(2013) 04 CAL CK 0013

In the Calcutta High Court

Case No : G.A. No. 3554 of 2011 and C.S. No. 41 of 2009

J.J. Exporters Limited APPELLANT

Vs

David James and Sons Limited and Others RESPONDENT

Date of Decision : 03-04-2013

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 2 Rule 2, Order 7 Rule 11(a), Order 7 Rule 11(d)
Contract Act, 1872 — Section 19, 20, 62

Citation : (2013) 4 CHN 14 : (2013) 3 WBLR 213

Hon'ble Judges : Nadira Patherya, J

Bench : Single Bench

Advocate : Samrat Sen, Hasnushana Chakraborty and Iran Hassan Nos. 1, 6 and 7, Jayjit Ganguly, Rudrajit Sarkar and P. Sancheti, for the Appellant; Krishnaraj Thakkar for the Defendant No. 2, for the Respondent

Judgement

Nadira Patherya, J.—C.S. No. 41 of 2009 was filed by the plaintiff for damages after taking leave under Clause 12 of the Letters Patent and Order 2 Rule 2 of the Code of Civil Procedure. By this application the defendant Nos. 1, 6 and 7 seek for revocation of leave granted under Clause 12 of the Letters Patent and for dismissal of the suit as against them.

2. The case of the defendant Nos. 1, 6 and 7 is that the defendant No. 3 purchased goods manufactured by the plaintiff, pursuant to a Memorandum of Understanding dated 5.5.2007 between the plaintiff and the defendant No. 4. The purchase order was issued by the defendant No. 3 and the payment was secured by a Letter of Credit issued by the defendant No. 2. Out of the entire quantity, 7200 pieces of goods were supplied and the balance was not supplied. Therefore a Memorandum of Compromise was executed on 7th October, 2007 wherein it was agreed that the balance goods would be purchased for Rs. 1 crore. Accordingly supply was made and cheques issued, which cheques were dishonored for non-payment.

3. The applicants/defendants had no role to play either in the issuance of the Letter of Credit or in the agreements. All that the applicants did is to apply to the defendant No. 2 to issue the Letter of Credit in favour of the plaintiff for a commission and thus acted as a facilitator and was not in any other way involved in the transaction with the plaintiff. The reliefs sought in the suit against the applicants/defendants cannot be granted as the same is barred by law. The cause of action is based on the compromise dated 7.10.2007 in respect of which no Letter of Credit was issued. By virtue of the compromise the Memorandum of Understanding dated 5.5.2007 stood novated. No cause of action arose within the jurisdiction of this Hon''ble Court and forum non-convenience is another reason for non-grant of relief. The plaintiff has abused the process of Court by forum shopping. Prior to filing of the suit an action for pre-disclosure was initiated in England by the plaintiff which was dismissed. The only reason for invoking the jurisdiction of this Court is the practice of fraud at the corporate office of the plaintiff i.e. at Hastings Chamber within the jurisdiction of this Court. From the search made in the internet there is no mention of the plaintiff''s corporate office at the said place. Therefore the effect of fraud could not have been felt within the jurisdiction. The plaintiff irrevocably undertook to indemnify the defendant No. 1 against all expenses, losses, claims and consequences arising on account of opening a Letter of Credit in its favour and also undertook not to approach any Court of law for any reason whatsoever. This was executed in the letter dated 10th May, 2007 by the plaintiff in favour of the defendant No. 1 and was legally binding on the plaintiff. In the action for pre-disclosure an affidavit was filed wherein it was categorically stated that the only involvement of the defendant No-1 was limited to the request made by it to the defendant No. 2 to issue the Letter of Credit in the normal course of business and this request was made on behalf of Richmond Mercantile Limited FZC acting on behalf of its Principal, Trade-fin International a Dubai based agent.

4. By initiating proceedings in the United Kingdom and thereafter by initiating proceedings in the Calcutta High Court the plaintiff has engaged in forum shopping which should not be encouraged as held in M/s. Chetak Construction Ltd. Vs. Om Prakash and Others, and by doing so the plaintiff has abused the process of Court as held in Tamilnad Mercantile Bank Share Holders Welfare Association Vs. S.C. Sekar and Others,

5. Assuming that the agreement dated 5.5.2007 was accepted in Calcutta within the jurisdiction but the cause of the action is so miniscule that the same need not be traced. Therefore balance of convenience and inconvenience calls for revocation of the leave granted as held in Bhuramull Maskara and Another Vs. Ram Kumar Maskara and Others, Jyoti Bhusan Mukherjee Vs. Eastern Tea Company Ltd., 2, Bihar State Agro-Industries Development Corporation Ltd. Vs. Ram Chand Khosla and Another, and Ultra Engineering Industries P. Ltd. Vs. Spintex Industries Pvt. Ltd., . The initial agreement of 5.5.2007 was replaced by the Memorandum of Compromise dated 7th October, 2007. Therefore by virtue of Section 62 of the Contract Act novation took place. The plaintiff has accepted

novation and has in fact based its claim on the novated contract. The plaintiff also seeks for a declaration that the Memorandum of Understanding dated 5.5.2007, the Memorandum of Compromise dated 7th October, 2007 and the purchase order dated 8th May, 2007 are void on the basis of the dishonored cheques paid pursuant to the Memorandum of Compromise. Therefore novation has been accepted to which the defendant Nos. 1, 6 and 7 are not parties.

6. Reliance is placed on Kusum Ingots and Alloys Ltd. Vs. Union of India (UOI) and Another, and The Union of India Vs. Kishorilal Gupta and Bros., The existence of the original agreement dated 5.5.2007 is an admitted fact and need not be proved. The cause of action pleaded is also not to be proved as held in Kusum Ingots and Alloys Ltd. Vs. Union of India (UOI) and Another,

7. On the ground of suppression of material fact in the plaint the suit is liable to be dismissed as held in Madanlal Jalan Vs. Madanlal and others I.T.C. Limited Vs. Debts Recovery Appellate Tribunal and Others, and Azhar Hussain Vs. Rajiv Gandhi, . The English proceedings have been suppressed by the plaintiff in the plaint.

8. In view of the aforesaid leave granted under Clause 12 of the Letters Patent and Order 2 Rule 2 of the CPC be revoked and the suit be dismissed as against the defendant Nos. 1, 6 and 7.

9. In opposing the said application it has been submitted by Counsel for the plaintiff that it has been alleged by the applicants that no cause of action has arisen within the jurisdiction of this Court and that the suit is barred by law, forum shopping and forum non-convenience, therefore the suit be dismissed. It is an admitted position that the purchaser is an Australian Company and Letter of Credit at the request of the defendant No. 1 was opened by the defendant No. 2. The defendant Nos. 6 and 7 are the Directors of the defendant No. 1. In fact the defendant Nos. 6 and 7 are also Directors of the defendant Nos. 1, 2 and 3. As fraud has been practised in India the balance of convenience warrants the suit to be tried here. In Liverpool and London S.P. and I Asson. Ltd. Vs. M.V. Sea Success I and Another, the principle of cause of action has been espoused. Bihar State Agro-Industries Development Corporation Ltd. Vs. Ram Chand Khosla and Another, is distinguishable as the plaintiff was induced by fraud to enter into a contract. Clause 5 of the agreement be also considered.

10. In reply it has been submitted by Counsel for the applicants/defendants that Liverpool and London S.P. and I Asson. Ltd. Vs. M.V. Sea Success I and Another, is distinguishable as revocation of Clause 12 of the Letters Patent was not in issue in the reported case, instead it was a case under Order 7 Rule 11(a). Sections 19 and 20 of the Contract Act deal with void and voidable agreements. There is no declaration sought in the plaint that the second contract be declared null and void therefore it is barred by Order 7 Rule 11(d).The inspection certificate was to be signed by the defendant No. 4 or by the defendant No. 2 or by the authorized signatory of the defendant No. 2. In no way were the

applicants/defendants involved. Defendant No. 4 is the agent of the defendant No. 3 which will be evident from the Memorandum of Compromise. By the said Memorandum of Compromise the right to legal recourse was restricted to the parties under the Compromise Agreement. Therefore in view of AIR 1949 Calcutta 495 and the suit being barred under Order 7 Rule 11(d) the leave granted under Clause 12 of the Letters Patent be revoked.

11. Counsel for the defendant No. 2 submits that the effect of fraud if at all would have been felt in Bangalore where the registered office of the plaintiff is situate which is outside the jurisdiction of this Court. Therefore orders be passed in G.A. 3554 of 2011.

12. Having considered the submissions of the parties, on a reading of the Plaint, the cause of action against the applicants/defendants has been pleaded in the following paragraphs:--

8. The defendants are in active collusion and connivance with one another. The defendant Nos. 1, 2 and 3 doing so through the instrumentality of the defendant Nos. 5, 6 and 7. The purpose and effect of such collusion and connivance is to practise fraud on Indian exporters and thereby making substantial financial gain. The fraud practiced on the plaintiff is enumerated in the following paragraphs, which can also be taken to be the particulars of such fraud. The effect of such fraud was felt by the plaintiff inter alia at its corporate office within the jurisdiction of this Hon''ble Court.

9. xxxxxxxxxxxxxxxxx

10. xxxxxxxxxxxxxxxxx

11. xxxxxxxxxxxxxxxxx

12. Payment for the said goods was purported to be secured by a Letter of Credit dated 23rd May, 2007 which was amended on 2nd June, 2007 by enhancing the amount, the date of expiry being 24th July, 2007, by the defendant No. 2 at the request of the defendant No. 1. The terms of the Letter of Credit particularly clause 46A sub-clause, Clause 5 is as follows:

Clause 5: The inspection certificate signed and issued by the authorised representative of the applicant bearing and authentication of signature by authorized signatory of Habibsons Bank Limited, U.K.

The said Letter of Credit was issued by the defendant No. 2 from its place of business outside the aforesaid jurisdiction. A copy of the said Letter of Credit is annexed hereto and marked with the letter "C".

13. xxxxxxxxxxxxxxxxxxx

14. xxxxxxxxxxxxxxxxxx

15. xxxxxxxxxxxxxxxxxx

16. xxxxxxxxxxxxxxxxxx

17. xxxxxxxxxxxxxxxxxxx

18. xxxxxxxxxxxxxxxxxxxx

19. xxxxxxxxxxxxxxxxxxxx

20. The defendants deceived the plaintiff by inserting a clause in the Letter of Credit that the authorised representative of the defendant No. 1 which apparently had nothing to do with the contract would be sent to issue as inspection certificate.

21. xxxxxxxxxxxxxxxxxxxxxx

22. The defendant No. 1 or their purported nominee being the defendant No. 4 had never any intention of issuing an inspection certificate.

13. In paragraph 12 of the Plaint it has been admitted that the Letter of Credit was issued by the defendant No. 2 at the request of the defendant No. 1 under the Memorandum of Understanding dated 5.5.2007. No Letter of Credit was issued pursuant to the Memorandum of Compromise, instead the terms of payment was varied and cheques were issued by the defendant No. 4, the agent of the defendant No. 3 to the plaintiff.

14. The applicants/defendants were also not in any way involved in the Memorandum of Understanding dated 5.5.2007. All that the applicants/ defendants did was to apply to the defendant No. 2 to issue a Letter of Credit in favour of the plaintiff for a commission charged. This was done at the request of Richmond Mercantile Limited FZC who was acting on behalf of Trade fin International, its principal.

15. The applicants/defendants were in no way involved with the plaintiffs. This was brought to the notice of the English Court in the affidavit filed to the action for pre-disclosure initiated by the plaintiff in the United Kingdom:

8. The respondents have no involvement in the underlying transaction between the applicant and Audalian. Other than what appears on the face of the documents the respondents have no knowledge of the applicant, Pooja Creations, Audalian, Sirdanwal Overseas or Mr. Verma. So far as the respondents are concerned the provision of this LC was an ordinary commercial transaction of a kind in which they are involved on a dally basis.

9. The respondents became involved only in relation to the provision of the LC. I am informed by our customer, Richmond Mercantile Limited FZC, that it was at all material times acting on behalf of its principal, Trade-fin international ("Trade-fin"), a BVI company and that a Dubai based agent, Mr. Joneja, had introduced this matter to Trade-fin. Trade-fin in turn, through its agent, referred the matter to David James. David James charged a commission and applied to Habibsons Bank to open this LC in favour of Pooja Creations. The LC was established on the

basis of a pro forma invoice.

10. xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx

11. xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx

12. The LC (as amended) expired on 28th July, 2007 and there was no other presentation of shipping documents before expiry.

13. Throughout this transaction the respondents point of contact was the Trade-fin''s agents. The respondents merely acted as facilitators of a commercial transaction: David James in the role of applicant confirming house and Habibsons Bank as issuing bank. The respondents were not involved in the underlying transaction and knew nothing of any Ajay Verma or Sirdanwal Overseas (or for that matter Audalian, Pooja or the Applicant) other than what was set out on the face of the documents and on a consideration of the said facts the action was dismissed on 9th December, 2008 by the English Court and it is subsequent thereto that this suit has been filed in 2011. This has not been disclosed by the plaintiff and tantamounts to suppression of material fact, and forum shopping, both of which have been deprecated In the decisions reported in Prestige Lights Ltd. Vs. State Bank of India, and Tamilnad Mercantile Bank Share Holders Welfare Association Vs. S.C. Sekar and Others,

16. In paragraph 25 of the Plaint which is set out hereinbelow it has been pleaded that the plaintiff confronted the defendant No. 4 with the fraud mentioned in the preceding paragraphs of the Plaint and a Memorandum of Compromise was entered into on 7.10.2007 wherein the defendant No. 4 agreed to pay to the plaintiff the sum of Rs. 2,14,63,200/- and cheques were also issued. Paragraph 25 reads as follows:--

25. When the plaintiff confronted the defendant No. 4 with the above fraud, he as agent entered into a written memorandum of compromise on 7th October, 2007 in Bangalore outside the aforesaid jurisdiction. By the said memorandum of compromise the defendant No. 4 agreed to pay the price and/or compensate the plaintiff for the loss suffered by the plaintiff for a sum of Rs. 1,57,21,992/-. A copy of the said memorandum of compromise is annexed hereto and marked with the letter "D".

17. The cheques for Rs. 1,57,21,992/- were dishonoured as pleaded in paragraph 26 of the plaint and is set out below:--

26. The defendant No. 4 purported to make the above payment by cheques which were all dishonoured for insufficiency of funds.

18. It is on the basis of the aforesaid paragraphs that the relief for damages has been sought.

19. On execution of the Compromise dated 7.10.2007 the Memorandum of Understanding dated 5.5.2007 stood novated and novation has also been accepted by the plaintiff as the decree sought is for the sums mentioned in the

Compromise dated 7.10.2007 executed admittedly in Bangalore between the plaintiff and the defendant No. 4. The applicants/defendants are not parties to the Compromise on which the claim is based.

20. The plaintiff has the unfettered choice of forum and mere inconvenience of the defendant will not restrict the plaintiff''s right to file suit in a Court of its choice but when an application for revocation of leave granted is filed then not only balance of convenience and/or inconvenience will be considered but whether the suit is mala fide and harassing will also be considered.

21. In the facts of the instant case mala fides on the part of the plaintiff in filing the suit against the applicant/defendants is evident and not only the doctrine of forum convenience comes into play but that the suit filed against the defendants is mala fide and harassing and will cause grave injustice to the defendants if the leave is not revoked has emerged.

22. As no part of the cause of action against the applicant/defendants has arisen within the jurisdiction therefore the decision in AIR 1949 Cal 495 aids the applicant/defendants.

23. Liverpool and London S.P. and I Asson. Ltd. Vs. M.V. Sea Success I and Another, relied on by the plaintiffs does not aid it as there is no dispute with the principles laid down in the said decision but the same is distinguishable on facts as in the instant case there exists no cause of action against the applicant/ defendants.

24. For all the said reasons G.A. 3554 of 2011 is allowed and the leave granted against the applicants/defendants under Clause 12 of the Letters Patent and Order 2 Rule 2 of the CPC stands revoked as against the applicant/defendants. C.S. 41 of 2009 accordingly stands dismissed against the applicants/defendants. G.A. 3554 of 2011 is accordingly disposed off.