

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 16.08.2016

CORAM:

THE HONOURABLE Mr.JUSTICE A.SELVAM
and
THE HONOURABLE Mr.JUSTICE P.KALAIYARASAN

O.S.A.No.1 of 2011
and M.P.No.1 of 2011
and CMP.No.12002 of 2016

V.Parandhaman .. Appellant/1st Defendant

Vs.

1.D.Umamaheswaran .. R1/Plaintiff

2.Indian Bank,
Rep by its Manager,
Nanganallur Branch,
Chennai 600 061. .. Respondent No.2/2nd Defendant

Original Side Appeal under Order XXXVI Rule 1 of Original
Side Rules, against the Judgment and Decree dated 02.12.2009
made in C.S.No.832 of 2001.

For appellant : Mr.T.S.Ramaswamy
for Mr.P.Ravishankar Rao

For respondents : Mr.C.P.Sivamohan for R1
No appearance for R2

J U D G M E N T

(Judgment of the Court was delivered by
P.KALAIYARASAN, J.)

This Original Side Appeal is directed against the
Judgment and Decree of the learned single Judge, dated
02.12.2009 passed by the learned single Judge in C.S.No.832 of
2001.

2. The case of the plaintiff as averred in the plaint is
as follows :

(i) The plaintiff was the Managing Director of M/s.
Vaanaivil Technology Private Ltd., (VTPL), a company
incorporated under the Companies Act, which focussed in e-
commerce and web technology in India and in abroad. The first

defendant offered to purchase the entire business, its rights, trademark and brand of VTPL on a going concern basis. The plaintiff accepted the offer. A Memorandum of Understanding (MOU) was entered into between the first defendant and the plaintiff on 20.01.2000. The sale consideration was fixed at Rs.75,00,000/- and the same to be paid as per schedule of payment in Clause (2) of the MOU. The first defendant paid Rs.20,00,000/- to the plaintiff. The first defendant committed breach in paying the balance, resulting in execution of Supplemental agreement, dated 03.12.2000, wherein it was agreed inter alia that the first defendant would pay Rs.11,50,000/- as full and final settlement of consideration for the transfer of shares of VTPL to be paid on 31.01.2001 and for which, the first defendant also agreed to furnish bank guarantee for the aforesaid sum.

(ii) The second defendant furnished Bank guarantee on behalf of the first defendant to the tune of Rs.11,50,000/- on 19.12.2000. The Bank guarantee furnished was to expire by 31.07.2001. The second defendant by its letter, dated 17.05.2001 to the plaintiff stated that the first defendant had instructed them to extend the validity of the guarantee for a further period of two months from 31.07.2001 and required him to file a suit or any action to enforce the claim under the guarantee before 30.09.2001, failing which to have the guarantee forfeited.

(iii) Again on 14.05.2001, the first defendant suggested certain modification and the plaintiff was constrained to accept the same and the same was incorporated into a mutual agreement entered into between the first defendant and the plaintiff. It was covenanted in the said mutual agreement, dated 14.05.2001 that out of Rs.11,50,000/- payable by the first defendant, which is 88.86% of the collection of Rs.12,94,111/-, the plaintiff be paid the balance Rs.7,44,335/- (i.e., Rs.11,50,000 - Rs.4,05,665 = Rs.7,44,335/-), after having given credit to the amount paid. The first defendant had paid Rs.4,05,665/- as on 14.05.2001. The first defendant paid a further sum of Rs.1,01,319/- to the credit of the plaintiff, leaving the sum of Rs.6,43,196/- unpaid.

(iv) The second defendant, by its letter, dated 03.10.2001, sought plaintiff's willingness to receive the first defendant's cheque for Rs.55,982/-, being the amount alleged to be due as final settlement with the Audit certificate, dated 30.09.2001. The said amount was not inconsonance with the amount payable to the plaintiff and however, since the letter stated that the cheque amount was not a payment under the Bank guarantee, the plaintiff received the cheque. Even the said cheque was not honoured by the first defendant by instructing the Banker for stoppage of it. The

first defendant ought not have deviated from his own commitment, have agreed and accepted to pay Rs.11,50,000/-.

(v) The Bank Guarantee furnished by the second defendant has not been fulfilled by the first defendant and therefore, the Bank Guarantee holds good to the extent of Rs.6,43,196/- due and payable to the plaintiff and the damages to the tune of Rs.5,00,000/-, as the plaintiff has been put to untold hardships and that payments have not been paid in time.

3. The contentions of the first defendant in his written statement are as follows :

(i) The Memorandum of Understanding (MOU), dated 20.01.2000, Supplemental Agreement, dated 03.12.2000 and Mutual Agreement, dated 14.05.2001 entered into between the plaintiff and the first defendant are not disputed. All allegations as against the first defendant are denied. As per the Supplemental Agreement, the plaintiff in Clause 7 has confirmed that the sales receivables of VTPL as on 30.11.2000 was Rs.12,94,111/- and based on such confirmation, the first defendant had agreed to pay the plaintiff a sum of Rs.11,50,000/- in full and final settlement of consideration for the transfer of shares of VTPL, which was to be paid before 31.01.2001.

(ii) In the Supplemental Agreement, it is further provided that the first defendant would furnish a Bank Guarantee for Rs.11,50,000/- and that if any portion of the receivable were not realised / received on or before 31.01.2001, the same would be deducted from the consideration payable by the Bank Guarantee and would be enforceable, provided the plaintiff performs his obligation, as stated in the agreement.

(iii) Another Pre-condition of the Guarantee is that a Certificate from M/s. Ramarathnam & Madhavan Associates, Chartered Accountants, to the effect that the plaintiff has discharged his obligations under the agreement was required to be submitted by the plaintiff to the Bank.

(iv) As per the provisions in Supplemental Agreement, an Audit Certificate was obtained for the total realisation up to 30.09.2001, which was only Rs.6,33,565/- as against the total amount of Rs.12,94,111/-. With regard to the aforesaid figure, the payment at the rate of 88.86% amounted to Rs.5,62,986/- as against which Rs.5,07,004/- had already been paid and the balance due therefore was only Rs.55,982/-. Therefore, the first defendant instructed the Indian Bank to realise the cheque issued by the first defendant for Rs.55,982/- to the plaintiff, on his surrendering the Original Guarantee to the Bank.

(v) Since the plaintiff refused to surrender the Bank Guarantee, the first defendant had to instruct the Banker for stoppage of payment. The plaintiff cannot contend that the Bank Guarantee has not been fulfilled or that the same would

be hold good for Rs.6,43,196/-. The further claim of Rs.5,00,000/- as damages is purely speculative and has been obviously included with a view of bringing the above suit, within the jurisdiction of this Court. Therefore, the suit is to be dismissed.

4. The case of the second defendant, as elucidated in their written statement is as follows :

The second defendant being Bank is made a party based on the Deed of Guarantee, dated 19.12.2000. The Deed of Guarantee was originally followed up to 31.07.2001 and at request of the first defendant, the same has been extended up to 30.09.2001. Under the said agreement, the plaintiff is the beneficiary and he can invoke the guarantee on or before 30.09.2001 for any demand or claim from the first defendant.

(ii) As per the said guarantee, the claim or demand shall be made in writing and supported by Certificate from Chartered Accountants, viz., M/s. Ramarathinam & Madhavan Associates and the same is binding on the plaintiff and the defendants. The plaintiff invoked the guarantee by a letter, dated 29.07.2001 but the same was not supported by certificate from the Chartered Accountants, as stipulated under the guarantee. The said invocation is not valid and proper in law. However, the second defendant has sent a suitable reply on 03.10.2001 to the plaintiff. In the mean time, the first defendant sent a letter, dated 29.09.2001 along with a cheque for Rs.55,982/- and the Auditor's Certificate, calling upon the plaintiff to produce the guarantee and to collect the settlement. Based on the said letter, the second defendant had expressed the impossibility of honouring invocation of the guarantee. The plaintiff had received the said cheque but failed to return the original Deed of Guarantee on or before 31.10.2001 as informed by the Bank in its letter, dated 14.10.2001. The plaintiff was further intimated in that letter that in the event of failure to return the Bank Guarantee would treat the guarantee as cancelled.

(iii) On 03.11.2001, the second defendant received a telegraphic message from the plaintiff and came to know of the interim injunction passed by this Court. Therefore, the suit is liable to be dismissed as against the second defendant.

5. The learned single Judge framed two issues and after analysing both the oral and documentary evidence of both sides, partly decreed the suit, directing the first defendant to pay the plaintiff a sum of Rs.6,43,196/- with interest at 18% p.a from 31.01.2001 till the date of decree and subsequent interest at 12% p.a with proportionate cost.

6. The learned counsel appearing for the appellant contended that as per the Supplemental Agreement, dated

03.12.2000, if any portion of trade receivable is not realised / received on or before 31.01.2001, the same would be deducted from the consideration payable by the Bank Guarantee and therefore, the first defendant is not entitled to pay for the unrealised trade receivables. In the agreement, the fixation of the figure of Rs.11,50,000/- was passed only upon the sale receivable as on 30.11.2000. It is further contended that the first defendant is not liable to pay any amount, excepting receivables realised. The plaintiff has not followed the conditions, as per the agreement.

7. The learned counsel appearing for the first respondent / plaintiff per contra contends that though the sale consideration was fixed at Rs.75,00,000/-, due to non payment of the balance amount by the first defendant, supplemental agreement was executed and it was agreed for final settlement on further payment of Rs.11,50,000/- and even after furnishing Bank Guarantee, the first defendant did not pay that amount, resulting to another mutual agreement, wherein it was agreed to pay the balance of Rs.6,43,196/- out of Rs.11,50,000/- at 88.86%. The first defendant failed to pay even that amount and has come forward with this suit. It is further contended that the learned single Judge has rightly decreed the suit, after considering the entire evidence and the same does not require any interference in the appeal.

8. The admitted facts are that the plaintiff, as Managing Director of M/s. Vaanavil Technology Private Ltd., (VTPL), a company incorporated under the Companies Act, promoted and focussed the company in e-commerce and web technology in India and in abroad. The first defendant offered to purchase the entire business, its right, trademark and brand of VTPL and the plaintiff also accepted the offer. The plaintiff and the first defendant entered into a Memorandum of Understanding (MOU), dated 20.01.2000. The sale consideration was fixed at Rs.75,00,000/-. A sum of Rs.20,00,000/- was paid on the date of MOU and the balance amount to be paid at the end of 12 months period, subject to certain future sale projection. On 03.12.2000, supplemental agreement was entered into between the plaintiff and the first defendant, wherein the first defendant agreed to pay to the plaintiff, a sum of Rs.11,50,000/- as full and final settlement of consideration for the transfer of the share paid on 31.01.2001. Again mutual agreement was entered into between them on 14.05.2001, wherein it was agreed to pay the balance at 88.86% of the collection as and when the amount of outstanding is realised and the validity period of Bank Guarantee was agreed to be extended up to 30.09.2001.

whether the first defendant is liable to pay the entire balance amount out of the amount Rs.11,50,000/- agreed as final settlement or whether he is liable to pay only the receivable amounts.

10. As already pointed out, the total sale consideration was originally fixed at Rs.75,00,000/- and Rs.20,00,000/- was received on the date of Memorandum of Understanding. In the supplemental agreement, the balance amount was agreed to be Rs.11,50,000/- as final settlement. In the mutual agreement, the balance in Rs.11,50,000/- is to be paid by realisation and for that the Bank Guarantee was extended for another 2 months.

11. The relevant portions of the supplemental agreement and mutual agreement are suffice to decide the issue which reads as under :

"Supplemental Agreement, dated 03.12.2000

7. The party of the second confirmed that the sales receivables as on 30.11.2000 is Rs.12,94,111/- (Rupees Twelve Lakhs Ninety four thousand one hundred and eleven only) as stated in the Annexure that party to the first part agrees to pay to the party of the second a further sum of Rs.11,50,000/- (Rupees Eleven Lakhs fifty thousand only) as a full and final settlement of consideration for the transfer of the shares of VTPL, which shall be paid on 31.01.2001.

The party of the first also agrees to furnish bank guarantees for the sum of Rs.11,50,000/- (Rupees Eleven Lakhs Fifty Thousand only). If any proportion of trade receivables is not realised / received on or before 31.01.2001, the same shall be deducted from the consideration payable by the bank guarantee.

The bank guarantee for Rs.11,50,000/- (Rupees Eleven Lakhs and Fifty thousand only) to be payable by the first party to the second party on 31.01.2001 shall be enforceable provided the parties to the second part performs his obligation as stated in the MOU. A certificate from M/s. Ramarathnam & Madhavan Associates, Chartered Accounts, 37, Pinjala Subramaniam Street, T.Nagar, Chennai - 600 017, nominated by the party to the first part to the effect that the parties to the second part have discharged their obligations under this agreement shall be submitted by Mr.Umamaheswaran to the Bank, when claiming payment under the bank guarantee.

The first party agrees to pay the realisation made after 31.01.2001 to the second party by extending the bank guarantee, in proportion to the unrealised amounts. However, the outer date of realisation shall not be beyond 31.07.2001."

"Mutual Agreement, 14.05.2001

2. Mr.V.Parandhaman will pay towards the consideration as payable as follows :

(a) As per the Supplemental Agreement, dated 03.12.2000, the amount of sundry debtors outstanding to be received is Rs.12,94,111/- (Rupees Twelve Lakhs Ninety four thousand one hundred and eleven only) and the amount payable to Mr.D.Umamaheswarn is Rs.11,50,000/- which means 88.86% of the collection.

(b) Out of Rs.12,94,111/- a sum of Rs.4,01,510/- (Rupees Four lakh one thousand five hundred and ten only) has been received from the debtors and a sum of Rs.43,000/- also to be considered as received (from Board of Equalisation). Mr.V.Parandhaman has paid a sum of Rs.3,10,665/- (Rupees Three lakhs ten thousand six hundred and sixty five only) to Mr.D.Umamaheswaran towards the consideration. As of date, the balance debtors to be received is Rs.8,49,601.36 (Annexure para 1) (Rupees Eight lakhs forty nine thousand six hundred and one and paisa thirty-six only) and the amount payable are Rs.7,54,956/- (Rupees Seven lakhs fifty-four thousand nine hundred and fifty-six only), i.e., 88.86% on outstanding and Mr.D.Umamaheswaran can receive the consideration as and when the amount of outstanding is realized. The validity period of Bank Guarantee is to be extended upto 30th September 2001. A payment of Rs.95,000/- is being towards the above dues made by Mr.V.Parandhaman to Mr.D.Umamaheswaran now vide Cheque No.943111, dated 14.05.2001.

12. The entire company was sold to the first defendant by the plaintiff under the MOU, dated 20.01.2000. When the supplemental agreement was entered into, the Bank Guarantee was agreed to be executed by the first defendant towards the final settlement amount Rs.11,50,000/-. The first defendant also executed Deed of Bank Guarantee for Rs.11,50,000/- on 19.12.2000, within 15 days from the date of supplemental agreement and the same was valid up to 31.07.2001. Before the

expiry of the Bank Guarantee, the first defendant paid only a portion of the amount towards the final settlement and by way of mutual agreement, dated 14.05.2001, the first defendant agreed to pay the balance amount and also agreed to extend the bank guarantee for another two months, i.e., 30.09.2001. Thus, in supplemental agreement, the first defendant agreed to pay Rs.11,50,000/- to the plaintiff as final settlement and in mutual agreement, dated 14.05.2001, he agreed to pay the balance amount in the above said Rs.11,50,000/- before 30.09.2001.

13. No doubt, in the supplemental agreement, it is mentioned that if any portion of the receivable were not realised / received on or before 31.01.2001, the same would be deducted from the consideration payable by the Bank Guarantee. In mutual agreement also, it is mentioned that the plaintiff can receive the consideration as and when the amount of outstanding is realised.

14. As already pointed out, the entire company has been sold away by the plaintiff to the first defendant and as per the mutual agreement, dated 14.05.2001, the plaintiff also got relieved from the employment of the company with effect from 14.05.2001 and therefore, the realisation of the amount was not within the hands of the plaintiff. Having relieved the plaintiff from employment and extending bank guarantee up to 30.09.2001, it is to be construed that the first defendant has to realise the receivables and pay the balance amount, out of the final settlement amount of Rs.11,50,000/- before the expire of the Bank Guarantee.

15. Therefore, it is for the first defendant to show what steps he has taken to realise the receivables and also the accounts and establish that in spite of his efforts, he could not realise the amount within the time. But the first defendant has not whispered about his efforts either in his letter, Ex.D.2 or in the pleadings. The Audit Certificate, Ex.D.3, depicts only what is payable to the plaintiff as a final settlement on the basis of the realisation of receivables. The above certificate does not preclude the first defendant from the onus to prove that he made every prudent attempt to realise the receivables and he realised only the meagre amount as per the accounts.

16. Thus, the first defendant breached the contract in realising the sale receivables. The learned single Judge has rightly decreed the suit in part and this Court do not find any reason to interfere with the Judgment of the learned single Judge and accordingly, this Original Side Appeal is liable to be dismissed.

In fine, this Original Side Appeal is dismissed with

<https://hcservices.ecourts.gov.in/hcservices/>

costs, confirming the Judgment and Decree of the learned single, dated 02.12.2009 made in C.S.No.832 of 2001. Consequently, connected miscellaneous petitions are closed.

Sd/-
Assistant Registrar(CS II)

//True Copy//

Sub Assistant Registrar

tsvn

To

1. The Manager
Indian Bank,
Nanganallur Branch,
Chennai 600 061.

2. The Sub Assistant Registrar,
Original Side, High Court,
Madras 104.

1 cc to Mr.P.Ravishankar Rao, Advocate, sr.46457

1 cc to Mr.C.P.Sivamohan, Advocate, sr.46488

O.S.A.No.1 of 2011

rj co
kra 01/09/2016

सत्यमेव जयते
WEB COPY