
(2016) 01 DEL CK 0215
In the Delhi High Court
Case No : CS (OS) 1219/2011

Sanjay Kriplani

APPELLANT

Vs

Fountainhead Motels Private Ltd. and Others

RESPONDENT

Date of Decision : 27-01-2016

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 12 Rule 6, Order 23 Rule 3, Order 7 Rule 11(a)

Citation : (2016) 3 ADDelhi 40

Hon'ble Judges : Valmiki J. Mehta, J.

Bench : Single Bench

Advocate : Arjun S. Bawa and Pravan Sharma, Advocates, for the Appellant; Manmeet Arora, Apoorv Tripathi and Chand Chopra, Advocates, for the Respondent

Final Decision : Dismissed

Judgement

Valmiki J. Mehta, J.—OA No. 433/2015 & IA Nos. 23087-88/2015 and 18176/2015

1. Learned counsel for the defendant nos.1, 6 and 7 states that she does not oppose the applications and OA subject however to the terms as stated hereinafter. The plaintiff will lead evidence of two witnesses. The plaintiff shall complete his entire evidence within four hearings and no further opportunity will be granted to the plaintiff in view of the otherwise negligent conduct of the plaintiff in not leading the evidence on time. Plaintiff will also pay costs of Rs. 40,000/- to the counsel for the defendant nos.1, 6 and 7. Costs will be paid within four weeks from today.

2. OA and the applications are disposed of.

IA No. 17791/2012

3. This application is disposed of as not pressed.

IA No. 18596/2015

4. This application is disposed of as not pressed.

IA No. 23089/2015

5. This application need not be shown in the list as it is already disposed of on 2.11.2015.

IA No. 21047/2013 (u/O XII Rule 6 CPC)

6. This is a suit for recovery of Rs. 4 crores along with interest @ 18% per annum. As per prayer clause (a), the money decree is sought against defendant nos. 1 to 10. During the course of arguments, learned counsel for the plaintiff concedes that no money decree is prayed against defendant nos.4 to 10 and prayer (a) of the plaint be read so as not to seek money decree against defendant nos.4 to 10. Accordingly, defendant nos.4 to 10 are deleted from the array of parties as they are not necessary parties as no relief has been claimed against them. In case such persons are required as witnesses for the proof of aspects which the plaintiff relies upon, then such persons can be summoned as witnesses. With the same observations, defendant no. 11 is also deleted from the array of defendants.

7. The essence of the cause of action which is pleaded in the suit is that the plaintiff provided consultancy and advisory services for setting up of Hotel Claremont for defendant no.1/company. The plaintiff claims the suit amount on account of consultancy, advisory and brokerage services of setting up of Hotel Claremont for the defendant no.1. These averments are found in paras 1.7 and 1.9 of the plaint.

8. As per the plaint, actual amount of Rs. 12 crores had become due to the plaintiff from defendant nos. 1 to 3, with an amount of Rs. 9 crores being the principal amount and Rs. 3 crores as the interest, however, para 1.19 of the plaint refers to a Deed of Composition and Settlement dated 1.2.2008 whereby the defendant no.1/Company agreed to make payment of Rs. 8 crores and subsequently, another Agreement was entered between the plaintiff and defendant nos. 1 to 3 on 17.4.2008 whereby the defendant nos. 1 to 3 agreed that their liability towards the plaintiff was for a sum of Rs. 4 crores. Accordingly, the subject suit is filed for the recovery of Rs. 4 crores from the defendant nos.1 to 3.

9. Defendant nos. 1 to 3 originally filed a common written statement. The preliminary objections in this written statement show that the defendant nos. 2 and 3 denied their signatures on the Composition/Settlement Deed dated 17.4.2008. Defendant nos. 2 and 3 had stated that the Settlement Agreement dated 17.4.2008 is a forged and fabricated document. In fact, the defendants 2 and 3 by means of filing their affidavits dated 4.7.2011 and 3.8.2011 and also by filing their replies to various applications have consistently denied their liability as also the liability of defendant no.1 to pay the suit amount to the plaintiff. The

defendant nos. 1 to 3 had also taken up an alternative case that the cheque bearing no.435674 dated 17.5.2008 was taken by the plaintiff under coercion and serious threat to the defendant nos. 2 and 3. Also, in an appeal FAO(OS) No. 402/2009 filed against defendant nos. 2 and 3, the defendant nos. 2 & 3 herein by their affidavit dated 16/17.8.2011 took similar stand in the FAO(OS) No. 402/2009 denying their liability in the present suit by stating that the subject suit bearing CS(OS) No. 1219/2011 has been filed on the basis of forged document.

10. Subsequent developments after filing of the suit have taken place and which show that defendant nos.2 and 3 have transferred their shareholding of defendant no.1/Company to the defendants 6 and 7. Now learned counsel for the defendants no.2 and 3 who appears today states that the defendant nos. 2 and 3 want to change their stand taken in the written statement already filed by them in this Court and the defendant nos. 2 and 3 want to concede to the fact that the defendant nos. 2 and 3 had in fact signed the Settlement Agreement dated 17.4.2008 with the plaintiff. It is further and very curiously stated on behalf of defendant nos. 2 and 3 that the defendant nos. 2 and 3 however do not admit their own personal liability but only admit to the liability in the Settlement Agreement dated 17.4.2008 as of the defendant no.1/Company.

11. Learned counsel for the plaintiff has very strenuously argued that in view of the fact that the Settlement Agreement dated 17.4.2008 entered into before filing of the suit was signed by defendant nos.1 to 3 admitting their liability to the payment of the suit amount, the present suit should be decreed under Order XII Rule 6 of the Code of Civil Procedure, 1908 (CPC). It is also argued that this is all the more so today as the defendant nos.2 and 3 are now admitting to the liability of the defendant no.1/Company by stating that the earlier stand in the written statement filed by defendant nos. 1 to 3 that the Settlement Agreement dated 17.4.2008 was forged and fabricated document is to be withdrawn to the limited extent that defendant nos.2 and 3 stated that the liability contained in the Settlement Agreement dated 17.4.2008 is of the defendant no.1 but not of the defendant nos.2 and 3. Suit is therefore prayed to be decreed against defendant no.1/Company.

12. In the present suit, issues were framed on 23.5.2014, which are as under:-

"(i) Whether the plaint is liable to be rejected under Order 7 Rule 11 (a) CPC?
OPP

(ii) Whether the suit of the plaintiff is barred by limitation? OPD

(iii) Whether the plaintiff is guilty of suppression of material facts? If so, its effect. OPD

(iv) Whether the plaintiff is entitled to a decree in the sum of Rs. 4 crores? If so, against whom. OPP

(v) Whether the plaintiff is entitled to interest? If so, at what rate and for what

period and on what amount. OPP

(vi) Relief."

The aforesaid issues show existence of disputed questions of facts which can be decided only after parties are allowed to lead evidence on their stands.

13. I have today passed an order taking a liberal stand in favour of the plaintiff allowing the filing of the affidavit by way of evidence on behalf of the plaintiff in spite of negligence of the plaintiff and by noting the fairness of the stand of the counsel for the defendant nos. 1,6 and 7 in not opposing the OA of the plaintiff against the closure of the right of the plaintiff to lead evidence. I have stated above that defendant no.1/company is owned by defendant nos. 6 and 7 and who are the present controlling group of the shareholders of the defendant no.1/ Company.

14. The provision of Order XII Rule 6 CPC has been dealt with in a catena of judgments by the Supreme Court to hold that the said provision can be looked into when only once there are categorical admissions admitting to the liability. Of course admissions can also be taken from implied admissions, however, admissions have to be clear, inasmuch as, the monetary liability that too on an amount running into crores as sought in this case, cannot be fastened on to a contesting defendant.

15. In my opinion, the stand now taken by the defendant nos.2 and 3 admitting the Settlement Agreement dated 17.4.2008 qua the defendant no. 1 and that the defendant nos. 2 and 3 however are not the debtors, this changed stand by conceding to the liability only of defendant no.1 in terms of the Settlement Agreement dated 17.4.2008 is a mischievous and a mala fide stand in order to avoid their personal liability and which debt exists in terms of the Settlement Agreement dated 17.4.2008. This is really only because defendant nos.2 and 3 have now transferred their shareholding to the new controlling shareholders being defendant nos. 6 and 7. Obviously, such type of mala fide tactics and dishonest stand need to be adversely commented upon by this Court, more so as issues have already been framed and the defendant nos. 6 and 7 are denying the suit claim and the defendant nos. 2 and 3 are admitting to the liability only of the defendant no.1, only because defendant nos. 2 and 3 are no longer the ownership/controlling group of shareholders of the defendant no.1/Company.

16. Mere fact that FIRs were registered at the instance of defendant nos. 2 and 3 against the plaintiff, and which have been quashed cannot have a bearing so far as the pleadings and issues in the present suit are concerned for the purposes of Order XII Rule 6 CPC scenario.

17. It may be noted that the present stand of defendant nos.2 and 3 admitting to the liability of defendant no.1/Company for the plaintiff to claim a decree against defendant no.1/Company is a deliberate mala fide act on the part of the defendant nos.2 and 3, inasmuch as, admittedly inter se disputes are going on

between defendant nos.2 and 3 on one hand and defendant nos.6 and 7 on the other and a suit bearing CS(OS) No. 299/2012 is pending before a learned Single Judge of this Court.

18. It is high time that litigants and advocates understood the very basis of existence of Order XII Rule 6 CPC as the object of Order XII Rule 6 CPC is not to convert a suit involving disputed questions of facts so as to be decided as if a writ petition is decided i.e only on the basis of pleadings. This is more so in the present case where mala fide stand of defendant nos.2 and 3 has now come on record in favour of the plaintiff although earlier defendant nos.2 and 3 by filing their joint written statement with the defendant no.1/Company disputed the liability of the defendant no. 1 on the ground that the Settlement Agreement dated 17.4.2008 was a forged and a fabricated document. Defendant nos.2 and 3 are not admitting to the Settlement Agreement dated 17.4.2008 as a whole, although the Settlement Agreement dated 17.4.2008 shows the liability existing of all the defendant nos. 1 to 3. This stand of defendant nos.2 and 3 is in direct contrast to the language of the Settlement Agreement dated 17.4.2008 which imposes upon them a personal liability because defendant nos. 2 and 3 are now only admitting to the liability of the defendant no.1/Company which has now been taken over by the defendant nos. 6 and 7. This mala fide stand cannot be allowed to prejudice defendant nos.1, 6 and 7 as the Settlement Agreement dated 17.4.2008 either exists as a whole or goes as a whole.

19. In view of the aforesaid discussion, I need not make any observations on an earlier application being IA No. 1979/2012 under Order XXIII Rule 3 CPC filed by the plaintiff and which was withdrawn on 6.2.2012 and reference to which was made by the counsel for the defendant nos. 1, 6 and 7 during the course of arguments.

20. I note that though counsel for the plaintiff sought to rely on certain agreements subsequent to the Settlement Agreement dated 17.4.2008, but in none of those agreements being the Agreements dated 8.7.2010 and 28.3.2011 there is any privity of contract between defendant no.1/Company through its present controlling group of shareholders defendant nos.6 and 7 with the plaintiff showing that the liability of the plaintiff is admitted by the defendant no.1 through defendant nos.6 and 7. Once the plaintiff does not have privity of contract with the executants of these subsequent agreements, no aspect of such documents can be taken advantage of by the plaintiff.

21. In view of the above, this application is dismissed with costs of Rs. 25,000/-. Costs shall be paid within six weeks from today.

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22. List before the Joint Registrar for fixing up the dates of trial on 29th April, 2016.