

S U P R E M E C O U R T O F I N D I A

RECORD OF PROCEEDINGS

CIVIL APPEAL NO(s). 6977 OF 2001

TAMIL NADU WATER SUPPLY & DRAINAGE BOARD

Appellant (s)

VERSUS

N. MAHALINGAM

Respondent(s)

(With office report)

Date: 07/09/2006 This Appeal was called on for hearing today.

CORAM :

HON'BLE MR. JUSTICE S.B. SINHA

HON'BLE MR. JUSTICE DALVEER BHANDARI

For Appellant(s)

Mr. V. Krishna Murthy,Adv.

For Respondent(s)

Mr. M.N.Rao, Sr. Adv.

Mr. R. Nedumaran,Adv.

Mr.Rajiv Rufus, Adv.

Mr. Ramesh, Adv.

UPON hearing counsel the Court made the following

O R D E R

The appeal is dismissed in terms of the signed order. No costs.

dwaj)

(Meenu Sethi)

(Pushap Lata Bhar

Court Master

Court Master

Signed order is placed on the file

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO.6977/2001

Tamil Nadu Water Supply &
Drainage Board

... Appellant

VERSUS

N. Mahalingam

... Respondent

O R D E R

This appeal is directed against the judgment and order dated 27.4.2000 passed by the Division Bench of the High Court of Judicature at Madras whereby and whereunder it affirmed the judgment and decree dated 16.6.1993 passed by a learned Single Judge of the said Court dismissing the Suit filed by the appellant herein against the defendant- guarantor.

Basic fact of the matter is not in dispute. The respondent herein was the Director of one M/s Shakthi

Pipes Limited , a joint sector company incorporated under the Companies Act. The Company used to

manufacture cast iron spin pipes. It had established a plant having an industrial licence therefor. The plant, however, remained closed for a period of about three years from 1968 for want of orders. The Company requested the Government to place an order for about 30,000 tonnes of cast iron spin pipes on a forward delivery basis; pursuant to or in furtherance whereof the Government of Tamil Nadu issued G.O. Ms. No. 1964 dated 22.10.1969 directing the Chief Engineer, Public Health Engineering and Municipal Works to do the needful. An advance of 20% against the initial order for

15,000 tonnes of cast iron was also paid to the Company for the year 1969-70.

Admittedly, the Company could not discharge its obligations under the Contract entered into by the parties wherefrom the provisions of Section 4(b) of Tamil Nadu Relief Undertaking(Special Provisions Act 1969) was invoked. The said provision reads as under:

" that all or any of the contracts, assurances of property, agreements, settlements, awards, standing orders or other instruments in force, to which any relief undertaking is a party or which may be applicable to any

relief undertaking, immediately before the date with effect on and from which the relief undertaking was declared a relief undertaking shall be suspended in operation or that all or any of the rights, privileges, obligations and liabilities accruing or arising thereunder before the said date, shall be suspended or be enforceable with such modifications and in such manner as may be specified in such notification."

The assets of the Company including the plant remained under the control of the State from the year 1972-1978. However, as the Company could not be revived, the Management of the factory was given back to the Company.

The appellant, thereafter, filed a Suit in the Original Jurisdiction of the High Court of Judicature at Madras on 31.3.1981. Paragraph 8 of the plaint which relates to the first respondent reads as under:

"Para 8- That Thiru N. Mahalingam of M/s. Shakti Pipes Ltd., to stand as personal surety for the amount advanced for purchase of raw materials. That the

arrangments were to be tried for one year. The cost of raw materials were estimated at Rs. 40 lakhs for the 2 month production of pipes.

"Accordingly thru N. Mahalingam executed a personal security bond dated 15.2.1971 undertaking to

indemnify the Government to the total extent of Rs. 40,00,000/- in respect of the moneys advanced to the Company, 1st defendant for the purchase of raw materials."

The cause of action for the Suit was stated in the plaint was in the following terms:

" Therefore, the cause of action on the suit arose on 22.10.1969 when the Government accepted the proposal of the defendant in G.O. Ms.No. 1964 and advanced the sum of Rs. 25 lakhs on 12.11.1969 when the sum of Rs. 25 lakhs was actually paid on 9.2.1971 when the Government directed Rs. 38,78,012.57 to be advanced for the purchase of raw materials and when the bills of the defendant to the value of Rs.12,18,066.96 was passed on 31.3.1978 and adjusted towards insurance charges and interest due on the advances."

So far as the respondent, who was arrayed in the Suit as 2nd defendant in his personal capacity is concerned, the decree was sought for for a sum of Rs. 40,00,000/- which amount was to be given in credit towards the amount due from 1st defendant.

Learned Single Judge dismissed the Suit by a judgment and decree dated 16.6.1993 as against the respondent herein on the ground that he being a surety

and the modification purported to have been effected to condition of G.O. Ms. No.349 dated 9.2.1971 without his knowledge and consent, his obligations as surety came to an end.

It was, furthermore, held that the period of limitation might have stopped running as against the Company in terms of the provisions of the Tamil Nadu Relief Undertaking(Special Provisions Act 1969) but it did not stop running as against the respondent herein. The letters patent appeal preferred by the appellant was also dismissed.

The contention of the appellant before us, however, is that as the respondent herein had executed an Indenture of Indemnity, Guarantee and Personal Surety on 15.2.1971; is barred by the time thereof the relevant provisions whereof are as under:

" 2. "The Surety" doth hereby further covenant with "The Government"and undertake to indemnify and keep "The Government" indemnified against all loss and damage and may be caused to them consequent upon the breach of the covenants, terms, conditions and

stipulations contained in G.O. Ms. No. 349 dated 9th February 1971 by "The Company".

3."The Surety" doth hereby further covenant with

"The Government" to stand as personal surety for the amount advanced by "The Government" from time to time to "The Company" towards the cost of raw materials etc.

The learned counsel for the appellant would submit that in view of stipulations contained in clause 2 of the said instrument the cause of action did not stop

running having regard to the provision of the Tamil Nadu Relief Undertaking(Special Provisions) Act, 1969 and in particular keeping in view the fact that the loss and damages caused by reason of breach of terms of the Contract by the Company, was not possible to be determined unless and until a Suit in that behalf was filed both as against the Company as well as the Indemnity.

However, when pointed out that no such case has been pleaded in the plaint, the learned counsel has

drawn our attention to Issue No.2 framed by the learned Single Judge which reads as under:

"2. Whether the deed of indemnity bond executed by the 2nd defendant on 15.2.1971 is enforceable and whether the 2nd defendant is liable as surety?."

Our attention was further drawn to the further statement made by the respondent herein in his written

statement which is as under:

" Following the conditions laid down in G.O. Ms.No. 349 dated 9.2.1971, this Defendant executed a Deed of Indemnity dated 15.2.1971 undertaking to indemnify the Government to the total extent of Rs. 40 lakhs in respect of the monies used and utilised for procurement of raw materials as aforesaid."

The liability of the respondent arising under the said instrument is not in question. What is in question is the enforcement of his liability viz as to whether he became liable as a surety or as an indemnitor. A bare perusal of the averments made in paragraph 8 of the plaint would clearly demonstrate that the respondent

was sued in his personal capacity as a surety in respect

of the amount advanced for purchase of the raw materials. The appellant neither pleaded nor proved any breach of terms of the contract on the part of the Company in respect whereof the respondent was an indemnitor and thus would also become liable in terms of Section 125 of the Indian Contract Act. If the plaintiff itself had not pleaded any breach of contract on the part of the Company vis-a-vis the respondent herein, the question of his being liable as an indemnity holder would not arise.

It is trite what is not pleaded cannot be proved. In fact in this case no such evidence was adduced or could be adduced showing any breach of the terms of the Contract on the part of the Company. Furthermore, even in para 11 of the plaint, the appellant did not make any averment as to how and on what date the Company committed breach of the contract. As noticed hereinbefore, even in the plaint reliefs sought for as against the company was only for Rs. 40 lacs on the premise that the said amount was to be given credit towards the amount due from it. In any view of the

matter, the statements made in the written statement on the issue proved by the learned Single Judge of the High Court have no bearing to the question raised before us.

We are, therefore, of the opinion that no foundation and facts had been laid down in enforcing the purported obligations on the part of the respondent. There is thus no merit in the appeal. It is dismissed

accordingly. No costs.

.....J.

(S.B.SINHA)

.....J.

(DALVEER BHANDARI)

New Delhi,

September 7, 2006.