

(2005) 02 MAD CK 0167
In the Madras High Court
Case No : C.S. No. 389 of 2004

M/s. Ferdous Finance (P) Ltd.

APPELLANT

Vs

R. Thyagarajan, A.V.K. Umapathy, V. Sowrirajan and M/s.
Jeez Impex (P) Ltd.
R. Thyagarajan, No. 47, Third
Street, East Ahiramapuram, Chennai - 600 004 Vs M/s.
Ferdous Finance (P) Ltd.

RESPONDENT

Date of Decision : 25-02-2005

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 7 Rule 11, Order 7 Rule 11(a)
Criminal Procedure Code, 1973 (CrPC) — Section 482

Citation : (2005) 02 MAD CK 0167

Hon'ble Judges : R. Balasubramanian, J

Bench : Single Bench

Advocate : R. Thiagarajan, for the Appellant; T.K. Seshadiv for the first
Defendant, for the Respondent

Judgement

R. Balasubramanian, J.—The first defendant has moved this court under Order 7 Rule 11(a) of the Civil Procedure to reject the plaint on the ground that the plaint does not disclose any cause of action against him. Heard Mr. T.K. Seshadri, learned counsel appearing for the applicant/first defendant and Mr. R. Thiagarajan, learned counsel for the respondent/plaintiff. In this order hereinafter, I will refer the parties to this application, as the plaintiff and the first defendant. The suit is to recover money due under a promissory note dated 22.3.2001. The fourth defendant is a private limited company, of which defendants 1 to 3 are shown to be Directors. The plaint allegation is that the first defendant is the Chairman while defendants 2 and 3 are the Managing Director and Director respectively of the fourth defendant company. The grounds on which the first defendant wants the plaint to be rejected are as follows:-

"There is an allegation in the plaint that the promissory note in question was executed by the first defendant on behalf of defendants 2 to 4; the alleged consideration of Rs. 50 lakhs for the promissory note is shown to have been paid

by two cheques, each for a sum of Rs. 25 lakhs drawn in favour of the fourth defendant company and that the said sum was accordingly credited into the account of the fourth defendant company; therefore the borrowal is only by the fourth defendant company; the promissory note on which the suit is laid, was not signed by the first defendant in his individual capacity but only for and on behalf of the fourth defendant company; the suit document itself shows that the fourth defendant company is the borrower; though the names of defendants 2 and 3 are shown as co-executants in the promissory note, yet, they have not signed in it; the promissory note was signed by the first defendant in his capacity as the Chairman of the fourth defendant company as could be seen from the document itself; there is no personal liability on the first defendant for the said borrowal by the fourth defendant company and therefore there is no cause of action."

2. Mr. T.K. Seshadri, learned counsel appearing for the first defendant would state that on the above allegations found in the plaint that the borrower is only by the fourth defendant company and therefore the first defendant cannot be personally proceeded with for the liability of the company. For this purpose, he relied upon the judgments reported in *Bank Of Maharashtra v. Racmann Auto Pvt. Ltd.* (Volume 74) Company Cases 752 (Delhi High Court) and *I.O.B. v. R.M. Marketing And Services* (Volume 107) Company Cases 606 (Delhi High Court). Learned counsel also relied upon a judgment of the Supreme Court reported in *I.T.C. Limited v. The Debts Recovery Appellate Tribunal* (1997 (III) C.T.C. 746) to contend that the plaint must disclose clear right to sue and the court cannot be carried away by clever drafting of the plaint creating illusions of cause of action. Learned counsel would therefore stress that once the plaint allegation shows that the borrowal in question on which the suit is laid, is *prima facie* shown to be by the fourth defendant company, then, it must be taken that the plaintiff does not disclose any cause of action against the first defendant, since he can not be made personally liable. Contending to the contra Mr. R. Thiagarajan, learned counsel appearing for the plaintiff would submit that whether the plaint allegation do show a cause of action or not has to be necessarily decided only with reference to the allegation in the plaint. According to him, the entire plaint must be read as a whole to find out whether it does or does not disclose a cause of action against the first defendant. Learned counsel would then argue that unless the Court finds that on the face of the allegations in the plaint no cause of action is made out, the Court cannot exercise its power to reject the plaint. Learned counsel would then submit that the Court must find, if at all it can exercise the power of rejecting the plaint under Order 7 Rule 11 of the Code of Civil Procedure, that the plaintiff has no arguable case at all. To show what should enter the mind of the Court while considering the application filed to reject the plaint, learned counsel brought to my notice the judgment of the Bombay High Court reported in *M/s. Crescent Petroleum Ltd. Vs. m.v. "MONCHEGORSK"* and another, and that of the Supreme Court reported in *Sopan Sukhdeo Sable v. Asstt. Charity Commr.* (2004) 3 Sup 137 and *Liverpool & London SP. & 1 Assn. Ltd. v. M.V. Sea Success* (2004) 9 Sup 512.

3. Let me now look at the allegations in the plaint. In sum and substance, the plaint allegations are as follows:-

"The first defendant sought for a loan of Rs. 50 lakhs; he also produced a copy of the resolution dated 23.2.2001 passed by the Board; since the first defendant is a well known Advocate, the plaintiff believed him and gave the required sum of Rs. 50 lakhs on 22.3.2001 by two post dated cheques; on receipt of the two cheques, the first defendant executed the promissory note; the first defendant himself wrote his name and the names of defendants 2 and 3; but he alone signed the promissory note and promised to get the signatures of defendants 2 and 3, which he failed; cheques had been realised through the defendants' bankers - State Bank of India; the first defendant being the Chairman of the fourth defendant company induced the plaintiff to give the loan amount of Rs. 50 lakhs in the name of the fourth defendant company and had illegally diverted the amount to his own benefits and purposes; though the first defendant alone executed the promissory note, defendants 2 and 3 are jointly and severally liable as Directors of the fourth defendant company; the promissory note was executed by the first defendant on behalf of defendants 2 to 4 and hence they are jointly and severally liable to pay the amount."

From the above allegations in the plaint, the first defendant wants this court to conclude even at this stage that the fourth defendant is the borrower and therefore the first defendant cannot be made liable.

4. Let me now apply my mind to the points put forward before me. The promissory note is shown to have been signed by the first defendant in his capacity as Chairman of the fourth defendant company. There is no dispute that the cheques were drawn in the name of the fourth defendant company and they were credited into the bank account of the fourth defendant company. The plaint allegations are that "the first defendant is the borrower; he induced the plaintiff to give the cheques in the name of the fourth defendant company; the first defendant executed the promissory note and the money credited into the bank account of the fourth defendant company had been diverted by the first defendant for his personal use. At this stage I have to necessarily state that in the absence of Articles and Memorandum of association of the fourth defendant company, it is not possible to decide whether the first defendant signing alone in his capacity as Chairman of the fourth defendant company would make the company itself liable for the said borrowing. Board resolutions on this aspect is also not placed before court. The second and fourth defendant have not chosen to participate in the proceedings till now. The Court is not in a position to think of the definite defence of the second and fourth defendant. Incidentally I referred to the typed set filed by the third defendant in the suit in Application No. 1994 of 2004. There are innumerable resolutions available in that paper book passed by the Board of the fourth defendant. Some of the resolutions indicate that two of the Directors named therein were permitted to act on behalf of the fourth defendant company. Therefore in any situation hereafter the fourth defendant

may contend that the act of the first defendant in signing the promissory note only by himself for borrowing the money may not bind the company. Everything is at a fluid stage now. Equally it is open to the plaintiff to prove that though the promissory note was executed by the first defendant in his capacity as Chairman of the fourth defendant company, yet, it is only his personal borrowing and only due to his inducement, money was lent by drawing cheques in the name of the fourth defendant company. The plaintiff may also prove that the money credited to the fourth defendant account was not utilised for any purposes of the fourth defendant company but it was withdrawn for the personal use of the first defendant. There are enough pleadings on these lines. Therefore, in my considered opinion, it is not possible to hold even at the threshold of the case that the borrower is only the fourth defendant company and therefore other than the fourth defendant, none else including the first defendant can be made liable. The Bombay High Court, in the reported judgment above referred to, had laid down the law on Court's power under Order VII Rule (2) of the Code of Civil Procedure, which reads as hereunder:-

"It is settled law that the plaint can be rejected as disclosing no cause of action if the Court finds that it is plain and obvious that the case put forward is unarguable. The phrase "does not disclose a cause of action" has to be very narrowly construed. Rejection of the plaint at the threshold entails very serious consequences for the plaintiff. This power has, therefore, to be used in exceptional circumstances. The court has to be absolutely sure that on a meaningful reading of the plaint it does not make out any case. The plaint can only be rejected where it does not disclose a cause of action or where the suit appears from the statements made in the plaint to be barred by any provisions of law. While exercising the power of rejecting the plaint, the Court has to act with utmost caution. This power ought to be used only when the Court is absolutely sure that the plaintiff does not have an arguable case at all. The exercise of this power though arising in civil procedure, can be said to belong to the realm of criminal jurisprudence and any benefit of the doubt must go to the plaintiff, whose plaint is to be branded as an abuse of the process of the Court. This jurisdiction ought to be very sparingly exercised and only in very exceptional case. The exercise of this power would not be justified merely because the story told in the pleadings was highly improbable or which may be difficult to believe."

The Supreme Court in Sopan's case referred to supra had held that for deciding an application under Order 7 Rule 11 (a), the averments in the plaint alone are germane and pleas taken by the defendant in the written statement would be wholly irrelevant at that stage. If this judgment is taken into account, then it is clear that the first defendant on a possible legal defence available to him, is trying to throw out the plaintiff's case even at the threshold by resorting to Order 7 Rule 11(a) of the Code of Civil Procedure, which is impermissible as per the judgment referred to above. It must be noticed that in the above judgment the Supreme Court had held that even without the intervention of the defendant, a duty is cast upon the court to perform its obligations in rejecting the plaint hit by

any of the infirmities under clauses (a) to (d). In the same judgment, the Supreme Court has also held as follows:-

"The Trial Court must remember that if on a meaningful and not formal reading of the plaint, it is manifestly vexatious and merit less in the sense of not disclosing a clear right to sue, it should exercise the power under Order 7 Rule 11(a) taking care to see that the ground mentioned therein is fulfilled. If clever drafting has created the illusion of the cause of action, it has to be nipped in the bud at the first hearing by examining the party searchingly under Order 10 of the Code. It is true that by ingenious drafting a cause of action in the nature of red herrings cannot be brought into the judicial arena."

In Liverpool's case, the Supreme Court had once again laid down the law on this point, which reads as hereunder:-

"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 ascertaining whether the plaint shows a cause of action, the court is not required to make an elaborate enquiry into doubtful or complicated questions of law or fact. By the statute the jurisdiction of the court is restricted to ascertaining whether on the allegations a cause of action is shown. So long as the claim discloses some cause of action or raises some questions fit to be decided by a judge, the mere fact that the case is weak or not likely to succeed is no ground for striking it out. The purported failure of the pleadings to disclose a cause of action is distinct from the absence of full particulars.

It may be true that Order 7 Rule 11 (a) although authorises the court to reject a plaint on failure on the part of the plaintiff to disclose a cause of action but the same would not mean that the averments made therein or a document upon which reliance has been placed although discloses a cause of action, the plaint would be rejected on the ground that such averments are not sufficient to prove the facts stated therein for the purpose of obtaining relief's claimed in the suit. Furthermore, a fact which is within the special knowledge of the defendant need not be pleaded in the plaint.

5. Having the law laid down by the Supreme Court in the above referred to judgment, I went through the plaint with utmost care and caution. The result is, I do not find any clever drafting creating illusory cause of action in the plaint. The Supreme Court has said in one of the above referred to judgments that the plaint allegation in the entirety must be taken as correct and then only the question whether the cause of action is disclosed or not must be looked into. It is akin the power available to High Court u/s 482 of the Code of Criminal Procedure in quashing criminal proceeding. While that power is exercised, the Supreme Court has always held that accepting the entire allegation in the complaint as

true and yet, if no case is made, then alone, the Court can quash the proceeding. Therefore it is clear that the Court cannot go beyond the allegation in the plaint in the context of the possible defence that one may raise and decide as to whether the cause of action is disclosed or not. The Supreme Court in Liverpool's case also held that elaborate enquiry into doubtful or complicated questions of law or fact is not necessary. As already stated, on the pleadings, the plaintiff may be in a position to prove during trial that though promissory note is shown to be executed in the name of the company by the first defendant in his capacity as Chairman of the said company and cheques have been drawn in the name of the company and credited into its account, depending on the defence taken by the defendants, yet, the borrowing is that of the first defendant himself or by the company. In the two reported cases of Delhi High Court, the Court decided the liability of the Director of a company in a suit after evidence was recorded during trial. Therefore the conclusions arrived at by the Delhi High Court in the two judgments is based on evidence collected during trial and not at the threshold of the case itself. The judgment of I.T.C. Limited relied upon by the first defendant does not turn to scale in favour of the first defendant. For all the reasons stated, I find that the plaint does disclose a cause of action against the first defendant. It cannot be said that by any stretch of imagination that the plaintiff has no case at all to argue. Therefore I find that no case is made out for rejecting the plaint under Order 7 Rule 11(a) of the Code of Civil Procedure. The application is accordingly dismissed.