
(2006) 01 DEL CK 0118
In the Delhi High Court
Case No : CS (OS) No. 930 of 2000

Kannu Exports

APPELLANT

Vs

Banque Nationale De Paris (Suisse) and Others

RESPONDENT

Date of Decision : 31-01-2006

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 6 Rule 17, Order 7 Rule 11, Order 7 Rule 11(d), Order 7 Rule 13, Order 7 Rule 14

Citation : (2006) 01 DEL CK 0118

Hon'ble Judges : Anil Kumar, J

Bench : Single Bench

Advocate : Rakesh Tikku, for the Appellant; T. Khan, for Defendant No. 1, Jagdish Lall Jain, for the Defendant No. 2 and Nishant Joshi, for the Defendant No. 4, for the Respondent

Final Decision : Allowed

Judgement

Anil Kumar, J.—This order shall dispose of defendant No. 4s application under Order VII Rule 11 (D) read with Section 21 and Section 151 of CPC for rejection of plaint and plaintiffs application for amendment of the plaint under Order VI rule 17 read with Section 151 of Code of Civil Procedure.

IA No. 9339/2001

1. By this application, the defendant No. 4 has sought rejection of plaint on the ground that the defendant is a foreign company and does not have any office in India and it does not carry on any business in India nor resides in India and in the circumstances Indian Courts do not have jurisdiction to entertain any proceeding against the defendant No. 4/applicant. The defendant No. 4/applicant has also sought rejection of the plaint on the ground that it is well settled that the presence of a foreign defendant who appears under protest to contest jurisdiction does not confer jurisdiction on the court and because the defendant is contesting the jurisdiction of the Court under protest, no jurisdiction is conferred and since there is no jurisdiction against the defendant No. 4/applicant

plaint is liable to be rejected against him.

2. The applicant/defendant No. 4 asserted that it neither resides within the jurisdiction or voluntarily appeared or has contracted with the plaintiff, Therefore, the Courts in India do not have any jurisdiction to try the case against the defendant No. 4. The reliance was placed by the applicant/defendant No. 4 on British India Steam Navigation Co. Ltd. Vs. Shanmughavilas Cashew Industries and Others, World Tanker Carrier Corporation Vs. SNP Shipping Services Pvt. Ltd. and Others, World Tanker Carrier Corporation v. S.N.P. Shipping Services Pvt. Ltd. and Ors. and (1963) 2 SCR 577 Raj Rajender Sardar Moloji Nar Singh Rao Shitole v. Shankar Saran and Ors. to contend that since the defendant No. 4 is a foreign company not having its registered office in India, the Courts in India does not have jurisdiction against such an entity. The applicant has also relied on D. Ramachandran Vs. R.V. Janakiraman and Others, to contend that the plaint is liable to be rejected as it does not disclose any cause of action against the defendant No. 4/applicant, a foreign company. The applicant has also relied on ITC Limited Vs. Rakesh Behari Srivastava and others, Baroda Oil Cakes Traders Vs. Parshottam Narayandas Bagulia and Another, Baroda Oil Cakes Traders v. Parshottam Narayan Das Bagulia and Anr. to contend that the plaint in the facts and circumstances of the case is liable to be rejected under Order VII rule 11 of the Code of Civil Procedure.

3. The applicant has also sought rejection of plaint on the ground that the contract No. CPA/12/7/98 was not between defendant No. 4 and Kannu Exports and in case of any dispute the matter had to be referred to the arbitration of GAFTA in London and on this ground also it is claimed that the Court does not have jurisdiction and the plaint is liable to be rejected.

4. The application for rejection of plaint is contested by the plaintiff contending inter alias that defendant No. 4/applicant and the defendant Nos. 1 and 2 are jointly and separately liable to compensate the plaintiff for the losses suffered on account of default committed by defendants on account of illegal and malafide breaches of the terms of Letter of Credit. Refuting the allegation that the Court does not have jurisdiction, it was asserted that cause of action wholly/partially arose within the jurisdiction of this Hon"ble Court and denied the allegation of defendant No. 4 that it does not reside or carries on business within India. Regarding the allegation of there being no contract, it has been averred that the suit has been filed on account of violation of the terms of LC No. 98/404200/MC and not on the basis of any contract. The existence and presence of any contract No. CPA/12/7/98 was not admitted by the plaintiff and was denied.

5. The claim of the plaintiff is that he was beneficiary of the letter of credit and it was breached by the defendants causing immense loss to the plaintiff which he is seeking to recover by this suit. plaintiff contended that the suit discloses cause of action and on the pleas raised by the applicant/defendant No. 4 which require adjudication, the plaint can not be rejected. The learned counsel for the plaintiff placed reliance on 88 (2000) DLT 769 Inspiration Clothes and U v. Colby

International Ltd. to contend that for rejection of plaint, the court must look at plaint and documents accompanying the plaint only and nothing else and not to look at defense of defendants or documents relied on by the defendant.

6. Whether the plaint does not disclose causes of action in the facts and circumstances on account of defendant No. 4 being a foreign company and not having any office in India and not carrying on business in India

7. Rule 11 of Order 7 of the CPC contemplates rejection of plaint where it does not disclose a cause of action, where the relief claimed is undervalued or the plaint is written on an insufficient stamp and where it is barred under any law. Rule 11 is as under: R.11. Rejection of plaint.

The plaint shall be rejected in the following cases:

- a. where it does not disclose a cause of action:
- b. where the relief claimed is undervalued, and the plaintiff, on being required by the Court to correct, the valuation within a time to be fixed by the Court, fails to do so:
- c. where the relief claimed is properly valued, but the plaint is written upon paper insufficiently stamped, and the plaintiff, on being required by the Court to supply the requisite stamp paper within a time to be fixed by the Court, fails to do so:
- d. where the suit appears from the statement in the plaint to be barred by any law:

[Provided that the time fixed by the Court for the correction of the valuation or supplying of the requisite stamp papers shall not be extended unless the Court, for reasons to be recorded, is satisfied that the plaintiff was prevented by any cause of an exceptional nature from correcting the valuation or supplying the requisite stamp papers, as the case may be, within the time fixed by the Court and that the refusal to extend such time would cause grave injustice to the plaintiff.

8. Rejection of a plaint is a serious matter as it non suits the plaintiff and kills the cause of action. It cannot be ordered cursorily without satisfying the requirement of the said provision. It is no more rest integra that to decide under Order VII Rule 11 of the Code of Civil Procedure, averments in the plaint have to be read without looking at the defense and thereupon it has to be seen whether on the averments made in the plaint, Order VII Rule 11 get attracted or not and from the averments made in the plaint and it has to be seen whether the jurisdiction of the Court is made out or not and whether the suit is barred by any law. Reliance can be placed on 2005 V AD (Delhi) 541 Kanwal Kishore Manchanda v. S.D. Technical Services Pvt. Ltd.; 2005 (II) AD (Delhi) 430 Asha Bhatia Vs. V.L. Bhatia, Asha Bhatia v. V.L. Bhatia; 2003 5 AD (Delhi) 370 Condor Power Products Pvt. Vs. Sandeep Rohtagi, Condour Power Products Pvt. Ltd. v. Sandeep Rohtagi.

9. A cause of action is a bundle of facts which are required to be pleaded and proved for the purpose of obtaining relief claimed in the suit. For the aforementioned purpose, the material facts are required to be stated but not the evidence except in certain cases where the pleading relies on any misrepresentation, fraud, breach of trust, willful default, or undue influence. 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. For the said purpose the averments made in the plaint in their entirety must be held to be correct. The test is as to whether if the averments made in the plaint are taken to be correct in their entirety, a decree would be passed. In *Baroda Oil Cakes Traders (supra)*, a Division Bench of Bombay High Court had elaborated about the cause of action. The cause of action was described as:

The bundle of facts which constitute the cause of action in a civil suit does not and is not intended to comprise every fact which may be proved in evidence. It is only material facts that constitute the cause of action which must be proved by the plaintiff before he can obtain a decree. Facts which the plaintiff may allege incidentally and the facts which may be brought in evidence as "res gestae" would not necessarily constitute a part of the cause of action. The distinction between facts which are relevant and material and those that are incidental and immaterial is sometimes not easy to be drawn; but the said distinction is nevertheless important for the purpose of deciding which facts constitute the cause of action and which are not included in it.

10. So long as the plaint discloses some cause of action or raises some questions fit to be decided by a judge, the mere fact that the case is weak and not likely to succeed is no ground for striking it out or inferring that the plaint does not disclose cause of action. The purported failure of the pleadings to disclose a cause of action is distinct from the absence of full particulars. The court has not to see whether the claim made by the plaintiff is likely to succeed: it has merely to satisfy itself that the allegations made in the plaint, if accepted as true, would entitle the plaintiff to the relief he claims. If accepting those allegations as true, no case is made out for granting relief, no cause of action would be shown and the plaint must be rejected. But in ascertaining whether the plaint shows a cause of action the court does not enter upon a trial of the issues affecting the merits of the claim made by the plaintiff. It cannot take into consideration the defenses which the defendant may raise upon the merits; nor is the court competent to make an elaborate enquiry into doubtful or complicated questions of law or fact. In *Inspiration Clothes (supra)* relied by the plaintiff it was held that the validity of a document is not to be considered at the stage of considering the application under Order VII Rule 11 of Code of Civil Procedure. It was held that to reject the plaint on the ground that it does not disclose cause of action, court should look at plaint and documents accompanying the plaint only and nothing else and not to look at defense of defendants or documents relied on by the defendant.

11. The reliance was also placed on *D. Ramachandran Vs. R.V. Janakiraman* and

Others, where the Apex Court held that effect of dismissal of a suit is altogether different and distinct from the effect of rejection of the plaint. For consideration whether the plaint discloses cause of action or not the pleas and documents of the defendants are not to be considered. The Apex Court had held as under:-

Learned Single Judge fell in error in placing reliance upon the material supplied by the defendant, which alone is sufficient to set aside the impugned order. Learned Single Judge instead of proceeding to reject the plaint dismissed the suit, which approach is also erroneous. The effect of dismissal of suit is altogether different and distinct from the effect of rejection of the plaint. In case plaint is rejected under Order 7 Rule 11, CPC, filing of a fresh plaint in respect of the same cause of action is specifically, permitted under Rule 13 of Order 7, CPC. Altogether different consequence follows in the event of dismissal of suit, which has the effect of precluding the plaintiff to file a fresh suit on the same cause of action. Rejection of plaint takes away the very basis of the suit rendering as if there was no suit at all or that no suit was instituted. Order of dismissal of suit while recognising the existence of a suit indicates its termination. While deciding the application under Order 7 Rule 11, CPC, learned Single Judge ought not and could not have dismissed the suit. Even in the decision of the Supreme Court in T. Arvindandam's case (Supra), relied upon by learned Counsel for the appellant, it was held that if on a meaningful- not formal-reading of the plaint it is manifestly vexatious and merit-less, in the sense of not disclosing a clear right to sue, the Trial Court should exercise his power under Order 7 Rule 11, CPC taking care to see that the ground mentioned therein is fulfilled. In order to fulfill that ground bare allegation made in the plaint and documents filed therewith were required to be looked into, which in the instant case clearly disclosed at least a cause of action against the defendant that defendant was liable for damages for its acts of omission and commission. It would be an altogether different situation that the plaintiff might not ultimately succeed in obtaining a decree against the defendant or that Court might come to the conclusion that suit would not be maintainable against the defendant and that plaintiff had a cause of action only against defendant's principal and its parent until in Hong Kong, but such aspect could not have been gone into at this stage. Three paragraphs of the plaint quoted above in our view do clearly disclose cause of action for the plaintiff to claim damages.

12. In ITC Limited (Supra) relied on by the defendant No. 4/applicant, it was held that irrespective of any objection taken by the defendant, it is the duty of the Court to see if the plaint really discloses any cause of action or if the plaint was barred under the provision of any law. A Single Judge of the Allahabad High Court had held:

The only restriction was that nothing beyond the amended pleading was to be looked into for taking a decision under Order 7, Rule 11, CPC. On this point I must agree with the submission of Sri Shanti Bhushan that Order 7, Rule 11, CPC casts a duty on the Court and it cannot be left to the event of an objection in this

respect to be raised by one party. It is the duty of the Civil Court, from the contents of the plaint, to find if there was any disclosure of a cause of action or if at all it was barred under the provisions of any law. The defendant could, at best, assist the Court to indicate that how these clauses (a) and (d) would apply.

13. The defendant No. 4/applicant has argued vehemently that since the defendant company does not reside in India and does not have any office in India and does not carry on any business in India, no cause of action has been disclosed against the defendant No. 4 and in the circumstances, the Court does not have jurisdiction and contest by the applicant about jurisdiction, does not confer jurisdiction on the India Courts. Reliance was placed by the learned counsel on a number of cases, however, perusal of all these cases relied on by the applicant show that all the cases relied on by the applicant/defendant No. 4 are apparently distinguishable and do not support the plea of the applicant. The Apex Court in the matter of World Tanker Carriers Corporation (Supra) had held that part X-A of Merchant Shipping Act does not deal with the personal right of an owner of the vessel of limited liability in respect of claims against him arising out of a collision of his vessel. Dealing with the admiralty suit arising out of the collision of the vessels, the plaintiff had brought the action in Bombay with a view to obtain anti-suit injunction against all the claimants who had filed proceedings against the owners of the vessels in the Courts of United States prior to filing of the admiralty suit. It was held in these circumstances that since owner of one of the vessels was a foreign company registered in Cyprus and collision had taken place on the high seas, no part of cause of action has arisen within the jurisdiction of Bombay High Court. The decision was given by the Court after considering the pleas and contentions of the parties. In another case of Moloji Nar Singh Rao Shitole (supra), the Apex Court was concerned with the execution of a decree passed by the Additional District Judge, Gwalior, whether it was not executable at Allahabad which is clearly distinguishable from the plea of the defendant No. 4 that it is a foreign company not having its business at India nor residing at India. Another precedent relied on by the defendant No. 4/application, British India Steam Navigation Co. Limited (supra) had held that the jurisdiction of the Court in actions in personam may be decided by the parties themselves on basis of various connecting factors and the parties to a contract in international trade or commerce may agree in advance on the forum which is to have jurisdiction to determine disputes which may arise between them. The Apex Court held:-

The jurisdiction of the Court in actions in personam may be decided upon by the parties themselves on basis of various connecting factors. The parties to a contract in international trade or commerce may agree in advance on the forum which is to have jurisdiction to determine disputes which may arise between them. The express choice of law made by the parties obviates need for interpretation. The chosen court may be a court in the country of one or both the parties, or it may be a neutral forum. The jurisdiction clause may provide for a submission to the courts of a particular country, or to a court identified by a formula in a

printed standard form, such a bill of lading referring disputes to the courts of the carrier's principal place of business. It is a question of interpretation, governed by the proper law of the contract, whether a jurisdiction clause is exclusive or non-exclusive, or whether the claim which is the subject matter of the action falls within its terms. If there is no express choice of the proper law of the contract, the law of the country of the chosen court will usually, but not invariably, be the proper law.

14. With these enunciations in mind, the pleas raised in plaint be considered. A perusal of the averments made in the plaint show that the plaintiff had negotiated with the defendant No. 4 for 12,500 metric tonnes of rice which was to be supplied to defendant No. 4. The goods were to be loaded at Kakinda Port in polypropylene bags of 50 kg each. For the value of the consignment, a letter of credit was opened by defendant No. 1 for US 3292808 and defendant No. 2, State Bank of Mysore, was the Bank through whom it was negotiated by the plaintiff. The letter of credit was valid till 15th November, 1998 and at the instance of defendant No. 1, the consignment was sent in five different lots corresponding to five separate bills of lading. The plaintiff, Therefore, averred that after procuring the material, it shipped the same and five separate bills of lading were drawn and each bill of lading was accompanied with necessary documentation in terms with the letter of credit. Each of the bills of lading had the endorsement to the effect that no lien is to be exercised at the discharge port for demurrage incurred at loading port which endorsement was also duly authenticated by the master of the vessel. The averment of the plaintiff is that defendant No. 1 had its Branch office at Delhi where LC No. 98404200/MC was opened at the instance of defendant No. 4 and it was on the representation of said LC, the plaintiff eventually shipped the goods and also submitted the documents to its Banker in India, Defendant No. 2. The plaintiffs account was credited with the amount of the letter of credit and it was expected that the payment would be received from defendant No. 1. No objection was raised nor any discrepancy pointed out by the defendant No. 2 to the plaintiff and even defendant No. 1 had sent a fax dated 26th November, 1998 and admitted the receipt of documents.

15. A specific averment has been made by the plaintiff that defendant No. 1 in collusion with defendant No. 4 had filed proceedings in Geneva Court on 26th November, 1998 and there an injunction was obtained which suit was subsequently withdrawn after a few days of obtaining the injunction order. For the jurisdiction of the Courts at Delhi, the plaintiff averred as follows:

30) That the cause of action to file the present suit firstly arose around 23.11.1998 when the documents were submitted to the defendant No. 2 for onward transmission/realisation from the defendant No. 1. The cause of action arose on 26.11.1998 when the defendant No. 1 refused to honour the commitments. It against arose on 1.12.1998, 4.12.1998 and other dates when the correspondence/letters/telexes were exchanged between the defendant as

well as the plaintiff. The cause of action also arose when the defendants refused to pay the amount. The cause of action is continuing as long as the principal amount along with the interest is not paid.

31. That this Hon"ble Court has got the territorial jurisdiction to try and decide the suit in as much as the documents were sent from Delhi by the plaintiff to the defendant No. 2 who turn had sent the said documents for onward realisation to the defendant No. 1 from Delhi. This Court has also jurisdiction in as much as the plaintiff was entitled to receive the amount at New Delhi. The cause of action and or part thereof also arose in Delhi. Defendant No. 2 and 3 also have their office in Delhi and are working for gain at Delhi. Defendant No. 1 has also got one of its branches at Delhi. The contract was also concluded with the defendant No. 4 at Delhi through exchange of telex. The loss and injury was also suffered by the plaintiff at Delhi. Hence this Court has the territorial jurisdiction.

16. The plea expounded by the plaintiff is that contract has been entered between the plaintiff and the defendant No. 4 at Delhi on account of exchange of telexes. Though in reply to the application under Order VII rule 14, the plaintiff has asserted that the claim is on account of breaches in the letter of credit and no contract was entered. But for the purpose of rejection of plaint, the pleas raised in the plaint are to be considered and not the allegations made in the reply to the application. Whether the plaintiff shall be able to prove that a contract was entered between the plaintiff and defendant No. 4 on the basis of telexes is not to be considered at this juncture for the purposes of consideration of application for rejection of plaint by the defendant No. 4. Regarding an arbitration clause in the contract, which is not admitted by the plaintiff, even the defendant No. 4 has not invoked the same. An arbitration agreement between the parties ipso facto will not oust the jurisdiction of the Court. The defendant No. 4 has neither expounded the arbitration agreement/clause nor invoked the arbitration clause/agreement between the parties and in the circumstances, the jurisdiction of the Court will not be ousted on such a plea of the defendant No. 4/applicant. In any case for purpose of rejection of plaint, pleas raised in the plaint are to be considered and not the pleas raised by the defendant No. 4/applicant.

17. In the circumstances, the inevitable inference is that the plaint does disclose cause of action against defendant No. 4 plaintiff has contended that the contract was concluded between the plaintiff and defendant No. 4 at Delhi on the basis of telex and, Therefore, the cause of action has arisen at Delhi. If the cause of action has arisen at Delhi, it is to be adjudicated and merely on the averment of the defendant No. 4 that it is a corporation not having any office at Delhi, the plaint of the plaintiff cannot be rejected. Ultimately, whether the plaintiff will succeed or not has to be adjudicated on the basis of documents and evidence led by the parties, however, from the plaint and the documents filed by the plaintiff, the plaint cannot be rejected on the ground that no cause of action is disclosed. The cases relied on by the defendant No. 4 are apparently different and distinguishable and do not support any of the contentions of the defendant No.

4./applicant.

17. Consequently, the application of the defendant No. 4/applicant under Order VII rule 11 read with Section 21 and Section 151 of CPC for rejection of the plaint is without any merit and is dismissed.

IA No. 2629/2001

18. This is an application under Order VI Rule 17 read with Section 151 of CPC for amendment of the plaint. The plaintiff has filed the suit for recovery of Rs. 5,23,49,757.00 and interest @ 20% per annum against the defendants jointly and severally. The plaintiff contended that it deals in the trading of commodities and payment is also received through letters of credit.

19. The assertion of the plaintiff is that a Letter of Credit for total amount of US 3292808 was opened by defendant No. 1 on behalf of defendant No. 4 which LC was authenticated by defendant No. 3. Defendant No. 2, according to plaintiff, was the negotiating Bank. The plaintiff contended that despite no discrepancy, defendant No. 2 refused to honour the letter of credit and, consequently, the plaintiff has filed the suit for recovery on account of dishonouring of letter of credit leading to distress sales and suffering of loss by plaintiff.

20. The plaintiff averred against defendant No. 3 that it was an advising Bank whose job was only to authenticate LC and after the notice was issued to defendant No. 3, plaintiff was approached by defendant No. 3 who explained the role of defendant No. 3 as only of authenticating the letter of credit and, consequently, the plaintiff does not want to seek any relief against defendant No. 3 and wants to amend the prayer to seek recovery of the sum of Rs. 5,23,49,757/- along with interest @ 20% per annum against defendant Nos. 1, 2 and 4 in place of all the defendants. The plaintiff has contended that defendant No. 3 is only a proper party against whom no relief is being prayed and, in the circumstances, plaintiff wants to amend the prayer clause. plaintiff contended that amendment sought is necessary for determination of real controversies between the parties.

21. Reply to the application is filed by the defendant No. 4 alleging that the company does not have any office in India and it does not reside and work for gain in India and Therefore, the Courts in India do not have jurisdiction and in the circumstances, the Court should not proceed with the application unless the question of jurisdiction is decided by the Court.

22. From the pleadings of the plaint, it has been held, that it can not be inferred that the plaint does not disclose cause of action or that the Court does not have jurisdiction to try the suit at this stage.

23. So whether the amendment to the plaint as sought by the plaintiff should be allowed or not The purpose and object of Order 6 Rule 17 is to allow either party to alter or amend his pleading in such manner and on such terms as may be just. The power to allow the amendment is wide and can be exercised at any stage of

the proceedings in the interests of justice on the basis of guidelines laid down in various precedents. Though the amendment cannot be claimed as a matter of right and under all circumstances but the Courts while deciding such prayer do not adopt a hyper technical approach. Liberal approach is the general rule particularly in cases where the other side can be compensated with costs. Technicalities of law can not be permitted to hamper the Courts in the administration of justice between the parties. Amendments are allowed in the pleadings to avoid uncalled for multiplicity of litigation. It is also no more rest integra that pretrial amendments are allowed more liberally than those which are sought to be made after the commencement of trial or after conclusion thereof. Mere delay usually cannot be a ground for refusing a prayer for amendment because merits of amendment sought to be incorporated by way of amendments are not to be judged at the stage of allowing prayer for amendment.

24. Considering the facts and circumstances and that the plaintiff is dominus litis and would be entitled to give up his claim against any of the defendants and in view of the fact that the defendant No. 3 is a negotiating Bank and none of the defendants have opposed the proposed amendment on the merits, it is inevitable to infer that the amendment sought by the plaintiff is necessary for determination of real controversies between the parties and no prejudice shall be caused to the defendant No. 4, who has opposed amendment and filed a reply.

25. Therefore, in the facts and circumstances, I deem it proper to allow the amendment sought by the plaintiff to amend the prayer clause and allow him to seek recovery of the suit amount only against the defendant Nos. 1, 2 and 4 and give up his claim against the defendant No. 3. Consequently the application of the plaintiff for the amendment of plaint under Order VI rule 17 is allowed. Amended plaint be filed within four week.