

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 14.07.2017

Coram

The Honourable Mr.Justice RAJIV SHAKDHER
and
The Honourable Mr.Justice ABDUL QUDDHOSE

Original Side Appeal No.284 of 2011
and M.P.No.1 of 2011

MPIL Corporation Ltd formerly known as
Mather and Platt (India) Limited,
Egmore Benefit Society Building,
113, Flowers Road, Chennai - 84. ... Appellant/Defendant

Vs.

Kaleeswari Industries,
Partnership Firm Rep. by its
Partner N.Chockalingam,
32/1, Nammalwar Street,
Choolai, Chennai 600 112. ... Respondent/Plaintiff

Prayer: Appeal filed under Order XXXVI Rule 1 of the O.S.Rules
read with Clause 15 of the Letters Patent to set aside the
judgment and decree dated 12.01.2011 in C.S.No.631 of 1996.

For Appellant : Mr.B.Chandrasekaran
for M/s.R.Subramaniam Asso.

For Respondent : Mr.T.S.Baskaran

J U D G M E N T

(Judgment of the Court was delivered by RAJIV SHAKDHER,J.)

1. This is an appeal, against the judgment and decree dated
12.01.2011, passed by the learned Single Judge, in C.S.No.631 of
1996.

1.1. The respondent firm, before us, had filed a suit, for
recovery of a sum of Rs.35,60,314/- along with interest, at the
rate of 18% per annum, from the date of the suit, till its
payment, along with costs.

1.2. The learned Single Judge, has decreed the suit for a
sum of Rs.7,50,000/- with interest at the rate of 18% per annum,

from the date of the suit, till payment, along with proportionate cost.

2. The appellant company, which was the sole defendant in the suit, being aggrieved, has filed the instant appeal.

3. In order to adjudicate upon the appeal, the following broad facts are required to be noticed.

3.1. The respondent firm, had with a view to commence the business of manufacturing book binding cloth and related goods / articles, sought to purchase the subject apparatus from the appellant company.

3.2. The total cost of the subject apparatus, which was quoted by the appellant company, was a sum of Rs.21,14,677.50/- inclusive of packing charges, Excise Duty and Central Sales Tax.

3.3. It may be pertinent to note, that the, respondent firm had sought financial assistance, for purchasing the subject apparatus, by seeking loan from Tamil Nadu Industrial Investment Corporation Limited (in short, 'T.I.I.C.').

3.4. The record shows that the quotation was furnished by the appellant company, to the respondent firm, on 31.03.1987 (Ex.P3), which, finally culminated, albeit, after a gap of nearly 18 months into a contract on 01.11.1989. By virtue of this communication, the appellant company, confirmed the order dated 30.06.1987, raised by the respondent firm qua the subject machinery.

3.5. It may be pertinent to note, at this stage, that the subject apparatus, which, essentially helped in production of book binding cloth comprised of three machines, namely, back-filling machine; damping machine and calendering machine.

4. The record also shows that the respondent firm had paid an advance of Rs.1,00,000/- and therefore against the balance amount of Rs.20,28,468.87/-, the respondent firm, made further payments in a sum of Rs.18,75,621.96/-. What remains outstanding qua the payment of the subject machinery was a sum of Rs.2,52,847.01/-.

4.1. Evidently, the respondent firm was not happy with the performance of the subject machinery and therefore after exchange of much correspondence between the parties, the dispute, landed up before the Tamil Nadu State Consumer Dispute Redressal Commission (in short 'State Consumer Commission').

4.2. The petition filed by the respondent firm was numbered as O.P.No.349 of 1992. The respondent firm, in the said action, sought various relief against the appellant company.

4.3. Evidently, the respondent firm was able to persuade the State Consumer Commission to direct the appellant company to pay a sum of Rs.4,97,152.86/-, along with interest at the rate of

12% per annum from the date of the said order. In addition, costs in a sum of Rs.2,000/- was also awarded in favour of the respondent firm.

5. Pertinently, the State Consumer Commission arrived at the aforementioned figure after adjusting a sum of Rs.2,52,847.01/- against the sum of Rs.7,50,000/- which was the cost of the back-filling machine.

5.1. Furthermore, the State Consumer Commission also directed the respondent firm to return the back-filling machine.

5.2. It may be relevant to note at this stage, that the respondent firm, before the State Consumer Commission, restricted its claim only to the back-filling machine, though, the claim was made before it with regard to the defect in the entire apparatus comprising of three major machines, to which we have made a reference above.

6. Apparently, both parties were aggrieved by the decision rendered by the State Consumer Commission, and thus, appeals were filed by them before the National Consumer Disputes Redressal Commission, Delhi (in short 'National Consumer Commission').

6.1. The National Consumer Commission vide order dated 17.05.1995, allowed the appeal of the appellant company and dismissed the appeal filed by the respondent firm.

6.2. Briefly, the reasons given by the National Consumer Commission for dismissing the respondent firm's appeal was, that, there was no deficiency in service and that the defects, if any, in the subject apparatus obtained at the very inception and therefore, if at all it was a case of breach of contract, qua which the remedy, if any, available to the respondent firm was by way of a civil suit.

7. Being aggrieved, the respondent firm, preferred a Special Leave Petition (in short 'S.L.P.'), being S.L.P.Nos.20635 and 20636 of 1995. The Supreme Court dismissed both the S.L.Ps vide orders dated 25.09.1995 and 02.01.1996.

8. The record further shows that since the respondent firm failed to pay T.I.I.C., the said entity, took out proceedings under the State Financial Corporation Act, 1951 and thus, proceeded to auction the assets of the respondent firm.

8.1. Consequently, not only the land and building, but also the subject apparatus, was sold in the auction conducted by T.I.I.C. It is in this background, the respondent firm chose to file the instant suit.

8.2. The total damages claimed under various heads by the respondent firm was a sum of Rs.35,60,314/-.

9. Pursuant to the conclusion of the pleadings, the following issues were framed by the trial Court:

"(i) Whether the plaintiff is entitled to get a decree for Rs.35,60,314/- with interest at the rate of 18% p.a. As prayed for ?

(ii) Whether the suit claim is barred by limitation ?

(iii) Whether the suit claim is barred by the principles of res-judicata in view of the order passed in OP.No.349/1992 on the file of the State Consumer Disputes Redressal Commission dated 17.05.1993 ?

(iv) Whether the suit claim is barred by waiver and principles of estoppel ?

(v) Whether there are any breach of guarantee or warranty as alleged in the plaint ?

(vi) To what relief the plaintiff is entitled to?."

10. In so far as the issue Nos.2 and 3 were concerned, the trial Court ruled in favour of the respondent firm.

10.1. It held that the suit was not barred by limitation and that principles of res judicata would not apply, merely because, the respondent firm had taken recourse to proceedings before the State Consumer Commission.

11. As regards issue No.4, the trial Court ruled in favour of the appellant company and held that the principles of estoppel would apply.

11.1. In other words, the trial Court came to the conclusion that the respondent firm could only sustain the claim with respect to the back-filling machine. It appears that this conclusion was reached by the trial Court, inter alia, for the reason that even before the State Consumer Commission, respondent firm had restricted its claim to the back-filling machine.

11.2. In this behalf, the trial Court also noted the stand taken by the respondent firm, in its letter dated 10.06.1991 (Ex.P45). For the sake of convenience, the contents, of the said letter, are extracted hereinafter:

"The erection and commission of 3 Bowl calendar, back filling unit and damping machine has been completed by your Erector Mr.P.G.Nair.

All the above said 3 machines working properly except Doctor blade of back filling unit is not working properly."

11.3. A mere perusal of the said letter (Ex.P45) would show that the respondent firm had conveyed to the appellant company, that except for doctor blade, which was part of back-filling machine, all other machines were working properly.

12. Continuing with the narrative, as regards issue No.5, the trial Court, in effect, came to the conclusion, that there was a breach of guarantee.

12.1. This conclusion, inter alia, was reached by the trial Court based on the quotation given by the appellant company, which contained in Ex.P3, which, inter alia, was indicative of the fact that, the appellant company, would supply suitable drives for the subject machinery, to enable it, to give an output of 10 meters per minute.

12.2. Reliance in this behalf was placed by the trial Court on Ex.P8, which was an undertaking given by the appellant company that the subject machinery will contain first class material and will be of sound workmanship, and that, if there were any defective parts, they would be replaced, within a period of twelve (12) months, from the date of delivery of the subject machinery.

13. It is, in this context, the trial Court, in so far as, issue No.1 was concerned, ruled that the respondent firm would be entitled only to the value of the back-filling machine and therefore, would be entitled to return of Rs.7,50,000/-. Accordingly, as indicated right at the beginning, the decree in a sum of Rs.7,50,000/-, with interest at the rate of 18% per annum was passed in favour of the respondent firm.

14. Being aggrieved, this instant appeal have been filed.

15. Mr.Chandrasekaran who appears on behalf of the appellant company, assails the judgment on the following grounds:

(i) The maximum damages that could have been awarded was 10% of the total cost of the subject apparatus, which was the amount retained by the respondent firm;

(ii) That the suit was barred by res judicata. In this behalf, reliance was placed on the order of the National Consumer Commission;

(iii) The contours of the grievance has been changed, in as much as, when an action was filed before the State Consumer Commission, the grievance articulated by the respondent firm was that there was a defect in the back-filling machine and / or deficiency in service, whereas, in the suit, the grievance projected is that the appellant company was responsible for the breach of contract.

16. Mr.T.S.Baskaran, who appears on behalf of the respondent firm, on the other hand, says, that the entire project failed on account of defective apparatus, supplied by the appellant

company.

16.1. The respondent firm, consequently, could not repay the dues of T.I.I.C., which led to the auction of its assets ,which, included not only the land and building but also the subject apparatus.

16.2. It was, thus, submitted that the damages claimed by the respondent firm in the suit could not be restricted, as was contended on behalf of the appellant company, to 10% of the retained amount.

16.3. Furthermore, the learned counsel submitted that principle of res judicata would not apply to the instant suit action, as the subject matter of the suit action and that which had been preferred, before the State Consumer Commission, was different.

16.4. As regards the submissions made on behalf of the appellant company that the respondent firm had chosen to sue only for defect in goods and / or deficiency in service and not for breach of contract, it was asserted that no fetter would be laid, as long as, the respondent firm was within limitation and the instant action was not barred by the principle of res judicata.

16.5. Furthermore, the learned counsel submitted that the trial Court was wrong in restricting the damages to a sum of Rs.7,50,000/- which was the original cost of the back-filling machine.

17. We have heard the learned counsel for the parties and perused the records.

18. What clearly emerges is that the respondent firm has not filed a cross appeal against the impugned judgment and decree.

18.1. Therefore, the finding rendered by the trial Court that the respondent firm will only be entitled to cost of the back-filling machine cannot be disturbed.

18.2. Even otherwise, upon examining Ex.P45, which is the letter dated 10.06.1991, we are of the view, that the conclusion reached by the trial Court was correct and therefore requires to be sustained.

19. As regards, the argument, advanced on behalf of the appellant company that the principle of res judicata would apply, we are of the view, once again, the conclusion reached by the trial Court was right, which is that the principle of res judicata will not be applicable in this case as the nature of the action filed before the State Consumer Commission was different from what has been filed in this Court.

19.1. The action filed before the State Consumer Commission pertained to defect in goods and/or deficiency in service, whereas, the instant action filed before this Court, concededly, is based on breach of contract.

20. The other argument, advanced on behalf of the appellant company that the damages had to be restricted to 10% of the amount retained, according to us, is a submission which is completely untenable.

20.1. The 10% of the consideration, which was retained, was towards the balance price of the subject apparatus.

20.2. The retention was made to ensure that the subject apparatus performed according to the specifications agreed to between the parties. There is nothing on record which show that parties had agreed that, in case, the subject apparatus did not perform according to the specification, agreed to between them, the aggrieved party, which, in this case, is the respondent firm, would not be entitled to claim the damages for a sum more than the amount retained, which is 10% of the price of the subject apparatus.

21. In so far as the other argument advanced on behalf of the appellant company, which is, that the respondent firm had elected to sue the appellant company only with regard to the defect in the back-filling machine and / or the deficiency in service and therefore it could not file a suit for breach of contract, is, according to us, interrelated with the argument based on the principle of res judicata.

21.1. We already expressed our view with regard to that submission advanced on behalf of the appellant company.

21.2. We only reiterate that this submission is misconceived in law. The respondent firm was well within its right to sue the appellant company for breach of contract. As a matter of fact, the National Consumer Commission also adverted to this facet of the matter.

21.3. Having said so, what concerns us is that the trial Court while noticing the fact that there was admittedly a balance sum of Rs.2,52,847.01 payable by the respondent firm to the appellant company did not touch upon this aspect of the matter. The records shows, that no issue was drawn up on this aspect of the matter.

21.4. Furthermore, what is clearly evident is that while the appellant company has been directed to pay the cost of the back-filling machine, which is, valued at Rs.7,50,000/-, there is no direction made to carry out adjustment with regard to the value of the back-filling machine. As noticed by us, the subject apparatus which includes the back-filling machine was sold along with land and building in an auction held by T.I.I.C.

21.5. The trial Court, according to us, should have taken this fact into account as the respondent firm, according to us, cannot be awarded cost of back-filling machine without due adjustment being made, in the very least, qua the proportionate value obtained for it either in the auction or else its depreciated value given the fact the said machine is not physically available.

21.6. The appellant company was entitled for either the return of the back-filling machine, whatever be its condition, or for adjustment of its value as indicated above.

21.7. At this juncture, it is not possible for us to determine either the depreciated value or the proportionate value received in the auction carried out by TIIC. Therefore, all that one can do, at this juncture, is to adjust the balance price, which, in any event, the respondent firm was required to pay to the appellant company. The balance price admittedly, was a sum of Rs.2,52,847.01/-.

22. We could have taken the easier route of remanding the matter to the trial Court, however, having regard to the amount involved and the period for which the parties have been litigating between themselves, we are inclined to modify the decree to the extent indicated hereafter.

23. Accordingly, the impugned judgment and decree is modified to the extent that the respondent firm would be paid a sum of Rs.4,97,152.99/-.

23.1. This sum is arrived at after adjusting Rs.2,52,847.01/- from the value of the back-filling machine which is pegged at Rs.7,50,000/-.

23.2. So far as interest is concerned, we do not deem it fit to modify the rate of interest. Accordingly, the respondent firm will be paid interest at the rate of 18% per annum on the sum of Rs.4,97,152.99/- from the date of institution of the suit till the date of its payment.

23.3. In addition, cost shall also be paid as decreed by the trial Court.

24. The appeal is disposed of accordingly. Resultantly, the pending application shall stand closed.

s/d-
Assistant Registrar(CS III)

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Sub-Assistant Registrar

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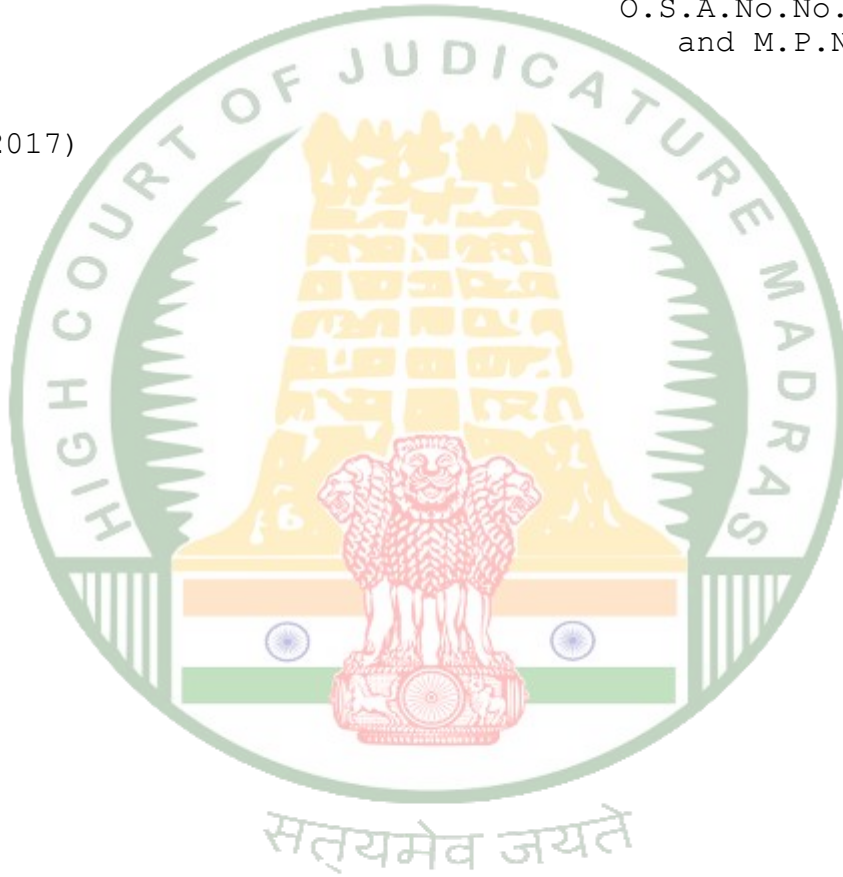
1. The Sub Assistant Registrar
(Original Side)
High Court, Madras.

+1 Cc to Ms. R. Subramaniam, Advocate sr 49957.

+1 CC to Mr.T.S. Baskaran, Advocate sr 49761.

O.S.A.No.No.284 of 2011
and M.P.No.1 of 2011

GJ(CO)
sp(07/09/2017)



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