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Original Side Appeal (CAD) Nos.94 & 130 of 2022

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 20.02.2024

CORAM:

THE HONOURABLE MR JUSTICE R.SUBRAMANIAN

AND

THE HONOURABLE MR JUSTICE R.SAKTHIVEL

Original Side Appeal (CAD) Nos.94 and 130 of 2022

1. M/s. Bell Finvest India Ltd.,
Rep by its Managing Director,
Mr.Bhupesh Rathod,
No.1107, Maker Chamber V, Nariman Point,
Mumbai 400 021.

2. Bupesh Rathod

3. Chirag Rathod ... Appellants in both the Appeals

Versus

M/s.Vivriti Capital Limited,
Rep by its Managing Director/Principal Officer,
Floor 12, Prestige Polygon,
Anna Salai, Teynampet,
Chennai 600 035.

.... Respondent in both the Appeals

Amended vide order of Court dated 18/12/23 made in
CMP No.24849/23 in OSA (CAD) No.94/22 (DKKJ & PDBJ)



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PRAYER: Original Side Appeals (CAD) filed under Section 13 of the Commercial Courts Act, 2015 and Order XXXVI Rule 9 of the Original Side Rules,

(i) to set aside the order and decretal order dated 27.01.2022 and made in C.S.(Commercial Suit) No.556 of 2019 in the Ordinary Original Civil Jurisdiction (Commercial Division) of this Court in Application No.2277 of 2021 and costs imposed and allow the above Original Side Appeal (Commercial Appellate Division).

(ii) to set aside the order and decretal order dated 27.01.2022 and made in Application No.2278 of 2021 in C.S.(Commercial Suit) No.650 of 2019 in the Ordinary Original Civil Jurisdiction (Commercial Division) of this Court in Application No.2278 of 2021 and costs imposed and allow the above Original Side Appeal (Commercial Appellate Division).

For Appellants : Mr.Ajay Francis Inigo Loyola
(in both the Appeals)

For Respondents : Ms.Abitha Banu
(in both the Appeals)



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COMMON JUDGMENT

(Judgment of the Court was delivered by R.SUBRAMANIAN, J.)

The appellants in these two appeals canvass the correctness of the orders of this Court passed in Application Nos.2277 & 2278 of 2021 which were Applications filed under Order XVIII-A of the Code of Civil Procedure as amended by the Commercial Courts Act, 2015.

2. The brief background facts that are necessary for disposal of these Appeals are as follows:

Both the first appellant and the respondent are non-banking Finance Companies. While the appellants claim that it is a small non-banking Finance Company engaged financing micro and medium industries, the respondent is said to be a larger Finance Company having at its disposal huge sums of money. In the course of its business, it is claimed that, the respondent contacted the promoters of the first appellant and offered to advance large sums of monies to enable the first appellant to enhance its business.



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3. According to the appellants, after having assimilated the business of the appellants and after having examined the conduct of the business by the first appellant, the respondent offered to advance a sum of Rupees 20 Crore in tranches. Based on that promise, a sanction letter was issued by the respondent on 15.05.2019, which was followed by a Facility Agreement on the same date. While the respondent agreed to advance a sum of Rs.20 Crores to the appellants in tranches depending upon the drawdown request that are made by the first appellant, the first appellant was required to furnish security in the form of execution of a charge on the receivables and personal guarantee by the two promoters. The agreement also provided for repayment of the amounts received in equated monthly installments.

4. Claiming that the respondent has not honoured its commitments under the agreement and drawdown requests made by the appellants were not honoured resulting in loss of business and damages, the appellants filed the suit in CS No.556 of 2019 seeking damages to the tune of Rs. 5 Crores. The respondent responded with a counter suit in CS No.650 of 2019 seeking



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recovery of the monies that was paid by it pursuant to the agreements dated 15.05.2019, amounting to Rs. 6,19,65,257.93 with interest at 18% per annum with monthly rests from the date of the suit till the date of actual payment. Several interim orders were passed in the suits. Subsequently, the respondent filed the two applications viz. Application Nos.2277 and 2278 of 2021 seeking a summary judgment.

5. This was resisted by the appellants contending that there are serious triable issues in the suit, therefore, grant of summary judgment under Order XIII-A of the Code of Civil Procedure as amended by the Commercial Courts Act, 2015 is not permissible. It was also claimed that the damages part of the claim at least will survive.

6. The learned Single Judge, who heard the Applications found that there are serious lapses on the part of the appellants in complying with the terms of the Contract dated 15.05.2019, and it was this default on the part of the appellants that led to the contract being terminated by both the parties on 17.08.2019. The learned Single Judge also found that the claim of the



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appellants are that it was not a default is unacceptable. Ultimately, the learned Single Judge concluded that there is no chance of the appellants to succeed in its suit for damages and also that its defence in the suit for recovery is a moon shine, which has no chance of success. On the above findings, the learned Single Judge decreed the suit filed by the respondent, while dismissing the suit filed by the appellants.

7. We have heard Mr.Ajay Francis Inigo Loyola, learned counsel appearing for the appellants and Mrs. Abitha Banu, learned counsel appearing for the respondent.

8. The learned counsel appearing for the appellants would vehemently contend that the defaults, that are projected as major defaults by the respondent, are only subsequent conditions and the learned Single Judge had put the cart before the horse in coming to the conclusion that the non-compliance with those conditions would amount to a violation on the part of the appellants. Drawing our attention to Clause 19 of the Facility Agreement dated 15.05.2019, the learned counsel would submit that it is a subsequent

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condition and the same would start operating only when the respondent had honoured a drawdown request for a sum of Rs.2 Crores at a time.

9. The learned counsel would also contend that the second default which is attributed to it, is regarding misrepresentation on the defaults to its lenders. According to the learned counsel, the defaults occurred subsequently and therefore, they cannot be treated as defaults which would vitiate the agreement. On the third ground of default viz. non-payment of the dues for disbursement made by the appellants within the time stipulated under the Facility Agreement, the learned counsel would submit that the default is a reaction or a consequence of the default by the respondent committed in not honouring the drawdown request.

10. Contending contra, the learned counsel appearing for the respondent would submit that though Clause 19 of the Facility Agreement is shown to be a subsequent condition, it has to be read with Clause 12 of the general conditions of the contract which would go to show noncompliance with Clause 19 within a period of one month from the date of the execution of the



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hypothecation agreement would itself amount to a default and therefore, the compliance with Clause 19 would not depend on the honouring of the drawdown request. The learned counsel would also point out that there was a suppression on the part of the appellant in not disclosing that they were in default of several loans payable to their lenders even on the date of the agreement.

11. The learned counsel would also point out that the appellants have miserably failed to repay the money advance by way of equated monthly instalments regularly. Despite there being orders of this Court directing payment of EMI, the appellants have not complied with those orders which make their defence to the suit wholly unsustainable.

12. We have considered the rival submissions.



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13. A commercial Court is empowered to render a summary judgment if the grounds mentioned in Rule 3 of Order XIII-A are satisfied. The grounds are:

- (a) The plaintiff has no real prospect of succeeding on the claim, or the defendant has no real prospect of successfully defending the claim as the case may be; and
- (b) There is no other compelling reason why the claim should not be disposed of before recording oral evidence.

14. In the case on hand, the fact that the respondent has advanced a sum of Rs.6 Crores to the appellant is not in dispute. The dispute is only regarding the compliance with the contractual terms. The contractual terms are mutual. They are reciprocal promises and obligations to be performed by both the parties. Once it is found that one of the parties has not performed its obligations within the time spelt out in the agreement, the other party cannot be forced to perform the remaining part of the contract. The learned Single

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Judge has found that the appellants have not performed its obligations within the time allowed under the contract, though the learned counsel for the appellants would very seriously dispute the finding contending that the conditions prescribed under Clause 19 of the Facility Agreement are only subsequent conditions, we are unable to accept his contention in view of the fact that Clause 12(z) of the general conditions of the contract makes its obligatory for the appellants to have performed their part of the contract viz. Registration of the Charge within 30 days of the execution of the hypothecation agreement. The hypothecation agreement was executed on 15.05.2019, the charge must have been registered within 30 days there from. Admittedly it was not done. Therefore, the contention of the learned counsel for the appellants cannot be accepted.

15. On the second major default which has been accepted by the learned Single Judge, the contention of the counsel is that those defaults occurred after the agreements are entered into. The learned Judge has, as of fact, found that the defaults are prior in point of time and the CIBIL rating of the appellants were affected because of the defaults and the appellants also owed monies to

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other financiers and there was in default of the instalments payable under those loans on the date of the agreement. No material has been placed before us to demonstrate that those findings are factually in-correct. We are therefore unable to accept the said contention of the learned counsel also.

16. On the third ground, the learned counsel for the appellants is on a very weak ground. Admittedly, the appellants have not paid the instalments due for the admitted amounts that have been received by them as per the contract. Interim orders of this Court directing payment of such instalments were also not complied with. Therefore, the learned Single Judge was right in coming to the conclusion that there is a default on the part of the appellants in paying the monies that are payable as per the contract.

17. The learned counsel would raise another novel plea that the very suit is barred under the provisions of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002. The learned counsel would seek to invoke the bar enacted under Section 34 of the Act, to contend that the suit is barred. Section 34 of the Securitisation and



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Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, reads as follows:

34. Civil court not to have jurisdiction.—No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which a Debts Recovery Tribunal or the Appellate Tribunal is empowered by or under this Act to determine and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act or under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993)

A reading of the above Section would show that what is affected by the Section, if the jurisdiction of the Civil Court to entertain challenge to any action taken by the secured creditor under the Act, and not a general suit for



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recovery. This is made clear by Section 37 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 which reads as follows:

37. Application of other laws not barred.—

The provisions of this Act or the rules made thereunder shall be in addition to, and not in derogation of, the Companies Act, 1956 (1 of 1956), the Securities Contracts (Regulation) Act, 1956 (42 of 1956), the Securities and Exchange Board of India Act, 1992 (15 of 1992), the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993) or any other law for the time being in force.

A combined reading of Sections 34 and 37 would show that the contention of the learned counsel cannot be accepted, since Section 37 makes it clear that the Act itself is in addition to and not in derogation of any other law for the



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time being in force which means the other modes of recovery are always available to the secured creditors.

18. We therefore, see no merits in these Appeals, the Appeals are **dismissed**. However in the circumstances and taking note of the fact that the learned Single Judge has imposed cost while disposing of the suit by way of summary judgment, we are not imposing any cost in these Appeals.

(R.SUBRAMANIAN, J.) (R.SAKTHIVEL, J.)

20.02.2024

jv

Index : No

Internet : Yes

Neutral Citation : No

Speaking Order

To

The Section Officer,

Original Side,

High Court of Madras

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and

R.SAKTHIVEL, J.

jv

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