

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated:29.01.2018

Coram

THE HONOURABLE Mr. JUSTICE M.VENUGOPAL

AND

THE HONOURABLE Mr. JUSTICE S.VAIDYANATHAN

O.S.A.No.4 of 2018

The Banyan

Rep by its Director,

56/58 Spur Tank Road,

Chetpet, Chennai - 600 031.

... Appellant/Defendant

Vs.

Florida Constructions (P) Ltd.,

Represented by its Director,

Mr.Subash Chandra Bose

Florida's Nest Apartments

Flat No.D, 2nd Floor,

VGP Selva Nagar,

Chennai - 600 042.

...Respondent/Plaintiff

Prayer: Appeal filed under Order XXXVI Rule 1 of the O.S. Rules read with Clause 15 of the Letters Patent against the Judgment and Decree passed by this court dated 28.02.2017 passed in C.S.No.715 of 2012 filed under Order VII Rule 1 of CPC read with Order 4 rule 1 of O.S rules (a)for a direction directing the defendant to pay sum of Rs.31,80,659/- with future interest at the rate of 24% per annum on the principal of Rs.18,49,220/- from the date of presentation of plaint till the date of realization and (b) for the Costs of the Suit.

For Appellant : Mr.H.Adaikala Arockiaraj

JUDGMENT

[Judgment of the Court was delivered by M.VENUGOPAL, J.]

The Appellant/Defendant has preferred the present Original Side Appeal [as an aggrieved person] as against the Judgment dated 28.02.2017 in C.S.No.715 of 2012 passed by the Learned Single Judge.

2.Heard the Learned Counsel for the Appellant.

3.Since this Court is disposing of the present Original Side Appeal filed by the Appellant/Defendant, at the admission stage itself, it is not ordering notice to the Respondent/Plaintiff.

4.Appellant/Defendant's Contentions:

4.1.According to the Learned Counsel for the Appellant/Defendant, the Judgment of the Learned Single Judge in C.S.No.715 of 2012 dated 28.02.2017 in holding that 'the Respondent/Plaintiff Company are entitled to the amount towards the final Bill dated 27.03.2009 i.e. Rs.18,49,220/- with interest as claimed by them etc.,' is against law, facts and probabilities of the case.

4.2.The Learned Counsel for the Appellant/Defendant contends that by placing reliance on Ex.P4 dated 27.03.2009 and holding that it was a final Bill, the Learned Single Judge had committed an error in regard to the arising of cause of action for the Respondent/Plaintiff to file the suit in question.

4.3.Expatiating his submission, the Learned Counsel for the Appellant/Defendant proceeds to point out that Ex.P4 is only a xerox copy of Final Bill dated 27.03.2009 and original of Ex.P4 was not filed before the Learned Single Judge and particularly in view of the admission of P.W.1 to the effect that he was in possession of the original Ex.P4 and that the notings in pencil found in Ex.P4 are not found in the original, the Learned Single Judge is not correct in admitting the Ex.P4 as a document and this has resulted in a serious miscarriage of Justice to the Appellant/Defendant.

4.4.The Learned Counsel for the Appellant comes out with a plea that Ex.P4 dated 27.03.2009 cannot be said to be a Final Bill raised by the Respondent/Plaintiff to the Appellant/Defendant and hence, the date of Ex.P4 cannot be concluded or taken into account for the purpose of limitation.

4.5.The Learned Counsel for the Appellant contends that as per the Work Order-Ex.P3, there is no mention that the Appellant/Defendant is bound by the certificate by the Architect with regard to the Final Bill. Also that, the Appellant/Defendant had not acknowledged the liability in any manner and that because of the defective construction made by the Respondent/Plaintiff, the Appellant/Defendant had suffered loss and they had to engage another contractor to execute the repair work.

4.6.In this connection, the Learned Counsel for the Appellant/Defendant brings it to the notice of this Court that the Appellant/Defendant had not acknowledged Ex.P4 and as a matter of fact, D.W.1 had deposed, in cross examination, that he was not aware that the Architect had finalised Rs.18,49,220/- in

Ex.P4 and that the Respondent/Plaintiff had not established as to who had made the writings in pencil in Ex.P4.

4.7.The Learned Counsel for the Appellant/Defendant takes a stand that the Appellant/Defendant had not admitted the liability and in fact, the Architects certification was not made on 27.03.2009 (the date of Ex.P4) and even as per Ex.P4, the Appellant/Defendant does not admit as Final Bill payable, which is mentioned as Rs.9,02,674.17.

4.8.Yet another argument advanced on behalf of the Appellant/Defendant is that the Respondent/Plaintiff had not arrayed the Architect as one of the parties to the Civil Suit in C.S.No.715 of 2012 and in the absence of the Architect, being made as a party in the Suit or non-examination of the Architect as a witness, to know the genuinity of Ex.P4, the Learned Single Judge should not have relied upon Ex.P4 dated 27.03.2009 at the time of decreeing the Suit and per contra, the Suit should have been dismissed.

4.9.The Learned Counsel for the Appellant/Defendant points out that at the bottom of Ex.P4 dated 27.03.2009 (in the Enclosures) it was mentioned that the Final Bill was dated 23.02.2008 on which date, the Suit is barred by limitation and therefore, the Learned Single Judge came to a wrong conclusion by placing reliance on Ex.P4, without appreciating the fact that the Final Bill was dated 23.02.2008 from which date the Suit is barred by Limitation. That apart, the Suit is barred by Limitation and the interest ordered by the Learned Single Judge at the rate of 24% p.a. is very high and exorbitant.

5.On the basis of the pleadings in C.S.No.715 of 2012, the Learned Single Judge had framed four issues. On the side of Respondent/Plaintiff, in the main suit, witness P.W.1 was examined and Ex.P1 to Ex.P7 were marked and on behalf of Appellant/ Defendant, D.W.1 was examined and Ex.D1 to Ex.D6 were marked.

6.The Points that arise for determination in the present Original Side Appeal are as follows:

(1) Whether the Respondent/Plaintiff is entitled to claim of a sum of Rs.31,80,659/- with commercial interest at 24% p.a. on the principal of sum of Rs.18,49,220/- from the Appellant/Defendant?

(2) Whether the Suit is barred by Limitation?

Discussions and Findings on Points No.1 and 2:

7.According to the Respondent/Plaintiff Company, they are

engaged in the construction work and during the course of business, the Appellant/Defendant had placed a Work Order dated 07.04.2006 for raising construction of about 10 cottages in R.S.No.62, Thriuvidanthai Village, Kovalam, Kancheepuram District.

8. According to the Respondent/Plaintiff Company, after completion of work, they had handed over the project to the Appellant/Defendant and the said project was to the satisfaction of the Defendant as seen from the averments of the Plaintiff. When the Respondent/Plaintiff raised a Final Bill for a sum of Rs.18,49,220/- the same was approved by the Architect viz., M/s.Varsha and Pradeep, but the Appellant/Defendant had failed to pay the amount which resulted in issuance of legal notice dated 25.04.2011 by the Respondent/Plaintiff. In spite of the fact that the Appellant/ Defendant had received the notice, but, they failed to settle the outstanding amount. It appears that the aforesaid amount of Rs.18,49,220/- includes deduction of 5% in respect of Retention amount and another 5% towards Penalty.

9. The pleas of the Respondent/Plaintiff as seen from the Plaintiff are that since they had completed whole project in time with the specification specified by the Appellant/Defendant's Architect, the said retention and penalty amount deducted by the Appellant/ Defendant does not arise. The aforesaid action on the part of the Appellant had resulted in heavy loss to the Respondent/Plaintiff Company and therefore, the Respondent/Plaintiff Company had filed the instant Suit for recovery of the amount in question.

10. It is useful to refer to the evidence of P.W.1 (in cross examination) to the effect that the Architect had sent the original of Ex.P4 to the Defendant (Appellant) and marked a copy to the Respondent/Plaintiff and he had filed the copy before this Court. Although P.W.1 in his evidence had stated (in Ex.P4) a sum of Rs.902,674.17 paise was certified to be the amount for releasing the same, he had tacitly admitted that the amount of Rs.18,49,220/- was arrived at and the same was written in pencil in Ex.P4 - Final Bill.

11. Also that, the evidence of D.W.1 to the effect that it is correct to state that as per Ex.P4 dated 27.03.2009, Architect of the organisation has approved and certified the additional cost incurred for the additional work. But, he does not know what was the amount that was certified and finalised by their Architect as shown in Ex.P4 to the tune of Rs.18,49,220/-. Further, D.W.1 had proceeded to state that it was correct to state that as per written statement and proof affidavit in paragraph 6 that the final amount was fixed at Rs.18,49,220/- by

their Architect.

12.It is to be noted that as per Ex.P3 - Work Order dated 07.04.2006, the Appellant/Defendant had placed the Work Order in respect of Civil, Sanitary and Electrical Works concerning the Project viz., 'The Banyan Village at Thrividanthai Village (Survey No.147/12, 13, 14, 15, 16)'. It appears that the total value of the Contract as per Ex.P3 is Rs.69,97,052.76 paise and it is categorically mentioned in Ex.P3 that the value of this Contract is approximate and the final payment shall be made on a measure and pay basis and that apart, the Work Order was placed based on the tender documents and drawings floated by the Appellant/ Defendant's Architects M/s.Varsha and Pradeep.

13.Ex.P5 is the Notice dated 25.04.2011 issued by the Advocates of the Respondent/Plaintiff Company addressed to the Appellant/Defendant inter alia stating that in spite of the completion of the entire project long back and also submission of the final bill, the Appellant had not paid the amount of Rs.18,49,220/- as per Final Bill in spite of repeated requests etc. In short, the Ex.P5 - Legal Notice demands a balance amount of Rs.18,49,220/- together with interest at 24% p.a. within a period of 7 days from the date of receipt of copy of the receipt of notice. To the Legal Notice - Ex.P5 dated 25.04.2011 issued on behalf of the Respondent/Plaintiff, the Appellant/Defendant, after receiving the same had not effected any payment either towards Principal or Interest.

14.Before the Learned Single Judge, the Appellant/Defendant came out with the pleas that it admitted Ex.P4 - Certification of Payment of Final Bill dated 27.03.2009 for Rs.18,49,220/- of M/s.Varsha and Pradeep, but before settlement, the Respondent/Plaintiff had failed to carry out the repairs and they have engaged the services of M/s.Tata Reality Infrastructure Limited. In fact, the stand of the Appellant is that the Respondent/Plaintiff Company had committed breach of trust by deficiency in service and Ex.P5 - Legal Notice dated 25.04.2011 by the Respondent/Plaintiff Company itself was issued after limitation period, the Suit filed by the Respondent/Plaintiff is barred by Limitation.

15.It is to be pointed out that Section 62 of the Indian Evidence Act, 1872 speaks of 'Primary Evidence'. Ordinarily, the rule is that secondary evidence is inadmissible until the non-production of primary evidence is satisfactorily established, as per decision of the Hon'ble Supreme Court in Tukaram v. Dighole Vs. Manik Rao Sivaji Kokate, AIR 2010 SC 965.

16.Indeed, the existence of primary evidence generally excludes secondary evidence, except in cases where secondary evidence of a particular kind only is admissible as per Section

65(e) and (f) of the Evidence Act.

17. In fact, Section 63 of the Evidence Act deals with "Secondary Evidence". Admissibility of secondary evidence would be subject matter of evidence. Only if a Court is to go into the evidence, the presumptive evidence can also be taken into account. A secondary evidence of document may be allowed by a Court of Law to be led only when original is proved to have existed but was lost or misplaced. A person cannot be compelled to produce the document which he claims not possessed of. Mere production of photo copies do not amount to proof of the same unless the copy given in evidence must be shown either to have been made from the original or compared with the original to be given in evidence. A party desiring to adduce secondary evidence must do so before the concerned Court/Judge recording the evidence. It is for the Judge recording evidence who must decide, if any objection as raised, whether or not to admit the secondary evidence in evidence. It is trite that a document which is otherwise inadmissible cannot be taken in evidence only because no objection to the admissibility thereof was taken, as per decision Malay Kumar Ganguly V. Dr. Sukumar Mukherjee, AIR 2010 SC 1162.

18. Indeed, Section 65 of the Act is there any evidence in order to protect the interest of an individual who is unable to produce either the original or the secondary evidence of the types mentioned in Section 63 of the Act, as per decision L.S. Sadappan V. K.S. Sabarinathan, AIR 2002 Mad 278. No wonder, proper foundation is required to be laid to prove of persons right to adduce secondary evidence. Secondary evidence as a rule is admissible only in the absence of primary evidence. Section 65 of the Act admits secondary evidence only of the existence or the contents of a document which is lost or otherwise unavailable, however, the execution of the document must be proved through evidence in conformity with Section 67 of the Evidence Act. In short, the conditions laid down in Section 67 is to be fulfilled before the secondary evidence can be admitted. In fact, a party furnishing the secondary evidence is not relieved of his obligation to establish the execution just as if the original document had been produced, unless the case is covered by Section 90 of the Act, as per decision Sk. Rafid Uddin V. Sk. Korbar Udduin, 2007 (50) AIC 919 (920) (Cal.).

19. In reality, an application for production of secondary evidence is to furnish full details and must be supported by a proper affidavit, as per decision of the Hon'ble Supreme Court in State of Rajasthan V. Khemraj reported in 2000 SC 1759. A secondary evidence can be permitted to be adduced only after non-production of primary evidence is satisfactorily accounted for and the document cannot be refused to be received in

secondary evidence simply on the ground that the party had not disclosed from where, which authority he obtains the documents and whether the said documents are coming from a proper custody, as per decision *Gafarsab V. Ameer Ahmed* reported in AIR 2006 Kant 95. Secondary evidence of the contents of a document cannot be admitted without non-production of the original being first accounted for in such a manner as to bring it within one or other of the cases provided for in the Section 65, as per decision *J.Yashoda Shobharani*, AIR 2007 SC 1721. Also, the contents of document can be given by means of secondary evidence as per Section 65(a) (c) and (d) of the Indian Evidence Act.

20. Moreover, Section 65 of the Evidence Act, 1872 refers to seven cases in which the secondary evidence of a document is admissible and the same runs as under:

"(a) when the original is in possession or power (i) of the opposite party; or (ii) of a person who is out of the reach of, or not subject to, the process of the court; or (iii) of any person legally bound to produce it and when such person does not produce it after demand, ie notice under s. 66;

(b) when the existence, condition or contents of the original are admitted in writing by the person against whom it is proved;

(c) when the original is lost or destroyed;

(d) when its production is physically impossible or highly inconvenient;

(e) when the original is a public document;

(f) when the original is one of which a certified copy is permitted by this Act;

(g) when the originals consist of numerous accounts or other documents which cannot be conveniently examined in court."

21. In this connection, it may not be out of place for this Court to make a pertinent mention that ordinarily when a party is in possession of the best evidence, he/she is to produce the said best evidence by producing the original document, as a primary evidence as per Section 63 of the Indian Evidence Act. If the party offers sufficient, acceptable, cogent and coherent explanation, then, in regard to the non production of the original, if a Court of Law satisfies with the reasons assigned, then, it can permit the other party to mark document in question. More so, when P.W.1, in his evidence, had stated that he had sent original of Ex.P4 to the Architect of the Appellant/Defendant, then, marking of Ex.P4 xerox copy by the Respondent/Plaintiff is satisfactorily explained and in short, the non-production of original Final Bill of Ex.P4 is not fatal.

22. Apart from that, in the instant case, Ex.P4 - xerox copy was admitted by D.W.1 (witness on behalf of the Appellant/Defendant) and when D.W.1 had admitted Ex.P4 as a xerox copy of

the original, as per Section 17 of the Indian Evidence Act, 1872, the admission is the best piece of evidence of the witness and as such, the non-production of original of a particular document viz., Ex.P4, in the present case, for original Ex.P4 cannot be a fatal one.

23. In regard to the stand taken on behalf of the Appellant/Defendant that the Architect viz., M/s.Varsha and Pradeep was not arrayed as one of the parties to the main Suit by the Respondent/Plaintiff, it is to be pointed out by this Court that in a Civil Suit, the Respondent/Plaintiff is a 'dominus litis' and it is for the Respondent/Plaintiff to array a party as one of the parties to the concerned or relevant proceedings. In the instant case, M/s.Varsha and Pradeep is an Architect, on behalf of the Appellant/Defendant and they have only arrayed at the final amount of Rs.18,49,200/- which amount is due and payable to the Respondent/Plaintiff and added further, the admitted amount in the Final Bill viz., Rs.18,49,220/- was certified by the Architect M/s.Varsha and Pradeep. That apart, when M/s.Varsha and Pradeep viz., the Architect is an Agent on behalf of the Appellant/Defendant, then, their admission of a sum of Rs.18,49,220/-, being the amount payable to the Respondent/Plaintiff Company, by the Appellant/Defendant puts an embargo on the Appellant/Defendant to take a plea that non-examination of the Architect affects the Judgment passed by the Learned Single Judge in Civil Suit in C.S.No.715 of 2012.

24. After contest, the Learned Single Judge in regard to the plea taken on behalf of the Appellant/Defendant that Ex.P4 is only a xerox copy of the Final Bill, the Learned Single Judge came to the conclusion at para 17 of the Judgment in C.S.No.715 of 2012 to the effect that the person had given sufficient explanation for non-production of the original of Ex.P4 and there is no bar for marking of the said Ex.P4 -xerox copy, more particularly, when there is an admission by D.W.1, in the cross examination, that the amount admitted by the Appellant/Defendant Institution in the written statement was based on Ex.P.4. In view of the fact that the Appellant/Defendant Institution had admitted Ex.P4 - xerox copy, the Learned Single Judge opined that the non-production of original of Ex.P4 cannot be put against the Respondent/Plaintiff to nonsuit the Respondent/Plaintiff.

25. Coming to the aspect of the rate of interest of 24% per annum, being an excessive and exorbitant one and also that the plea is taken on behalf of the Appellant/Defendant Institution before this Court that the quantum of interest at 24% was not agreed to between the parties, this Court significantly points out that there is no pleading in regard to the issue of Interest in the written statement being raised by the Appellant/Defendant Institution.

26. In so far as the award of "Interest", it is to be

pointed out that the same is payable by means of "Restitution". No wonder, "Interest" cannot be claimed by any one as a matter of routine or right as the case may be. The exercise of discretionary power by a Court of Law to grant "Interest" is to be pressed into service with the aid of judicial thinking mind, of course, based on the facts and circumstances of a given case which float on the surface. Undoubtedly, in respect of commercial transaction, a Court of Law is empowered to allow a pendente lite and future interest.

27. In this regard, a mere running of the eye over the contents of the Plaint filed by the Respondent/Plaintiff at para 8 in C.S.No.715 of 2012 indicates that the Respondent/Plaintiff had justified its position/stand to claim interest at 24% p.a. because of the fact that the transaction is a commercial one and also that, the Respondent/Plaintiff Company had borrowed money from various third parties to pay off their dues which had occasioned only due to the Appellant/Defendant who are not paid to the Respondent/Plaintiff in time and the said outstanding amount claimed by the Respondent/Plaintiff only arising out of the contract entered into between the parties.

28. In view of the fact that the Appellant/Defendant had not raised any plea in regard to the claim of interest of 24% p.a. made by the Respondent/Plaintiff Company and since it is only raised in the Memorandum of Grounds in O.S.A., this Court holds that in the absence of any pleading in regard to the interest in the written statement filed by the Appellant/Defendant before the Respondent/Plaintiff Company, then, it is not open to the Appellant/Defendant to raise a plea of interest much less the 24% claimed by the Respondent/Plaintiff in the Suit. Apart from that, the Respondent/Plaintiff in the Plaint in C.S.No.715 of 2012 had specifically averred that it had borrowed money from various third parties to pay of their dues which according to them, had occasioned only due to the act of the Appellant/Defendant who had not paid the money to it under the Work Contract entered into between the parties. Taking note of the fact that the transaction being a commercial one and also the fact that the Respondent/Plaintiff had come out with a plea that it had borrowed money from numerous third parties to pay of their dues and also that, the Appellant/Defendant had not paid the outstanding amount as per Ex.P4 which is due and liable to be paid by it under the Contract, this Court unhesitatingly holds that the claim of interest 24% for the amount of Rs.18,49,220/- cannot be said to be an excessive or exorbitant one.

29. In regard to the plea of the Appellant/Defendant that the Legal Notice - Ex.P5 was issued by the Respondent/Plaintiff on 25.04.2011 i.e. after the limitation period and in view of the fact that the last transaction between the parties was on 31.03.2008, the Suit filed by the Plaintiff is not maintainable,

because of the reason that the same is barred by limitation, it is relevant for this Court to point out that the Respondent/Plaintiff Company filed the suit on 26.03.2012 and the Final Bill - Ex.P4 dated 27.03.2009 and the Final Bill - Ex.P4 was prepared only after the Architect and the Respondent/Plaintiff arrived at the consensus in regard to the sum of Rs.18,49,220/- to be paid by the Appellant/Defendant/Institution. Just because, the Architect M/s.Varsha and Pradeep, being the Agent of the Appellant/Defendant, was not examined as a witness and not arrayed as one of the Defendants in the main Suit that will not enable the Appellant/Defendant/Institution to take a plea that the Architect had only arrived at the final settlement in Ex.P4 and that the Defendant had not agreed to the same. As a matter of fact, the Appellant/Defendant, being the 'Principal' and the Architect M/s.Varsha and Pradeep was only an Agent and the Agent's act will have to be honoured by the Appellant/Defendant based on the principle of 'act of Agency' and as such, it is not open to the Appellant/Defendant to take a contra plea that the non-examination of the Architect M/s.Varsha and Pradeep or non-impleadment of the said Architect M/s.Varsha and Pradeep, affects the Suit in material term.

30.It is to be pointed out that Article 18 of the Limitation Act, 1963 pertains to Suits for the price of work turned out by the Plaintiff for the Defendant at his request, where no time has been fixed for payment. Undoubtedly, Article 18 of the Limitation Act covers a Suit by a Contractor for recovery of price for the work executed etc. To attract the ingredients of Article 18 of the Limitation Act, three factors are essential. The Suit should be for price of the work turned out by the Plaintiff for the Defendant. The said work ought to have been executed at the request of Defendant thereby implying an existence of contract. Therefore, a Suit by a Contractor for the price of work turned out by him under the Contract is governed by Article 18 of the Limitation Act, 1963 as per decision Zilla Parshed V. Smt.Shanthi Devi, ILR (1965) 1 All 783.

31.In the instant case on hand, Ex.P4 is the xerox copy of the certification of payment of Final Bill dated 27.03.2009 issued in respect of the Project 'The Banyan Village' and in regard to the 'Civil Electrical and Plumbing Works' executed by the Respondent/Plaintiff is the starting point of Limitation in regard to the Suit filed by the Respondent/Plaintiff and therefore, the ingredients of Article 18 of the Limitation Act, will apply. Since the present Suit is filed by the Respondent/Plaintiff for recovery of money for the work turned out, the Article 18 of the Limitation Act, 1963 squarely applies to the present Works Contract.

32.In view of the above, this Court holds that the Suit is

laid well within three years from the date of Final Bill viz., 27.03.2009 and one cannot brush aside a primordial fact that the Suit was filed by the Respondent/Plaintiff Company on 26.03.2012. In fact, only from the date of Final Bill viz., Ex.P4 dated 27.03.2009, the period of limitation begins to run and if this Court take into account of Ex.P4 - Final Bill dated 27.03.2009, then, the Suit filed by the Respondent/Plaintiff is well within the period of Limitation viz., 26.03.2012, being the date of filing of the Suit. Therefore, the contra plea taken on behalf of the Appellant/Defendant Institution is not accepted by this Court.

33.In the light of foregoing discussions and this Court answering the Points No.1 and 2 against the Appellant/Defendant and also on an overall assessment of the entire conspectus of the attendant facts and circumstances of the present case in an integral fashion, comes to an irresistible and inevitable conclusion that the Judgment passed by the Learned Single Judge in C.S.No.715 of 2012 dated 28.02.2017 does not suffer from any material irregularities or patent illegalities in the eye of Law. Consequently, the Appeal fails.

34.In fine, the Original Side Appeal is dismissed, leaving the parties to bear their own costs. The Judgment passed by the Learned Single Judge in C.S.No.715 of 2012 dated 28.02.2017 is affirmed by this Court for the reasons assigned in this Appeal.

Sd/-
Assistant Registrar(CS IX)

//True copy//

Sub Assistant Registrar

Sgl

TO

1.The Sub Assistant Registrar,
Original side Section,
High Cour, Madras 104.

+1cc to Mr.Sundar Mohan, Advocate SR.No.6366

O.S.A.No.4 of 2018

EV(CO)
GN(14/02/2018)