

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 09.12.2020

CORAM

THE HONOURABLE MR.JUSTICE T.S.SIVAGNANAM
and
THE HONOURABLE MRS.JUSTICE V.BHAVANI SUBBAROYAN

O.S.A.No.275 of 2020
and
C.M.P.No.13480 of 2020

Sai Electromech Industries
Represented by its Authorised Signatory
853, GIDC Estate
Wadhodia
Vadodara - 391 760
Gujarat, India

...Appellant

-vs-

Sicagen India Ltd.,
Represented by its Authorised Signatory,
Mr.S.Mahadevan
4th Floor, SPIC House,
No.88, Mount Road, Guindy
Chennai - 600 032

..Respondent

Prayer: Memorandum of Grounds of Original Side Appeals filed under Order 41 Rules 1 & 9 of the Madras High Court O.S.Rules r/w Clause 15 of the Letters Patent, against the judgment and decretal order dated 03.03.2020 passed by this Court in A.No.5206 of 2017 in C.S.No.676 of 2017.

For Appellant : Mr.R.Palaniandavan
For Respondent : Mr.D.S.Ramesh

JUDGMENT

[Order of the Court was made by T.S.SIVAGNANAM, J.]

We have heard Mr.R.Palaniandavan, learned counsel for the appellant and Mr.D.S.Ramesh, learned counsel for the respondent.

2. This appeal is directed against the order dated 03.03.2020 in Application No.5206 of 2017 in C.S.No.676 of 2017, wherein an application filed by the respondent / plaintiff under

Order 38 Rule 5 was ordered and the appellant / defendant was directed to furnish security for the suit claim of Rs.1,23,62,585/-.

3. The learned counsel for the appellant would contend that the affidavit filed in support of the application is a verbatim repetition of the plaint averments and none of the essential averments needed to support an application under Order 38 Rule 5 of C.P.C., finds place in the affidavit. Furthermore, the Hon'ble Court also has not recorded its satisfaction by affidavit or otherwise that the appellant / defendant with an intent to obstruct the delay of any decree that may be passed is about to dispose of the whole or any part of his property or to remove whole or any part of his property from the local jurisdiction limits of the Court. Therefore, unless and until such satisfaction is recorded by the Court, an order to furnish security under Order 38 Rule 5 cannot be passed.

4. Per contra, the learned counsel appearing for the respondent would submit that the suit was laid for recovery of a sum of Rs.96,58,270/- together with interest, which was due and payable to the respondent / plaintiff for supply of materials to the appellant / defendant at Chennai. It is further submitted that the details of the invoices raised by the respondent / plaintiff have been set out in paragraph 6 of the plaint. Though the amounts due and payable as early as in 2015, the appellant / defendant has not settled the amount, which prompted the respondent / plaintiff to file the suit before this Court. It is further submitted that the appellant / defendant had filed an application to revoke the leave granted by the Court in Application No.3636 of 2017 by filing a separate application in Application No.5 of 2018. It is submitted that the application filed by the appellant / defendant in Application No.5 of 2018 was dismissed by order dated 12.12.2019 and the appeal filed by the appellant / defendant before the Hon'ble Division Bench in O.S.A.No.124 of 2020 was dismissed by judgment dated 12.03.2020. Therefore, it is submitted that the Court rightly directed the appellant to furnish security.

5. In reply, the learned counsel for the appellant would submit that the respondent / plaintiff is wrong in stating that the supplies were effected to at Chennai, whereas the supplies were effected to at Gujarat and as against the judgment in O.S.A.No.124 of 2020 dated 12.03.2020, the appellant preferred Special Leave Petition in S.L.P.No.14131 of 2020 before the Hon'ble Supreme Court, which is likely to be listed before the Hon'ble Supreme Court of India shortly.

6. After we have elaborately heard the learned counsel for the parties and carefully perused the materials placed on

record, we find that the Court has not recorded its satisfaction to support its order, directing the appellant / defendant to furnish security. It is a settled legal position that power under Order 38 Rule 5 should be exercised very sparingly with utmost caution and such power should be exercised, when a clear case has been made out by the plaintiff, because the power is a drastic one and the attachment before judgment is not granted on a mere assumption by the plaintiff that the defendant is attempting to dispose of whole or part of his property or being removed from the jurisdiction of the Court. The essential requirement being that the Court has to satisfy itself on the basis of the materials and its satisfaction should be reflected in the order passed by the Court under Order 38 Rule 5 of C.P.C.

7. On going through the impugned order, we find that the satisfaction has not been recorded by the Court. The Court was of the view that the appellant/defendant has not filed a counter affidavit and the request for adjournment for filing counter affidavit was rejected and the Court proceeded to direct the appellant to furnish security for the suit claim. The defense sought to be raised in this regard is that they were earnestly pursuing the application to revoke leave which was pending since 2017 and was disposed of only by 12.12.2019 and immediately, thereafter the appellant had filed appeal before the Hon'ble Division Bench which was dismissed on 12.03.2020 and aggrieved by such judgment, the appellant has filed SLP before the Hon'ble Supreme Court. Furthermore, if the appellant had to file a counter affidavit, touching upon the merits, there is every likelihood that the respondent/plaintiff will come up with the plea that the appellant/defendant has acquired himself of the factual position. In any event, we are of the considered view that the Court should record reasons as to why it was convinced to exercise the power under Order 38 Rule 5. The learned counsel for the respondent would submit that there are sufficient material available with the respondent/plaintiff and leave may be granted to the respondent/plaintiff to file a better affidavit in support of the prayer under Order 38 Rule 5 C.P.C. As we are satisfied that the Court has not recorded reasons as to why it thought fit to exercise power under Order 38 Rule 5, we are inclined to interfere with the order passed by the Court. However, we do not propose to foreclose the remedy available to the respondent/plaintiff for which purpose, we are inclined to remand the matter to the learned Single Bench for fresh consideration of the application on merits and in accordance with law. The respondent/plaintiff is granted liberty to file an additional affidavit in support of its contentions.

8. For all the above reasons, the appeal is allowed and the impugned order is set aside and Application No.5206 of 2017 stands restored and the matter is remanded to the learned Single

Bench to consider the application on merits and in accordance with law, after giving one opportunity to the appellant/defendant to file a counter affidavit, giving a reasonable time of about seven days and the averments set out in the original affidavit filed in support of the application as well as additional affidavit, which we have permitted the respondent/defendant to file before the Court. No costs. Consequently, connected miscellaneous petition is closed.

s/d-
Assistant Registrar

True Copy

Sub-Assistant Registrar

Kak

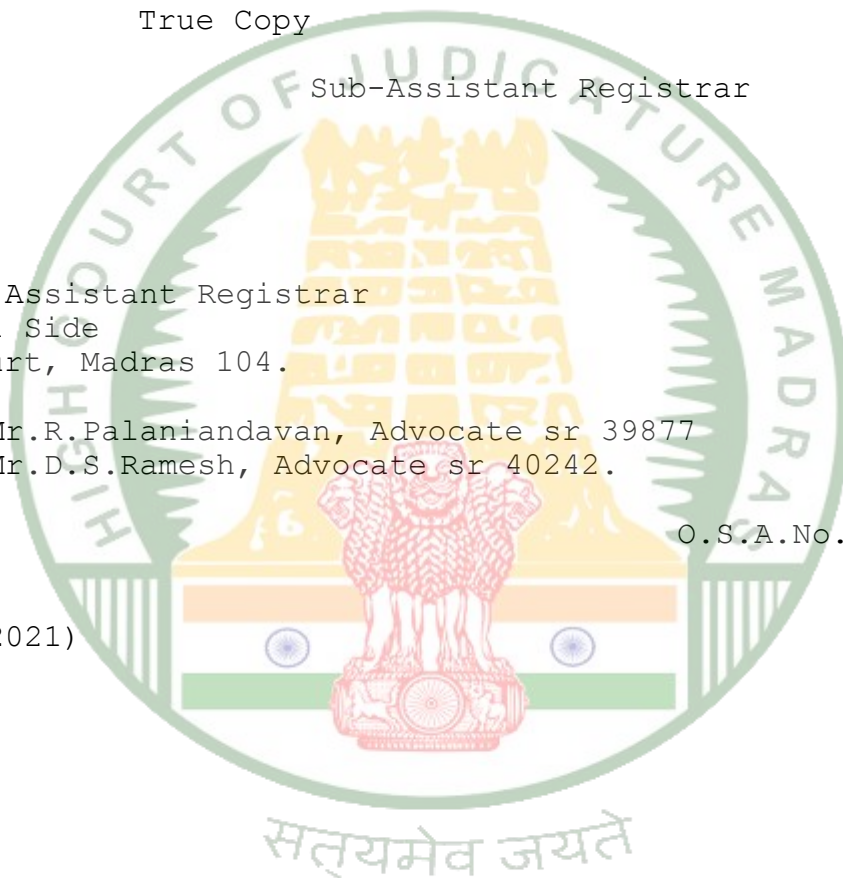
To

1.The Sub Assistant Registrar
Original Side
High Court, Madras 104.

+1 CC to Mr.R.Palaniandavan, Advocate sr 39877
+1 CC to Mr.D.S.Ramesh, Advocate sr 40242.

O.S.A.No.275 of 2020

MP(CO)
SP(11/01/2021)



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