

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 30-08-2016

Pronouncement Date: 20-09-2016

Coram:

The Hon'ble Mr.Justice A.SELVAM
and
The Hon'ble Mr. Justice P.KALAIYARASAN

O.S.A.No.77 of 2010
and C.M.P.No.13011 of 2016
and M.P.No.1 of 2010

Sree Venkateswara Engineering
Corporation
Registered Partnership Firm Rep. by

1. J. Anandhavalli
2. J. Padmanabhan
3. J. Jayashree
4. J. Chandramouliswaran

.. Appellants

(J.P. Janarthanam, since deceased cause title amended vide order of Court dated 08-09-2009 made in mammo dated 08-09-2007)
(Cause title accepted vide order of Court dated 04-03-2010 made in M.P.No.1 of 2010 in O.S.A.SR.No.105673 of 2008)

Vs.

ICICI Bank Ltd.,
Rep. by its Chairman
Land Mark
Race Course Circle
Vadadora - 390 007

.. Respondent

Original Side Appeal preferred under Clause 15 of Letters Patent read with Order XXXVI Rule 1 of Original Side Rules against the order of this Court dated 14-09-2006 made in C.S.No.785 of 1990.

For Appellants : Mr. S. Subbiah
For Respondent : Mr.A.S. Vijayaraghavan,
Senior Central Government Standing Counsel

JUDGMENT

(JUDGMENT OF THE COURT WAS DELIVERED BY A.SELVAM, J.)

This Original Side Appeal is directed against the judgment and decree dated 14-09-2006 passed by the learned Single Judge of this Court in C.S.No.785 of 1990.

2. The appellant herein, as plaintiff, has instituted C.S.No.785 of 1990 on the file of this Court praying to pass a money decree in favour of the plaintiff to the tune of Rs.29,14,952/- (Rupees Twenty Nine lakhs Fourteen thousand Nine hundred fifty two only) wherein the present respondent has been shown as sole defendant.

3. The nub of the averments made in the plaint are that one Andhra Civil Construction, a partnership firm has secured a contract for constructing North Brake Waters for Tuticorin Harbour Project under an agreement dated 21-10-1970. A portion of the work is valued at Rs.1.07 Crores and an agreement of subcontract has been executed by the said firm. After some time, the said firm has stopped execution of work from 01-12-1972 due to heavy loss. In its place, the plaintiff has agreed to execute the remaining work and entered into agreement dated 12-08-1973. The plaintiff has obtained a Relinquishment Deed on 17-12-1975. For the purpose of doing contract works in North Brake Water and South Brake Water, Tuticorin Project Work, the defendant has advanced loans by way of overdraft facilities to the tune of Rs.43.74 lakhs. On the basis of the Relinquishment Deed, the main contractor has taken over all the assets, machineries and deposits of the plaintiff as on 31-12-1975 and also undertaken to pay off all liabilities of the plaintiff arising out of the execution of sub-contract. As per Relinquishment Deed, the main contractor has agreed to pay a sum of Rs.13,00,000/-(Rupees Thirteen lakhs only) immediately, as soon as it

received Escalation Award amount from the Government. The said main contractor has not paid the said sum of Rs.13,00,000/- (Rupees Thirteen lakhs only). Consequently, C.S.No.150 of 1976 has been instituted wherein certain directions have been given. Pursuant to the directions dated 03-04-1978, an Advocate Commissioner has sent a notice to the defendant on 23-06-1979 and thereby called upon to pay Rs.25,00,000/- (Rupees Twenty five lakhs only). The defendant sent a reply notice dated 12-07-1979 wherein it has been stated to the effect that the entire amount has been adjusted. Now the defendant is bound to pay an amount of Rs.29,14,952/- (Rupees Twenty nine lakhs fourteen thousand Nine hundred fifty two only). Under the said circumstances, the present suit has been instituted for the relief sought therein.

4. In the written statement filed on the side of the defendant, it is averred that the defendant has received a sum of Rs.25,00,000/- (Rupees Twenty five lakhs only) from Tuticorin Port towards the bills in respect of North Brake Water Works. The said sum of Rs.25,00,000/- (Rupees Twenty five lakhs only) has been properly adjusted for the loan

accounts of the plaintiff and also for the loan accounts of three others on the instructions of the plaintiff. Further, it is averred that original price bonds are not available with the plaintiff and as such, payment of amount does not arise and there is no merit in the same and the suit deserves to be dismissed.

5. The learned Single Judge, after considering the rival pleadings raised on either side has framed necessary issues and after making elaborate discussion has come to a conclusion to the effect that the plaintiff is not entitled to get the relief sought in the plaint and ultimately, dismissed the suit. The judgment and decree passed by the learned Single Judge are being challenged in the present Original Side Appeal.

6. The learned counsel appearing for the appellant/plaintiff has repeatedly contended to the effect that with regard to construction of North Brake Waters in Tuticorin Harbour, an agreement has come into existence between Andhra Civil Construction and Chief Engineer of the

concerned project. After execution of a portion of the work, the said construction company has not been able to complete the remaining work and subsequently, a sub-contract has been created in favour of the plaintiff and with regard to payment of bills, an account has been in existence in the erstwhile Bank of Madura Limited. The main contractor is liable to pay an amount of Rs.25 lakhs (Rupees Twenty five lakhs only) to the plaintiff and the same is available in the erstwhile Bank of Madura Limited and subsequently, amalgamated with the present defendant and now, the defendant is not liable to pay the said amount of Rs.29,14,952/- (Rupees Twenty Nine lakhs Fourteen thousand Nine hundred fifty two only) and even though on the side of the plaintiff replete evidence have been adduced, the learned Single Judge has failed to consider the same and erroneously dismissed the suit and therefore, the judgment and decree passed by the learned Single Judge are liable to be set aside.

7. To resile the contentions put forth on the side of the appellant/plaintiff, the learned Senior Central Government Standing

Counsel has sparingly contended that even though on the side of the plaintiff so many documents have been exhibited, no document has been filed for the purpose of showing the alleged liability of the defendant. The learned Single Judge after considering the lack of evidence on the side of the plaintiff has rightly dismissed suit and therefore, the judgment and decree passed by the learned Single Judge do not call for interference.

8. It is admitted that on the side of the appellant/plaintiff various documents have been filed and all those documents are relating to previous legal proceedings and also the main contract alleged to have been created in favour of Andhra Civil Construction and also in respect of sub-contract created in favour of the plaintiff.

9. The sum and substance of the case of the plaintiff is that in the erstwhile Bank of Madura Limited, an amount of Rs. 25 lakhs (Rupees Twenty Five lakhs only) is available so as to pay the same to the plaintiff.

10. The consistent defence taken on the side of the respondent/defendant is that those amounts have been adjusted towards loans received by the plaintiff and its sister's concern and now, no amount is in existence in the account of the plaintiff. In fact, this Court has perused the entire judgment passed by the learned Single Judge. The learned Single Judge after elaborating the documents filed on the side of the appellant/plaintiff has given a specific finding to the effect that no clinching document is available on the side of the appellant/plaintiff to prove the alleged liability of the defendant.

11. On the side of the defendant, D.W.1 has been examined and his specific evidence is that the concerned amount has been adjusted towards loans. For the purpose of giving rebuttable evidence no documentary evidence is available on the side of the plaintiff. If really such liability is in existence definitely some documents would have become emerged. As stated earlier, the erstwhile Bank of Madura Limited has been amalgamated with the present defendant. But for the

purpose of proving the existing liability of the defendant, no documents have been filed on the side of the plaintiff.

12. In the present Original Side Appeal, on the side of the appellant/plaintiff, C.M.P.No.13011 of 2016 has been filed under Order 41 Rule 7 of the Code of Civil Procedure. Along with C.M.P.No.13011 of 2016, a document dated 06-04-1976, has been filed. Considering the nature of dispute that exists between the parties, this Court is of the view that C.M.P.No.13011 of 2016 is liable to be allowed and the same is allowed. The document annexed therein has been marked as Ex-P71.

13. The learned counsel appearing for the appellant/plaintiff has also contended that on the basis of the additional document, the Court can easily come to a conclusion that in between the plaintiff and erstwhile Bank of Madura Limited, some money transaction has been in existence. Under the said circumstances, the claim of the appellant/plaintiff is bona fide. But the learned Single Judge has erroneously dismissed the suit.

14. Ex-P71 is nothing but a true copy. Since original of Ex-P71 has not been marked and since with regard to Ex-P71, no evidence is available, the Court cannot come to a conclusion that a liability has been in existence on the part of the defendant.

15. Even at the risk of repetition, the Court would like to point out that in the instant case, absolutely there is no evidence on the side of the appellant/plaintiff for the purpose of proving that the present defendant is liable to pay the suit amount to the appellant/plaintiff. Since the present suit has been instituted praying to pass a money decree in respect of the amount mentioned therein, the entire burden lies upon the appellant/plaintiff. But, unfortunately, the appellant/plaintiff has not proved the same. The learned Single Judge after poring the available evidence on record has rightly dismissed the suit.

16. In view of the discussion made earlier, this Court has not found any force in the contentions put forth on the side of the

appellant/plaintiff and therefore, the Original Side Appeal deserves to be dismissed.

In fine, this Original Side Appeal is **dismissed without costs.**
The judgment and decree dated 14-09-2006 in C.S.No.785 of 1990, passed by the learned Single Judge of this Court are confirmed. The connected M.P.No.1 of 2010 is also dismissed.

(A.S.,J.) (P.K.,J)
20-09-2016

Index : Yes/No
glp

A.SELVAM, J.
and
P.KALAIYARASAN, J.

glp

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