

(2004) 07 CAL CK 0030
In the Calcutta High Court
Case No : C.O. No. 2739 of 2002

Sri Swapan Karak

APPELLANT

Vs

Allahabad Bank and Others

RESPONDENT

Date of Decision : 22-07-2004

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 7 Rule 11, Order 7 Rule 11(1)
Constitution of India, 1950 — Article 227

Citation : (2004) 3 CALLT 631 : (2005) 4 CHN 391

Hon'ble Judges : Arun Kumar Mitra, J

Bench : Single Bench

Advocate : Pijush Dutta and Bidyut Kanti Khanna, for the Appellant; A.K. Routh, Sudeep Palchoudhury, Amitava Dasgupta and Arpita Biswas, for the Respondent

Judgement

Arun Kumar Mitra, J.—This is an application under Article 227 of the Constitution of India which challenges order dated September 10, 2002 passed in the Case No. DRAT/CAL/8/2002/874 by Hon'ble Mr. Justice Ronojit Kumar Mitra, Chairperson, Debts Recovery Appellate Tribunal, Calcutta affirming the order dated 15th May, 2002 passed by the learned Officer, Calcutta Debts Recovery Tribunal No. 2 in T.A. No. 665 of 2001.

2. The Allahabad Bank authorities submitted a claim against the petitioner before the Calcutta Debts Recovery Tribunal No. 2. The said claim case was registered as O.A. No. 149 of 1995.

3. In the said claim case the petitioner filed an application under Order VII, Rule 11 of the Code of Civil Procedure. The said application was rejected. The petitioner moved this High Court on an application under Article 227. The High Court passed an Order on the said application under Article 227 and observed that since there is appellate authority over the Tribunal, the petitioner should prefer appeal before the said authority.

4. Accordingly, the petitioner preferred Title Appeal No. 665 of 2001 before the

appellate authority. The Bank contested and the Appellate authority after hearing the learned counsel for the parties affirmed the order passed by the learned Tribunal by the judgment delivered on September 10, 2002 and the appellate Tribunal dismissed the appeal with cost assessed at Rs. 5,100/-.

5. Against the said judgment and order the petitioner has come up before this Court. According to the petitioner, both the learned Tribunal as well as the learned appellate authority went on wrong when dismissing the application for the petitioner filed under Order VII, Rule 11 of the Code of Civil Procedure.

6. Mr. Dutta, the learned counsel for the petitioner submitted that the complaint petition filed by the Bank does not disclose any cause of action and as such the application should have been allowed and should not have been rejected summarily.

7. The learned senior counsel for the petitioner also submitted that without considering the point of limitation the learned Tribunal as well as the learned appellate authority irregularly exercised their jurisdiction by observing that Limitation Act applies in the instant case.

8. Summarily, it is the case of the petitioner that the limitation aspect insofar as the filing of the Bank claim is concerned, the Tribunal and the appellate authority should have considered the provisions laid down in the Debt Recovery Tribunal Act.

9. The specific contention which has been made by the learned senior counsel for the petitioner is that the claim petition does not make out any cause of action and as such the said claim petition should have been rejected.

10. The learned counsel submitted that the application filed by the petitioner before the Tribunal under Order VII, Rule 11 of the CPC should have been allowed by rejecting the claim.

11. The provisions of Order VII, Rule 11 of the CPC is quoted herein below:

"Rule 11. Rejection of plaint - The plaint shall be rejected in the following cases:

(a) where it does not disclose a cause of action;

(b) where the relief claimed is undervalued, and the plaintiff, on being required by the Court to correct the valuation within a time to be fixed by the Court, fails to do so;

(c) where the relief claimed is properly valued, but the plaint is written upon proper insufficiently stamped, and the plaintiff, on being required by the Court to supply the requisite stamp-paper within a time to be fixed by the Court, fails to do so;

(d) where the suit appears from the statement in the plaint to be barred by any law".

12. The said provisions of the CPC in its Clause (a) provides for rejection of the claim where it does not claim cause of action.

13. On scrutiny of the claim petition filed by the Bank authorities before the Tribunal which is annexure to this revisional application, it does not appear to this Court that no cause of action was made out by the Bank authorities. It may be that in a particular Paragraph, cause of action has been specified but if the entire claim petition is scrutinized, it will appear that cause of action was there and cause of action was made out in the claim petition of the Bank filed before the Tribunal.

14. It is a settled proposition of law that when a plaint is to be rejected under Order VII, Rule 11 is to be seen that whether on plain reading of the plaint it disclose that there is no cause of action, then and then only the plaint can be rejected. Reference may be made in this context to a decision of the Hon'ble Apex Court reported in State of Orissa Vs. Klockner and Company and Others,

15. The relevant Paragraph 25 of the judgment is quoted hereinbelow:

"25. Now coming to SLP (C) No. 19846 of 1995, this petition is filed against the judgment and order of the High Court of Orissa at Cuttack in First Appeal No. 14 of 1995 dated 12.5.1995. By the order under appeal, the High Court has reversed the order of the learned Subordinate Judge, Bhubaneswar dated 26.3.1994, by which the learned Subordinate Judge accepting an application filed under Order 7 Rule 11 CPC, rejected the plaint in Title Suit No. 231 of 1992 filed by the first respondent in special leave petition. The learned single Judge of the High Court while reversing the order of the learned subordinate. Judge observed as follows:

"In the present case on a fair reading of the petition filed by Defendant 1 under Order 7 Rule 11 of CPC it is clear that the case of the applicant is that the plaintiff has no cause of action to file the suit. It is not specifically pleaded by the applicant that the plaint does not disclose any cause of action. The learned trial Judge has also not recorded any specific finding to this effect. From the discussions in the order it appears that the learned trial Judge has not maintained the distinction between the plea that there was no cause of action for the suit and the plea that the plaint does not disclose a cause of action. No specific reason or ground is stated in the order in support of the finding that the plaint is to be rejected under Order 7 Rule 11 (a). From the averments in the plaint, it is clear that the plaintiff has pleaded cause of action for filing the suit seeking the reliefs stated in it. That is to say that whether the plaintiff has cause of action to file the suit for the reliefs sought that question is to be determined on the basis of materials (other than the plaint) which may be produced by the parties at appropriate stage in the suit. For the limited purpose of determining the question whether the suit is to be wiped out under Order 7 Rule 11(1) or not the averments in the plaint are only to be looked into. The position noted above is also clear from the petition filed by Defendant 1 under Order 7, Rule 11 in

which the thrust of the case pleaded is that on the stipulations in the agreement of 20.4.1982 the plaintiff is not entitled to file a suit seeking any of the reliefs stated in the plaint.

10. Coming to the question whether the plaint is to be rejected under clause (d) of Rule 11 of Order 7, the Supreme Court in the case of Orient Transport Co. has clearly laid down that there is a distinction between a case in which the validity, effect and existence of the arbitration agreement is challenged and suit in which the validity of the contract which contains an arbitration clause is challenged. The bar to suit u/s 32 of the Arbitration Act extends to a case where the existence, effect or validity of an arbitration agreement is challenged and not to the latter type of the suit. On this question too the learned trial Judge has failed to maintain the distinction between the two types of cases. He has failed to notice that the case pleaded by the plaintiff is that the entire agreement including the arbitration clause is null and void and unenforceable and not that the arbitration agreement is null and void.

11. From the lower Court record in the case and also the records in a similar suit filed by the State of Orissa, Title Suit No. 152 of 1993 in which OMC Ltd. is a defendant, it appears that in both the cases Defendant 1 Klockne and Company filed applications u/s 3 of the Foreign Awards (Recognition and Enforcement) Act, 1961. Such application presupposes that the applicant accepts the position that the said Act applies to the case and the Arbitration Act, 1940 has no application to the case. Under the Foreign Awards Act, there is no specific provision for bar of suit. Further, from the averments in the application filed under Order 7 Rule 11 of CPC, it is clear that the main case pleaded by the applicant was that the parties had agreed that the Swiss law will be applicable to the contract as well as the Arbitration Agreement and the venue of arbitration will be at London, and, therefore, the Indian law in general and the Arbitration Act in particular, have no application to the case. Alternatively the applicant has pleaded that even assuming that the Indian law of Arbitration applies to the case then the suit is barred u/s 32 of the Act. The learned trial Judge does not appear to have considered the main case pleaded by the applicant but disposed of the petition on consideration of the alternative case pleaded by it. Therefore this finding against bar of the suit Order 7 Rule 11(d) is also vitiated.

12. On the analysis and discussions in the foregoing paragraphs, it is my considered view that the order passed by the learned trial Judge rejecting the plaint under Order 7 Rule 11 (a) and (d) of CPC is unsustainable and has to be set aside. Accordingly the appeal is allowed and the order dated 26.3.1994 of the Civil Judge (Senior Division) Bhubaneswar in Miscellaneous Case No. 75 of 1993 is set aside. There will be no order for costs of this Court".

16. Another decision in this context is referred which has been reported in Raj Narain Sarin (Dead) through Lrs. and Others Vs. Laxmi Devi and Others,

17. In this judgment the Hon''ble Apex Court observed that rejection of claim

under Order VII Rule 11 of the CPC which has been observed that the rejection should be made only where the litigation was utterly vexatious and an abuse of process of Court.

18. In view of the settled position of law and in view of the scrutiny of the plaint/petition, it appears to this Court that cause of action was there in the claim petition and it was also disclosed in the said claim.

19. In my view limitation aspect was also properly considered by the learned Tribunal as well as by the learned appellate authority of the Tribunal.

In my further view, the claim petition disclosed cause of action and cause of action for the claim is very much there.

In that view of the matter, this application is dismissed.

There will be Order as to costs.

Urgent Xeroxed certified copy, if applied for, will be given to the parties expeditiously.

Later on

Learned Advocate for the petitioner prays for stay of operation of the Order passed by this Court. Prayer is allowed. Stay is granted for a period of four weeks from date.