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OSA NO.225 OF 2020

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 11.01.2024

CORAM:

THE HONOURABLE MR. JUSTICE R.SUBRAMANIAN

AND

THE HONOURABLE MR. JUSTICE R.SAKTHIVEL

OSA NO.225 OF 2020

AND

CMP NO.11278 OF 2020

1.V.M.Chettiar and Sons India L.L.P.,
Represented by its Managing Partner
Mr.V.M.Lakshminarayanan
337, Anna Salai, Teynampet,
Chennai – 600 018.
(Amended as per order dated 30.10.2019
in A.No.137 of 2019)

2.Mr.V.M.Lakshminarayanan

... Appellants

Vs.

Mrs.V.Swarnalatha

... Respondent

PRAYER: Appeal filed under Order 36 Rule 1 of Original Side Rules read with Clause 15 of Letters Patent, to set aside the judgment and decree dated 14.02.2020 made in C.S.No.369 of 2008.



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For Appellants : Mr.A.L.Somayaji
Senior Counsel
for Mr.S.Elambharathi

For Respondent : Mr.V.Raghavachari
Senior Counsel
for Ms.V.Srimathi

J U D G M E N T

The defendants in C.S.No.369 of 2008 are on appeal.

2.Challenge is to the joint and several decree granted by the Trial Court directing the defendants 1 and 2 to pay a sum of Rs.1,60,00,000/- with interest at the rate of 6% per annum from 01.04.2008 till the date of realization along with costs of the suit.

3.For convenience, the parties will be referred to as per their rank in the Suit.

4.The plaintiff sued for recovery of a sum of Rs.3,30,25,360/- with interest at the rate of 12% per annum as against the defendants. The first defendant is the Company and the second defendant is the Director of



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the first defendant Company. The claim was based on three agreements

dated 23.10.1998, 14.07.1999 and 02.03.2005. According to the plaintiff,

under the above three agreements, the defendants had agreed to pay a sum

of Rs.2,60,00,000/- in return for an investment of Rs.1,00,00,000/- made

by the husband of the plaintiff Late Mr.Kesava Chowdhry in the real estate

business that was being carried on by the first defendant.

4.1.The first agreement dated 23.10.1998 was entered into between the husband of the plaintiff and the first defendant wherein the deceased Kesava Chowdhry had acknowledged the receipt of Rs.40,00,000/- and the first defendant on its part, had assured payment of Rs.2,20,00,000/-. Out of the said sum of Rs.2,20,00,000/-, a sum of Rs.60,00,000/- was to be paid by end of December 1998 and remaining amount of Rs.1,60,00,000/- was to be paid by the end of August 1999. It was agreed that this was in full settlement of all claims including interest, if any. The said agreement further stated that it will be subject to successful completion of the projects on hand.



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4.2.This was followed by the second agreement dated 14.07.1999, which was entered into with the plaintiff since her husband Kesava Chowdhry had died by then. This agreement evidences part payment of Rs.26,00,000/- out of Rs.60,00,000/- payable before December 1998. There was an assurance to pay the balance of Rs.34,00,000/- in instalments commencing from September 1999 and to be completed by December 1999 and the further sum of Rs.1,60,00,000/- was agreed to be paid by the end of January 2001. The second agreement was in continuation of the first agreement dated 23.10.1998.

4.3.Thereafter, it appears that some payments were made and a third agreement came to be entered into between the parties on 02.03.2005. Under the third agreement, the plaintiff acknowledged receipt of Rs.1,00,00,000/-. The balance of Rs.1,60,00,000/- was to be paid by the end of January 2001. Significantly, the third agreement dispensed with the requirement of completion of projects or successful implementation of the projects. However, the first defendant wrote to the plaintiff on 12.03.2008



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stating that since the project did not take off, it was not liable to pay a sum of Rs.1,60,00,000/- as agreed to under the third agreement dated 02.03.2005. This led to the plaintiff issuing a legal notice on 15.03.2008 to the first defendant demanding payment. The first defendant sent a reply on 24.03.2008 contending that the agreement to pay Rs.1,60,00,000/- was dependent on successful completion of the projects and since the projects did not take off, the liability would not arise. This compelled the plaintiff to sue for recovery.

5.The second defendant is the Director of the first defendant company. The suit was resisted by the defendants contending that the agreement to pay itself was dependent on successful completion of the projects. The projects having failed, the defendants were forced to liquidate the assets and repay the secured creditors. It was claimed that the first defendant had incurred losses and therefore, payment of Rs.1,60,00,000/- does not arise. It was also contended that the second defendant is an unnecessary party to the suit.



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6. On the above pleadings, the Hon'ble Judge framed the

following issues:

“(i). Has not the defendants committed default in payment of money as per the agreement dated 23.10.1998?

(ii). Are not the defendants liable to pay Rs.3,30,25,360/- with interest at the rate of 12% to the plaintiff?

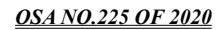
(iii). Whether the entire amount due to Kesavan Chowdhary has been repaid to the plaintiff?

(iv). Whether the failure of the project was only due to omission and commissions of Kesava Chowdhary?

(v). Whether the suit is bad for the non joinder of necessary parties i.e., the heirs of Kesava Chowdhary under whom the plaintiff claims?

(vi). Whether the 2nd defendant is an unnecessary party to the suit and the suit is hit by misjoinder of necessary parties?

7. The plaintiff was examined as P.W.1 and one Mediator Mr.G.K.Naidu was examined as P.W.2 and Exs-P.1 to P.9 were marked. The second defendant was examined as D.W.1 and Exs-D.1 to D.16 were marked.



record, concluded that the liability of the first defendant to pay a sum of Rs.1,60,00,000/- was independent of the implementation of the projects.

To come to the said conclusion, the Hon'ble Judge went by the language of the third agreement dated 02.03.2005 wherein there was an express undertaking to pay *de hors* the implementation of the projects. As far as the issue as to whether the second defendant is a necessary party or not, the Hon'ble Judge concluded that since the second defendant had signed all the documents as a Director of the first defendant Company, which are subject matter of the suit, the second defendant cannot be considered as a unnecessary party. The Hon'ble Judge, however, found that the plaintiff would be entitled to interest only from 01.04.2008 in view of the specific agreement between the parties. On the above conclusions, the Hon'ble Judge granted a joint and several decree for a sum of Rs.1,60,00,000/- with interest at the rate of 6% per annum from 01.04.2008 till the date of realization along with cost of the suit. Aggrieved, the defendants are on

appeal.



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9. We have heard Mr.A.L.Somayaji, learned Senior Counsel

appearing for the appellants / defendants and Mr.V.Raghavachari, learned

Senior Counsel appearing for the respondent / plaintiff.

10. Mr.A.L.Somayaji, learned Senior Counsel appearing for the appellants would vehemently contend that all the three agreements must be read together and since the third agreement is in continuation of the first two agreements, the liability to pay must depend on the completion of the projects. The fact that the project was not completed is admitted and therefore, according to the learned Senior Counsel, the liability to pay the sum of Rs.1,60,00,000/- will not arise. The learned Senior Counsel would also stress on the fact that the first defendant has paid a sum of Rs.1,00,00,000/- which has been acknowledged under the third agreement dated 02.03.2005, marked as Ex-P.6. He would also point out that once the fact that the project did not take off is admitted, the liability will not accrue.



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10.1. In support of his submission, learned Senior Counsel for

the appellants would draw our attention to the three agreements. Stressing

on the language of the agreements, the learned Senior Counsel would

submit that the Hon'ble Judge was not right in disassociating the first two

agreements from the third agreement and coming to a conclusion that the

defendants would be liable *de hors* the non-implementation of the projects.

The learned Senior Counsel would also contend that the Hon'ble Judge was

wrong in granting a joint and several decree against the defendants.

Drawing our attention to each and every one of the agreements where the

second defendant has signed as a Director of the first defendant company,

the learned Senior Counsel would contend that unless there is any

document to impress the liability of the company on the Director, the

learned Judge was not justified in granting a joint and several decree. He

would also contend that the deceased Kesava Chowdhry had other legal

heirs and they have been made as parties to the suit.



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11.Contending contra, Mr.V.Raghavachari, learned Senior

Counsel appearing for the respondent / plaintiff would submit that the third agreement makes the liability independent of the completion or implementation of the projects, drawing our attention to the terms of the third agreement dated 02.03.2005, particularly, the last two paragraphs which read as follows:

*“As circumstances were not favourable to Butterfly
Constructions Ltd, the project did not come up.*

*However, we hereby extend our aforesaid liability to pay
Rs.1,60,00,000/- (Rupees One Crore and Sixty Lakhs Only) for
payment by end of March 2008.”*

11.1.Mr.V.Raghavachari, learned Senior Counsel would contend that the liability to pay Rs.1,60,00,000/- is not deponent on the completion of the projects. As far as the liability of the second defendant is concerned, the learned Senior Counsel would submit that he, being the Director of the company and he having diverted the funds of the husband of the respondent / plaintiff is personally liable.



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11.2. The learned Senior Counsel would invite our attention to

the pleadings in para 6 of the plaint, wherein there is an allegation of diversion of funds and the legal notice dated 15.03.2008 wherein also there is an allegation of diversion of funds, to contend that the Director of the company would be liable. As regards the legal heirs of Kesava Chowdhry are concerned, the learned Senior Counsel would point out that the second agreement itself states that the liability is transferred to the plaintiff instead of Kesava Chowdhry and therefore, non-impleading of the other legal heirs of the deceased Kesava Chowdhry is not fatal to the suit.

12. We have considered the submissions made on either side.

13. On the arguments of the learned Senior Counsel on both sides, the following points arise for determination:

(i) Whether the liability under the third agreement is independent of the non-implementation of the project.



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(ii) Whether the second defendant could be personally made

liable.

(iii) Whether the legal heirs of Kesava Chowdhry are

necessary parties to the suit.

Point No.(i)

14. There are three agreements between the parties regarding the liability. The first agreement is dated 23.10.1998 and the relevant portion of which reads as follows:

“TERMS OF THE AGREEMENT:

1. The party of the Second Part, V.Kesava Choudry acknowledges receipt of Rs.Forty Lakhs, as part payment of the total sum advanced by him.

2. The party of the First Part, V.M.Lakshminarayanan, agrees to pay a sum of Rs.60,00,000/- (Rupees Sixty Lakhs Only) by end of December, 1998 and a further sum of Rs.1,60,00,000/- (Rupees One Crore and Sixty Lakhs Only) by end of August, 1999, in full settlement of all claims including interest, if any, subject to successful completion of the projects on hand.

3. Both the parties agree to the above terms.”



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15.Of course, a reading of the above agreement would lead to

the impression that the assurance to pay a sum of Rs.2,20,00,000/- apart from Rs.40,00,000/- had already been paid was subject to the successful completion of projects on hand.

16.The second agreement is dated 14.07.1999. Paragraph 3 of

the second agreement reads as follows:

“3.This agreement is in continuation of the agreement dated 23.10.1998 and does not provide for any additional payment to the party of the second part, excepting shifting of the liability acknowledged by the party of the first part to Mrs.V.Swarnalatha, party of the second part, as herein above mentioned.”

This says that it is in continuation of the first agreement dated 23.10.1998

and it only shifts the liability in favour of the plaintiff due to the death of her husband Kesava Chowdhry.

17.The third agreement is dated 02.03.2005. The operative

portion of the third agreement reads as follows:



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“In view of Late Sri.V.Kesava Chowdhary's involvement in the Project in the initial stage, as a gesture butterfly Constructions Ltd, agreed to pay further sum of Rs.1,60,00,000/- (Rupees One Crore and Sixty Lakhs Only) by end of January 2001, anticipating the Project implementation.

As circumstances were not favourable to Butterfly Constructions Ltd, the project did not come up.

However, we hereby extend our aforesaid liability to pay Rs.1,60,00,000/- (Rupees One Crore and Sixty Lakhs Only) for payment by end of March 2008.” (Emphasis supplied)

18.A reading of the third agreement would show that there has been a change in the terms of the contract between the parties. While the first agreement made the liability dependent on the successful completion of the projects, the second agreement shifted the liability to the plaintiff due to the death of her husband. While the first two agreements are in close proximity with each other, the third agreement was almost six years after the second agreement. There was a definite shift in the stand of the parties under the third agreement. The third agreement very clearly acknowledges



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the liability of the first defendant company to the plaintiff to the tune of

Rs.1,60,00,000/- and the said amount is to be paid by the end of March

2008. More importantly, the third agreement dispenses with the

requirement of implementation or completion of the projects, where it

acknowledges that the projects could not come up and despite the fact that

the projects could not come up, the company agrees to pay a sum of

Rs.1,60,00,000/- to the plaintiff.

19.A plain reading of the three agreements and the language used in the three agreements, makes it very clear that the contention of the learned Senior Counsel for the appellants to the effect that the liability was dependent on successful completion of the projects cannot be accepted.

The language of the agreements, particularly, the third agreement is very clear. It does not admit any other interpretation than the one that has been adopted by the Hon'ble Judge. We are, therefore, in agreement with the findings of the Hon'ble Judge that the liability was independent of the

completion of the projects. Point No.(i) is answered against the appellants.



Point No.(ii)

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20.All the three agreements are entered into by the company and the second defendant had signed on behalf of the company. There is nothing to show that the second defendant, as the Director of the company, had undertaken the liability of the company.

21.It is fundamental principle of Company Law that a Director or a Shareholder of a Limited Company cannot be made liable for the debts of the company beyond the value of his or her shareholdings unless there is a contract undertaking the liability.

22.It is not case of the plaintiff that there is a contract in and by which the second defendant had undertaken the liability of the first defendant. The legal notice which was issued on 15.03.2008 has been issued only to the first defendant. Though there is an allegation that other properties were purchased out of the funds provided by the husband of the plaintiff, there is nothing to show that the second defendant has undertaken



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the liability of the first defendant company. In the absence of such

undertaking or a guarantee, we do not think that the second defendant

could be made liable personally for the suit claim. We do not find that this

issue was anywhere discussed by the Hon'ble Judge. An issue was framed

as to whether the second defendant is not a necessary party to the suit. The

Hon'ble Judge has rendered a finding to the effect that his joinder cannot

be said to be a mis-joinder in view of the fact that he had taken part in the

suit transactions. That by itself cannot fasten the liability on the second

defendant personally. After all, a Company has to be represented by

somebody and such representation will not incur a personal liability unless

there is an express contract. We are, therefore, unable to sustain the decree

granted by the Hon'ble Judge against the second defendant. It is seen that

the first defendant was converted into a Limited Liability Partnership

(L.L.P). However, the position in law would be the same. Point No.(ii) is

answered accordingly.



Point No.(iii)

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23.This relates to non-impleading the heirs of Kesava Chowdhry in the light of the second agreement that was entered into on 14.07.1999 wherein it is expressly stated that the liability of Kesava Chowdhry is transferred to the plaintiff, we do not think that non-impleading the other heirs of deceased Kesava Chowdhry could be said to be fatal to the suit. Once the defendants had acknowledged their liability to the plaintiff, the plaintiff cannot be non-suited on the ground that she has not impleaded the other heirs while suing the defendants. Hence, we do not see any merit in the contention on the third point relating to non-impleading the heirs of the deceased Kesava Chowdhry. Point No.(iii) is answered accordingly.

24.In fine, the Original Side Appeal is partly allowed and the judgment and decree dated 14.02.2020 made in C.S.No.369 of 2008 is confirmed only with reference to the first defendant. The joint and several decree is set aside and there shall be a decree for payment of a sum of



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Rs.1,60,00,000/- (Rupees One Crore Sixty Lakhs Only) with interest at the

rate of 6% per annum from 01.04.2008 till date of recovery as against the

first defendant only. The plaintiff would be entitled to costs in the suit.

However, we make no order as to costs in this appeal. Consequently,

connected civil miscellaneous petition is closed.

[R.S.M., J.]

[R.S.V., J.]

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Index : No

Internet : Yes

Neutral Citation : No

Speaking Order

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