IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 07..03..2024

CORAM
THE HON'BLE MR JUSTICE N.SATHISH KUMAR

Civil Suit No.51 of 2021

Satish Khanna

..... Plaintiff

-Versus-

M/s. Prince Foundations Ltd.,
Rep. By it Managing Director,
Mr.Ashwin Kumar Kamdar,
No.61, Ormes Road, Kilpauk,
Chennai 600 010.

.... Defendant

Suit filed under Order IV, Rule 1 of the Madras High Court Original Side Rules r/w Order VII, Rule 1 of the Code of Civil Procedure praying to pass a judgment and decree against the defendant directing to pay a sum of Rs.4,35,25,000/- to the plaintiff with interest at 12% per annum on Rs.3,60,00,000/- from the date of plaint till date of realization and for cost of the suit.

For Plaintiff	:	*Mr.P.Solomon Francis*
For Defendant	:	*Mr.R.Subramanian*

JUDGEMENT

Suit is for recovery of a sum of Rs.4,35,25,000/- from the defendant together with interest at 12% per annum on Rs.3,60,00,000/- from the date of plaint till date of realization and for cost of the suit.

2. The suit is based on loans advanced to the defendant by the plaintiff to the tune of Rs.6,50,000/- on various dates from 03.04.2017 to 21.06.2018.

3. The facts leading to the filing of the suit in brief are as under:-

(a) The plaintiff and Ashwin Kumar Kamdar, Managing Director of the defendant firm are friends. The defendant is a realtor company. The defendant borrowed a sum of Rs.6,50,00,000/- from the plaintiff from time to time on various dates for his commercial venture of putting up a complex in the property situated at Poonamallee High Road. Such payments were made only through bank channel. The details of advance made by the plaintiff to the defendant are as under:-

Sl.No.	Date	Amount Advanced
1.	03.04.2017	Rs.2,00,00,000/-
2.	06.04.2017	Rs.1,00,00,000/-
3.	19.06.2017	Rs.1,00,00,000/-
4.	21.06.2018	Rs.2,50,00,000/-

Sl.No.	Date	Amount Advanced
	Total	Rs.6,50,00,000/-
	[Rupees Six Crore and Fifty Lakh only]	

(b) Thereafter, the defendant repaid a sum to the tune of Rs.3,00,00,000/- (Rupees Three Crore only)on various dates from March, 2018 to June, 2018. The details of repayment made by the defendant to the plaintiff are as under:-

Sl.No.	Date	Amount repaid
1.	22.03.2018	Rs. 25,00,000/-
2.	31.03.2018	Rs. 75,00,000/-
3.	03.04.2018	Rs. 25,00,000/-
4.	13.06.2018	Rs. 75,00,000/-
5.	15.06.2018	Rs.1,00,00,000/-
	[Rupees Three Crore only]	

(c) Therefore, the balance of amount due and payable by the defendant was Rs.3,50,00,000/-. The defendant agreed to pay interest at the rate of 12% per annum on the borrowed amount and the defendant paid interest as on 31.03.2019 at the agreed rate of interest. The defendant used to deduct TDS on such interest amount remitted through banking channel. Thereafter, the defendant neither paid interest nor repaid the dues.

(d) The defendant issued 7 cheques each for Rs.50,00,000/- in favour of the plaintiff drawn on Corporation Bank, Kellys Branch. The details of the cheques are as under:-

Sl.No.	Cheque No. & Date	Cheque amount
1.	891282/15.03.2020	Rs.50,00,000/-
2.	891283/15.04.2020	Rs.50,00,000/-
3.	891284/15.05.2020	Rs.50,00,000/-
4.	891285/15.06.2020	Rs.50,00,000/-
5.	891288/15.07.2020	Rs.50,00,000/-
6.	891289/15.08.2020	Rs.50,00,000/-
7.	891290/15.09.2020	Rs.50,00,000/-

(e) The defendant assured the plaintiff that he would pay the cheque amount through banking channel and requested the plaintiff not to present those cheques for collection. Believing the words of the defendant and taking into account the relationship between them, the plaintiff did not present the first six cheques for collection. Since the payment towards the cheques were not made as promised, the plaintiff had no other option except to present the last cheque for collection. However, on presentation of the cheque dated 15.09.2020 issued by the defendant in his favour for Rs.50,00,000/- for collection with his bank the cheque got returned as dishonored. The plaintiff therefore issued a notice dated

10.12.2020 under Section 138 of the Negotiable Instruments Act and took recourse under the said Act before the appropriate court.

(f) Since the balance due was not repaid, on 11.07.2019, the plaintiff requested the defendant to sell one of the flats in the project 'Prince Courtyard' bearing Flat No.601 on the 6th Floor in Wing 'A' measuring 3330 square feet with carpet area of 2234 square feet inclusive of proportionate share in common areas such as passages, lobbies, lifts, staircases and other areas of common use and two numbers of parking slot at basement-I together with 734 square feet of undivided share of the land described in the agreement for Rs.3,87,44,875/-. On the same day, i.e., on 11.07.2019, a sum of Rs.10,00,000/- was paid as advance sale consideration by way of cheque bearing No.156491 dated 11.07.2019 drawn on City Union Bank in favour of the defendant which was encashed by the defendant by depositing the same into the account maintained in the name of Prince Foundation Limited Escrow Account- L & T-PCY. However, the defendant did not perform his part of contract as the L&T Housing Finance Limited has not given its no objection, the sale could not be completed. As the defendant was delaying the matter, the plaintiff sought the defendant to repay the amount due and payable by him. The defendant did not repay the dues despite repeated demands. Hence, the suit for recovery of money.

4. In his written statement, the defendant though admitted that he borrowed loan to the tune of Rs.6,50,00,000/- for commercial purposes and repayment of Rs.3,00,00,000/-, he contended that the balance amount of Rs.3,50,00,000/- due and payable by him was agreed to be treated as payment for the sale of a flat in favour of the plaintiff and an agreement was also reached at between him and the plaintiff in this regard. Hence, it is the contention of the defendant, that since the contract came to an end, earlier loan transactions have come to an end. It is his further contention that though some cheques were issued for a total sum of Rs.3,50,00,000/-, the defendant was not able to honour them due to lock-down. However, according to the defendant, the amount payable to the plaintiff was discharged by way of concessional rate offered to the family members of the plaintiff while selling flats bearing Flat Nos.201, 301, 101 and 102. Therefore, the defendant contended that he is not liable to pay any amount to the plaintiff towards repayment of loan and the suit has to be dismissed with exemplary costs.

5. On the basis of the above pleading of either party, the following issues have been framed for trial:-

(1) Whether the plaintiff is entitled to recover a

sum of Rs.4,35,25,000/- together with interest at 12% per annum on Rs.3,60,00,000/- from the date of plaint till the date of realization?

(2) Whether the suit is maintainable, despite the presence of arbitration clause in the agreement between the parties?

(3) Whether the plaintiff is entitled for the costs of the suit?

(4) Whether the defendant is entitled to claim the set off against the plaintiff for a sum of Rs.3,82,72,400/-? and

(5) To what other relief, the plaintiff is entitled to?

6. During trial, on the side of the plaintiff, the plaintiff examined himself as P.W.1 and Ex.P.1 to Ex.P.12 were marked while on the side of the defendant, Mr.Jagadish Bhai N Davey, who is the Chief Financial Officer of the defendant company was examined as D.W.1 and Ex.D.1 to Ex.D.8 were marked. Actually 9 documents were marked on the side of the defendant. Earlier, Ex.D.1 was marked on 06.03.2023 when the plaintiff was cross examined, but, it was not taken into account while marking further documents on the side of the defendant in his chief examination. Therefore, there is a discrepancy. It is only a clerical error.

Therefore, the board resolution will be considered as Ex.D.1 and the Online Printout Certified copy of Sale Deed executed by the defendant in favour of one Khushal Khanna will considered as Ex.D.1A in order to set the things right.

Issue Nos. 1 & 2:

7. The learned counsel for the plaintiff would submit that borrowal of the amount and amount due and repayable by the defendant after giving credit of Rs.3,00,00,000/- are not in dispute. According to the learned counsel, only for the purpose of repayment which was due and agreed to be paid by the defendant, an agreement came into existence.

8. The learned counsel for the plaintiff would further submit that apart from the agreement, the defendant himself had categorically admitted in the written statement that he is liable to pay a sum of Rs.3,50,00,000/-. Therefore, the learned counsel would submit that the plaintiff is entitled for recovery of the suit amount with interest and prayed to pass a judgment and decree against the defendant.

9. Per contra, the learned counsel for the defendant would contend that suit is not maintainable. The loan transactions came to an end in view of the subsequent agreement entered into between him and the plaintiff. Therefore,

according to the learned counsel, the amount which was due and payable by the defendant to the plaintiff cannot be sought to be recovered in view of the subsequent agreement entered into between the parties.

10. The learned counsel for the defendant would further contend that since the subsequent agreement contained a clause for making a reference for arbitration in case if any dispute between the parties, suit is not maintainable in law.

11. The leaned counsel for the defendant would add that the amount which was due and payable by the defendant to the plaintiff was adjusted by giving a concession to the family members of the plaintiff at the time of sale of flats in their individual names. Thus, according to the learned counsel, no amount was due and payable by the defendant as on the date of suit and as such suit is not at all maintainable and the same has to be dismissed.

12. This court has gone through the issues framed for trial of the suit. At the outset, this court is of the view that issue No.2 would not arise at all as it is not the case of the defendant in his entire written statement that because of the arbitration clause, suit is not maintainable. Therefore, framing of such issue would not be necessary .

13. Be that as it may, even assuming that there is a clause for referring a dispute to the arbitration in case of any dispute between the parties, such a right ought to have been exercised by the defendant before filing written statement in the civil suit. Whereas the defendant in this case failed to exercise such a right as per the contract and as such his right to seek a reference to arbitration stand automatically waived and extinguished. In such view of the matter, it cannot be said that the suit is not maintainable.

14. As far as the suit claim is concerned, the defendant has, admittedly, availed loan from the plaintiff to the tune of Rs.6,50,00,000/- on various dates as already set out hereinabove. The payments advanced were also transferred through banking channel. The defendant in his written statement has categorically admitted that he borrowed a total sum of Rs.6,50,00,000/- from the plaintiff. It is also not in dispute that the defendant repaid a sum of Rs.3,00,00,000/- out of the total loan amount due to the plaintiff. Payment towards interest @ 12% per annum paid on the loan amount up to 31.03.2019 is also not in dispute. These payments were also made through banking channel. Thereafter, according to the plaintiff, the defendant did not repay the principal amount due and payable by him nor did he pay interest on the borrowings.

According to the plaintiff, a sum of Rs.3,50,00,000/- towards principal was due as on the date of plaint. The defendant has not disputed the fact that a sum of Rs.3,50,00,000/- was due and repayable by him. In this regard, the defendant had issued 7 cheques each for Rs.50,00,000/- as already mentioned in the preceding paragraph of this judgment. When the issuance of the cheques towards the amount due and payable by the defendant was not disputed and when the cheques were issued within a period of three years from the date of original borrowal, i.e., from 03.04.2017, it has to be necessarily held that cheques were nothing but an acknowledgment of debt acknowledging the existing liability. Such acknowledgments were also made within the period of limitation. Such view of the matter, such cheques are enforceable for the payment. When the last of cheque was presented for collection by the plaintiff, it was returned as dishonoured**.** Thereafter, it is the agreed case of both the plaintiff and the defendant, that they have entered into an agreement (Ex.P.4) dated 11.07.2019. The specific contention of the defendant as well as the plaintiff is that towards repayment of Rs.3,50,00,000/- , the defendant agreed to sell one of the flats promoted by him in favour of the plaintiff for a total sale consideration of Rs.3,87,44,875/- and on that terms Ex.P.4 agreement was entered into between them. At the time of such agreement, a sum of Rs.10,00,000/- was also paid by the plaintiff to the defendant towards advance of sale consideration. This fact is also not disputed by the defendant. When the specific case of the plaintiff is to the effect that as the defendant has failed to comply with his obligation under the agreement (Ex.P.4) to convey the flat as the L & T Housing Finance Limited had not given its no objection at the relevant point of time, the plaintiff was no longer willing to go for further in the matter of purchase of flat and wanted the defendant to return the balance money due and payable to him. This fact is also not in dispute. The only contention of the defendant is that since the loan transactions culminated into an agreement and as the agreement was not culminated into sale deed, the loan transactions ceased to exist and therefore, the plaintiff is not entitled to recovery of the suit amount. Such contention in the considered opinion of this court has no force in the eye of law. When the defendant has admitted that he has to pay a sum of Rs.3,50,00,000/- with interest and towards such liability, an agreement came to be executed and the agreement is supported by consideration, since the contract was not concluded, it cannot be said that the consideration passed on under the agreement cannot be recovered. In such view of the matter, the contention of the defendant has no leg to stand.

15. Yet another defence raised by the learned counsel for the defendant is that the amount payable to the plaintiff was adjusted by offering concessional rate to some of the family members of the plaintiff when they purchased flats in their individual name and as such as on the date of plaint there was no amount due and payable to the plaintiff. In this connection, Ex.D.1 to Ex.D.8 have been filed by the defendant to show that certain flats were sold in favour of some of the family members of the plaintiff.

16. It is relevant to note here that unless the plea of discharge or adjustment is made and established by convincing evidence, merely on the basis of some sale transaction between some of the family members of the defendant and the defendant neither the plea of adjustment nor discharge can be presumed. When the plea of discharge or adjustment is raised by the defendant, the entire onus lies on him to establish the same with convincing oral and material evidence. Except raising such a plea, no other materials were made available on record by the defendant to show that concession was given and the flats were sold at a concessional rate and therefore, the entire amount of Rs.3,50,00,000/- due and payable by the defendant got discharged. Even in his cross examination D.W.1 has categorically admitted that the plaintiff had never given any

confirmation over such arrangement with regard to adjustment of outstanding dues nor he had issued any legal notice. Such being the position, merely on the basis of some individual transactions took place between some of the family members of the plaintiff and the defendant, plea of discharge cannot be accepted that too merely on the basis of oral submissions. Thus, the issue Nos.1 & 2 are answered accordingly holding that the suit is very well maintainable and that the plaintiff is entitled to recover the suit amount, however with interest @ 7.5% per annum from the date of plaint till date of realization.

Issue No.4:

17. In view of the findings recorded under issue Nos.1 and 2, the defendant is not entitled for any set off as claimed in the written statement. This issue is answered accordingly against the defendant.

Issue Nos 3 & 5:

18. In view of the answers given to the issue Nos.1, 2 & 4, the plaintiff is entitled for a decree as prayed for in the suit for recovery of suit amount, however with interest @ 7.5% per annum from the date of plaint till date of realization and for costs of the suit. These issues are answered accordingly in favour of the plaintiff.

In the result, Suit is decreed as prayed for with costs for recovery of a sum of Rs.4,35,25,000/- together with interest at 7.5% per annum on Rs.3,60,00,000/- from the date of plaint till the date of realization.

Index : yes / no 07..03..2024
Neutral Citation : yes / no
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Plaintiff's side Witnesses:
P.W.1 – Satish Khanna

Defendant's side Witnesses:

D.W.1 – Jagadish Bhai N. Davey (Chief Financial Officer of the Defendant Company)

Plaintiff' side Documents:

Ex.P.1	15.12.2020	Printout copy of Statement of Account for the period from 01.04.2017 to 31.03.2018 maintained by the plaintiff with City Union Bank, Purasawalkam Branch with Certificate under Section 65-B of the Evidence Act
Ex.P.2	-	Printout copy of the Ledger Balance of Prince Foundations P Ltd., for the period from 01.04.2017 to 31.03.2018 with Certificate under Section 65-B of the Evidence Act
Ex.P.3	-	Printout copy of For 26 AS – Annual Tax Statement under Section 203 AA of the Income Tax Act for the financial year 2017-2018/Assessment year 2018-19
Ex.P.4	11.07.2019	Original Agreement of Sale between the plaintiff and defendant
Ex.P.5	11.07.2019	Original Receipt issued by the defendant to the plaintiff towards part sale consideration (advance) with Certificate under Section 65-B of the Evidence Act

Ex.P.6	11.07.2019	Carbon copy of Booking Application form in the name of Satish Khanna (Plaintiff) issued by Prince Foundations P Ltd
Ex.P.7	-	Printout copy of Statement of Account for the period from 01.07.2019 to 31.07.2019 maintained by the plaintiff with City Union Bank, Purasawalkam Branch evidencing payment of advance of Rs.10,00,000/- with certificate under Section 65-B of the Evidence Act
Ex.P.8	12.07.2019	Original Confirmation Letter issued by Prince Foundation P Ltd., Kilpauk, Chennai to the plaintiff confirming the agreement for sale and construction
Ex.P.9	12.08.2020	Original Letter issued by the defendant to the plaintiff regarding allotment of Flat at Prince Courtyard
Ex.P.10	-	Original Courier Receipt and Postal Receipt
Ex.P.11	14.12.2022	Certified copy of Agreement of Construction entered between Prince Foundations (defendant company) and Vinod Kumar Kothari and 3 others
Ex.P.12	29.01.2021	Certified copy of sale deed executed by the Prince Foundations (defendant company) in favour of Vinod Kumar and 3 others

<u>Defendant's side document:</u>

Ex.D.1	11.01.2023	Board Resolution
Ex.D.1A	09.10.2020	Online Printout Certified copy of Sale Deed executed by the defendant in favour of one Khushal Khanna
Ex.D.2	09.02.2020	Online Certified copy of Agreement for Construction entered between the defendant company and Khushal Khanna
Ex.D.3	16.10.2020	Online Certified copy of sale deed executed by the defendant company in favour of Kashish Khanna
Ex.D.4	07.10.2020	Online Certified copy of Agreement for Construction entered between the defendant company and Kashish Khanna
Ex.D.5	16.10.2020	Online Certified copy of sale deed executed by the defendant company in favour of Vrinda Bathija
Ex.D.6	07.10.2020	Online Certified copy of agreement for construction entered by the defendant company with Vrinda S Bathija
Ex.D.7	24.09.2020	Online Certified copy of sale deed executed by the defendant

		company in favour of M/s.Palace Investments Property Developers rep. By its partner Gokul R Bathija
Ex.D.8	31.08.2020	Online Certified copy of Agreement for Construction entered between the defendant company and M/s.Palace Investments Property Developers rep. By its partner Gokul R Bathija
		07..03..2024

N.SATHISH KUMAR.J.,

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