

(2001) 07 DEL CK 0166

In the Delhi High Court

Case No : I.A.7912/91 in Suit No. 504/89

The Tata Iron and Steel Co. Ltd.

APPELLANT

Vs

M/s. Shakti Bearings and another

RESPONDENT

Date of Decision : 17-07-2001

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 29 Rule 1
Companies Act, 1956 — Section 291

Citation : (2001) 94 DLT 92 : (2002) 63 DRJ 305

Hon'ble Judges : Jiwan Dass Kapoor, J

Bench : Single Bench

Advocate : Ms. Deepa Das, for the Appellant; Mr. Shyam Kishore and Bk. Bikram Singh, for the Respondent

Final Decision : Allowed

Judgement

J.D. Kapoor, J.—This is a suit for recovery filed under Order 37 of Code of Civil procedure. Relevant facts are, in brief, as under :-

The plaintiff is engaged in the business of manufacture and marketing of iron and steel and iron and steel products. The plaintiff purchased/acquired from once Metal Box (India) Limited, the bearings unit/factory of the said Metal Box (India) Limited on and from October 1, 1983. Due to a series of unfavorable circumstances over which the said Metal Box (India) Limited had no control, the Bearings Unit/Factory of the said Metal Box (India) Limited, incurred heavy losses for four consecutive years since the settings up of the factory in 1979 which not only had a serious impact on its solvency, but also threatened the very existence of the said Metal Box (India) Limited. In order to avoid insolvency and in order to protect its corporate existence, the said Metal Box (India) Limited agreed to sell to the Tata Iron & Steel Company Limited, the Bearings Unit/Factory including all its assets and liabilities w.e.f. 1.10.1983 subject to the memorandum of understanding and agreement dated 29.8.1983. At the request of the defendants and on the basis of order placed by them, the plaintiff supplied

bearings to the defendants and against supply the following documents were sent to the defendants :- (a) Invoice for value of the bearing supplied ; (b) Delivery note cum challan; (iii) Original L/R. As per the plaintiff's books of account (khata) there is a balance amount of Rs. 5,76,445.11 due against the defendant as on 11.11.1986 in respect of the price of bearings supplied to the defendants by the plaintiff. The defendants issued various cheques towards the aforesaid payment outstanding in the plaintiff's books of accounts. All the above mentioned cheques were presented by the plaintiff to the defendant's bankers through its bank but all were returned dishonored/unpaid by the defendant's bankers. The non-payment of the cheque by defendant's bankers was duly intimated by plaintiff to the defendants and called upon them to pay the outstanding but the defendants failed to pay the same. Hence this suit.

2. By way of instant application, the defendants have sought Leave to defend the suit mainly on the following grounds :-

1) That the suit has not been filed by a duly authorised person inasmuch as there is no resolution of the board of directors of the company authorising filing of the suit and authorising the person to sign and verify the same.

2) On the face of the facts, the suit is not under the provisions of Order 37 CPC as the suit is in respect of the goods supplied and amount due on the basis of the accounts and the cheques issued were blank cheques and there was an agreement between the parties that the cheques will not be encased till such time, the commitments and other conditions are fulfilled. plaintiff vide letter dated 10.11.1986 informed the defendants that pending cheques would be deposited along with supplies of the bearings but the bearings were never supplied.

3) That the goods supplied were not according to the orders placed inasmuch as they are not in proper packets and the goods supplied were not according to the orders.

3. As regards the contentions that the suit has not been instituted by a duly authorised person, learned counsel has referred to para 2 of the plaint which according to him does not disclose that by way of resolution, Mr. Bhaduri was authorised to institute the suit and sign and verify and plaint. What is referred is that Mr. Bhaduri who is the Principal Officer of the plaintiff and a duly constituted attorney thereof and is authorised to institute the present suit for and on behalf of the plaintiff and to do all other co-related acts on behalf of the plaintiff.

4. According to Mr. Shyam Kishore, the learned counsel for the defendant, this is not a proper authorisation and in support of his contention, Mr. Kishore has placed reliance upon Nibro Ltd. Vs. National Insurance Co. Ltd., wherein a view was taken that Order 29 Rule 1 of Civil P.C. does not authorise persons mentioned therein to institute suits on behalf of the Corporation as it only authorises them to sign and verify the pleading on behalf of the corporation. It was further held:-

"It is well settled that under S.291 of the Companies Act except where express provision is made that the powers of a company in respect of a particular matter are to be exercised by the company in general meeting and in all other cases the Board of Directors are entitled to exercise all its powers. Individual directors have such powers only as are vested in them by the Memorandum and Articles. Thus, unless a power to institute a suit is specifically conferred on a particular director, he has no authority to institute a suit on behalf of the company. Needless to say that such a power can be conferred by the Board of Directors only by passing a resolution in that regard."

5. As regards the authority of Mr. Bhaduri as a duly authorised attorney of the company, learned counsel has contended that vide power of attorney dated 31.7.1985, company has given an authority in favor of Mr. Suresh Chandra Gupta wherein by way of resolution of Board of Directors, he was appointed as constituted attorney of the company and there is no reference that as to under what authority, the aforesaid Directors had executed the power of attorney appointing Mr. Gupta as the constituted attorney of the company.

6. Mr. Kishore has referred to clause (4) of the power of attorney to show that the said constituted attorney was not authorised and empowered to institute the suit. Clause (4) reads as under :-

"With prior written authority of the Managing Director or any whole-time Director of the Company or the President or the Vice President of the Company, the commence, prosecute, abandon, defend or submit to arbitration, any suits and other proceedings to which the company may a party and to sign, verify and present all complaints, written statements, consent orders or any other documents whatsoever expedient or necessary."

7. Another relevant clause is clause (15) which reads as under :-

"To delegate with the previous consent of the Managing Director or any Whole-time Director or the President or the Vice-President, to any party or parties the powers vested in him under these presents by the Said Attorney or any party or parties to whom the said powers or any part thereof may be delegated shall at all times be subject to the supervision or control of the Company and its Directors."

8. According to the learned counsel, clause 14 does not empower the attorney to institute the suit. It only empowers him to commence, prosecute, abandon, defend or submit to arbitrating, any suits and other proceedings to which the Company may be a party and to sign, verify and present all complaints, written statements, petitions, affidavits, etc.

9. I am afraid the very reference of the word "commence" itself embraces in its fold the word "institution" vis-a-vis suits. It is the intention which in paramount. It is not the requirement of law to mechanically reproduce the terminology or language of the section or statute. The sense a particular word or phraseology

conveys is material and decisive. The power to the attorney to commence any suit and other proceedings itself means and includes instituting a suit or proceedings. Had it not be so, there was no need for further empowering him to sign and verify and present the plaint as is referred in clause itself.

10. Similarly to say that Mr. Gupta has not legally and validly delegated his powers to Mr. Bhaduri is not correct as the power of attorney executed by Mr. Gupta in favor of Mr. Bhaduri clearly stipulates this.

11. Again the contention that the power to institute the suit was not allowed by the Vice President vide letter dated 10.6.1987 which only authorised Mr. Gupta to delegate powers to Mr. A.K. Bhaduri to take legal action in various Courts/Tribunals and Quasi Judicial Authorities/Judicial Authorities in India holds water like a sieve.

12. Power to take any legal action by way of delegation of powers is of wide amplitude particularly when looked into the context of power of attorney executed in favor of Mr. Gupta and it cannot be said that Mr. Gupta was not authorised to delegate powers to Mr. Bhaduri for taking legal action. It in my opinion, included institution, signing and verifying the suit. The intention and meaning conveyed is delegation of all the powers vested in Mr. Gupta to Mr. Bhaduri. Contention is a feeble attempt to whittle down the import of the delegated powers.

13. Now comes the objection with regard to the provisions of Order 37 as according to the learned counsel, suit is based upon only goods supplied and accounts and not on the basis of cheques. The defense stemming from the objection is that the cheques were issued blank subject to the condition that they would not be presented to the bank for encashment unless disputes between the parties were settled.

14. In this regard, learned counsel has drawn my attention to paras 10, 13, 6 & 19 of the plaint. These are as under :-

"10. That the defendants are carrying on business as dealers in all kinds of Ball, Tapered Roller, Thrust Machinery and Tractors Bearing etc. The defendants have been placing orders on the plaintiff for the supply of bearings which the plaintiff has supplied to them from time to time.

13. As per the plaintiff's books of accounts (khata) there is a balance amount of Rs. 5,76,445.11 due against the defendant as on 11.11.1986 in respect of the price of bearings supplied to the defendants by the plaintiff.

16. That the non-payment of the cheques by defendant's bankers was duly intimated by plaintiff to the defendants and called upon them to pay the outstanding but the defendants failed to pay the same. The aforesaid amount of Rs. 5,76,445.11p is still unpaid.

19. That the plaintiff is entitled to recover and the defendants are liable to pay

the following amounts :-

Principal Rs. 5,76,445.11p (being amount of bills and cheques issued) Interest (from the date bill till the date of present plaint @ 18%) Rs. 2,42,923.97p ----- Rs. 8,19,369.08p ----- (Rupees Eight Lakhs Nineteen Thousand Three Hundred Sixty Nine and paise eight only)"

15. Admittedly the amount towards the cheques is higher than the amount mentioned in para 19 which shows that payment of cheques were adjusted towards the outstanding bills and the claim in respect thereof arises out of books of accounts in respect of goods supplied to the plaintiff.

16. Defendants have also filed documents raising certain disputes in respect of the quality of the goods supplied.

17. Documents show that at the request of the defendants and on the basis of order placed by them, the plaintiff supplied bearings to the defendants and against supply, the invoice for value of the bearing, delivery note-cum-challan and original L/R were sent to the defendants and as per plaintiff's books of account, balance amount of Rs. 5,76,445.11 was found due as on 11.11.86 and on various requests and reminders the defendants issued seven cheques as referred above but all the seven cheques were returned dishonoured.

18. For instance through letter dated 31.3.86, the plaintiff informed that the losses incurred by the defendant would be got covered by supply of bearings which would be made to him from the incoming production and details of the bearings were also given which were to be supplied in quantity to cover up the losses. Again by letter dated 10.11.86 reference was made to the correspondence and discussion the plaintiff had with the defendant regarding compensation of losses incurred by the defendant on account of letters lifting slow moving bearings. The plaintiff assured to compensate 50 per cent loss during the financial year by supplying the bearings and deposit the balance 50 per cent by the first quarter of 1987-88.

19. Thus the plaintiff also confirmed that the pending cheques would be deposited Along with supplies of the aforesaid bearings. It is contended that the bearings were never supplied nor the losses compensated and Therefore the amount mentioned in the cheques was not a debt as contemplated under the Provision under Order 37 Rule 1(b). It is further contended that the cheques were given blank and the date was also left blank and the fact that the cheques were dishonoured shows that these were given only subject to the supplies of the bearings compromised and assured by the plaintiff through the aforesaid letters.

20. It is well settled proposition that the court should grant leave to defend as a matter of course if the defendant succeeds in establishing a substantial or a good defense or the facts disclosed by the defendants given rise to triable issues. It is only in an exceptional case where the defense is false, frivolous and vexatious or unreasonable that the leave is refused. At the same time the discretion should be

exercised judicially and not capriciously. It is the possibility of the substantial success of the defense that determines the grant or refusal of the leave.

21. As is apparent from the aforesaid communications sent on 10.3.86 and in November, 1986 either the defendant gave the postdated cheques or the cheques referred by the plaintiff were presumed to be those cheques which were issued in the year 1986.

22. Since the cheques in question show that these were issued in the year 1987, the reference of the cheques in the letter dated 10.11.86 raises the plausible defense and throws up a triable issue as to whether the bearings as referred in these letters were supplied or not or whether defendants were compensated or not as assured by the plaintiff in the aforesaid communications.

23. All these are such disputes that requires to be ascertained and determined by way of evidence and Therefore entitle the defendant to leave to defend.

24. Application is allowed. I.A. is disposed of.