

(2006) 04 CAL CK 0016

In the Calcutta High Court

Case No : G.A. No. 3734 of 2001, G.A. No. 1918 of 2004 and C.S. No. 481 of 2000

Jaytee Exports

APPELLANT

Vs

Natvar Parekh Industries Limited and Others

RESPONDENT

Date of Decision : 05-04-2006

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 7 Rule 11
Contract (Amendment) Act, 1997 — Section 28
Contract Act, 1872 — Section 230, 28
Limitation Act, 1963 — Article 108

Citation : (2006) 3 CALLT 346

Hon'ble Judges : Kalyan Jyoti Sengupta, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Kalyan Jyoti Sengupta, J.—The aforesaid applications were heard together for convenience sake. The first mentioned application is demurer action taken out by the defendant No. 1 for revoking leave obtained by the plaintiff under Clause 12 of the Letters Patent for instituting the aforesaid suit in this Hon"ble Court or in any event the order may be made for revoking leave obtained by the plaintiff as against the aforesaid defendant; and rejection of the plaint, filed now, and dismissing the same and in any event rejecting the plaint dismissing the above suit as against the petitioner. The second mentioned application has been taken out by the plaintiff for Judgment on admission for a sum of Rs. 27,12,000/- against the defendant No. 1 with interest at the rate of 15% per annum from 22nd August, 1998 till date of the payment.

2. I thought the demurer action should be considered and decided first as the result thereof would obviously have inevitable legal implication on the application for Judgment on admission.

3. It is contended that the suit is barred by law for getting the plaint rejected. No

part of the cause of action arose within the jurisdiction and the suit is also barred by laws of limitation. Learned Counsel for the first defendant contends that the suit is barred u/s 230 of the Contract Act as going by the statements and averments of the plaint it will appear that the defendant No. 1 is described as agent of the disclosed principal, defendant No. 4, in the suit. The first defendant issued and signed Bill of Lading dated 15th January, 1998, acting as agent of the defendant No. 4 who is the carrier of the goods covered by the Bill of Lading, that were received by it. As such, when the principal, being defendant No. 4, is disclosed, the defendant No. 1 could not be sued. In support of this contention the learned Counsel has sought reliance on a decision of this Court reported in AIR 2002 Cal 211.

4. His next contention is that the suit is founded on the Bill of Lading and the transaction originated from its issuance and the consignment was carried by ship from Cochin to Dubai. Thus, the carriage of goods by sea under the aforesaid Bill of Lading is governed by the Indian Carriage of Goods by Sea Act, 1925 (hereinafter referred to as the said Act). The Bill of Lading was of dated 15th January, 1998. The plaintiff came to know of refusal of overseas buyer to accept the documents and make payment and return of the documents including Bill of Lading from Allahabad Bank on 1st September, 1998 on receipt of its letter. The suit was filed on 29th November, 2000. Therefore, starting point of limitation for filing of the suit is to be reckoned from 1st September, 1998. Therefore, obviously the suit has been filed beyond the period of the limitation of one year as prescribed by the said Act, 1925. There is no separate contract between the plaintiff and the defendant No. 1 to get out of the statutory period of limitation of one year under the said Act, 1925 as per Rule 6 of Article III of Schedule thereof. The said Act is a special statute and has since stood the test of time and the same does neither, in any way, affect the provision of Contract Act nor it debars any party to initiate legal proceedings. Filing of suit is essential for recovery of value of goods by the consignor from carrier for the alleged loss of goods carried on under Bill of Lading. The provision of Sea Act, 1925 alone is applicable and the Limitation Act, 1963 has no manner of application, as it is suit for recovery of value of goods by the consignor from carrier.

5. Sri Section Roy Chowdhury, senior advocate, appearing for the plaintiff, submits that while deciding the question of demurer action the plaint has to be read as a whole. It would appear therefrom that the plaintiff has several causes of action in the suit which includes inter alia, misrepresentation, breach of contract of carriage, breach of duty of care owed to the plaintiff, conversion of the goods and negligence. The plaintiff has also pleaded that the defendant No. 1 signed the Bill of Lading as the agent of defendant No. 4 which carries on business outside India. It is alleged in the plaint that the defendant No. 1 is bound as the principal. It has been specifically pleaded that the defendant No. 1 is guilty of breach of contractual obligation, tort and negligence. In particular, it has been pleaded in paragraph 15(b) that there was a contract or agreement between the plaintiff and defendant No. 1 as will be evidenced, inter alia, from

the facts stated hereinbefore and/or from the conduct and/from the course of dealings between the parties whereby the defendant No. 1 acknowledged liability and promised to pay the plaintiff its dues. He further submits that Order 7 Rule 11(d) of the CPC provides the bar under the law taking the statements and averments made in the plaint to be true and correct in its face value. The provision of Section 230 does not prohibit filing of the suit. It merely prescribes that in absence of a contract an agent is not personally bound nor can enforce the contract entered into by him on behalf of the principal. Thus in the absence of a legal bar to the suit, the provisions of Section 230 should not be resorted to in an application under Order 7 Rule 11 of the Code of Civil Procedure. It has been specifically pleaded in this case that the defendant No. 1 agreed to be personally bound by the contract entered into by the defendant No. 1 on behalf of the principal. Even in the absence of the pleading of a contract to the contrary there is statutory presumption with regard to such a contract where the contract is made by an agent for merchant resident abroad. In the instant case it has been pleaded in the plaint that the defendant No. 4 is resident abroad. He further contends that the bar u/s 230 applies to the contract and not to torts. Section 230 of the Contract Act can exclude liability in case of contract and the same does not apply to the claim on account of tort. In this connection he has relied on a Judgment of learned single Judge of this Court reported in 2004 (3) Cal LT 392 rendered in case of Saloo Choudhury and Anr. v. Nissan Europe N.V. and Ors. He also placed reliance on a passage from Bowstad on Agency (13th edition) pages 352, 354 and 413 and also an unreported Division Bench Judgment of this Hon'ble Court rendered in case of Shaw Wallace Co. v. Nepal Food Corporation and Anr. at pages 34 and 35.

6. As far as provision of Carriage of Goods by Sea Act is concerned, he contends that this condition of contract of carriage purporting to restrict limit time for enforcement of right is illegal as being contrary to legal provision u/s 28 of the Contract Act, 1872. It has also been pleaded that the fraudulent acts of the defendant was discovered after April, 2000, and the plaintiffs cause of action based on fraud, negligence, misappropriation, conversion and detention would be governed by period of limitation prescribed under Limitation Act. As such, purported restriction in the Bill of Lading as attracted by Sea Act are illegal, null and void as stated in paragraph 23 of the plaint. By reason of the amendment of Section 28 of the Contract Act, 1872 any agreement restricting a party from enforcing its rights under a contract, by legal proceedings or which limits the time within which he may, enforce his rights; or which extinguishes the right of any party from any liability on expiry of a specific period so as to restrict any part from enforcing his right, is void to that extent.

7. The said amendment received Presidential assent and was published in Gazette of India on 8th January, 1997. By reason of such amendment the provisions of Bill of Lading and/or schedule to the said Act purporting to restrict the period of filing of the suit is void and unenforceable. Therefore, the Judgment of this Court reported in AIR 1981 Cal 298 has no application in view of the

amendment of the aforesaid Contract Act.

8. As far as revocation of leave granted under Clause 12 of Letters Patent is concerned he contends that part cause of action has been pleaded to have arisen within the jurisdiction of this Court in paragraphs 3 to 8, 10, 15(a)(i), 15(a)(iv), 15(a)(v), 15(a)(vii), 15(a)(viii), 15(b), 16 and 27. The aforesaid statements and averments in those paragraphs constitute integral part of cause of action. The Supreme Court (in its Judgment) reported in *Indian Mineral and Chemicals Co. and Others Vs. Deutsche Bank*, , that such an application must be decided on the basis of the allegations made in the plaint that are true and correct. The Court should look into the documents including documents annexed to the plaint to come to the factual conclusion contrary to the averment of the plaint. He also contends that difficult and complex question of fact should not be decided on demurer application. The decision of this Court reported in *Ritu Sachdev Vs. Anita Jindal and Others*, is referred to in this regard.

9. Having heard the rival contentions of the learned counsels of the parties the first thing has to be decided as to whether any part of the cause of action is pleaded to have arisen within territorial jurisdiction of this Court or not for this issue relate to question of jurisdiction. Sum and substance of the case of the plaintiff is that entrustment of the goods for carriage of the same by sea by vessel to a port abroad. The first defendant acting as an agent of the 4th defendant entered into contract for undertaking carriage and as such the Bill of Lading was issued on payment of freight. But the goods were not taken delivery by the consignee and necessary documents viz. the original Bill of Lading and invoices were not cleared through the banker by the consignee and the same were returned. Therefore, it was the duty of the carrier to return the goods to the plaintiff, as it was the duty under the said Act to deliver goods to the actual consignee for clearance of the documents if not the goods should have been returned to the plaintiff. Thus, the goods are lost and missing. Therefore, the plaintiff charges defendants No. 1 and 4 for destruction, loss and/or conversion of the goods and this has been done by practicing fraud.

10. In view of the aforesaid situation, according to me, the part of the cause of action is to be the agreement relating to acceptance of the goods for carriage. In the plaint, in paragraph 4 it has been pleaded that the defendant No. 1 issued the Bill of Lading and made over the same to the plaintiffs for acceptance within the jurisdiction. It has also been pleaded that freight was paid by the defendant No. 1 through its Banker, Allahabad Bank, Park Street within the jurisdiction. I think payment by way of a demand draft cannot be compared with the payment by way of a cheque and in any event payment has to be made ultimately by issuing demand draft which situates within the jurisdiction of this Hon"ble Court.

11. Therefore, according to me, substantial part of the cause of action relating to the entrustment of the goods of carriage arose within the jurisdiction, as while recovering claim the plaintiff has to prove the factum of entrustment either by oral evidence or by documentary evidence. Here the documentary evidence is

the Bill of Lading and, factum of issuance of the same is stated to have taken place in Calcutta which has to be proved, if these allegations are traversed by the defendant. Thus, I am unable to accept the contention of the learned Counsel for the defendant No. 1 that no part of cause of action has arisen within the jurisdiction. The place of business of the defendant in this case is immaterial as the suit is based on cause of action having arisen partly within jurisdiction. It is now settled law that at this stage plaintiff is to be looked into accepting the statement to be correct. Fairly recent Supreme Court decision *Indian Mineral and Chemicals Co. and Others Vs. Deutsche Bank*, as quoted above Justice Paul for the Bench observed in paragraph 15 as follows:

The observation of Rankin, C.J. in *Secretary of State v. Gulab Rai Pali Ram* (supra) correctly represents the law as to how the Court should approach an application for revocation of leave. "I do really protest against questions of difficulty and importance being dealt with by an application to revoke the leave under Clause 12 of Letters Patent and to take the plaintiff off the file. Normally it is well-settled that the proper way to plead to the jurisdiction of the Court is to take the plea in the written statement and as a substantive part of the defence. Except in the clearest cases that should be the course.

12. Next contention raised by the first defendant is that the suit is barred u/s 230 of the Indian Contract Act as 4th defendant has been sued as the foreign principal. According to me, in order to apply the provision of Order 7 Rule 11(d) of the CPC there must be law whereby suit is barred. The relevant provision of Order 7 Rule 11(d) is set out hereunder:

11. Rejection of plaintiff. The plaintiff shall be rejected in the following cases:

(a)...

(b)...

(c)...

(d) Where the suit appears from the statement in the plaintiff to be barred by any law.

The text of Section 230 of the Contract Act on which reliance is placed in order to operate as a bar, is set out hereunder:

230. Agent cannot personally enforce, nor be bound by, contracts on behalf of principal. In the absence of any contract to that effect, an agent cannot personally enforce the contracts entered into by him on behalf of his principal, nor is he personally bound by them.

Presumption of contract to contrary. Such a contract shall be presumed to exist in the following cases:

(1) where the contract is made by an agent for the sale or purchase of goods for a merchant resident abroad;

(2) where the agent does not disclose the name of his principal;

(3) where the principal, though disclosed, cannot be sued.

13. From the plain reading of the said Section, as aforesaid, as rightly contended by Mr. Roy Chowdhury it is evident to me that filing of the suit against an agent in connection with the contract entered into by the agent on behalf of the principal is not barred, such contract cannot be enforced against it meaning thereby any liability or any claim arising out of such contract is not enforceable against it personally.

14. It may so happen that the contract may not be enforced against the principal personally but he can be sued as a defendant for effective adjudication of the suit without claiming any relief. Similarly, the agent can not enforce on behalf of the principal in relation to the contract entered into on behalf of the principal, who can enforce while doing it can join the agent as party plaintiff in the suit without any relief being claimed for agent.

15. According to me. Section 230 really grants immunity from personal liability of the agent but suit is not barred.

16. The contract to the contrary is to be presumed in certain cases. When the contract is made by an agent for the sale or purchase of the goods for merchant resident abroad, where the agent does not disclose the name of his principal.

17. Even then in order to apply the said Section it has to be examined how the suit is framed. Whether the case relates to a contract entered into by an agent on behalf of the principal or it is individual contract or otherwise. The law has been developed on this subject consistently that if by a separate contract while acting on behalf of the principal, the agent makes himself liable he can be sued or can sue. Similarly in case of tortious liability on account of negligence or misfeasance or malfeasance or in case of fraud, the agent can certainly be sued and he can be charged with the act of negligence even while acting on behalf of the principal and is bound to compensate for damages therefor. I find that there is substance in the argument of Mr. Roy Chowdhury that Section 230 is applicable only in case of the contract entered into by the agent on behalf of the principal in course of dealings and transactions, not otherwise. It is true in this case that there has been disclosed principal and also in this case principal as a party defendant is disclosed and merchant resident abroad, but dealing and transaction do not relate to sale or purchase of goods, so this presumption is not applicable. As far as Clause 2 of presumption is concerned it in my opinion relates to Indian principal. The decision of the single Bench of this Court in case of West Bengal Essential Commodities Supply Corporation Ltd. Vs. Koren Foreign Transportation Corporation and Another, is not applicable as that case factually is based on a contract for carriage of goods entered into by the agent of the principal, and both the principal and agent sued. At the time of the trial of the suit it was decided that the claim cannot be enforced against the agent but it was not held that suit was barred against the agent.

18. Moreover, as contended rightly by Mr. Roy Chowdhury that in the plaint the case of negligence and illegal conversion of the goods were also pleaded. So, according to me, the agent has joint and individual liability. A passage from Bowstead on Agency 13th Edn. is much relevant in this context (Article 112 at page 352) which says as follows:

Although the general rule is often said to be that an agent is not liable on the contracts he makes for his principal, there are nevertheless many cases where he is in fact so liable. The agent, first, may not disclose the existence of his principal: in such a case he is personally liable even though his principal may have right to intervene under the undisclosed principal doctrine. In other cases his principal may be unidentified, or have his place of business out of the jurisdiction, or be someone with whom the third party would be reluctant to deal, or about whom the third party knows nothing. In these and other situations the agent may be held to have assumed some form of personal liability. The question whether an agent who has made a contract on behalf of his principal is to be deemed to have contracted personally, and, if so the extent of his liability, depends on the intention of the parties to be deduced from the nature and terms of the particular contract and the surrounding circumstances, including any binding custom.

19. At page 354 of the same Text Book under the same Article the author comments as follows:

He may undertake a separate liability on a collateral or separate contract. A contract of indemnity is of course a specialized form of such a contract. Consideration could if necessary be found by the entry into the main contract with the principal. Examples of such contract are found in the case of breach of warranty of authority, auctioneers, and jobbers on the Stock Exchange. He may undertake a liability alternative to that of the principle, the choice to lie with the third party. Though this interpretation seems to be assumed by some of the cases on election, it is submitted that there is little to commend it.

20. A Division Bench Judgment of this case rendered an unreported Judgment of this Court in case of Shaw Wallace Co. Limited v. Nepal Food Corporation and Ors. has approved the Judgment of a learned single Bench for granting relief against an agent in case of negligence and tortious action. A single Bench of this Court also in another decision reported in 2004(3) Cal LT 392(HC) in case of Saloo Choudhury and Anr. v. Nissan Europe N.V. and Ors. in demurer action held that Section 230 applies only to contract as observed by me and not to the torts.

21. Therefore. I reject the contention of the learned Counsel of the defendant No. 1. The suit is barred as against it.

22. Another point regarding legal bar has been taken that one year limitation under the aforesaid Act has to be applied in this case. Firstly, I am of the view that when a suit is based on negligence and tort one year limitation has no manner of application as it is guided by Article 108 of the Limitation Act and not

by the aforesaid special Act. Assuming the special Act is applicable in this case, but, it has been contended that in view of the amendment of Section 28 of the amending Act, 1997 of Contract Act the effect of provisions of the said Act is deemed to have extinguished as it is a later statute. This legal issue is in my view no doubt complex, and ought not to be decided at this stage. So also it is ruled by this Court in a case reported in Ritu Sachdev Vs. Anita Jindal and Others, Therefore, the decision cited by the learned Counsel for the defendant No. 1, of this Court reported in Konsumex Vs. Anand and Co. and Others, is not appropriate at this stage unless the Court ultimately holds at the time of the trial of the suit the effect of amendment of Section 28 of the Contract Act vis-a-vis the provision of carriage of goods by Sea Act, 1925. Therefore, it cannot be said at this stage that the suit is barred by limitation.

23. Therefore, I find substance in the submission of Mr. Roy Chowdhury that these are the complex questions of law and should be decided conveniently at the time of the trial. So, I think this point of limitation is left for trial.

24. Under those circumstances, I hold there is no merit on this demurrer application and the same is dismissed.

25. As far as the application taken out by the plaintiff upon admission is concerned I do not find that there has been any admission either on behalf of the first defendant or any of the defendants in clear terms to accept the claim. Therefore, the question of passing of Judgment upon admission does not and cannot arise. The same is accordingly dismissed also.

Cost of both the applications cost in the suit.

In view of this Judgment and order interim order, if any, passed in any of the applications, stands vacated.

Let signed copy of the operative portion of this Judgment and order be made available to the parties, if applied for.