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AS. No.388 of 2016

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED 09.11.2022

CORAM

THE HONOURABLE MR.JUSTICE S.S.SUNDAR
and
THE HONOURABLE MRS. JUSTICE N.MALA

AS. No.388 of 2016
and CMP.No.16087 of 2017

M/s.Carrier Air conditioning & Refrigeration Limited
(Formerly known as Carrier Aircon Ltd.)
199/2-A, Panohal Udhyog Nagar,
Bimpore, Nanidaman,
Daman - 396 210, State of Goa

Presently having its registered office at
Narsingpur, Kherki Daula Post,
Guragaon (Haryana) 122 001,
(Rep. by its Divisional Manager
Sushil Kumar Sharma)

.. Appellant

**[Cause title accepted vide order of this Court,
dated 29.10.2015 made in MP.No.1 of 2015]**

Versus

1. M/s.Supreme Petrochem Ltd.,
(Transferee Company of SPL Polymers Ltd.,
Formerly known as
Shin Ho Petro Chemical (India) Ltd.)
Having its Registered Office & Works at
Ammulavoyl Village, Andarkuppam Post,
Manali New Town, Chennai 600 103.
Rep. by its Power of Attorney

Thiru.S.Jesunayagam.



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2. M/s.Tirupati Insulation Pvt. Ltd.,
22, Jalaram Chambers,
Kerlelibaug, Baroda 39002,
(Gujarat).

.. Respondents

PRAYER: First Appeal filed under Section 96 of C.P.C. r/w Order 41 Rule 1 of CPC, against the judgment and decree dated 20.11.2014 made in O.S.No.153 of 2006 on the file of the IV Additional District Judge, Ponneri.

For appellant	: Mrs.Inthu Karunakaran
For respondents	: Mr.P.Ravi Shankar Rao (for R1)

J U D G M E N T

(Judgment of the Court was delivered by S.S.SUNDAR, J)

The second defendant in the suit in OS.No.769 of 2009 of 2004 on the file of the District Court, Chengalpet, which was later transferred to IV Additional District Court, Ponneri and renumbered as OS.No.153 of 2006, is the appellant in the above appeal suit. The first respondent is the Transferee Company, which was formerly known as Shin Ho Petro Chemical (India) Ltd., who is the plaintiff in the suit.

2. The brief facts that are necessary for disposal of this appeal are as follows:



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It is the case of the plaintiff that they are suppliers of EPS resin and the first defendant in the suit is one of their customers. The first defendant after purchasing the EPS resin from the plaintiff, reprocessed the same and sold to other Companies. It is the case of the plaintiff that the second defendant is one of the prominent purchaser of the said material from the first defendant. Since the material was mainly supplied to the second defendant, a tripartite agreement dated 18.10.1999 was entered into between the parties, which was marked as Ex.A5 in the suit. The said tripartite agreement was for the period from 18.10.1999 to 18.04.2000 and it was to be renewed for a further period, if the parties agreed. Under the said agreement, the plaintiff should supply the EPS raw material required by the first defendant and the first defendant should reprocess the same and supply to the second defendant. Further, the appellant/second defendant had agreed to pay directly to the plaintiff the amounts due to the first defendant within 60 days. Having regard to the nature of agreement, it is stated that, the appellant was required to make payments directly to the plaintiff, which the appellant was liable to pay to the first defendant. In the said circumstances, the plaintiff has filed the suit on the ground that the first defendant had received EPS resin from them worth about Rs.13,00,000/-, but failed to pay the same.



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3. It is admitted by the plaintiff in the plaint that the said agreement was not renewed after 18.04.2000. It is also stated in the plaint that the second defendant in the purchase orders sent to the first defendant used to incorporate the wordings "payment shall be made directly to Shin Ho Petro Chemical (India) Ltd." It is further stated that the first defendant in all the invoices sent to the second defendant also used to incorporate the above said wordings whenever the goods are supplied to the second defendant by the first defendant. Though it is admitted by the plaintiff that the defendants were making payment to the plaintiff as per the tripartite agreement for some time, later, the plaintiff could not realise any payments for the goods supplied by the plaintiff to the first defendant and there is a due of Rs.12,40,371/-. Stating that both the defendants are liable to make payments for the goods supplied by the plaintiff to the first defendant as per the agreement, the suit came to be filed for recovery of Rs.12,40,371/- with interest at 18% per annum.

4. The first defendant remained *ex parte* and did not file written statement. The second defendant filed a written statement specifically contending that for all the consumption made by the second defendant, they had already paid the plaintiff as per the instruction of the first defendant and hence no money is payable by the second defendant to the plaintiff. It was also



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stated in the written statement that the second defendant cannot be made responsible for any materials supplied to the first defendant, which was not actually used by the second defendant. Yet another defence taken by the second defendant that there was no supply at all by the plaintiff to the first defendant during the relevant period.

5. The Trial Court decreed the suit as prayed for holding that the agreement Ex.A5 is binding on the second defendant and the defendants 1 and 2 are jointly and severally liable to pay the entire money claimed by the plaintiff as they had proved the value of the goods supplied to the first defendant. Aggrieved by the judgment and decree passed by the Trial Court, the above appeal is filed by the second defendant.

6. The learned counsel appearing for the appellant/second defendant submitted that the suit is barred by limitation. She further submitted that the Trial Court failed to see that no document was placed on record by the plaintiff to show liability on the part of the appellant. It was also contended that the suit tripartite agreement was in force for a period of six months, i.e., from 18.10.1999 to 18.04.2000 but the suit claim was not made for the goods supplied by the plaintiff to the first defendant during that period.

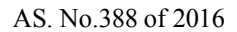


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7. The learned counsel also submitted that the cause of action for the suit is wholly misconceived and the plaintiff has no cause of action to file the suit against the appellant on the basis of the said agreement. The second defendant is liable to pay to the plaintiff for the materials supplied by the first defendant and it is not an agreement to indemnify the claim made by the plaintiff against the first defendant. Since the Trial Court has not considered the said fact and the particulars with respect to the suit claim, it is contended by the counsel that the judgment and decree is not only erroneous but also unsustainable.

8. On the other hand, learned counsel appearing for the first respondent/plaintiff submitted that the plaintiff is entitled to make a claim against both the first and second defendant on the basis of the tripartite agreement. From the pleadings and grounds raised, the question to be decided in this appeal is whether the second defendant is liable for the suit claim along with first defendant in terms of the tripartite agreement dated 18.10.1999 marked as Ex.A5.

9. The tripartite agreement relied upon by the plaintiff shows that the agreement was in force from 18.10.1999 to 18.04.2000. In the said agreement, it was mutually agreed by the plaintiff and the defendants 1 and 2 that the first defendant after obtaining purchase orders from the second defendant should



3) That all payments due to M/s.Tirupati Pvt. Ltd. arising out of sales to M/s.Carrier Air Con Limited shall be paid directly to M/s.Shin ho Petrochemcial (I) Ltd. in full. At the same credit Period (60 days) as applicable to Tirupati Insulation Pvt. Ltd."



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10. The said agreement is for a limited period of 6 months and the plaintiff has also admitted the same in his plaint that the agreement has not been renewed further. Therefore, the plaintiff should establish not only the goods supplied by the plaintiff to the first defendant but also the money due from the first defendant to the plaintiff during the agreement period. However, the account statement produced by the plaintiff would only show that the amount due was either prior to the period in which the agreement was in force or after the period.

11. It is seen that from the statement of accounts, this Court is unable to find any supply of raw material by the plaintiff to the first defendant during the relevant time. Further, the tripartite agreement/Ex.A5 is not an agreement to indemnify whatever claim the plaintiff has against the first defendant. The suit is allowed only on the wrong notion that the second defendant is liable to indemnify the plaintiff for all the goods supplied by the plaintiff to the first defendant.

12. A contract of indemnity as defined under Section 124 of Indian Contract Act, is a contract by which one party promises to save the other from loss caused to him by the conduct of promisor himself or by the



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conduct of any other person. Under Section 125 of the Contract Act, the promisee is entitled to recover from the promisor in terms of the contract of indemnity. In a contract of indemnity, there need not be privity of contract between the surety and the debtor and in such cases, the surety cannot compel the principal debtor to pay even though he can sue the principal debtor on behalf of the promisee. A contract of guarantee under Section 126 of Indian Contract Act is a contract to perform the promise or discharge the liability of principal debtor in case of his default. In the present case, the tripartite agreement under Ex.A5 is neither a contract of indemnity nor a contract of guarantee but a contract by which the second defendant promised the plaintiff to make payment directly to plaintiff whatever amount that is payable by the second defendant to the first defendant for the goods supplied by the first defendant to the second defendant during the period of agreement. In other words the liability of the second defendant under Ex.A5 comes only on proof of liability of the second defendant to the first defendant for the materials supplied by the first defendant to the second defendant. Hence, the liability is limited to the extent of the liability of the second defendant to the first defendant for the reprocessed raw materials supplied by the first defendant to the second defendant during the period of contract.

13. In this case, though the plaintiff states in the plaint that both



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the defendants should be responsible for the supplies made by plaintiff as both of them are using the same and utilizing for their business, they have not let in any evidence to prove the supplies made by the first defendant to the second defendant during the six months' period of contract. Though a letter dated 24.06.2000 marked as Ex.A6 is relied upon to show that the first defendant has given instructions to the second defendant to pay a sum of Rs.13,00,000/-, no other document is filed. The said document is disputed. The statement of account under Ex.A9 indicates no supply of goods by the plaintiff to the first defendant between 18.10.1999 to 18.04.2000. Therefore, the whole case of plaintiff on the basis of Ex.A6 letter is a false claim. When the liability of the second defendant to the first defendant towards supply of goods is disputed, the burden lies on plaintiff to prove the liability of appellant/second defendant under Ex.A5 agreement.

14. The plaintiff has to establish that the the goods were supplied by the plaintiff to the first defendant during the contract period and the amount was payable by the first defendant to the plaintiff during the relevant period. The burden lies on the plaintiff to establish that the second defendant had purchased the goods from the first defendant and the supply was made by them to the first defendant during the agreement period. However, the plaintiff



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has not produced any material to prove the same.

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15. From the accounts, it is seen that the suit has been instituted only for the claim against the first defendant for supply made by the plaintiff to the first defendant. Since the agreement is not to indemnify the first defendant in respect of all the claims made by the the plaintiff against the first defendant, this Court is of the view that the suit is misconceived and the plaintiff is not entitled to any relief against the appellant. The Trial Court on an erroneous understanding of cause of action that the agreement under Ex.A5 can be enforced against the second defendant to indemnify the first defendant, has granted a decree accepting the claim of the plaintiff. Though the first defendant is set exparte, this Court is unable to sustain the claim of plaintiff as against the second defendant. Therefore, the judgment and decree of the Trial Court is set aside and the decree is modified as one against the first defendant, who is the second respondent in this appeal. Accordingly, the plaintiff is entitled to a decree for recovery of sum of Rs.12,40,371/- with interest at 18% from the date of filing of the suit till the date of decree and interest at 6% from the date of decree till the date of realisation with costs as against the first defendant and the suit against the second defendant is dismissed.

<https://www.mhc.tn.gov.in/judis> 16. It is stated by the learned counsel for the appellant that the appellant



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has deposited a sum of Rs.6,20,185/- to the credit of the proceedings before the

Lower Court on 30.11.2016, pursuant to the conditional order passed by this Court while granting stay. Therefore, the appellant is permitted to withdraw the said amount upon production of this judgment. Accordingly, the appeal is allowed as indicated above with costs. Consequently, connected miscellaneous petition is closed.

(S.S.S.R.J.) (N.M.J.)
09.11.2022

Speaking Order : Yes / No
Index : Yes / No
pvs

To
1. The IV Additional District Judge, Ponneri
2. The Section Officer,
V.R.Section, High Court, Madras



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S.S.SUNDAR, J.
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