

(2001) 02 DEL CK 0017

In the Delhi High Court

Case No : IAs. 8156/99 and 12375/99 in Suit No. 2796/98

Shri K.S. Wahi

APPELLANT

Vs

M/s Ganga Exports and Others

RESPONDENT

Date of Decision : 13-02-2001

Acts Referred:

Citation : (2001) 3 AD 571 : (2001) 90 DLT 386 : (2001) 58 DRJ 150 : (2001) 3 RCR(Civil) 707

Hon'ble Judges : Mukul Mudgal, J

Bench : Single Bench

Advocate : Mr. Manohar Lal, for the Appellant; Mr. Sridhar Y. Chitale, for the Respondent

Judgement

Mukul Mudgal, J.—This is an application for leave to defend filed by the defendants in a suit under Order xxxvII of the CPC filed by the plaintiff, Shri K.S. Wahi.

2. The case of the plaintiff averred in the plaint is as under:

That the plaintiff had supplied raw cashew nuts to the defendants in the month of July 1997 by virtue of an agreement dated 6th July 1997 and as per the said agreement the goods were to be supplied from Abidjan (Ivory Coast) Port to Tuticorin (India) Port having a gross weight of 48.52 MT and net weight 47.875 MT i.e. 645 bags containing 80 kgs. cashew nuts each. According to the agreement the defendants was to make payment of 91% of the total value of the goods at the time of handing over the delivery order and the balance after taking delivery of the goods. The agreement also provided that if there was any damage beyond 10% as certified by SGS at loading port, the corresponding value of the raw nuts found damages by sprouting, water damage or loss in weight as certified by the surveyors at landing port should be given by the sellers. On 1st August 1997 the said raw cashew nuts were delivered to the defendants at Tuticorin against invoice dated 6th July 1997 for a sum of Rs.13,49,069/-. The plaintiff was given a cheque No. 695001 dated 31st July 1997 for a sum of Rs.12,27,994/- on

account by defendant No.4. By the letter dated 31st July 1997 the plaintiff was assured that the cheque was by way of an assurance for payment. The plaintiff was assured that the payment will be made by a bank draft within a week of delivery of the goods. The plaintiff believed the defendants and waited. The goods supplied by the plaintiff were shifted to Panaruti. The plaintiff also reached Panaruti to receive payment. On 10th August 1997 the defendants gave a letter to the plaintiff seeking one month's time for making the entire payment of Rs.13,49,069/- but the plaintiff did not agree to grant any further time and threatened the defendants with a letter dated 10th August 1997 that he will report the matter to the police. On this a post dated cheque No.947124 dated 31st August 1997 for a sum of Rupees ten lakhs was issued by the defendant No.2 from his personal account to silence the plaintiff. The plaintiff was assured by defendant No.2 that the cheque would be honoured. Defendant No.2 also issued a letter certifying the good quality and quantity of the goods. The defendant No.2 then sent a demand draft dated 26th August 1997 drawn on Karur Vyasa Bank, Karol Bagh New Delhi for a sum of Rs.five lakhs to the plaintiff. The plaintiff was further assured that the cheque No.947124 dated 31st August 1997 for rupees ten lakhs is a guarantee for the balance payment. The plaintiff thereafter got the bank draft of Rs.five lakhs encased and reminded the defendant about the balance payment due but the defendants did not make the balance payment of Rs.8,49,000/- which was the sum due after adjusting the sum of rupees five lakhs paid by the bank draft dated 26th August 1997. Consequently, the plaintiff presented the cheque dated 31st August 1997 to his banker, Bank of Maharashtra, Karol Bagh, New Delhi on 4th October 1997 but the cheque was returned on 17th October 1997 with the remarks "insufficient funds". Accordingly a legal notice dated 22nd October 1997 was issued to the defendants demanding the payment but without any result. The plaintiff also presented the cheque No. 695001 dated 31st July 1997 for a sum of Rs.12,27,994 issued by defendant No.4 and this time also the cheque was dishonoured. The plaintiff again served a legal notice to the defendants demanding the entire balance amount of Rs.8,49,069/- with interest and filed a criminal complaint u/s 138 of Negotiable Instrument Act which is pending in the Court of the Metropolitan Magistrate, Delhi where cognizance has been taken and summons issued to the defendant. Since cheque No. 947124 dated 31st August 1997 for Rs.10 lakhs and Cheque No.695001 dated 31st July 1997 for Rs.12,27,994/- were given by the defendants on an assurance to the plaintiff for liability of Rs.13,49,069/- as per agreement dated 6th July 1997, and pursuant to the above assurance given by the defendants the defendants after receipt of the goods had also paid a sum of Rs.5 lakhs and, Therefore, the balance amount of Rs.8,49,069/- with interest was thus outstanding. The plaintiff had suffered a loss as his transaction was international in character and the rates for the dollar had in the meanwhile risen from Rs.35.95 to Rs.43 per dollar. Therefore the plaintiff laid the following claim in the plaint:

Cost of the 47.875 Mt of raw cashew nuts 13,49,069.00 Payment made vide DD

drawn on Karur Vayaya Bak Ltd., Karol Bagh, New Delhi. 5,00,000.00 Balance
08,49,069.00 Interest 02,11,276.00 Cost of legal notices 4,400.00 Bank penalty
for dishonouring of two cheques 5,630.00 ----- Total 10,70,375.00

The plaintiff has also prayed for 18 per cent interest on the amount due and the suit was thus filed under Order xxxvII of the Code of Civil Procedure.

3. Consequent to the service of summons for judgment, an application being is 12375 of 1999 was filed by the defendants for leave to defend and supported by Shri Sridhar Chitale, counsel for the defendant on the following pleas:

(a) The first objection of the defendants was about the territorial jurisdiction of this Court on the plea that the contract was entered into at Kollam, Kerala and the delivery of the goods were taken by the defendants at Tuticurion Port, Tamil Nadu. It is stated that the goods were thereafter taken to Panruti, Tamil nadu by the defendants and the plaintiff himself has admitted that the plaintiff went to Panruti for getting the payment. It was also said to be admitted that the plaintiff accompanied the goods to Panruti to take the demand draft. It is admitted by the defendants that the cheque No.695001 dated 31st July 1997 for Rs.12,27,994- was drawn on Indian Bank, Kollam and cheque No. 947124 dated 31st August 1997 for Rs.ten lakhs was drawn on Syndicate Bank, Mylapore, Madras and the demand draft for Rs.five lakhs was drawn on Karur Vyasya Bank Ltd., Chidambaram and was also sent to the plaintiff from Chidambaram itself. It is, Therefore, stated that in view of the above no part of the cause of action has arisen in Delhi and the suit deserves dismissal on this ground itself.

(b) On merits of the dispute it is stated that the cheques for Rs.12,27,994/- and Rs.10 lakhs were not given in consideration for payment for the raw cashew nuts but only by way of a guarantee or assurance for performance of their part of the contract and after the surveyors report and detailed examination of the bags of the cashew nuts it was found that the raw cashew nuts were damaged and hence unprocessable and in a distress sale, which the plaintiff agreed to, a sum of Rs.4,87,532/- being the distress sale price was secured. It is further stated that the cheque for Rs.12,27,994/- was not presented till the third week of October 1997, almost a period of two months after the goods were verified and found to be in bad condition. Similarly the second cheque for Rs.ten lakhs dated 31st August 1997 was presented only on 4th October 1997. The late presentation of the cheques demonstrated that the cheques were not for payment but were by way of assurance. It is further stated that the plaintiff had given defective goods and had not performed his part of the contract and, Therefore, the guarantee given to assure performance of such a contract by way of two cheques cannot be enforced. It is stated that the surveyors at the landing port clearly certified in their surveyor report dated 8th August 1997 (said to be received by the defendant on 11th August 1997) that the damage to the raw cashew nuts was beyond the acceptable 10 per cent at the landing port and the cheques were presented for encashment after the defendants realized that the raw cashew nuts

supplied by the plaintiff were damaged beyond 50 per cent of the supplied goods and after the plaintiff had received the demand draft for a sum of Rs. five lakhs from the defendants. It is further stated that the defendants contacted the surveyor over the phone and were informed that the percentage of defective nuts were found to be in excess than that certified at the loading port and immediately upon receiving of such information the defendants conveyed the same to the plaintiff who was present in Panruti and, Therefore, the plaintiff agreed to receive the payment after receipt of the Surveyor's Report. However, at the plaintiff's request a post dated cheque for Rs. ten lakhs as an assurance and not for any guarantee, was given on 10th August 1997 by the defendant No. 2 from his personal account. It was also stated that after getting the information from the surveyor on 8th August 1997 the defendant got suspicious and opened all 645 bags individually which process is stated to have taken a month and was found that 50 per cent of the materials kept at the bottom of the bags were of extremely bad quality and not processable. It is further stated that the plaintiff agreed to the defendants disposing of the defective material which was done by a distress sale. The defendants had thus made the payment as per the realized value from the distress sale to the defendant. It is stated that one lakh of rupees were spent for this purpose by employing about 100 labourers and only Rs. 4,87,532/- was received from the distress sale. Meanwhile the defendants had sent a payment of Rs. 5,00,000/- to the plaintiff on 26th August 1997. The defendants thereafter sent a debit note on 5th September 1997 for the value of the nuts found damaged and requested the plaintiff to square up the accounts and return the cheques. It is further averred that the plaintiff had agreed that he will not present the cheques.

In reply to the application for leave to defendant, the plaintiff through his counsel, Shri Manohar Lal, has asserted that the defendant had wrongly stated that the demand draft for Rs. 5,00,00/- was drawn on Karur Vyasya Bank, Chidambaram. In fact it was drawn on Karol Bagh, New Delhi Branch of the Bank thus making it payable at New Delhi which clearly gave the jurisdiction to this Hon'ble Court. This misstatement was said to be made to plead lack of jurisdiction in Delhi Courts. Furthermore the other significant feature of the reply to the application is that the debit note dated 5th September 1997 has not been stated to have been received by the plaintiff.

In so far as the question of the jurisdiction of this Court is concerned it is very clear that whatever may be the place of execution of the agreement, a part of the cause of action has clearly arisen in Delhi by making a part payment of rupees five lakhs by demand draft payable at Karur Vyasya Bank, Karol Bagh, New Delhi. Furthermore the two cheques for a sum of Rs. 12,27,994/- and Rupees ten lakhs were presented in Delhi and were dishonoured at Delhi; the agreement dated 6th July 1997 does not state where the disputes were to be adjudicated upon. It also does not divest the Delhi Courts of jurisdiction or vest it exclusively in Kerala or Tamil Nadu Courts. Thus it is very clear that the part of the cause of action has arisen in Delhi and the Delhi Courts have not been

divested of the jurisdiction. In this connection the learned counsel for the defendants has relied upon A.B.C. Laminart Pvt. Ltd. and Another Vs. A.P. Agencies, Salem, , to contend that the jurisdiction is only in a Tamil Nadu Court. Learned counsel has relied upon an observation in para 15 of the judgment where it has been held that "If the contract is to be performed, where it is made, the suit on the contract is to be filed there and nowhere else". The plaintiff has relied upon paragraph 22 of the aforesaid judgment to contend that as part of the cause of action arose in Delhi and there was no exclusionary clause ousting Delhi Courts" jurisdiction, the Delhi Courts would also have the jurisdiction.

The said para 22 of ABC Laminart Judgment (Supra) reads as under:-

"We having already seen that making of the contract was a part of the cause of action and a suit on a contract Therefore could be filed at the place where it was made.

.....Under the facts and circumstances of the case we hold that while connecting factor with Kaira jurisdiction was ensured by fixing the situs of the contract within Kaira, other jurisdictions having connecting factors were not clearly, unambiguously and explicitly excluded. That being the position it could not be said that the jurisdiction of the Court at Salem which court otherwise had jurisdiction under law through connection factor of delivery of goods thereat was expressly excluded."

The plea of the plaintiff that this court has territorial jurisdiction by virtue of the fact that part of the cause of action of payment of Rs. five lakhs and the dishonouring of the cheques has arisen at Delhi is clearly sustainable in view of the above position of law laid down in Para 22 of the above judgment. Consequently this plea of the defendant about lack of jurisdiction of Delhi Courts cannot be sustained at this stage in view of the observations in Para 22 of ABC Laminart Judgment (Supra) as there is no exclusionary cause accounting the jurisdiction of this Court. In light of this discussion even on the facts pleaded by the plaintiff in his plaint about the dishonour of cheques and encashment of bank drafts, the Delhi Court would clearly have jurisdiction and the judgment in Oil and Natural Gas Commission Vs. Utpal Kumar Basu and Others, to the effect that issue of territorial jurisdiction must be divided on the facts pleaded in the petition does not bar the plaintiff's claim.

In so far as judgment reported as Board of Trustees for the Port of Calcutta and another Vs. Bombay Flour Mills Pvt. Ltd. and another, is concerned, the judgment is based on the fact that no part of the cause of action arose at Bharatpur and Therefore, the order passed by District Court. Bharatpur was without jurisdiction. In the present case I have already recorded a finding that the cheques were dishonoured in Delhi and more so Rs.5 lacs by way of demand draft was made payable at the Karur Vyasya Bank, Karol Bagh Branch, New Delhi and hence part of cause of action arose at Delhi and the said judgment, Therefore, cannot have any application.

After considering the above averments and the plea of jurisdiction it is clear that the pleas made in the application it is clear that the pleas made in the application are an after thought and have been made with a view to avoid the consequences of the Agreement dated 6.7.97. It is an admitted fact that the Surveyor's Report is stated to have been prepared on 8th August 1997. It is not possible to prima facie believe that the same was received by the defendants on 11th August 1997. It is very strange that in a matter of great urgency where the payment was made on 10th August 1997; by issuing cheques for the sum of Rs.10 lacs dated 31.8.1997, the defendant should have languidly waited for three days to receive the Surveyor's Report. It is further not stated in the application that whether the report was sent by post or it was delivered by hand on 11.8.97. It was merely stated that the report dated 8th August 1997 was received by the defendants on 11th August 1997. Furthermore a certificate of satisfactory quality and quantity of the goods was given on 10.8.97 by the defendant to the plaintiff. The alleged receipt of the Surveyor's Report on 11.8.97 without specifying the mode of transmission is obviously to get over the effect of the issuance of a cheque and certificate of fitness by the defendant on 10.8.97. Furthermore, the defendant avers that on 8.8.97 he had a telephonic talk with the Surveyor who communicated to him the unsatisfactory nature of goods. This knowledge of the state of goods on 8.8.97 makes the issuance of the certificate dated 10.8.97 by the defendant even more curious. Furthermore having come to know at least on 11.8.97 that the supplied goods were defective, no Explanation is forthcoming why a bank draft for Rs.5 lacs was issued on 26.8.97 by the defendant to the plaintiff - particularly when the amount payable was only Rs.4,87,532/- minus rupees on lakh as labour charges. It interesting to note that even the Surveyor's Report stated to have relied upon by the defendants avers that the total damage was 17.7 per cent. The defendants in order to avoid the consequence thereafter pleads that on a detailed examination of the goods which took about 4 weeks, the goods were found to be damaged beyond 50 per cent. Even this period of 4 weeks of detailed examination has been stated with a view to avoid the consequences of the bank draft issued on 26.8.97 for Rs.5 lacs. No reason is given why a Surveyor would not give his initial Report after a detailed examination and why it required 4 weeks for the defendant to survey goods himself when Rs.5 lacs were released within the said period of 4 weeks to the plaintiff. The certificate dated 10th August 1997 given by the defendant No.2, Mr. G.Vishwanathan is categorical and reads as under:-

"I am fully satisfied with the quality and quantity of the goods and no question about their quality will arise later on."

Even the letter dated 27.8.97 sent by the defendant No.1 enclosing the bank draft on 27.8.97 states that the balance will be cleared as soon as the defendant's Kollam's buyer makes the payment. Furthermore nothing has been brought on record to show that the alleged credit note dated 5.9.97 detailing the total damages was ever sent to the plaintiff. Furthermore even though the defendant knew by middle of August that about 50% goods were damaged no

communication has been said to have been sent to the plaintiff in this regard, till the plaintiff asked for the balance payment.

Thus the defendant's case in application for leave to defend is totally contradicted by its own letter dated 10.8.97 and 27.8.97. Prima facie this case set up in the application for leave to defend is an afterthought and set up to avoid the consequences of the agreement and issuance of cheque and is "moonshine" as per the following position of law laid down in Mechelec Engineers and Manufacturers Vs. Basic Equipment Corporation, :

"In Kiranmoyee Dassi and another Vs. Dr. J. Chatterjee , Das, J., after a comprehensive review of authorities on the subject, stated the principles applicable to cases covered by Order 17 C.P.C. in the form of the following propositions:

(a) If the defendant satisfies the court that he has a good defense to the claim on its merits the plaintiff is not entitled to leave to sign judgment and the defendant is entitled to unconditional leave to defend.

(b) If the defendant raises a triable issue indicating that he has a fair or bona fide or reasonable defense although not a positively good defense the plaintiff is not entitled to sign judgment and the defendant is entitled to unconditional leave to defend.

(c) If the defendant discloses such "facts as may be deemed sufficient to entitle him to defend, that is to say, although the affidavit does not positively and immediately make it clear that he has a defense, yet, shows such a state of facts as leads to the inference that at the trial of the action he may be able to establish a defense to the plaintiff's claim the plaintiff is not entitled to judgment and the defendant is entitled to leave to defend but in such a case the court may in its discretion impose conditions as to the time or mode of trial but not as to payment into court or furnishing security.

(d) If the defendant has no defense or the defense set up is illusory or sham or practically moonshine then ordinarily the plaintiff is entitled to leave to sign judgment and the defendant is not entitled to leave to defend....."

Thus upon going through the above pleas of the defendants I am satisfied that leave to defend should be granted to the defendants upon their depositing the principal sum of Rs.8,49,069/- with the Registrar of this Court within four weeks from today.

The application stands disposed of accordingly.

IA No.8156/99

In view of the finding made in the above application, there is no merit in this application under Order VII Rule 10 CPC and the same stands dismissed accordingly.

Suit No.2796/98.

Written statement be filed within 6 weeks and replication, if any, be filed within 4 weeks thereafter.

List before the Joint Registrar on 26th of April, 2001.