



C.R.P.No.2894 of 2024

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 30.07.2024

DELIVERED ON : 28.08.2024

CORAM:

THE HON'BLE MR.JUSTICE M. NIRMAL KUMAR

C.R.P.No.2894 of 2024

and

C.M.P.No.15401 of 2024

M/s.Venkatesh Coke and Power Ltd.,
No.6926A/D1, Chandrawal Road,
New Delhi – 110 007.

Rep. by Mr.Ravi Agarwal,
Managing Director

... Petitioner

Vs.

M/s.Mesuka Engineering Co. Pvt. Ltd.,
406, Vardgaman Market, Sector – 17,
Vashi, Navi Mumbai – 400 705
and having their Branch Office at
116/8, First Main Road, Kalaimagal Nagar,
Ekkattuthangal, Chennai – 600 097.

Rep. by Mr.R.S.Mahadevan,
Executive Director

... Respondent



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PRAYER: Civil Revision Petition has been filed under Article 227 of Constitution of India, 1950, praying to set aside the impugned order dated 16.02.2024 passed by the learned Commercial Court and to allow the I.A.No.4 of 2023 in COS No.1130 of 2022 filed by the petitioner.

For Petitioner : Mr.Karthick Seshadri
for Ms.S.K.Inthu

For Respondent : Mr.P.R.Raman, Senior Counsel
for Mr.Jaishankar Ramakrishnan

ORDER

This Civil Revision Petition has been filed seeking to set aside the impugned order dated 16.02.2024 passed by the learned Commercial Court and to allow the I.A.No.4 of 2023 in COS No.1130 of 2022 filed by the petitioner.

2.The petitioner/defendant in COS No.1130 of 2022 filed a petition under Order VII Rule 11 in I.A.No.4 of 2023 seeking to reject the plaint. The same came to be dismissed on 16.02.2024, against which, the present revision.



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3.The contention of the learned counsel for petitioner is that the Lower Court failed to consider that the existing plaint in the above suit does not contain any material facts about the respondent/plaintiff's right and entitlement to claim interest for the Earnest Money Deposit (EMD), which is 2% of the order value, as mandatorily required under Order VI Rule 1 & 2 of C.P.C. Further, the Commercial Court failed to consider that the pleading shall mean plaint or written statement and such pleadings shall state material facts as per Order VI Rule 1 & 2 of C.P.C. Thus, the existing plaint is only for claim of refund of EMD but not the claim of interest for EMD. Hence, adjudicating the claim of interest based on the existing plaint is not sustainable and impermissible under law. Hence, continuation of the suit is amount to abuse of process of law.

4.He further submitted that the present plaint contains only single prayer claiming Rs.88,25,592/-, which is a sum of both the value of EMD and its interest. The Lower Court failed to consider that as per order XIV Rule



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1(5) of C.P.C., the Court to ascertain upon the material propositions of fact or
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of law, the parties are at variants only by reading a plaint and written statement. In the above case, issues framed based on the plaint, which is defective. The issues not re-framed as the plaint not amended subsequent to the receipt of refund of EMD sum. The proof affidavit filed by the respondent/plaintiff during the year 2014 shows that major portion of the claim under the plaint received by the respondent/plaintiff several years ago. Hence, the proof affidavit and statements are not in support of the issues. In this case, there is a significant change in the facts. In this case EMD sum refunded to the plaintiff and no amendment has been incorporated in the cause of action for the claim of interest alone. If any such amendment is made, thereafter opportunity ought to be given to the petitioner/defendant to file additional written statement to defend the case of claim of interest alone for the EMD. Subsequently the issue should have been reframed based on the variants of the parties with regard to the propositions of fact or of law. It is



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also to be seen that till date the respondent/plaintiff not abandoned their claim of refund of EMD sum as per Order XXIII Rule 1 of C.P.C. The trial Court failed to exercise its powers under Order VII Rule 11 to put an end to the sham litigation in order to avoid wasting the judicial time for the suit wherein no cause of action is disclosed.

5.In support of his contention the petitioner relied upon the decisions of Hon'ble Apex Court in *Dahiben vs. Arvinbhai Kalyanji Bhanusali* reported in (2020) 7 SCC 366, *Azhar Hussain vs. Rajiv Gandhi* reported in (1986) Supp SCC 315 and *Liverpool & London S.P. & I Assn. Ltd. vs. M.V. Sea Success I* reported in (2004) 9 SCC 512, wherein the Apex Court had held that whether a plaint discloses a cause of action or not is essentially a question of fact. But whether it does or does not must be found out from reading the plaint itself. Further, the Apex Court in the case of *Hardesh Ores (P) Ltd. vs. Hede & Co.* reported in (2007) 5 SCC 61, held that it is not permissible under law to cull out a sentence or a passage from the



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plaint and to read it in isolation. It is the substance and not merely the form, which has to be looked into. Thus, in view of the above stated position, the Lower Court ought to have allowed I.A.No.4 of 2023, on the contrary dismissed the same. Hence, the above petition.

6.The learned Senior Counsel for the respondent/complainant submitted that reject the plaint petition filed by the petitioner is with a malafide intention to drag on the bonafide claims of the respondent/complainant. Learned Senior Counsel submitted that as per the provisions of Section 8 of the Commercial Courts Act, 2015, no revision application or petition shall be entertained against any interlocutory order of a Commercial Court. In view of the same, challenging the order passed in I.A.No.4 of 2023 is not maintainable. Further submitted that as per Section 13(1A) of the Commercial Courts Act, 2015, an appeal would only lie against the judgment and orders under Order XLIII of C.P.C. An order rejecting an application preferred under Order VII Rule 11 of C.P.C. is not enumerated or



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enlisted in Order XLIII of C.P.C. Further submitted that the petitioner filed a memo on 27.01.2023 with contentions that the present suit is defective and liable to be dismissed. The trial Court passed a detailed order in the said memo on 23.02.2023 and rejected the memo. Thereafter, knowing well Commercial Court has no revisional power with similar prayer filed I.A.No.4 of 2023 for rejection of plaint. The order passed in the memo and the prayer sought in I.A.No.4 of 2023 are one and the same hit by *res judicata*. Hence, the above C.R.P. to be dismissed at the threshold.

7.He further referring to the typed set submitted that the petitioner's contentions can very well be considered during trial in the suit and not by short-circuiting and rejecting the plaint under Order VII Rule 11 of C.P.C. The Hon'ble Apex Court in the case of *Sajjan Singh vs. Jasvir Kaur & others* in *Civil Appeal No.4221 of 2023 in S.L.P.(C) No.9921 of 2019* held that whether an appropriate prayer should have sought, is a matter ultimately to be decided in the suit and not an issue to be considered while deciding the



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rejection of plaint application. The grounds raised by the petitioner is beyond the scope of reasons or the principles enumerated in Order VII Rule 11 of C.P.C. On the facts of the case it was submitted that the respondent is engaged in the erection, installation and commissioning of engineering projects. During 1997, the respondent submitted their offer on 25.12.1997 based on the requirements of the petitioner. On 26.12.1997, the offer of the respondent was accepted and the petitioner informed that the value of the order shall be Rs.19,87,00,000/-. The petitioner insisted the respondent to pay EMD of 2% of total value of the project immediately. Though the respondent ready to submit a Bank Guarantee for EMD, the petitioner insisted for cash deposit and the respondent paid Rs.39,74,000/- by way of five demand drafts and the receipt of EMD amount was duly acknowledged by the petitioner vide receipt dated 22.01.1998.



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8.He further submitted that the petitioner not only collected EMD from the respondent but also collected from other contractors namely, Nagarjuna Constructions Co. Ltd., Raunaq Steel Industries, Simplex Concrete Piles (India) Ltd. and using this EMD amount had invested in procurement of lands in and around Athipattu Village, Thiruvallur District. The petitioner admitted the same in their letter dated 27.09.2001, they purchased 187 acres of land using the amount collected from the contractors in the name of EMD. The petitioner dragged the refund of amount received by them from 1998 till 2005. There are various communications and meetings held during this period. The petitioner having a site office in Chennai, which is within the territorial jurisdiction of the High Court, hence a suit in C.S.No.152 of 2006 filed before this Court. Subsequently, the suit was transferred to XVIII Additional District Judge, City Civil Court, Chennai and renumbered as O.S.No.970 of 2021. After constitution of Commercial Court, it has been transferred to the Commercial Court and again renumbered as



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C.O.C.No.1130 of 2022. The suit is pending for more than 18 years. The
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petitioner/defendant filed written statement with a delay before the Madras High Court and the same was allowed in the year 2013. In the written statement the petitioner raised all the defence, which were set out in reject the plaint petition. The respondent/plaintiff filed a suit for recovery of money along with interest. The respondent filed the above suit for recovering their principal and interest dues for Rs.39,74,000/-.

9.In the year 2011, the Hon'ble Delhi High Court in C.O.P.No.255 of 2003 in para IV of its order dated 05.04.2011, had reserved the right of the respondent/plaintiff as "*It shall be open to Mesuka Engineering Company (P) Ltd. to pursue only its claim of interest and other heads in respect of the said sum (EMD amount) and it shall be open for the respondent company (petitioner herein) to defend the same*". Thus the petitioner's contention that the suit for EMD interest is not maintainable, to be rejected without deliberation. The suit was posted for cross examination of PW1. Sufficient



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opportunity and time given to the petitioner to conduct cross examination in the year 2013 itself. The respondent/complainant present himself on three occasions from Bombay for this purpose, but no cross examination conducted. After giving sufficient time and opportunity, the High Court closed PW1 cross examination in the year 2014. Eight years after the closure of PW1's evidence, a petition filed by the petitioner to re-open and re-call the evidence of PW1 for cross examination which is nothing but a harassment and abuse of process of law but the application was allowed by the Commercial Court. Referring to adjudication dated 19.06.2024. It also recorded that the claim is only for the interest amount. The defendant's counsel was not ready to cross examine the witnesses. The Commercial Court in its adjudication dated 22.07.2024 recorded the presence of PW1 for cross examination. At that time the petitioner/defendant filed adjournment petition. The trial Court dismissed the same with cost and evidence of PW1 was closed. Thereafter too, the petitioner not conducted cross examination and



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cited the pendency of filing of above C.R.P. The contention of the petitioner is on mixed question of fact and law which necessarily to be decided at the time of trial and not in reject the plaint petition. The trial Court recorded the trajectory of the case in C.S.No.152 of 2006, the proceedings in C.O.P.No.255 of 2003 filed by M/s.Simplex Concrete Pipes India Limited and in which the EMD amount was undertook to be repaid to the plaintiff/respondent herein and the same was paid pursuant to the order dated 05.04.2011. By referring and extracting the order dated 23.02.2023 in dismissing the memo seeking to reject the plaint, wherein it had clearly recorded that in C.O.P.No.255 of 2003, liberty was given to the plaintiff to pursue the suit in claim of interest and other heads. Though the major claim to refund EMD was settled between the parties, finding that the present claim is only with regard to the entitlement of interest for the said EMD, the trial Court rightly dismissed the same.



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10. Considering the submissions made and on perusal of the materials, it is seen that originally the respondent filed a civil suit in C.S.No.152 of 2006 before this Court claiming EMD and its interest. A company petition in C.O.P.No.255 of 2003 filed before the Delhi High Court by Simplex Concrete Piles (India) Ltd., and the respondent was a party to the proceedings. The petitioner was directed to refund the EMD amount by order dated 05.04.2011 and the EMD amount repaid. In the said order liberty was given reserving the respondent/plaintiff's right to pursue the suit in C.S.No.152 of 2006 in claiming interest and other heads in receipt of the said sum (EMD). It is not in dispute that the EMD amount has been repaid but as regards the interest their rights preserved. It is seen that in this case when the suit was pending before this Court, the respondent/plaintiff filed the proof affidavit and marked the documents. Eight years thereafter a petition to reopen and recall PW1's evidence with condonation of delay filed before this Court and it was allowed in the year 2013. In the written statement all the



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defence, which are now set out, already made. The case was transferred from High Court to the City Civil Court in the year 2021 and thereafter to the Commercial Court in the year 2023. It is seen that before filing the reject the plaint petition, the petitioner filed three applications to reopen and recall PW1's evidence. It is also seen that the petitioner filed a memo with similar prayer of reject the plaint which was dismissed on 23.02.2023. Thereafter the present petition filed on 29.03.2023 under Order VII Rule 11 C.P.C. in I.A.No.4 of 2023. Though the memo ought to have been rejected in limine, the Commercial Court had disposed of the same on merits. Since the order on the Memo was not on interim application order, under any provision of law filing of I.A.No.4 of 2023 entertained and thereafter impugned order passed.

11.The contention of the petitioner that there is no cause of action is not sustainable. The second issue is that whether the plaintiff is entitled to receive the interest @ 15.5% per annum from 01.12.2005 till the date of



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realisation is sustainable in view of the order passed by the Delhi High Court in C.O.P.No.255 of 2003, wherein it had specifically reserved the right of the respondent/plaintiff to pursue its right in C.S.No.152 of 2006 as regards the claim of interest and other heads. Further para V of the order of Delhi High Court is that upon receiving the payment of Rs.39.74 lakhs, Mesuka Engineering Company (P) Ltd., undertakes that it shall immediately take steps to have the order dated 16.11.2006 of attachment on the petitioner/defendant's company, land recalled/vacated by filing appropriate application in the aforesaid suit. In C.S.No.152 of 2006. Paragraph 37 of the additional written statement dated 08.03.2022 filed by the petitioner/defendant is as follows:

“The Defendant submits that the Plaintiff has not complied with the directions of the Hon'ble High Court of Delhi, vide paragraph V of the said order dated 05.04.2011 in C.P.No.255/2003. In this regard, the Defendant was constrained to file an Application before the Hon'ble High Court of Madras, to raise the order of attachment before judgment passed on 16.11.2006 in Application No.



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3713 of 2006 in C.S.No.152 of 2006. The Hon'ble High Court of Madras, allowed the said Application, vide order dated 19.12.2018 passed in A.No.9967 of 2018 in A.No.3713 of 2006 in C.S.No.152 of 2006. However, in the encumbrance certificate pertaining to immovable properties mentioned in the said Application 3713 of 2006 in C.S.No.152 of 2006, still shows the attachment, made vide order dated 16.11.2006, despite communicating the said order to the concerned office of the Sub-Registrar. Hence, it is also essential to remove the said attachments made, consequent to the order dated 19.12.2018 passed in A.No.9967 of 2018 in A.No.3713 of 2006 in C.S.No.152 of 2006.”

12.From the above admitted position it is clear pursuant to the order passed in C.P.No.255 of 2003, an application preferred by the petitioner in C.S.No.152 of 2006 and orders obtained. When it is for claim of interest on EMD, diametrically opposite stand taken, claiming EMD amount repaid. The order of the Delhi High Court in C.P.No.255 of 2003 and prosecution of C.S.No.152 of 2006 cannot be in piece meal, amount to contravening stand adopted by the petitioner, not permissible. Further the contention of the



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petitioner involves mixed question of law and facts which cannot be decided
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in reject the plaint petition. It has to be necessarily decided during trial.

13.In view of the same, this Court is not inclined to entertain this
petition. Accordingly, the Civil Revision Petition is dismissed. No costs.
Consequently, connected miscellaneous petition is closed.

28.08.2024

Index : Yes/No
Internet : Yes/No
Speaking order/Non speaking order
Neutral Citation : Yes/No
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To

The District Judge,
Commercial Court, Chennai.



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M.NIRMAL KUMAR, J.

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**Pre-delivery order in
C.R.P.No.2894 of 2024
and C.M.P.No.15401 of 2024**

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