**(2012) 12 MAD CK 0074**

**In the Madras High Court**

**Case No :** Appln. No. 653 of 2012 in C.S. No. 76 of 2012

D. Mahendra Kumar Jain Proprietor M/S. Sri Venkateshwara Enterprises 56 Strotten Muthia Mudali ST Chennai 79 — APPELLANT

Vs

R. Damodaran Proprietor M/S. Lakshmi Electricals 26, II Cross ST CIT Nagar West Chennai 35, G. Sethu Madhavan Asst Vice President JLL, P and D.S. Level 8 Tower II TVH Belisca Tower Block 94 Mrc Nagar Chennai 28 and M/S. B.A. Continum Private Limited 9th floor Crest Building Phase II Ascendas IT Park, Taramani Chennai 113 — RESPONDENT

**Date of Decision :** 18-12-2012

**Acts Referred:**

**Citation :** (2012) 12 MAD CK 0074

**Hon'ble Judges :** Vinod K. Sharma, J

**Bench :** Single Bench

**Final Decision :** Dismissed

# Judgement

Vinod K. Sharma

1. The plaintiff has filed a suit for recovery of Rs. 1,09,95,994/- (Rupees one crore, nine lakh ninety five thousand nine hundred and ninety four only) with interest @ 12% p.a. from the date of filing of the suit till realisation. The plaintiff is a trader, trading in the name and style of "Sri Venkateshwara Enterprises". The defendant No. 1 approached the plaintiff in the month of August, 2011, claiming that he has been given contract by the Bank of America i.e. B.A. Continum Private Limited for the electrical works to be executed at 7th floor, Acendas I.T. Park, Phase III, Taramani.

2. M/s. B.A. Continum Private Limited is the subsidiary of Bank of America. The plaintiff started supplying electrical wires and accessories as per various purchase orders specifically placed on the plaintiff by the defendant No. 1 from 18.8.2011 till 10.12.2011 worth Rs. 1,28,15,732/- (Rupees one crore twenty eight lakhs fifteen thousand seven hundred and thirty two only) out of which the

defendant No. 1 paid a sum of Rs. 26,00,000/-(Rupees twenty six lakhs only) thus, leaving balance of Rs. 1,02,15,732/- (Rupees one crores two lakhs fifteen thousand seven hundred and thirty two only). The defendant No. 1 also borrowed a sum of Rs. 6,00,000/- (Rupees six lakhs only) from the applicant for clearing payment of one M/s. Elins Switch Boards Pvt. Ltd.

3. It is a case of the plaintiff that the defendant No. 1 admitted the correctness of the account and affixed his signature admitting the accounts to be correct.

4. It is also the case of the plaintiff that on 11.01.2012, the defendant No. 1 was asked to clear outstanding payment with copy to the defendant No. 2 being the Project Head of the site. The first defendant wrote a letter to M/s. B.A. Continum Private Limited instructing the said Company to forward all payments covered by his final bill, to the plaintiff and assured that he will not dispute or claim or raise any issues, if such payment or money transfer is transferred in favour of the plaintiff.

5. It is submitted that the defendant No. 2 refused to receive the letter, which resulted in issuance of legal notice. It is submitted that the defendant No. 1 promised orally and admitted the entire liability as per the statement of accounts dated 19.12.2011 and has also issued a letter to M/s. B.A. Continum Private Limited to release all further payments to the plaintiff. But till date, the plaintiff has not received any amount. The plaintiff has also furnished the details of outstanding due of the defendants in the suit. The plaintiff has restricted his claim of interest to 12% p.a.

6. It is also pleaded that the defendants 1 and 2 are colluding and conniving to prolong the payment due to the plaintiff and furthermore, the first defendant is interested to part with the project/contract, without clearing the plaintiff''s dues, at the instance of the defendant No. 2. The defendant No. 2 is not complied with the letters of the defendant No. 1.

7. With the suit, the plaintiff has filed the following applications.

A. No. 653 of 2012:

This application has been filed by the plaintiff/applicant for issuance of Pro-order prohibiting the Garnishee from releasing payment of any nature, due to the respondent No. 1 to the extent of suit claim.

8. The case of the plaintiff/applicant is that the defendant No. 1 and 2 are colluding and conniving each other, to delay the payment due to the plaintiff/ applicant and the defendant No. 1 is interested to part with the Project site, without clearing dues of the plaintiff.

9. It is further submitted that the defendant No. 1 and 2 are hand in glove with each other to deny payment to the plaintiff for the materials supplied worth more than crore of rupees.

10. It is submitted that if the respondent/Garnishee is not prohibited from

 

making payment to the first respondent, the plaintiff will not be in a position to recover the dues from the first respondent, as the defendant will take away the money payable to him by the second defendant resulting in irreparable sufferings to the plaintiff and his family members.

11. Counter affidavit has been filed wherein the defendants have denied averments in the application. The stand of the respondent No. 2 is that the respondent No. 3 M/s. B.A. Continum Private Limited, a subsidiary of Bank of America, is putting up a construction at their facility situated at 7th Floor, Ascendas I.T. Park, Phase III, Taramani high road, Taramani and for this purpose, the third respondent entered into an agreement with the defendant No. 1 for supply of electrical goods for electrical works to be undertaken by the defendant No. 3. That the electrical goods have been purchased from the plaintiff. The second respondent claims himself to be an employee of the Project Management Consultancy Company, whereas the first respondent is a Contractor selected by the third respondent. The applicant is Sub contractor of the first respondent/ defendant No. 1 for supply of electrical accessories.

12. It is submitted that the third respondent alone allocates contracts and issues work order and the second respondent is only to provide Project Management Consultancy Services for the third respondent and is not concerned with defendant No. 1.

13. The allegation of connivance are denied. It is the stand of the respondent No. 2 that the plaintiff is claiming money due from the respondent No. 1/defendant No. 1, whereas the first respondent claims payment due from the respondent No. 3, therefore, the second respondent is not related with at all. It is further submitted that the second respondent has no liability. Therefore, prays for dismissal of the application.

14. In the counter affidavit filed by the respondent No. 1/ defendant No. 1, it is admitted that the defendant placed purchase order and has taken delivery of goods worth Rs. 1,08,15,732/- (Rupees one crore eight lakhs fifteen thousand seven hundred and thirty two only) and out of which he paid a sum of Rs. 27,00,000/- (Rupees twenty seven lakhs only). He also admitted that he borrowed a sum of Rs. 6,00,000/- (Rupees six lakhs only), but it was repaid in two installments of Rs. 1 lakh and 5 lakhs on 20.10.2011 and 29.10.2011.

15. It is submitted that balance amount payable by the defendant No. 1 was Rs. 1,02,15,732/- (Rupees one crore two lakhs fifteen thousand seven hundred and thirty two only) out of which the defendant paid a sum of Rs. 27 lakhs on 31.10.2011. The amount payable by the defendant No. 1 therefore is Rs. 75,15,732/- (Rupees seventy five lakhs fifteen thousand seven hundred and thirty two only).

16. It is submitted that the plaintiff had supplied goods directly to the second respondent and that the defendant No. 1 has done labour work and therefore, invoice amount has to be collected by the plaintiff directly form the defendant

 

No. 2.

17. It is the stand of defendant No. 1 that a sum of Rs. 1,08,15,732/- (Rupees one crore eight lakhs fifteen thousand seven hundred and thirty two only) is due from defendant No. 3. He has also placed on record a detailed calculation showing recoverable amount.

18. It is submitted that total due amount from the respondent No. 3 as on date is Rs. 70,77,066/-(Rupees seventy lakhs seventy seven thousand and sixty six only) which is even less than the suit claim, this shows that plaintiff is charging excess amount than to one he is entitled to.

19. It is also the case of the defendant No. 1 that the plaintiff has collected blank pronotes, blank cheques and signatures and blank stamp papers as security for the goods purchased by the defendant No. 1. The defendant No. 1 also prays for dismissal of the application with exemplary costs.

20. The defendant No. 3 has not filed any counter.

21. Though normally the application against Garnishee can be maintained after the decree passed, still keeping in view of the peculiar facts and circumstances of this case, where defendant No. 1 has admitted his liability to pay past of suit claim and has also not disputed that the respondent No. 3 has utilised the goods supplied by the plaintiff, therefore, it is a fit case to exercise jurisdiction to direct the respondent No. 3 to deposit the amount payable to the defendant No. 1 to the credit of suit.

22. This application is allowed. The respondent No. 3 is directed to deposit the amount due and payable to the defendant No. 1 in this Court in the account of suit. No costs.

23. A. No. 1550 of 2012:

This application has been filed by the plaintiff, for appointing an independent Valuer to assess the value of the materials returned back by the respondent No. 1, to the applicant and to furnish a detailed report.

24. This application on the face of it, is misconceived, thus not maintainable in law. Admittedly, the relationship between the plaintiff and the defendant No. 1 is that of seller and purchaser. Therefore, no question arises for appointment of Valuer to assess the value of the goods, as the price of the returned goods is required to be adjusted. In any case, this is a question of evidence to be led by the plaintiff which cannot be a subject matter of interim application.

25. The application is nothing but misuse of process of Court. Consequently, this application is ordered to be dismissed with cost which is assessed at Rs. 5000/- (Rupees five thousand only) payable to the Tamil Nadu Legal Services Authority, Madras High Court, Chennai.

26. A. No. 1551 of 2012:

This application has been filed for grant of interim mandatory injunction restraining the first respondent to return back all the electrical materials supplied by the applicant which are used/unused and lying at the site at 7th Floor, Phase III, Zenith Building, Ascendas I.T. Park, Taramani on "as is where is basis" to the applicant.

27. This application again is misconceived. The plaintiff has already filed a suit to recover total amount for the goods sold. It is not understood as to how the plaintiff while maintaining the suit, can seek return of the goods supplied to the respondent No. 3 on behalf of the respondent No. 1. The interim application for injunction is maintainable to safeguard the final relief claimed in suit. The relief claimed in suit is for recovery of price for the goods supplied. Plaintiff/applicant cannot be permitted to make out altogether different case in interim application. Plaintiff while maintaining the suit for recovery of money for the goods supplied, cannot seek return of the goods as well as claim the price of the goods supplied. This application again is nothing but misuse of process of Court, therefore, is ordered to be dismissed with cost which is assessed at Rs. 5000/- (Rupees five thousand only) payable to the Tamil Nadu Legal Services Authority, Madras High Court, Chennai.

 