IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 24.09.2018

CORAM

THE HON'BLE MR.JUSTICE M.SUNDAR

C.S.No.66 of 2017
and A.No.7229 of 2018

M/s.Kamachi Industries Ltd.,
Formerly known as
M/s.Kamachi Sponge & Power Corporation Ltd.,
represented by its Office Executive Legal,
Mr.P.Baskaran,
No.39, ABC Trade Centre III Floor,
Inside Devi Theatre Complex,
Anna Salai, Chennai – 600 002. .. Plaintiff

Vs.

M/s.Geetha Sai Energy Solution Pvt., Ltd.,
Head Office,
No.127-A, North Red Hills Road,
Janakiram Reddy Colony,
Villivakkam, Chennai – 600 049. .. Defendant

This Civil Suit is preferred, under Order XXXVII Rule 2 of C.P.C., read with Order IV Rule 1 of High Court O.S. Rules
a)the sum of Rs.1,67,40,569/- together with interest at the rate of 24% per annum on Rs.1,30,27,680/- from the date of filing the plaint till the date of payment and/or realisation;
b) the cost of the suit; and
c) pass such further or other orders as may just and necessary in the circumstances of the case.

For Plaintiff : Mr.K.Mahalingam
For Defendant : Set exparte

JUDGMENT

The aforesaid application i.e., A.No.7229 of 2018 has been taken out under order XIII-A of 'The Code of Civil Procedure, 1908' ('C.P.C.' for brevity) as amended by 'The Commercial Courts Act, 2015' ('said Act' for brevity) with a prayer for summary judgment.

2. Mr.K.Mahalingam, learned counsel on record for the sole plaintiff is before this Commercial Division and learned counsel requested that a summary judgment in the main suit itself may please be passed, as the defendant has no real prospects of successfully defending the claim and that there is no other compelling reason as to why the claim of the plaintiff should not be disposed of before

recording oral evidence.

3. In support of his aforesaid submission, learned counsel pointed out that the sole defendant has been duly served with suit summons on 01.03.2017, but had not chosen to either enter appearance through a counsel or come before this court in any other manner. It is also pointed out that, thereafter the sole defendant was set ex-parte on 05.02.2018. Though obvious, it is also brought to my notice that sole defendant has not filed any written statement.
4. It is in the aforesaid circumstances, the aforesaid application for summary judgment has been taken out and obviously issues have not been framed. Therefore the stage on which the aforesaid application for summary judgment has been taken out is in order, is learned counsel for plaintiff counsel's say.

5. I deem it appropriate to examine the prayer for summary judgment under order XIII-A of C.P.C. as amended by the said Act. In other words, I examine the entitlement of the plaintiff to get a summary judgment against the defendant without recording oral evidence with regard to the suit claim.

6. A perusal of amended C.P.C. as amended by the said Act, particularly sub-Rule (3) of Rule 1 of Order XIII-A reveals that an application for summary judgment under Order XIII-A cannot be made in a suit in respect of any Commercial Dispute that has originally been filed as a summary suit. It is not in dispute that the instant suit, which is a Commercial Dispute, was originally filed as a summary suit under Order XXXVII of C.P.C.

7. Faced with the above situation, learned counsel for plaintiff requested this Court to treat this application i.e. A.No.7229 of 2018 as a prayer under clause (a) of sub-Rule (6) of Rule 3 of Order XXXVII C.P.C. Clause (a) of sub-Rule (6) of Rule 3 of Order XXXVII C.P.C. reads as follows:
'(a) if the defendant has not applied for leave to defend, or if such application has been made and is refused, the plaintiff shall be entitled to judgment forthwith;'

8. It is pointed out that entire Order XXXVII of C.P.C. has not been amended in any manner by said Act. Therefore, the powers of this Court i.e., Commercial Division under Order XXXVII remain intact. When the Court otherwise has powers, quoting of the wrong provision will not take away the powers of the Court and therefore, there is no difficulty in acceding to the request of the learned counsel for plaintiff to treat this as a prayer under Clause (a) of Sub-Rule (6) of Rule 3 of Order XXXVII of C.P.C.

9. The trajectory of the suit above will reveal that the sole defendant though duly served with suit summons on 01.03.2017, has not, within 10 days from the date of such service, entered appearance either in person or by a pleader. Likewise, the defendant within those 10 days has not chosen to file any affidavit or otherwise disclosing such facts as may be deemed sufficient to entitle the defendant to defend, apply on such summons for leave to defend such suit, as provided for under sub-Rule (5) of Rule 3 of Order XXXVII of C.P.C.

10. In the above backdrop, I now turn to the suit itself.
11. Short facts, as they unfurl from the plaint averments, reveal that the plaintiff is a company, which is engaged in the business of generating and selling electricity/power/energy. It is the case of the plaintiff that the defendant approached the plaintiff for purchase of power. To be precise, 4000 K WHR power and for this purpose, raised Letters of Indent dated 24.03.2015 and 24.04.2015. Plaintiff supplied powers as required by the defendant under the aforesaid Letters of Indent, is plaintiff 's further say.

12. Plaintiff also submits that as per the terms of payment and conditions of the invoice, if the payment is not received within five working days, defendant is liable to pay interest @ 0.375% per

week i.e., 18% per annum.

13. It is submitted by the plaintiff that the defendant did not make entire payment for the power supplied in the aforesaid manner and that as of 30.06.2015, the defendant's account showed a total debit balance of Rs.1,30,27,680/- (Rupees One Crore Thirty Lakhs Twenty Seven Thousand Six Hundred and Eighty only) towards balance invoice amount.

14. It is also the further case of the plaintiff that the defendant as on 30.04.2016 was liable to pay a sum of Rs.1,51,77,647/- to the plaintiff, out of which the aforesaid sum of Rs.1,30,27,680/- is towards balance invoice amount and sum of Rs.21,49,967/- is towards interest for the period from 01.06.2015 to 30.04.2016. It is also the further case of the plaintiff that notwithstanding this provision, plaintiff agreed to receive a consolidated round sum of Rs.1,50,00,000/- in full and final settlement of defendants.

15. It is submitted that defendant issued post-dated cheques and thereafter replaced the same with three other post-dated cheques for a sum of Rs.50,00,000/- each bearing cheque Nos.003575, 003576 and 003577 dated 16.03.2016, 23.03.2016 and 31.03.2016 respectively, all these cheques are drawn on ICICI Bank Ltd., Kolathur Branch, Chennai 600 099, totally for a sum of Rs.1,50,00,000/-

16. It is the case of the plaintiff that after issuing the aforesaid three cheques, defendant requested time and asked the plaintiff to wait for some more time to deposit these cheques. Ultimately, left with no option, plaintiff presented the aforesaid cheques for collection on 04.05.2016, 05.05.2016 and 06.05.2016 respectively through their bankers being Union Bank of India, Egmore Branch, Chennai and according to the plaintiff all the three cheques were dishonored with the bankers endorsement 'Funds insufficient'.

17. Most importantly, Mr.K.Mahalingam, learned counsel for plaintiff points out that when the plaintiff issued notice in this regard to the defendant, defendant has received the notice, admitted their liability and sent a reply requesting the plaintiff to postpone the legal action. Legal notice issued by the plaintiff is dated 21.05.2016. To be noted, it has been sent to the sole defendant, which is a private limited company as well as two other natural persons, who have been described as Directors in the sole defendant company. Apparently such a course had been adopted for the purpose of initiating action under Section 138 of the Negotiable Instruments Act against persons in charge of and responsible to the affairs of the sole defendant company. This document, together with postal receipt have been filed as document No.16 along with the plaint. What is of importance is, a reply to this notice dated 28.05.2016 sent by the sole defendant has been placed before me as plaint document No.17 and the same reads as follows:
'Date : 28.05.2016
To
Mr.K.MAHALINGAM., M.Com., B.Ed., LL.B.,
ADVOCATE,
FLAT NO.2, No.22, VAIDYANATHAN STREET,
NUNGAMBAKKAM, CHENNAI 600 034.
MOBILE : 98411 24370.
Dear Sir,
Sub :-
Settlement of dues-M/s Kamachi Sponge & Power Corporation Limited., Chennai 600 002.
Ref :-
Your Legal Notice Dt.21.05.2016.

We would like to inform you that, we are in receipt of your notice referred as above, on 25.05.2016 and noted the contents therein.
We hereby like to conform you that, we have to settle our dues of Rs.1,30,27,680/- being the balance for the supply electricity power generated by to M/s Kamachi Sponge & Power Corporation Limited, Chennai.
We also like to inform you that, we have yet to receive our depository funds from the generators, whom we had tied up during 2014-15, resulting us on a financial crisis.
We hereby like to express our sorry, as we could not able to honor our commitment to clear the dues as, we have not got credit from the external agencies as promised.
As we have to overcome from all this bad situation, we had sourced a financial institution for getting a term loan and the same was under process. On receiving a call from the Financial Institution our CEO and CFO had visited them last week for further discussion on sanction process. The Financial Institution informed us, as their statutory audit is under progress, the process on our loan sanction shall be taken for scrutiny only by middle of July 2016.
We positively expect that, our sanction and disbursement on loan from the financial institution shall be materialized on by end of 2nd week of August 16 and shall start repaying your dues instantly.
As the power restriction were withdrawn by Tamilnadu Government to industries during June 2015, our power trading business is totally stalled and the out standings from other generators also not received and lead us on financial crisis. As a token of security as insisted by them we have issued 3 cheques for Rs.50.00 lakhs. We came to know from our bankers that the cheques were returned without sufficient funds in our account. We also like to inform you that, as we had requested M/s Kamachi Sponge & Power Corporation Ltd., wide our letter dated 12.05.2016 to wait for some more time.
We also like to state that, we do not have any intention to delay in settling our dues to our principal at an any point of time, rather the present situation makes us. We assure you that we shall be settling the entire dues within 4 to 5 months on a phased manner positively.
In this regard, we hereby request you to postpone further legal action/proceedings against us until then please, as we were confident on settling their dues as stated above.
Kindly do co-operate with us in this regard.

Thanks and regards,
For GEETHA SAI ENERGY SOLUTIONS PVT LTD.,
(s/d)
DIRECTOR.
Copy to : M/s KAMACHI SPONGE & POWER CORPORATION LIMITED
ABC Trade Centre, Anna Salai, Chennai 600 002.'

18. More importantly, prior to the exchange of the aforesaid notice, learned counsel for plaintiff points out that the sole defendant had sent a e-mail dated 03.05.2016 (plaint Document No.13) and a letter dated 12.05.2016 (plaint Document No.15), which read as follows:
(i) Plaint Document No.13:

'Subject : Re : Geetha Sai Energy Solution Pvt. Ltd., - Outstanding dues/Cheque presenting reg.
From :Somasundaram Subramanian on Tue,03 May 2016 14:41:31
To : KSPCL Power
Cc : samburam, glkothari

Dear Sir,
We we're extremely sorry on delay in replying your mail due to hectic financial crisis and pressure as inadequate delay on getting sanctions from financial institution's on loans/overdrafts.
At present we have been sanctioned for a loan by a financial institution on infrastructure

development at Coimbatore and land Regn formalities were completed.
As to move further, now we are on the process of finalizing the builder to start construction activities and marketing.
Apart from the above activity, we have been due on getting a overdraft facility to facilitate a online trading on Groceries and pulses.
We have failed many times on keeping our commitments due to failure on expected inputs, and now we have been confident on overcoming all the hurdles, and as a good sign, ball started rolling forward.
We hereby assure you that, we shall start paying your dues before 15th May 2016 gradually and shall settle all you dues within 4-5 months period.
Our humble request to you, is to support us at this critical situation please.

Thanks and regards,
S.SOMASUNDARAM
DIRECTOR
GEETHA SAI ENERGY SOLUTIONS PVT LTD.
On Tuesday 3 May 2016, KSPCL Power wrote:
Dear Sir,
We refer to our earlier mail dated 24.03.2016 on the huge outstanding amount pending from your end.
In respect to the same we are unable to reach you on phone and there is no communication from your end even on mails.
On 18.04.2016, only your staff Mr.Ramesh & Mr.Raja had met our director Mr.Vinod Kothari and had communicated that the repayment will be started immediately. Our director had insisted to meet you in person in this regard.
It is almost 2 weeks after the meeting & there is no response from your side. When MR.Ramesh was contacted last week, he had mentioned that the payment will be started from 30.04.2016.
But until today we have not received any payment.
Today we have been continuously calling Mr.Ramesh. but the calls are not picked up.
Hence we have no other choice but to present your cheque.
We will be presenting one cheque of value Rs.50 lakhs today.
Kindly arrange to clear the amount without fail.
For your kind information.
Regards
Pushpa
8939602287

(ii) Plaint Document No.15
'Date : 12th May 2016.

To
The Managing Director,
KAMACHI SPONGE & POWER CORPORATION LIMITED,
'ABC' TRADE CENTRE, Devi Theatre Compound,
Annal Salai, Chennai 600 002.

Dear Sir,

Sub :-
Re-payment of your Dues Request for defer on proceedings regarding
Ref :-

Our email dated 3rd May 2016.

&&&&

We hereby like to inform you that, as stated in our email referred above, we were now came a bit out of our financial crisis as a forward move, we performed Bhoomi Pooja and about to start the construction activities on obtaining DTCP plan approval shortly.
We also like to inform you that, as informed on our further activity on Online marketing/trading of Groceries, were under progress and hope that very shortly it shall be launched and take off as our bankers have endorsed our request and principle loan sanction is expected by next week.
We shall like to state that, the 3 cheques bearing No's 003575 dated 16.03.2016, 003576 dated 23.03.2016 and 3577 dated 31.03.2016 (each Rs.50,000.00) issued to you as security have been presented for clearing and returned by our bankers (ICICI Bank Ltd., Kolathur Branch, Chennai) on 5th, 6th and 7th May 2016 respectively as 'In-sufficient of funds'.
On this circumstances, we hereby request you to consider our request as informed wide our mail as referred above, as we were confident on settling you entire dues within a span of 4-5 months period without further failings, and request you not to initiate any proceedings against us until then.
We once again request you to kindly consider us and extend your support to grow further with your help.

Thanks and regards,
For GEETHA SAI ENERGY SOLUTIONS PVT LTD.,
(s/d)
S.SOMASUNDARAM'

19. A perusal of aforesaid e-mail dated 03.05.2016 and letter dated 12.05.2016 which have been placed before me as plaint Document Nos.13 and 15, read in conjunction with the aforesaid legal notice and the reply notice, which have been placed before me as plaint Document Nos.16 and 17, bring to light that the defendant has admitted their liability in no uncertain terms. After accepting their liability in no uncertain terms, at least vide 3 plaint documents, which have been alluded to supra, the defendant after receiving summons in the summary suit on 01.03.2017 has not entered appearance within 10 days and taken recourse to sub-rule (5) of Rule 3 of Order XXXVII of C.P.C. Therefore, the plaintiff is certainly entitled to a judgment forthwith under Clause (a) of sub-Rule (6) of Rule 3 of Order XXXVIII of C.P.C.

20. This takes me to the plaint prayer.

21. As the defendant has not honoured the plaintiff's offer by receiving aforesaid round sum of Rs.1.5 crores in full quits, plaintiff has laid this suit for the entire sum of Rs.1,67,40,569/-. Besides this, interest has been claimed at the rate of 18% per annum on Rs.1,30,27,680/-, which is principal amount besides costs of the suit. This takes us to the question as to whether there is any contract between the parties regarding rate of interest. As alluded to supra, it is plaintiff's case that the plaintiff is entitled to get interest @ 0.375% per week, if the invoices are not cleared within five days. Invoices have been placed before me as plaint Document Nos.4 and 5. To be noted, plaint Document No.4 is dated 31.05.2015 and plaint document No.5 is dated 30.06.2015. There is a term in the said invoices, which reads as follows:
'2.Payment should be made within 5 working days otherwise penalty @ 0.375% per week of delayed payment will be charged/with cessation of power supply subject to Chennai jurisdiction only.'

22. I embarked upon the aforesaid exercise of examining whether there is a contract between parties to lis regarding rate of interest in the light of Section 34 of C.P.C.

23. As there is a contract between the parties, wherein the parties have agreed to pay interest at the rate of 0.375% per week, which according to the learned counsel for plaintiff translates to 18% p.a., plaintiff is entitled to get interest at 18% per annum, though 24% per annum has been prayed for in the prayer paragraph.

24. Considering the trajectory of the suit and considering the fact that the sole defendant has not chosen to enter appearance and has compelled the plaintiff to carry the matter to its logical end by pursuing this suit for over 1= years (to be noted plaint was presented on 25.01.2017), I am of the view that the plaintiff is entitled to costs.

25. A.No.7229 of 2018 is treated as an application under Order XXXVII Rule 3 (6a) of C.P.C. in the light of sub-Rule 3 of Rule 1 of Order XIII-A of amended C.P.C. as amended by the said Act, as alluded to supra.
26. Suit is decreed with costs as prayed for.

24.09.2018

Speaking/Non-Speaking order

Index : Yes/No

vsm

M.SUNDAR, J.
vsm

C.S.No.66 of 2017
and A.No.7229 of 2018

24.09.2018