(2011) 09 DEL CK 0159

In the Delhi High Court

Case No : IA No. 13244 of 2010 in CS (OS) 1184 of 2007

Spread Info Tech Consultants Pvt. Ltd. APPELLANT

Vs

ZTE Kangxun Telecom Company India Pvt. Ltd. and Another RESPONDENT

Date of Decision : 29-09-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 12 Rule 6, Order 7 Rule 11, 151

Citation : (2011) 09 DEL CK 0159

Hon'ble Judges : A.K. Pathak, J

Bench : Single Bench

Advocate : Gaurav Mitra and Saurabh Seth, for the Appellant; Rajiv Nayar Bishwajit Dubey and Anushree Tripathi, for the Respondent

Final Decision : Dismissed

Judgement

A.K. Pathak, J.—By this application under Order 7 Rule 11 read with Section 151 of the Code of Civil Procedure, 1908 (CPC for short) Defendants have prayed that the plaint be rejected.

2. Plaintiff has filed this suit against the Defendants for recovery of Rs. 3,66,85,008/- together with pendente lite and future interest @ 15% per annum.

3. Briefly stated, facts of the case as averred in the plaint and relevant for the purpose of disposal of this application are that Plaintiff entered into a Cooperation Agreement dated 12th August, 2004 with the Defendants; Agreement was executed on 14th August, 2004. In terms of the Agreement, Plaintiff was required to make all necessary arrangements and various other activities with the customers mainly Atlas Interactive India (Pvt.) Ltd. (for short AIIPL) for successful bid for the Defendants'' project. Defendants had agreed to pay a total 7% of FOB price towards fee of the Plaintiff for the said work. Initially, it was agreed that the Defendant No. 2 will pay to the Plaintiff the fee equal to 3.5% FOB value of the order within 30 days of the receipt of contract order. The balance 3.5% was payable within 30 days after Defendant No. 2 recovered

payment from the bank. It was further agreed that the aforesaid fees and conditions were applicable in respect of all future contracts with AIIPL. Plaintiff procured orders for Defendants from AIPL and a contract mainly No. AIIPL/ADSL/01-04 dated 16th August, 2004 was entered into between AIIPL and Defendant No. 2 and obligation of Plaintiff towards the Cooperation Agreement dated 12th August, 2004 stood completed. Thereafter, Plaintiff sent fee bill to Defendants by email with an invoice No. 2004/03-05 dated 1st October, 2004 for US$ 324414 towards fee at 3.5% of total contract price of US$ 10587632. Subsequently, on 18th March, 2005 amendment to the main agreement was entered into between the Plaintiff and Defendant No. 2 whereby contract price was fixed at US$ 92688971. Amendment was also made in respect of Clause 6 pertaining to payment to the cooperator whereby it was agreed that fee shall be paid by the Defendants to Plaintiff in two parts i.e. 3.3% of the total contract price within next 30 days of the signing of the Amendment Agreement and balance fee of 3.7% will be payable within 30 days after Defendant No. 2 recovers payment from the bank, as per delivery schedule of AIIPL. As per the purchase order and contracts of 2nd December, 2004 placed by AIIPL, goods were delivered by Defendant No. 2 by the end of March, 2005, thus, even the balance payment of 3.7% became due within 30 days of delivery. Accordingly, Plaintiff raised two bills on 19th April, 2005 and 1st May, 2005 respectively. However, Defendants did not make payments despite repeated requests of the Plaintiff. Legal notice dated 5th February, 2007 was served but payment was not made. Hence the suit for recovery.

4. Para 19 of the plaint relates to "cause of action" and reads as under:

That the "cause of action" arose on 14th August, 2004 when the Defendants had entered into an Agreement with the Plaintiff company and promised to pay the aforesaid commission. The cause of action arose when as per Agreement, the goods were transported by Defendant No. 1 to the customers mainly Atlas Interactive India (P) Ltd. The cause of action arose when the official of the Defendants had asked for the details of the bills from the Plaintiff, which were duly furnished and whatever was required to be done was done by Plaintiff. The cause of action further arose on each date, when the Plaintiff demanded the amount as mentioned, but the Defendant failed to pay the same. The cause of action further arose when the Plaintiff issued legal notices dated 5th February, 2007 and 31st March, 2007 to the Defendants which were duly received by them, but they have failed to pay the same and the cause of action is continuing one, as the Defendants have failed to pay the said amount.

5. It may be noted here that after Defendants filed their written statement, Plaintiff had moved an application under Order 12 Rule 6 for judgment on admission, which has been dismissed by this Court vide order dated 9th August, 2010.

6. Defendants have now filed this application seeking rejection of plaint on the ground that plaint does not disclose any cause of action, inasmuch as, Plaintiff

has suppressed material facts. Learned Senior Counsel has contended that the Plaintiff''s case is based (a) on the Cooperation Agreement dated 12th/14th August 2004, entered into between the Plaintiff and Defendants, (b) Amendment Agreement dated 18th March, 2005. Both these Agreements are null and void and unenforceable. As on 12th August, 2004 Plaintiff company was not in existence. Certificate of Incorporation clearly shows that it has been incorporated only on 3rd September 2004. Plaintiff cannot claim any money pursuant to the Agreement, which had been executed even before its incorporation. Reliance has been placed on Andhra Pradesh Tourism Development Corpn. and Another Vs. Pampa Hotels Ltd., . As regards Amendment Agreement dated 18th May, 2005, it is contended that the same is an unsigned document having no legal force. In nutshell, contention of learned Senior Counsel is that suit is without any cause of action and deserves to be rejected. By placing reliance on Abdul Gafur and Another Vs. State of Uttarakhand and Others, it has been canvassed that a meritless and vexatious litigation should be nipped in the bud.

7. Per contra, Learned Counsel for the Plaintiff has contended that Cooperation Agreement dated 12th/14th August, 2004 was executed by Ravi Chauhan, Promoter of the Plaintiff-company, thus, is binding between the parties. Even though company had been formally incorporated on 3rd September, 2004 all the agreements executed by the Promoter of the Plaintiff-company would bind parties to such Agreement(s) after company was formally incorporated in the month of September, 2004. Thus, Defendants cannot be allowed to wriggle out from their obligations arising out of the Cooperation Agreement. Reliance has been placed on the The Weavers Mills Ltd., Rajapalayam Vs. Balkis Ammal and Others, , The Sree Meenakshi Mills, Limited Vs. Calliangee and Sons and Others, and Asian Hotels Ltd., Bhikaji Cama Place Vs. D.D.A. Vikas Minar, I.P.Estate, New Delhi, . As regards Amendment Agreement dated 18th March, 2005, it is contended that in reply to I.A. No. 16879/2009 Defendants have admitted the existence of this document, though in the written statement they have disputed this agreement and have alleged that the same was never executed. Thus, it is subject matter of trial as to whether Amendment Agreement was executed between the parties or not in view of the contradictory stand taken by the Defendants in this regard. At this stage, Amendment Agreement cannot be ignored. It is further contended that Plaintiff has placed on record emails exchanged between Mr. Ravi Chauhan, Promoter of the Plaintiff and Defendants'' employee, with regard to payment of Plaintiff''s fee. Categorical averments have been made in the plaint in this regard which clearly indicate that plaint discloses sufficient cause of action for filing the suit for recovery.

8. It would be worthwhile to state here that an application under Order 7 Rule 11 of the CPC for rejection of plaint has to be decided on perusal of plaint and documents filed along with it. A plaint cannot be rejected on the basis of allegations made by the Defendant in his written statement or in an application for rejection of the plaint. The court has to peruse the plaint as a whole to find out whether it discloses a cause of action or not. If the plaint discloses cause of

action it cannot be rejected by the court exercising the powers under Order 7 Rule 11 of the Code. Whether the plaint discloses cause of action is a question of fact which has to be gathered on the basis of averments made in the plaint and taking those averments to be correct as a whole together with the documents filed along with the plaint. If the case is based on documents the same have also to be read along with the averments made in the plaint to find out if there is any cause of action for filing the suit.

9. In Hardesh Ores Pvt. Ltd. Vs. Hede and Company, , Supreme Court has held as under:

25. The language of Order 7 Rule 11 CPC is quite clear and unambiguous. The plaint can be rejected on the ground of limitation only where the suit appears from the statement in the plaint to be barred by any law. Mr. Nariman did not dispute that "law" within the meaning of clause (d) of Order 7 Rule 11 must include the law of limitation as well. It is well settled that whether a plaint discloses a cause of action 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 whether the averments made in the plaint, if taken to be correct in their entirety, a decree would be passed. The averments made in the plaint as a whole have to be seen to find out whether Clause (d) of Rule 11 of Order 7 is applicable. It is not permissible to cull out a sentence or a passage and to read it out of the context in isolation. Although it is the substance and not merely the form that has to be looked into, the pleading has to be construed as it stands without addition or subtraction of words or change of its apparent grammatical sense. As observed earlier, the language of Clause (d) is quite clear but if any authority is required, one may usefully refer to the judgments of this Court in Liverpool and London S.P. and I Asson. Ltd. Vs. M.V. Sea Success I and Another, and Popat and Kotecha Property v. State Bank of India Staff Association (2005) 7 SCC 210.

10. In Abdul Gafur''s case (supra), Supreme Court has held that plaint must contain material facts. When the plaint read as a whole does not disclose material facts giving rise to a cause of action which can be entertained by a civil court, it may be rejected in terms of Order 7 Rule 11 of the Code. Similarly, a plea of bar to jurisdiction of a civil court has to be considered having regard to the contentions raised in the plaint. For the said purpose, averments disclosing cause of action and the reliefs sought for therein must be considered in their entirety and the court would not be justified in determining the question, one way or the other, only having regard to the reliefs claimed dehors the factual averments made in the plaint.

11. In the backdrop of above settled legal position, overall reading of plaint shows that the case is based mainly on two documents i.e. Cooperation Agreement dated 12th/14th August, 2004 and Amendment Agreement dated 18th March, 2005. As per the Plaintiff, it is entitled to suit amount, in terms of

these two documents. Apart from the above agreements, reliance has also been placed on certain emails allegedly exchanged between the representatives of the parties. Emails exchanged between the parties would be relevant only if fee can be said to be payable to Plaintiff, in terms of Cooperation Agreement read with Amendment Agreement. In case both these Agreements are nonest and unenforceable in the eyes of law then no relevance can be attached to the emails. The whole case of the Plaintiff stands on the foundation of Cooperation Agreement and Amendment Agreement. It is not in dispute that Plaintiff company came into existence only on 3rd September, 2004. This fact is also evident from the Certificate of Incorporation. Admittedly, Cooperation Agreement in this case is dated 12th/14th August, 2004, that is, much prior to the date when Plaintiff-company came into existence. In Andhra Pradesh Tourism Development Corporation (supra), company was incorporated on 9th April, 2003; whereas Lease Agreement, and Management Agreement reliance whereupon was placed to contend that there was an Arbitration Agreement between the parties, was executed on 13th March, 2002. In these facts, Supreme Court held "admittedly the Respondent was not in existence on that date, as it was incorporated more than a year thereafter on 9th April, 2003; and that when it is alleged that the parties to the petition had entered into contracts which contained Arbitration Agreements on 30th March, 2002 and one of the parties thereof had not even come into existence on that date, obviously there was no contract much less any Arbitration Agreement between the parties."

12. In this case also Cooperation Agreement is dated 12th/14th August, 2004; whereas Plaintiff-company was incorporated on 3rd September, 2004 and was not in existence at the time when the Agreement was executed, thus, it can safely be concluded that the agreement is nonest in the eyes of law and will not bind the Defendants. Perusal of Cooperation Agreement clearly shows that it has been executed by the Plaintiff-company through its Director Ravi Chauhan. It has no where been mentioned that the agreement was being executed by Ravi Chauhan as promoter of M/s. Spred Info Tech Consultants Pvt. Ltd., under incorporation. Judgments referred and relied upon by the Plaintiffs'' counsel are in the context of different facts and are not applicable to the facts of the present case. In Asian Hotels (supra), bid for purchase of flat was made by the promoter on behalf of the company under incorporation. In Weavers Mills''s case (supra) also immovable properties were purchased by the promoters of company under incorporation. In the present case, perusal of agreement in no uncertain terms makes it clear that agreement was executed by the Plaintiff-company through its Director and not by the promoter of company under incorporation. Thus, Cooperation Agreement will not give rise to any cause of action for recovery of amount claimed in the suit.

13. As regards Amendment Agreement dated 18th March, 2005 is concerned, the same is an unsigned document. During the course of hearing counsel for the Defendants has admitted that signed agreement is not in possession of Plaintiff. However, in view of the specific averments made in the plaint regarding

execution of the Amendment Agreement and admission by the Defendants in reply to the I.A. No. 16879/2009 this document cannot be ignored at this stage; even though, in the written statement execution of this document has been disputed. Whether Amendment Agreement was executed or not, in view of the shifting stand taken by the Defendants in the written statement vis-a-vis reply to the application is subject matter of trial. In the reply Defendants have stated "even the amendment effected in the Cooperation Agreement on 18th March, 2005 did not alter the obligations posed on the Plaintiff/applicant, even though it altered the payment obligation/structure of the fees to the Plaintiff/applicant by Defendant No. 1." It is true that while disposing of the application under Order 7 Rule 11 CPC the court has only to look averments made in the plaint and the documents filed along with it and have not to take into account defence of the Defendants and the averments made in the application under Order 7 Rule 11 CPC but at the same time, the admissions made by the parties cannot be ignored. Thus, the Amendment Agreement dated 18th March, 2005 cannot be taken out of consideration at this stage, being an unsigned document.

14. For the foregoing reasons, it cannot be said that plaint does not disclose any cause of action and deserves to be rejected.

15. Application is dismissed.

