical pleas based on strict adherence to procedural provisions.

48.Keeping the submissions made on either side, I have carefully perused the mateirals available on record. From the perusal of the records, I find that the 1st defendant-firm herein has acknowledged their liabilities to the extent of Rs.76,14,755.81 in C.S.No.491 of 2014 and Rs.12,29,551/- in C.S.No.496 of 2014 (principal amount) by various confirmation letters. The plaintiffs' debtor's ledger for the period from 01.04.2009 to 31.03.2010 and from 01.04.2010 to 31.03.2011 also confirms the amount. While so, the defendants 5, 6 & 9 settled the properties in favour of the 10th defendant during the years 2011-2013. After settling the properties in favour of the 10th defendant, on 23.01.2014, for the first time the 6th defendant sent a notice to the plaintiffs disputing the liabilities. Therefore, in my opinion, the conduct of the defendants in acknowledging their liability and at the same time alienating the properties in favour of the 10th defendant would *prima facie* show their intention to avoid the payment to the plaintiffs. Though now the defendants are denying their liabilities, all along they were acknowledging their liabilities by various confirmation letters. The 6th defendant has disputed their liabilities through their notice dated 23.01.2014, for the first time, in order to avoid the payment to the plaintiffs only as an afterthought. Therefore, I do not find any valid ground to set aside the order dated 28.08.2014 directing the defendants to furnish securities.

49.Though the learned senior counsel for the defendants submitted that in the order dated 28.08.2014 directing the defendants to furnishing security, no amount was mentioned for providing security and no value of the property sought to be attached was given; I am of the opinion that the said contention of the learned senior counsel cannot be a ground to revoke the direction given by this Court to furnish security. It is further submission of the learned senior counsel for the defendants that even before filing the present suits, the properties sought to be attached were already settled in favour of the 10th defendant and hence, the same cannot be attached now. As contended by the learned senior counsel for the defendants, from the documents produced on the side of the defendants, particularly the Certificate issued by the Registrar of Firms, I find that the 10th defendant is not the partner of the 1st defendant-firm, in whose name presently the properties sought to be attached stand. Therefore, I find some force in the submission made by the learned senior counsel for the defendants that since the subject properties were already settled in favour of the 10th defendant, who is not a partner of the 1st defendant-Firm, now the subject properties cannot be attached. But, at the same time, I am of the opinion that since the properties sought to be attached have become unattachable on the date of filing the suit, it does not mean that the order passed by this Court directing the defendants to furnish security has become invalid. Since this Court has already come to the conclusion that there is admitted liabilities, it would be appropriate to direct the defendants to furnish bank guarantee to the extent of the suit claims, in the interest of justice.

50.Hence, **the defendants are directed to furnish bank guarantee for a sum of Rs.1,62,88,063/- in respect of A.No.5337 of 2014 in C.S.No.491 of 2014 and a sum of Rs.26,78,028/- in respect of A.No.5338 of 2014 in C.S.No.496 of 2014, within a period of four weeks from the date of receipt of a copy of this order.**

In fine, *A.Nos.1759 & 1757 of 2015* filed to revoke the leave, are dismissed. *Consequently, Application Nos.1760 & 1758 of 2015* filed by the defendants 1, 6, 7 & 9 seeking to stay the proceedings of the suits, are also dismissed. Application Nos.7889 & 6411 of 2014 and A.Nos.1173 & 1172 of 2015 filed in C.S.Nos.491 & 496 of 2014 respectively, filed to set aside the order dated 28.08.2014, are also dismissed, with a direction to the defendants to furnish bank security as stated above. Consequently, A.Nos.7890 & 6410 of 2014 filed in C.S.Nos.491 & 496 of 2014 respectively for stay of the order dated 28.08.2014, are also dismissed.

16.06.2015

Index : Yes /No
Internet : Yes / No

R.SUBBIAH, J.

ssv

Pre-delivery order
in

A.Nos.7889 & 7890 of 2014
and 1759, 1760 & 1173 of 2015
in
C.S.No.491 of 2014

and
A.Nos.6410 & 6411 of 2014
and 1757, 1758 & 1172 of 2015
in
C.S.No.496 of 2014

16.06.2015