

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 10.07.2018

CORAM:

The Honourable Mr.Justice **M.M.SUNDRESH**
and
The Honourable Mr.Justice **N.ANAND VENKATESH**
Original Side Appeal Nos.178 and 188 of 2018
and
CMP Nos.12670 and 12671 of 2018

R.Ravinder Kumar

... Appellant in both OSA's

Vs.

1. G.Madan
Director of Pamban Apparels Limited
2. Pamban Apparels Limited,
rep. By its Directors,
Kanavi Taluk, Koilpatti Village,
Aandipatti, Theni District – 620 512

3. R.Ashok

4. G.Kumar

5. R.Gopalan

6. Pamban Software Limited,
No.230, Vaigai Dam Road,
Kanavi Taluk, Koilpatti Village,
Aandipatti, Theni District

..Respondents in both OSA's

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Common Prayer : Original Side Appeals is 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 20.04.2017 passed in Application No.5922 of 2016 **(in OSA No.187 of 2018)**, Application No.936 of 2016 **(in OSA No.188 of 2018)** in C.S.No.426 of 2003.

For Appellants : Mr.Parthasarathy
in both OSA's

For Respondent(s) : M/s.S.P.Arthi for 1st respondent
in both OSA's

COMMON JUDGMENT

N.ANAND VENKATESH., J.

These Original Side Appeals have been filed by the Appellant who is the plaintiff in the suit in C.S.No.426 of 2003 against the common order passed in Application Nos.936 and 5922 of 2016 dated 20.04.2017, wherein these applications were allowed by the learned Single Judge.

2. The Appellant filed a suit for recovery of money against M/s.Pamban Apparels Limited and its Directors. The contesting respondent herein is the 5th defendant in the suit. All the defendants in the suit were set ex-parte and based on the pleadings and the

documents filed by the appellant herein, an ex parte Judgment and decree dated 19.03.2010 came to be passed by this Court, wherein the suit filed by the appellant was decreed as prayed for.

3. Thereafter, the Appellant herein filed E.P.No.86 of 2012 in order to execute the decree against the defendants. Even in the execution proceedings, there was no contest on the side of the defendants and by an order dated 25.11.2014, the learned Master ordered the transmission of the decree to the District Court, Theni for the purpose of execution. At this point of time, the 5th Defendant who is the applicant in Application Nos.936 and 5922 of 2016 filed two petitions one to condone the delay of 2101 days in filing the application to set aside the ex-parte decree and the other was filed to permit the applicant to be represented through his power of Attorney and along with these applications, the 5th Defendant also filed the written statement in the above said suit.

4. The learned Single Judge on considering the materials available on record come to a conclusion that no notice was served on the 5th Defendant in the suit and at that time, when a notice is said to have been served, the 5th defendant was not available at Aandipatti,

Theni District and the same was evidenced by the immigration seal made at Mumbai on 23.06.2012. Therefore, the learned Single Judge came to a conclusion that the 5th Defendant was not served with the summon in the suit and he had no knowledge about the proceedings. Accordingly, the learned Judge allowed the application to condone the delay in filing the petition to set aside the ex-parte decree on terms. The learned Single Judge also found a valid ground to permit the 5th Defendant to be represented by a Power of Attorney Agent, since he was working in abroad.

5. We do not think it appropriate to interfere with the factual findings given by the learned Single Judge with regard to the service of summon and we also had the benefit of looking at the immigration seal on 23.06.2012 made in Mumbai, which was the date on which the suit notice is said to have been served on the 5th defendant. Once this Court finds that the summon has not been served in the suit on the 5th defendant, the consequence would be to give an opportunity to the 5th defendant to contest the suit and defend his right. Insofar as the power of Attorney to represent the 5th defendant, we do not find any ground to interfere with the same.

6. The suit is of the year 2003 and therefore, we thought it fit to impose higher costs on the 5th defendant since the plaintiff has been struggling with the proceedings without getting any relief for the last fifteen years. We therefore, direct the 5th defendant who is the 1st respondent in these appeals to directly pay to the plaintiff a sum of Rs.1,00,000/- (Rupees one lakh only) towards costs within a period of two weeks from the date of receipt of copy of this order.

7. Taking into consideration of the facts and circumstances of the case the ex-parte decree insofar as the 5th defendant is concerned will stand set aside. In order to expedite the proceedings, we directed the appellant and the 1st respondent/5th defendant to file the draft issues in order to give a directions to the learned Master to commence the trial and complete it within a time frame. Accordingly, the appellant and the 1st respondent / 5th defendant filed a draft issues. The following issues are framed in the suit based on the pleadings and the draft issues submitted by the respective counsel :

1. Is the Loan Agreement dated 13.01.1996 valid and binding on the 5th Defendant?
2. Did the 5th Defendant sign and execute any guarantee Agreement in favour of the Plaintiff?

3. Does the Guarantee Agreement purportedly signed by the 5th Defendant support the Loan Agreement dated 13.01.1996?
4. Did the Plaintiff syndicate any funds on the basis of the Loan Agreement and if yes, to what extent?
5. What is the sum purportedly due to the Plaintiff and on what basis?
6. Have the promissory notes that form the basis of the claim, been legally made over in favour of the plaintiff?
7. Whether the plaintiff is entitled for decree as prayed for as against the 5th defendant?

10. The Original Side Appeals are disposed of with the following directions :-

(a) The 1st respondent / 5th defendant shall pay a sum of Rs.1,00,000/- (Rupees one lakh only) to the appellant / plaintiff toward costs, within a period of two weeks from the date of receipt of copy of this order.

(b) If the 1st respondent / 5th defendant fails to

pay the cost within the time stipulated by this Court, the ex-parte decree dated 19.03.2010 shall stand revived.

(c) On payment of costs within the time stipulated by this Court, the ex-parte decree dated 19.03.2010 shall stand set aside insofar as the 1st respondent/5th defendant is concerned.

(d) The issues that have been framed by this Court shall come into operation.

(e) The suit shall be send for trial before the Additional Master I, who is directed to complete the trial within a period of three months from the date on which the suit is listed before the Additional Master I. Immediately on completion of the trial, the suit shall be placed before the learned Single Judge for final hearing.

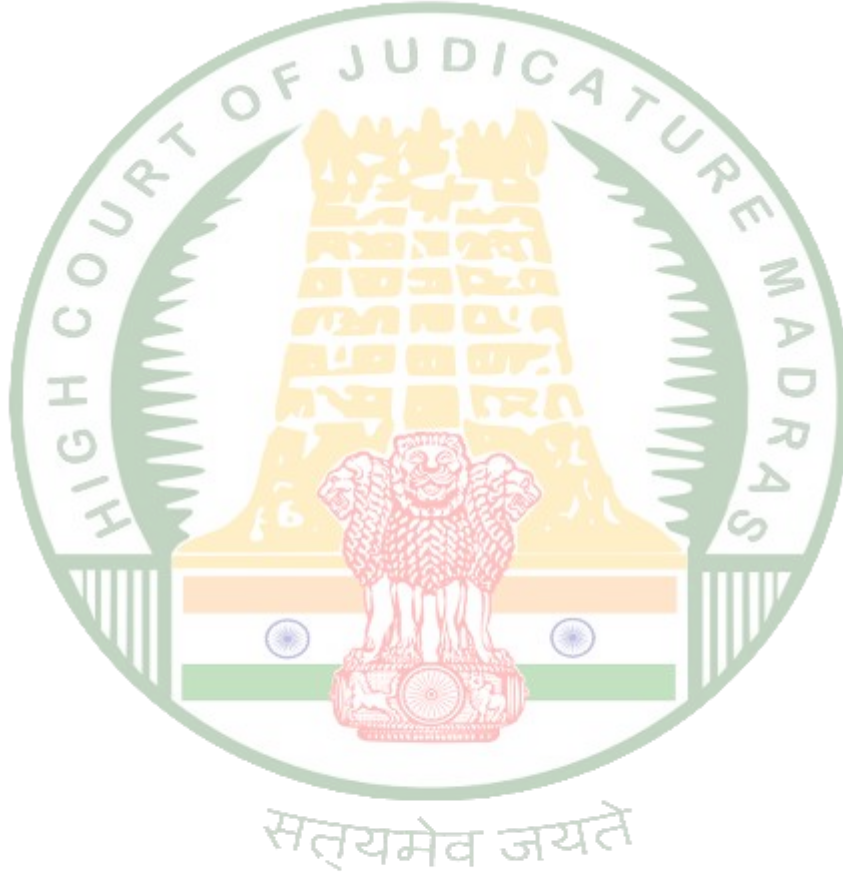
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(M.M.S.,J.) (N.A.V.,J)
10.07.2018

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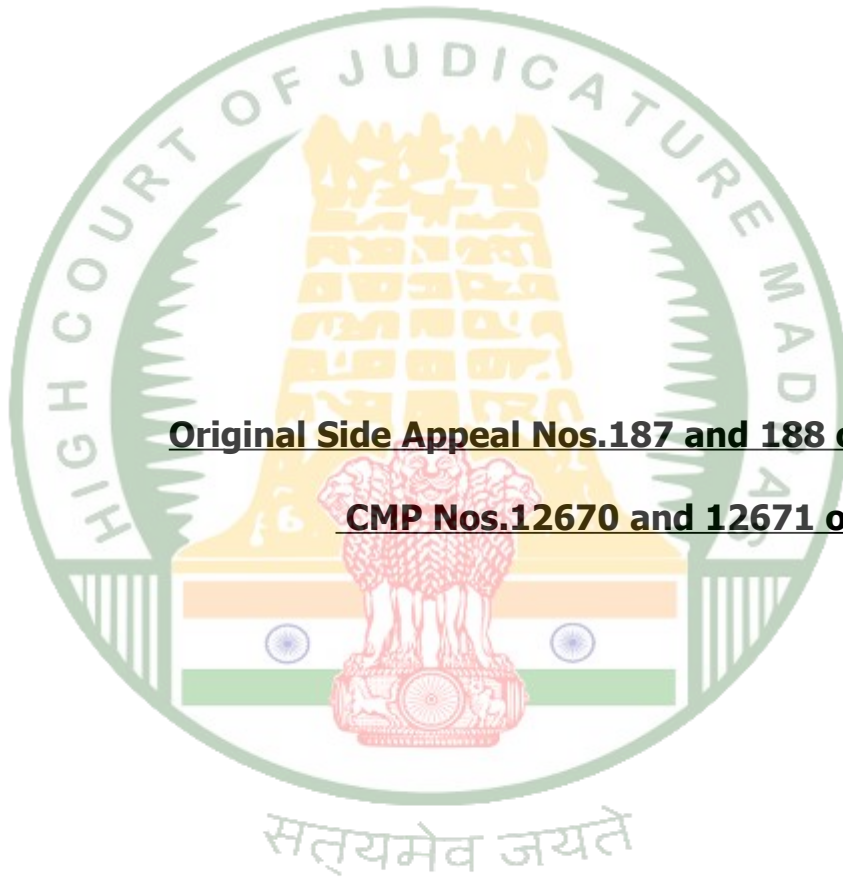
The Sub. Asst. Registrar
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High Court,
Madras.



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