
(2012) 02 CAL CK 0018

In the Calcutta High Court

Case No : GA No. 1761 of 2010, C.S. 135 of 2010

Siddhi Vinayak Industries Pvt. Ltd. and Another

APPELLANT

Vs

Maresh Goyal and Others

RESPONDENT

Date of Decision : 02-02-2012

Acts Referred:

Citation : (2012) 02 CAL CK 0018

Hon'ble Judges : Harish Tandon, J

Bench : Single Bench

Advocate : A. Kankani and Mr. A. Bajoria, for the Appellant; Utpal Bose, for the defendant No. 1 and 2 and Mr. D.N. Sharma, for the defendant No. 5 and 6, for the Respondent

Judgement

Harish Tandon, J.—The petitioner No. 1 imported. RBD palm oil (edible grade) and sold 500 mt. of the said oil on high seas sale with the petitioner no. 2 on 1st October 2008. The petitioner no. 1 claimed that the petitioner no. 2 is its sister concern and both are carrying on the business from their registered office at 24A Shakespeare Sarani, Kolkata - 700 071. Subsequently the petitioner no 2 entered into another high seas sale agreement dated 1st October 2008 with the respondent no. 5 being the proprietorship concern of the respondent no. 6. Bill of lading was also executed on the basis of the said high seas sale agreement by the petitioners in favour of the said respondent no. 5.

2. However it is contended by the petitioners that the respondent no. 1 and 2 had a long standing business relationship with the petitioners and the respondent no. 3 and 4 are the brokers of the edible oils and had been acting in such capacity for and on behalf of the petitioners and acquired confidence and trust of the petitioners. The said respondents subsequently approached in such capacity to the petitioners indicating that the respondent no. 1 and 2 are interested in purchase of 500 mt. of the said edible oil, since the petitioner had a previous dealing with the aforesaid respondents and as such there was no hesitation in accepting the said proposal of the respondent no. 3 and 4 and ultimately the

price was finalized at Rs. 3,75,000/- per mt. CIF, Kandla. Thereafter, on a representation of the respondents no. 1 and 4 that the respondent no. 5 is a business concern of the respondent no. 1 and 2 and the respondent no. 6 and as such the high seas sale agreement could be entered into with the respondent no. 5 which was accepted by the petitioner as they could not doubt the genuineness of the representation of the respondent no. 1 and 4 because of the long standing business relationship. Subsequently the petitioners came to know that the aforesaid representation was false as the respondent no. 5 has no financial status and is the proprietorship concern of the respondent no 6. It is alleged that the aforesaid respondents have colluded and hatched a conspiracy against the petitioner by their fraudulent act; particulars whereof are set out in the plaint. On the aforesaid facts it is further alleged in the plaint that upon execution of the high seas sale agreement the bill of lading was endorsed and necessary instruction was issued for delivery of the said 500 mt. of palm oil to the respondent no. 5. It is further alleged that out of 500 mt., 425 mt. (approx.) was taken delivery without payment of the agreed rate in terms of the said high seas sale agreement which constrained the petitioner no. 1 to issue a letter of cancellation of the delivery order on 22nd October 2008.

3. It is hereby made clear that the aforesaid facts recorded herein is a reproduction of the allegations made in the plaint which is yet to be proved on trial. The aforesaid facts are narrated for the purpose of the present application and shall not be construed to be a finding of this court nor shall have any impact at the time of considering another inter locutory application or at the time of final disposal of the suit.

4. The petitioner no. 2 thereafter filed a suit being CS 268 of 2008 against the respondent no. 6 upon obtaining a leave under clause 12 of the letters patent. Since the goods being perishable in nature, prayer was made for appointment of the receiver for the purpose of sale of 75 mt. of the palm oil. On 12th January 2009, an order was passed to hand over the said goods to the respondent no. 6 who showed his readiness and willingness to pay the price at the agreed rate and the price value of the said 75 mt. of the palm oil was directed to be deposited with the Registrar, Original Side of the High Court at Calcutta.

5. Thereafter the petitioner no. 2 filed an application for release of the deposited amount with the Registrar, Original Side, High Court at Calcutta whereas the respondent no. 6 filed an application for revocation of the leave granted under clause 12 of the letters patent. Another application was taken out by the petitioner no. 1 for its impleadment in the said proceeding.

6. The aforesaid four applications viz. an application for appointment of receiver, an application for revocation of the leave under clause 12 of the letters patent, an application for release of the deposited amount with the Registrar, Original Side and an application for addition by the petitioner no. 1, were taken up on 25th November 2009 wherein it is held that the petitioner. No. 2, the plaintiff of the said suit, could not disclose the cause of action and the leave under clause

12 was revoked, as a consequence whereof, the plaint was rejected. It is further observed that the amount deposited with the Registrar, Original Side shall remain with it for a period of six months from date and if within the period, any person entitled to the said amount produces an order, the Registrar will act on the basis of such order, in default the defendant therein i.e. respondent no. 6 herein was granted liberty to seek and obtain the refund of the money deposited by him. The present suit is initiated by the petitioners and the short facts in the plaint pleaded has already been narrated hereinbefore.

7. Now in the present application the petitioners have prayed for refund of the amount deposited with the Registrar, Original Side, High Court, Calcutta in terms of an order dated 12th January 2009 passed in an earlier suit being CS 268 of 2008. The petitioners intend to jettison their petitions on the basis of the facts as indicated hereinabove which has been opposed primarily by the respondent no. 5 and 6.

8. For proper and effective adjudication it would require the reproduce the salient features of the defence made in the affidavit. In paragraph 15 and 16 of the said opposition the respondent no. 6 denies to have signed in the high seas sale agreement but in paragraph 19 he says that the bill of lading executed in his favour is not the same as is annexed by the petitioners. In paragraph 20 of the affidavit-in-opposition it is admitted that the bill of lading was endorsed in favour of the respondent no. 5 and 6. The said respondent further proceed to state that the petitioner has given wrongful and illegal instruction for stoppage of the delivery to the said respondents.

9. The respondent no. 1 and 2 denied their involvement in the transaction and have pleaded ignorance of any such agreement with the respondent no. 5 and 6.

10. On perusal of the relief claimed in the instant petition and the allegations made in the plaint the respondent no. 1- 4 has hardly anything to submit and as such this court does not intend to lay any emphasis on their submission.

11. At the hearing of the instant application it is specifically contended by the respondent n o. 5 and 6 that they never took delivery of 425 mt. of the palm oilen oil but have incurred expenditure of Rs. 10 lakh (approx.) for custom duties and clearances, therefore they have a lien over the goods. It is further contended that the petition is a ground in support of the notice of motion by pointing out of the prayer made in the notice of motion which does not include the prayer made in the said petition.

12. By refuting the aforesaid contention it is said by the petitioners that the procedural irregularities as pointed out is curable defects for which the application cannot be rejected. It is lastly contended that the respondent no. 5 and 6 could not deny the title of the petitioners and the aforesaid objection has no semblance of truth in it.

13. From the rival pleadings and submissions this court does not find that there

is any dispute that the petitioner no. 1 imported the palm oil (edible grade). Although the petitioner no. 1 took a specific stand that it executed a high seas sale agreement with the petitioner no. 2 on 1.8.2008 who in turn executed a further high seas sale agreement with the respondent no. 5 on the same date but the same has been denied by the respondents. The respondents have not come forward with the counter case in their opposition relating to the import of the said goods by any other person other than the petitioners. Interestingly, in paragraph 15 of the said affidavit-in-opposition it is said that the purported high seas sale agreement dated 1st October 2008 executed between the petitioner no. 2 and the respondent no. 5 does not bear the signature of the respondent no. 6 and is not the valid one but did not aver anything relating to their entitlement of 500 mt. of palm oil. Interestingly, in paragraph 19 the respondents no. 5 and 6 state that the bill of lading which is annexed to the petition does not bear the signature of the respondents no. 6 but in the second sentence of the paragraph 20 it is said that the petitioner no. 1 endorsed the bill of lading along with the relevant invoice standing in its name to the respondents no. 5 and 6. The third sentence of paragraph 20 proceeds that the delivery order was issued by the petitioner no. 1 in favour of the respondents no. 5 and 6 who has spent Rs. 10 lakh for clearance of the goods which was agreed to be adjusted against the price of the goods. The said respondents in one hand denies any high seas sale agreement on 1.8.2008 as well as the issuance of the bill of lading annexed to the petition but on the other hand, agreed the execution of the issuance of the bill of lading by the petitioner no. 1 in their favour. In commercial transaction without reserving the price and its profitability which according to the petitioner was done with the high seas sale agreement, the bill of lading cannot be endorsed by the seller in favour of the buyer.

14. Even the court in its order dated 12th January 2009 passed in an earlier suit recorded that the said respondents are ready and agreed to pay the agreed rate for the said quantity of 75 mt. of palm oil. The entire affidavit-in-opposition is silent as to the agreed rate. There is no other agreement forthcoming from where it can be said that the parties have agreed on some other terms and conditions except the said high seas sale agreement dated 1st October 2008. On the meaningful reading of the said high seas sale agreement dated 1st October 2008 apart from the price as well as the quantity, the buyer has to arrange for obtaining the delivery of the goods from the Customs and Port authorities upon making the custom, port charges, warfages, handling and transportation charges etc. Furthermore it is admitted that the petitioner no. 1 wrongfully issued an instruction for stoppage of delivery which could not have any bearing or impact or relevancy in absence of any contractual relation between the petitioner no. 1 and the said respondents. There is no averment in the opposition that the price of the goods have been paid by the petitioner but the only defence taken is the payment of Rs. 10 lakh towards custom duties and clearances which under the said high seas sale agreement is agreed to be paid by the buyer i.e. respondent no. 5 and 6.

15. While revoking the leave under clause 12 and rejecting the plaint of suit no. 268 of 2008 this court observed in unequivocal terms that there was indeed an agreement for sale of 500 mt. of palm oil oil by the petitioner no. 2 to the respondent no. 6.

16. Therefore I have no hesitation in my mind to hold that the petitioners are entitled to the amount deposited with the Registrar, Original Side, High Court, Calcutta in terms of an order dated 12th January 2008 in suit no. 268 of 2008.

17. Before passing an order on the basis of the finding made hereinabove, the other point which is raised and agitated by the said respondents is required to be dealt with. By placing the notice of motion it is contended that the same does not contain any prayer for refund of the money but is the reproduction of the prayer of the suit. On perusal of the notice of motion as well as the instant petition there is no doubt that the prayers are couched differently. Chapter 20 Rule 3 and 7 of the Original Side Rules of the High Court at Calcutta provides that an application can either be moved by the applicant before the court directly or file the same in the Registrar office for taking out a notice of motion together with the affidavit or affidavits of service and the affidavits in support thereof. It further appears that an application is nothing but a ground of notice of motion. It is not a case of filing an application without accompanying a notice of motion but is a case where there is a defect in the prayer made in the petition and the notice of motion. In case of Abdul Gani Vs. David Jacob reported in 57 CWN 313 this court held :

The taking out of a summons or a notice of motion under the practice of this Court is not the making of an application. It is an act of the party and not an act of the Court. The application is however made, when the Court takes cognizance of the application, and acts upon it.

18. Therefore, the notice of motion is simply a formal warning that an application will be made which itself has come simultaneously. The moment the application is made the court took a cognizance thereof either by passing an interim order, direction for affidavits or sometimes adjourning and or postponing the hearing of the said application. In the instant case the application was being adjourned from time to time and the direction for affidavits were also made but the point as to the disparity in the prayers made in the notice of motion and the said application, was never taken.

20. Subsequently the Division Bench in case of Vijay Kumar Khanna Vs. Kanai Chandra Pal, held that the taking out of the notice of motion under Chapter 20 of the Original Side Rules is directory in nature and not mandatory in these words :

16. Therefore, there cannot be any doubt that the normal procedure is that application has to be taken out by way of a notice of motion and such notice to be taken out not less than four clear days and in case of short service of such notice of motion leave has to be taken from the Court. But where the matter is so urgent, in that case the Court may make an order on an application

dispensing such service of notice of motion at that point of time. It may happen that a suit has been dismissed for want of prosecution and the Counsel may appear before the Court and makes an application for restoration of the same, the Hon'ble Judge after hearing him and the defendant may set aside the dismissal order and restore the proceedings. It is not necessary to take out any notice of motion on such application at that point of time. Therefore, it has to be construed that the application was entertained by the Court dispensing the said formalities. Even, in some cases, we have found that a party may come before the Court and moves an application which cannot wait even for a day and files an application without taking out a notice of motion and the Court entertains such application and directs him to serve a notice of motion to the other side so that the other side can appear before the Court on the returnable date and submissions can be made by them on such date. Therefore, it is clear that service of notice of motion is nothing but a notice to the parties who can appear before the court and can present his case. Therefore, it is a direction of the Court on the applicant to serve such notice to the other side. Therefore, we have to come to the conclusion that the taking out of a notice of motion under Chapter XX of the Original Side Rules is directory in nature.

21. Once the court have entertained the application at the very threshold in the absence of any objection as to the defective notice of motion, such objection should not weigh much so as to entail the dismissal of the application at the stage of granting the final relief thereupon. Had the said objection been taken at the very nascent stage, the court is not denuded of its power to direct the parties to file notice of motion subsequently which could have cured the defects. After the court has taken cognizance of an application and pass several orders thereupon such objection is not tenable at the final stage of the proceeding. I am, therefore, of the view that the provision under Chapter 20 of the Original side Rules being directory in nature as held by the Division Bench of this court in case of Vijoy Kumar Khanna (supra) the application cannot be dismissed for defect in the prayer. Since the prayer in an application is sufficiently indicative of the relief claimed by the petitioners the respondents are well aware as to the prayer of the petitioners. I do not find any merit in the said objection as well.

22. In view of the finding made hereinabove, the application is allowed. The Registrar, Original Side, High Court, Calcutta is directed to hand over the said sum of Rs. 28,34,625/- to the petitioners within six weeks from date. Together with accrued interest thereupon if the said amount is kept in a fixed deposit

23. There shall be no order as to costs.

24. Urgent Photostat certified copy of this order, if applied for, be given to the parties on priority basis.

Harish Tandon, J.

LATER

25. After the delivery of the judgment the learned Advocate appearing for the respondent nos. 5 and 6 prays for stay of operation of this order. The same is considered and I do not find any ground to pass an order of stay. The same is therefore rejected.