

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 16.04.2019

CORAM:

THE HONOURABLE MR. JUSTICE M.M. SUNDRESH
AND
THE HONOURABLE MR. JUSTICE C.SARAVANAN

A.S No. 471 of 2011

M/s. Southern Cogen Systems Private Limited
No.63-D, Shankaran Avenue,
Vellachery Road,
Vellachery, Chennai - 600 042
Rep. By its Director Mr.B.S.Adishesh Appellant/2nd Defendant

Vs.

1.M/s. Sree Venkateswara Engineering Corporation
No.8/2, Mettupalayam Road,
Coimbatore - 641 043
Rep.by its Managing Director,
Mr.C.N.Sathyamurthy1st Respondent/Plaintiff

2.M/s. Fashion Synccotex Private Limited,
A-1, Mahalakshmi Apartments,
Venkatakrishna Road, R.S.Puram,
Coimbatore - 641 002
Rep.by its Executive Director
Mr.P.M.Sundaram2nd Respondent/ 1st Defendant

Prayer: Appeal filed under Order 41 Rule 1 r/w Section 96
of CPC against the judgment and decree dated 07.08.2006 passed
in O.S.No.912 of 2004 on the file of II Fast Track Court,
Additional District & Sessions Court, Coimbatore.

For Appellant : Mr.Karthik Mukundan

For Respondents : Mr.Mukunth for
M/s.Sarvabhauman
Associates for R1
R2 - Given up.

JUDGMENT
(Delivered by M.M.Sundresh,J.)

This appeal is preferred by the appellant, who is the second
defendant, being aggrieved over the judgment and decree rendered

by the trial Court, by which both the defendants were made liable jointly and severally to a specific decree amount in favour of the plaintiff/first respondent.

2. First, let us deal with the admitted facts. An agreement (Ex.B1) was entered into between the appellant and the first respondent on 22.05.2002. Under the aforesaid agreement, the appellant was appointed as Marketing Agent to the first respondent/plaintiff. The relevant covenants of the agreement are extracted hereunder:-

"2.All the offers initially would be made by Marketing agent on behalf of Manufacturer and the required stationary are to be given free of cost by Manufacturer.

3.Marketing Agent will represent for all technical discussions if required for commercial discussions and order finalization. The respective expenses of the personnel are to be born by the respective organization.

4.Manufacturer will pass on a commission of 10% on the basic invoice value (net of taxes) for any order value worth up to Rs.1 crore and 7.5% on the basic contract value for orders worth more than Rs.1. Crore to marketing agent.

5.Manufacturer will support through required advertising in engineering journals and periodicals to promote the product and the details would be discussed and agreed mutually. The cost of the same shall be born by the Manufacturer.

6.Marketing agent will assist manufacturer in generating inquiry and converting onto orders.

7.Complete offer copy and all pre-order correspondence will be given to Manufacturer by Marketing agent by e-mail.

8.The marketing agent shall charge any support required by Manufacturer from the Marketing agent other than the marketing on no profit basis (Cost Basis)

9.all payments of commission shall be paid by the Manufacturer on pro-rata basis to the Marketing agent.

10.This contract can be terminated by giving notice of Six months by either of the parties. All accrued commission shall be paid in full for the orders obtained during the tenure of the contract by the Marketing Agent even after the term initiating the contract."

3. This document is not disputed, but rather admitted between the parties. The first respondent/plaintiff was doing business in manufacturing Boilers. The second respondent, being the first defendant, placed orders for the purchase of boilers. This was done through the Purchase Orders under Ex.A1 and A2 through the appellant. Some payments have been made for a sum of Rs.12,00,000/- by the first defendant in favour of the plaintiff. This was also done through the appellant. Thereafter, a communication was sent by the first defendant to the appellant under Ex.B10, dated 08.11.2002, stating that out of the sum of Rs.10,00,000/- paid, Rs.7,71,200/- will have to be given in favour of the plaintiff and the remaining Rs.2,28,800/- can be appropriated by it for the purchase of wood chipping machine and balanced advance payment. Needless to state that for the recovery there was an agreement between the appellant and the first defendant. Similarly, supplies were also made by the plaintiff in favour of the first defendant.

4. Under Ex.B11, dated 20.02.2003, a letter was sent by the first defendant to the appellant ordering for erection and commission of boiler with all accessories. Under Ex.B14, dated 28.04.2003, a letter was sent by the first defendant to the appellant stating that there was a delay in supplying the boilers resulting in loss, as the production was further delayed. In the aforesaid communication, the first defendant acknowledged that the original order value is of Rs.27 lakhs, but the same will have to be reduced to Rs.22 lakhs in view of the delay that occasioned due to the failure of the plaintiff in making supply at the appropriate time. Accordingly, a sum of Rs.5,00,000/- was reduced unilaterally by the first defendant. It was stated that a further sum of Rs.12,00,000/- was paid to the plaintiff. However, the first defendant also acknowledged the factum that a further sum of Rs.1,12,050/- has to be paid in favour of the plaintiff. A reply dated 31.03.2004 was sent under Ex.B16 by the appellant once again reiterating that a sum of Rs.12 lakhs has already been given in favour of the plaintiff by way of advance and the remaining amount has been used by it. Accordingly, the first defendant was asked to release the payment due. The payment due was also asked based upon the boiler value as agreed upon by the parties originally for a sum of Rs.27 lakhs.

5. Since the aforesaid amount was not paid, the plaintiff filed the suit seeking recovery of a sum of Rs.16,51,549.48 along with the interest accrued. This is more or less in tune with the communication sent by the appellant to the defendant no.1 under Ex.B16 claiming a sum of RS.16,09,380/- to be payable to the plaintiff.

6. The first defendant took a plea stating that it has paid

Rs.21,91,488/- and only a balance of Rs.5,93,561.48 is payable by them. Before the trial Court, the plaintiff marked Exs.A1 to A14 as against Exs.B1 to B17. One witness was examined on behalf of the plaintiff as against two witnesses one each on behalf of the appellant and the first defendant. The trial Court framed the following issues for consideration: (i) Is the plaintiff entitled to get the relief? (ii) If not, to what relief the plaintiff is entitled to?

7. Placing reliance upon exhibits marked, coupled with the oral evidence, the Court below fixed the liability on both the defendants. Insofar as the appellant is concerned, the trial Court was pleased to hold that inasmuch as, the appellant is the marketing agent of the plaintiff, and some amount having been paid by the first defendant in favour of the appellant, coupled with the further fact that there was a independent transaction between the parties, the liability cannot be avoided. There was also an implied authority on the part of the appellant to secure the amount due from the second defendant. Challenging the same, the present appeal has been filed.

8. The learned counsel appearing for the appellant would contend that in view of the admitted facts with respect to status of the parties namely, the appellant, being the marketing agent of the plaintiff, and the transactions are between the plaintiff and the defendant no.1 coupled with lack of evidence to show that the appellant was holding the amount due to the plaintiff, the trial Court ought not to have decreed the suit as against it. The learned counsel placed reliance upon Exs.B2, B10 to B16 to buttress his submission.

9. The learned counsel further submitted that there is absolutely no evidence available to fix the liability on the appellant, who is only an agent of the plaintiff. There is an agreement between the plaintiff and the second defendant. If the appellant is an agent, then for the non-payment of the dues they cannot be made liable. There is also no material to hold that the appellant is having any sum due to the plaintiff. The documents referred above would also clearly show that it is the first defendant who owes amount. Therefore, the trial Court has also fixed the liability on the appellant without any basis at all. Therefore, the judgment and decree rendered by the trial Court would require interference.

10. The learned counsel appearing for the first respondent/ plaintiff would submit that though the primary facts are not in dispute, payments were made through the appellant. The appellant has not discharged its prime duty of making the payment in favour of the plaintiff. As the trial Court considered the materials available on record, both oral and documentary, no interference is required.

11. At this juncture, we may note that inasmuch as the first defendant has not preferred any appeal against the decree passed by the trial Court, the said decree has become final as against it.

12. We find considerable force in the submission made by the counsel appearing for the appellant. Admittedly, the appellant is only the agent of the first respondent/plaintiff. We do not find any evidence at all to fix the liability on the appellant, especially in the teeth of Exs.B10, B11, B14 to B16. These documents would clearly show that the both the defendants are aware of the fact that what has been paid to the plaintiff is only Rs.12 lakhs emanating from the first defendant. It is also the case of the plaintiff that only Rs.12 lakhs has been received. Therefore, Rs.12 lakhs amount given by the first defendant in favour of the appellant has also been handed over to the plaintiff. It is further case of the first defendant that some amount is not liable to be paid by the plaintiff. This is the dispute between the plaintiff and the first defendant. In any case, the appellant cannot be asked to pay the said amount. The appellant, being the agent of the plaintiff, notwithstanding the dispute, cannot be asked to make the payment. Even the admitted amount has not been paid by the first defendant, as could be seen from the records. Thus, the trial Court, in our considered view, has misdirected itself by fixing the liability on the appellant.

13. The fact that there was an independent transaction between the appellant and the first defendant per se cannot be a ground to hold that the appellant is liable to pay the amount due to the plaintiff. Both are distinct and different contracts. Thus, we hold that the trial Court has erred in decreeing the suit without any basis both factually and documentary as against the appellant.

14. Accordingly, while answering the issues in favour of the appellant, we set aside the judgment and decree rendered by the trial Court. However, we make it clear that the judgment and decree rendered by the court below against the first defendant would stand. The amount, if any, deposited by the appellant is permitted to be withdrawn.

In view of the above, the appeal stands allowed. No costs. Consequently, M.P.No.1 of 2011 is closed.
ssm

Sd/-
Assistant Registrar (CS VI)

//True Copy//

Sub Assistant Registrar

To

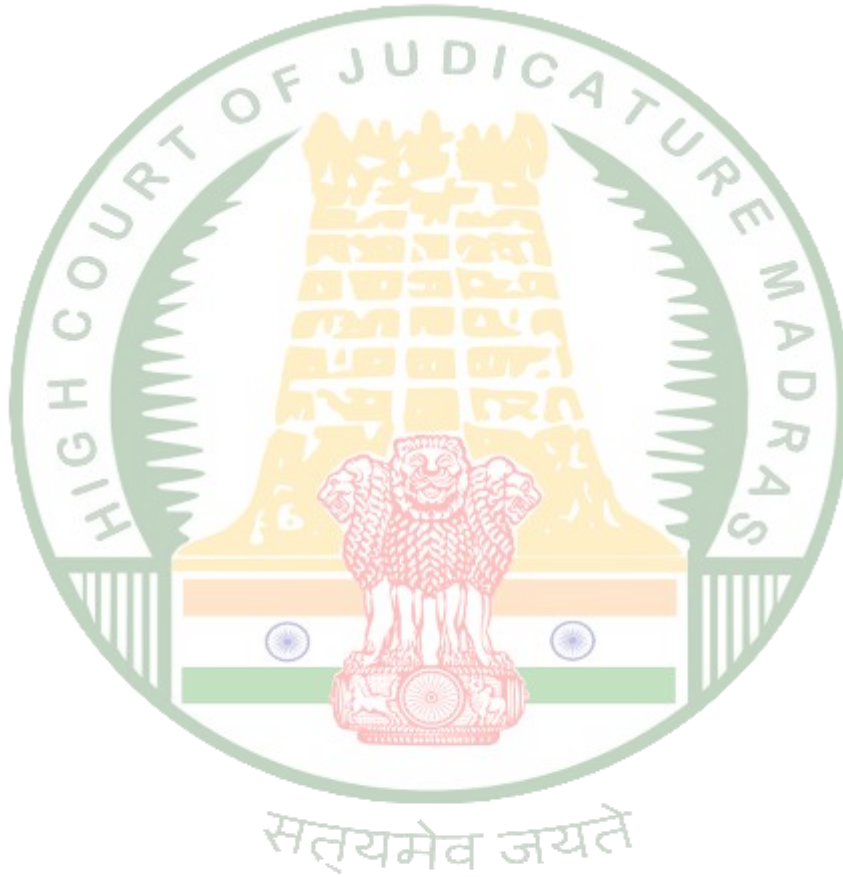
1. The Additional District & Sessions Judge,
Fast Track Court NO.II, Coimbatore.

+2cc to M/s.Menon,Karthick,Mukundan Advocates, SR.No.37543/19

+1cc to M/s.Sarvabhauman Associates, Advocate, SR.No.38027/19

A.S. No. 471 of 2011

Kak (27/07/2019)



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