

(2009) 08 MAD CK 0415

In the Madras High Court

Case No : Application No's. 1478 and 2746 of 2008 in C.S. No. 80 of 2008

Shree Ganesh Steel Rolling Mills Ltd.

APPELLANT

Vs

Anjaney International Co. Ltd., Alex Stewart Assayers Ltd.
and Spices Trading Corporation Ltd.
Alex Stewart
Assayers Ltd. Vs Shree Ganesh Steel Rolling Mills Ltd.,
Anjaney International Co. Ltd. and Spices Trading
Corporation Ltd.

RESPONDENT

Date of Decision : 28-08-2009

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 20

Citation : (2009) 08 MAD CK 0415

Hon'ble Judges : K. Chandru, J

Bench : Single Bench

Advocate : Satish Parasaran, for Fox Mandal and Associates in A. No. 2746 of 2008, for the Appellant; K. Chandrasekaran, for 1st Respondent in A. No. 2746/2008, for the Respondent

Judgement

K. Chandru, J.—Heard both sides.

2. A. No. 1478 of 2008 is filed by the plaintiff seeking permission to segregate tin cans from impurities and burn the tin cans and use the impurities such as mud and dust for filling of earth, pending disposal of the suit.

3. A. No. 2746 of 2008 is filed by the second defendant under Order 14 Rule 8 of CPC for revoking the leave granted by this Court on 30.01.2008 in A. No. 417 of 2008 in C.S. No. 80 of 2008.

4. The plaintiff filed the suit in C.S. No. 80 of 2008 seeking for a judgment and decree, directing the defendants 1 and 2 to pay to the plaintiff a sum of Rs. 1,26,24,000/- with subsequent interest from the date of the plaint, i.e. 29.01.2008 till the date of realisation. The suit was presented and admitted on 30.01.2008.

5. It is the case of the plaintiff that it is a limited company incorporated under the Companies Act. It engaged in the business of manufacturing iron ingots and TMT bars. For manufacturing of these products, they procured various types of ferrous scraps in the local market as well as import them from overseas suppliers. In the course of their business, the plaintiff approached one local agent of the first defendant foreign company by name M/s.Sundar and Sekar of Chennai, for the supply of shredded iron scraps with an average density of 70 pounds per cubic foot and the maximum impurities of 1%. The local agent agreed to supply by connecting his principal the first defendant.

6. The first defendant on being contacted by his local agent, forwarded the invoice and sales contract, dated 6.11.2007 agreeing to supply 1000 MT of shredded iron scrap at the rate of 380 US Dollars per metric ton. As per the contract, the shredded iron scraps should have an average density of 70 pounds per cubic foot and impurities at 1%. It was to be shipped before 10.12.2007 and payments will be made by LC payable at site on presentation of commercial invoices, packing list, certificate of origin issued by the shipper, bill of lading and pre shipment inspection certificate confirming the density by the second defendant. The goods should be delivered at Chennai Port being the Port of discharge. The letter of credit should be negotiated with any bank at Hong Kong.

7. It was stated that during the course of the business, the third defendant facilitated the opening of LC and had entered into a separate contract with the plaintiff on 7.11.2007 containing various clauses. By the said agreement, he had effected an high sea sales of the imported shredded iron scrap of the description given in favour of the plaintiff. Though no relief is claimed against the third defendant, he has been made as a formal and proforma party. It was the case of the plaintiff that the first defendant was well aware that the shredded iron scraps will be sold to the plaintiff by them and the third defendant is only a facilitator for opening of the LC. As per the terms of the contract between the plaintiff and the first defendant, the LC was opened and the terms of the LC was subsequently amended at the instance of the local agent of the first defendant. The LC was opened by the third defendant favouring the first defendant through the Bankers M/s. Yes Bank Ltd., Bangalore.

8. The plaintiff stated that pursuant to the contract, out of the first consignment of 500 MT, a part of the materials was shipped by the first defendant from La Spezia Port, Italy. Ten containers of the first shipment weighing 265.540 MT consigned to the third defendant who sold it in high sea sale basis by a contract, dated 29.12.2007 to the plaintiff. The plaintiff filed the bill of entry with the Customs Department at Chennai and cleared the goods by paying the customs duty of Rs. 11,53,663/-. As per the term of the contract, the commercial invoice, dated 19.12.2007 was enclosed with the certificate of origin. The quantity of 265.540 MT was shipped in 10 containers and the particulars of containers were also furnished.

9. The second defendant gave a certificate of pre-shipment inspection, dated

5.12.2007 attaching the particulars of container and certified that the cargo is shredded iron scraps with an average density of 70 pounds per cubic foot with maximum impurities of 1%. The shipment was done in the presence of the second defendant. The total net weight of 10 containers was 265.540 MTs.

10. The plaintiff had stated that after clearance by the Customs, he engaged a surveyor GEO Chem for the clearance of the materials. Thus, the 10 containers were cleared. Believing that the containers will contain materials, which were ordered to be imported, the same was unloaded at the work spot. However, when the containers were destuffed, they did not correspond with its description. The first defendant's local agent was present at the time of destuffing. It was not shredded scrap, but an inferior waste scrap with no value. The first defendant's agent saw the destuffed materials. What has been shipped was not shredded iron scraps, but burnt municipal waste. The container was stuffed with bits of tin boxes with heavy impurities. Only three containers were destuffed and the remaining seven were still in tact and kept at the work spot of the plaintiff. The plaintiff also requested the local agent to have a joint inspection. He was denying the same.

11. The plaintiff was also appraised by the Liner that another consignment of ten containers totally weighing 269.260 MTs had arrived at the Chennai Port and the containers were being cleared. The second defendant had also issued the certificate, dated 18.12.2007, containing the same lines with the same description as in the case of previous consignment. The said containers were in the process of being shifted to Container Freight Station. The high seas sales agreement by the plaintiff with the third defendant for this consignment was dated 11.1.2008.

12. It was stated by the plaintiff that the non destuffed seven containers as well as the new 10 containers would contain the same useless debris and wastes and he had to pay customs duty of Rs. 11,81,823/-. The plaintiff also had paid detention charge of Rs. 2 lakhs, i.e. Rs. 1 lakh for each consignment. The third defendant's banker M/s. Yes Bank negotiated the documents and honoured the LC to an extent of value of 534.800 MTs out of the total value of 1000 MTs. A sum of 203224 US Dollars was released by the third defendant. The value of 534.800 MT in terms of Indian Rupees is Rs. 80,88,315/- the conversion rate being Rs. 39.80 per US Dollar. Thus, the total damage incurred by the plaintiff was worked out to nearly Rs. 1,06,24,000/-.

13. It is the case of the plaintiff that if only the ordered materials were supplied, he would have used the same in the manufacturing of the ingots and TMT rods. The plaintiff in order to meet his market demand, had to purchase the iron scrap from outside in the open market, which further resulted in loss of Rs. 20 lakhs. It is the case of the plaintiff that the defendants 1 and 2 have colluded with each other and have defrauded the plaintiff by supplying goods which are useless. The defendants 1 and 2 were hand in glove with each other. The second defendant being the certifying agent, should have acted with an high degree of fidelity since

the plaintiff had reposed confidence on him. The second defendant having conspired with the first defendant is also bound to indemnify the plaintiff against the loss and damages suffered. Therefore, the plaintiff having left with no option filed the present suit as set out already.

14. As stated already, pending the suit, the plaintiff took out an application in A. No. 1478 of 2008 seeking for permission to segregate the tin cans from the impurities and burn the tin cans and use the impurities, i.e. mud and dust for filling of earth.

15. This Court granted leave in A. No. 417 of 2008 on 30.01.2008. This Court also appointed an Advocate Commissioner to inspect the materials contained in the containers as per the description found in the judges summons. The Advocate Commissioner was also permitted to take the assistance of a Technical Officer attached to the National Metallurgical Laboratory and take inventory and submit his report.

16. The plaintiff also took out O.A. Nos. 102 and 103 of 2008 seeking for prohibitory orders against the garnishee. On 30.01.2008, prohibitory orders were issued against the garnishee in both the applications.

17. Further time was also granted for the Commissioner to complete his work. The plaintiff was also permitted to transfer all the 10 containers lying in the Container Freight Station to their work spot. After that the remaining 10 containers were also directed to be destuffed in the presence of the Advocate Commissioner. After destuffing all the materials from the 20 containers, the plaintiff was directed to store them in an area earmarked exclusively for that purpose. The Advocate Commissioner had also filed his report, dated 29.02.2008. It is under these circumstances, this application was taken out by the plaintiff. The defendants have not filed any counter in the said application.

18. In the meanwhile, the second defendant has filed the Application in A.No.2746 of 2008, seeking for revocation of the leave granted by this Court. It is the case of the second defendant that they did not have any residence nor they do carry on business within the jurisdiction of this Court. While the first defendant is carrying on business at Hong Kong, the second defendant is at England and the third defendant is at Bangalore. The High Sea Sale Contract, which is said to have been breached, is the one entered into between the third defendant and the plaintiff. Neither the first defendant nor the second defendant were privy to the High Sea Sale Contract. Hence the suit is not maintainable, since the plaintiff themselves have stated that the third defendant is only a proforma party and no relief was claimed against them. The High Sea Sale Contract between the plaintiff and the third defendant was entered into outside the jurisdiction of this Court. The amounts were payable to the third defendant and not to any other defendants, who are outside the jurisdiction of this Court.

19. The plaint did not disclose any cause of action against the second defendant. The pre-shipment inspection certificates issued by the second defendant were

issued at Italy (the Port of loading) and were given to the third defendant, which is having its office at Bangalore. The second defendant had actually entered into an agreement outside the jurisdiction of this Court for such inspection with one M/s. Stemin Spa of Italy. At the instance of M/s. Stemin Spa, a certificate was issued by the second defendant bona fide mentioning the name of the third defendant. Since the transaction was done by M/s. Stemin Pa on behalf of the first defendant and they being a vital party to the transaction and are having jurisdiction outside of this Court, and as they were not made as party to the suit, the suit is not maintainable.

20. It was also stated that as per the guidelines laid down by the International Federation of Inspection Agencies which accompanied the pre-shipment inspection reports expressly provided under Clause 21 that it would be governed by the laws of England subject to the exclusive jurisdiction of the English Courts. If it is a case of breach of contract, it can be only between the first defendant and the plaintiff. The second defendant is not privy to the contract.

21. It was stated that an attempt has been made by the plaintiff to combine multifarious causes of action in a single suit. The breach of contract was discovered by the plaintiff while destuffing the container at Chennai, resulting in actual damages to the plaintiff cannot afford a cause of action to maintain the present suit. Therefore, leave that has been granted should be revoked.

22. In opposition to this application, the plaintiff has filed a reply affidavit, dated 12.6.2009. It was stated that though the defendants are residing outside the jurisdiction of this Court, the breach of contract had occurred within the jurisdiction of this Court. The first defendant was represented by their local agent. The third defendant is only a facilitator. The contract between the third defendant and the plaintiff was entered into and executed at Chennai and notarised at Chennai on 11.1.2008. In that contract, the name of the buyer and seller were mentioned. The second defendant had issued a false certificate with the active connivance of the first defendant. The inspection certificate issued by the second defendant had asserted that the visual inspection was made by them during the loading process, which is clearly a false statement. Inasmuch as the second defendant had admitted that M/s. Stemin Spa of Italy is his agent, the plaintiff had nothing to do with the contract between them. There is also no multifarious causes of action in the suit.

23. Taking the application filed by the second defendant first, Mr. Satish Parasaran learned Counsel leading M/s. Fox Mandal & Associates, appearing for the second defendant, placed reliance upon the Division Bench judgment of this Court in Parameswari Veluchamy and 2 Ors. v. T.R. Jayaraman and 7 Ors. reported in 2002 (1) CTC 134. Reliance was placed upon paragraphs 12, 20 and 21 of the said judgment, which are as follows:

12. If the plaintiffs had brought the suit only in relation to the three items in Madras, as already noticed, question of granting leave would not arise, but

having regard to all the facts of this case it is clear that a mere claim made by them in relation to those properties cannot be made the foundation on which their claim for a share in all other properties all of which are outside Madras should be tried by this Court. It would be like trying to make an elephant stand on a pin head.

....

20. The suit brought by the plaintiffs though it is in part a suit for land situated within the jurisdiction of this Court, is primarily a suit for a share in the properties which are situated outside the jurisdiction of the Court, all the defendants being residents outside and carrying on business outside the jurisdiction of this Court. The suit is not similar to one wherein a person entitled to a share in the joint family property can bring a suit in this Court for a share in the joint family property by saying that some of the joint family properties are situated within the jurisdiction of this Court. According to the plaintiffs own case there is no coparcenary property. In the plaint there is no averment regarding the properties in Madras mentioned in the plaint schedule by whom it was acquired, when it was acquired, mode of acquisition, consideration paid therefore etc. No document in relation to these properties was filed with the plaint. On the other hand the documents produced by the plaintiffs clearly show that those three items were purchased by some of the defendants nearly two decades after the demise of their father in whose estate the plaintiffs claim a share.

21. Moreover, considerations of convenience are very germane while determining the question of grant, refusal or revocation of leave. Almost all the properties, the documents relating thereto and the witnesses who have knowledge of the same are outside the city of Madras.

24. However, in the same judgment, the Division Bench had observed in paragraph 9, which is as follows:

9. There can be no doubt that this Court has jurisdiction to try any suit in relation to any land which is situated within the jurisdiction of this Court. No leave of the Court is necessary in such cases. In case where a part of cause of action arises within the jurisdiction of this Court as also in cases where the defendants do not reside or carry on business or work for gain within the jurisdiction of this Court leave of the Court is essential. The grant or refusal of leave is discretionary.

25. The learned Counsel further relied on an another Division Bench judgment of this Court in National Westminster Bank Ltd., U.K. v. Devraj Nensee & Co. and Ors. reported in 1997 (1) LW 117 for the purpose of contending that if defendants are residing outside the jurisdiction and no part of the cause of action arose within the jurisdiction of this Court, the plaintiffs were not entitled for any relief.

26. He also placed reliance upon the judgment of the Supreme Court in Sopan

Sukhdeo Sable and Others Vs. Assistant Charity Commissioner and Others, , wherein the Supreme Court after referring to the provisions of Order 7 Rule 11 quoted the judgment of the Supreme Court in T. Arivandandam Vs. T.V. Satyapal and Another, in Paragraph 12 of the said judgment observed as follows:

12. The trial court must remember that if on a meaningful and not formal reading of the plaint it is manifestly vexatious and meritless in the sense of not disclosing a clear right to sue, it should exercise the power under Order 7 Rule 11 of the Code taking care to see that the ground mentioned therein is fulfilled. If clever drafting has created the illusion of a 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. (See T. Arivandandam v. T.V. Satyapal.)

27. The learned Counsel finally relied upon the decision of the Supreme Court in Dabur India Ltd. Vs. K.R. Industries, and referred to the following passage found in paragraph 34, which is as follows:

34. What then would be meant by a composite suit? A composite suit would not entitle a court to entertain a suit in respect whereof it has no jurisdiction, territorial or otherwise. Order 2 Rule 3 of the Code specifically states so and, thus, there is no reason as to why the same should be ignored. A composite suit within the provisions of the 1957 Act as considered in Dhodha House, therefore, would mean the suit which is founded on infringement of a copyright and wherein the incidental power of the court is required to be invoked. A plaintiff may seek a remedy which can otherwise be granted by the court. It was that aspect of the matter which had not been considered in Dhodha House but it never meant that two suits having different causes of action can be clubbed together as a composite suit.

28. By relying upon the said passage, he contended that the suit having two different causes of action cannot be clubbed together in making a composite suit as was done in the present case. Therefore, he prayed that since no part of cause of action arose within the jurisdiction of this Court, the leave granted must be revoked.

29. Mr.K.Chandrasekaran, learned Counsel appearing for the respondent plaintiff after referring to Section 20(c) of CPC read with its 3rd explanation contended that in respect of the suit arising out of a contract, the cause of action arises as per the said Section in any one of the places mentioned therein. For this purpose, he placed reliance upon the judgment of the Supreme Court in A.B.C. Laminart Pvt. Ltd. and Another Vs. A.P. Agencies, Salem, . He referred to the following passages found in paragraphs 13 to 15 of the said judgment, which are as follows:

13. u/s 20(c) of the CPC subject to the limitation stated theretofore, every suit shall be instituted in a court within the local limits of whose jurisdiction the cause of action, wholly or in part arises. It may be remembered that earlier Section 7 of Act 7 of 1888 added Explanation III as under:

Explanation III. - In suits arising out of contract the cause of action arises within the meaning of this Section at any of the following places, namely:

- (1) the place where the contract was made;
- (2) the place where the contract was to be performed or performance thereof completed;
- (3) the place where in performance of the contract any money to which the suit relates was expressly or impliedly payable.

14. The above Explanation III has now been omitted but nevertheless it may serve as a guide. There must be a connecting factor.

15. In the matter of a contract there may arise causes of action of various kinds. In a suit for damages for breach of contract the cause of action consists of the making of the contract, and of its breach, so that the suit may be filed either at the place where the contract was made or at the place where it should have been performed and the breach occurred. The making of the contract is part of the cause of action. A suit on a contract, therefore, can be filed at the place where it was made. The determination of the place where the contract was made is part of the law of contract. But making of an offer on a particular place does not form cause of action in a suit for damages for breach of contract. Ordinarily, acceptance of an offer and its intimation result in a contract and hence a suit can be filed in a court within whose jurisdiction the acceptance was communicated. The performance of a contract is part of cause of action and a suit in respect of the breach can always be filed at the place where the contract should have been performed or its performance completed. If the contract is to be performed at the place where it is made, the suit on the contract is to be filed there and nowhere else. In suits for agency actions the cause of action arises at the place where the contract of agency was made or the place where actions are to be rendered and payment is to be made by the agent. Part of cause of action arises where money is expressly or impliedly payable under a contract. In cases of repudiation of a contract, the place where repudiation is received is the place where the suit would lie. If a contract is pleaded as part of the cause of action giving jurisdiction to the court where the suit is filed and that contract is found to be invalid, such part of cause of the action disappears. The above are some of the connecting factors.

30. He also placed reliance upon the judgment of the Supreme Court in *Indian Mineral and Chemicals Co. and Others Vs. Deutsche Bank*, for contending that for revoking the leave under Clause 12 of the Letters Patent, the assertion made in the plaint will have to be assumed to be true, while determining the question of revocation of leave on point of demurrer. In this context, he placed reliance upon paragraphs 10 and 11 of the said judgment, which is as follows:

10. We are of the opinion that the learned Judges erred in revoking leave under Clause 12 of the Letters Patent in view of the clear assertions made in the plaint,

and the assertions in a plaint must be assumed to be true for the purpose of determining whether leave is liable to be revoked on a point of demurrer. In the plaint the jurisdiction of the High Court was claimed on the ground that:

- (1) UCO Bank's branch, which was within the Court's jurisdiction, intimated the plaintiffs that the letter of credit had been issued by the respondent;
- (2) the documents were presented by the plaintiffs to the said branch of UCO Bank; and
- (3) payment was to be received by the plaintiffs from the said branch of UCO Bank.

11. The Division Bench could have held that what was alleged to be a part of the cause of action did not form part of the cause of action at all. This the Division Bench did not do. It was not open to the Division Bench to come to a contrary factual conclusion in respect of any of these three grounds. The appeal is, therefore, liable to be allowed on this ground alone.

31. He also placed reliance upon the decision of the Supreme Court in *Mayar (H.K.) Ltd. and Others Vs. Owners and Parties, Vessel M.V. Fortune Express and Others*, for contending that the allegation made by the defendant in the written statement or in an application for rejecting the plaint, cannot be the basis for rejecting the plaint. As long as the jurisdiction of this Court is not ousted by any contract between the parties, the Court has got jurisdiction. In this context, he referred to the following passages found in paragraph 16 of the said judgment, which is as follows:

18. ...In *A.B.C. Laminart (P) Ltd. v. A.P. Agencies* this Court has considered the ambit of the exclusion Clause whereby the jurisdiction of one court is excluded and conferred upon another court by agreement of the parties and said that in a suit for damages for breach of contract, the cause of action consists of making of the contract, and of its breach, so that the suit may be filed either at the place where the contract was made or at the place where it should have been performed and the breach occurred.

When the court has to decide the question of jurisdiction pursuant to an ouster clause, it is necessary to construe the ousting expression or Clause properly to see whether there is ouster of jurisdiction of other courts. When the Clause is clear, unambiguous and specific accepted notions of contract would bind the parties and unless the absence of *ad idem* can be shown, the other courts should avoid exercising jurisdiction. As regards construction of the ouster Clause when words like "alone", "only", "exclusive" and the like have been used, there may be no difficulty. Even without such words in appropriate cases, the maxim "*expressio unius est exclusio alterius*" - expression of one is the exclusion of another - may be applied. What is an appropriate case shall depend on the facts of the case. In such a case, mention of one thing may imply exclusion of another. When certain jurisdiction is specified in a contract, an intention to exclude all

others from its operation may in such cases be inferred. It has, therefore, to be properly construed.

The learned Counsel further contended that since there was no agreement between the parties for ousting the jurisdiction, this Court has ample power to deal with the same.

32. In the present case, the plaintiff had approached this Court and obtained leave on the basis that there was substantial cause of action arisen within the jurisdiction of this Court. It is immaterial whether the defendants are residing outside the jurisdiction of this Court for grant of leave. None of the decisions cited by the learned Counsel for the second defendant was of any assistance to them. On the contrary, for deciding whether there existed any cause of action for filing a suit, only plaint averments have to be looked into.

33. The Supreme Court in the context of Order 7 Rule 11 CPC dealt with the scope of as to what constitutes a cause of action and what should be the basic criteria to decide a case under Order 7 Rule 11 in *Liverpool and London S.P. and I Asson. Ltd. Vs. M.V. Sea Success I and Another*, . In paragraphs 139, 140, 146, 147 and 149, it has been observed as follows:

Rejection of plaint

139. 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.

Cause of action

140. 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, wilful default, or undue influence.

146. 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 reliefs claimed in the suit. The approach adopted by the High Court, in this behalf, in our opinion, is not correct.

147. In *D. Ramachandran v. R.V. Janakiraman* this Court held: (SCC p.271, para 8)

It is well settled that in all cases of preliminary objection, the test is to see whether any of the reliefs prayed for could be granted to the appellant if the averments made in the petition are proved to be true. For the purpose of considering a preliminary objection, the averments in the petition should be assumed to be true and the court has to find out whether those averments disclose a cause of action or a triable issue as such. The court cannot probe into the facts on the basis of the controversy raised in the counter.

149. In *D. Ramachandran v. R.V. Janakiraman* it has been held that the court cannot dissect the pleading into several parts and consider whether each one of them discloses a cause of action.

34. Therefore, it cannot be said that the leave has been granted without there being any cause of action, which had arisen within the jurisdiction of this Court. Hence, the application in A. No. 2746 of 2008 for revoking the leave will stand dismissed.

35. With reference to the other application filed by the plaintiff, it is to be noted that already materials are kept separately by an order of this Court. There has been no opposition to that application by the defendants. Hence, the application in A. No. 1478 of 2008 is ordered as prayed for. No costs.