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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Date of Decision : March 18, 2016

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FAO(OS) 523/2015

M/S ROTHENBERGER INDIA PVT LTD Appellant

Represented by: Mr.Gaurav Dua, Advocate

versus

M/S RAMSAGAR CONSTRUCTIONS

& ANR

..... Respondents

Represented by: Mr.Nitin Gupta, Advocate

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MS. JUSTICE MUKTA GUPTA

PRADEEP NANDRAJOG, J. (Oral)

1. Vide order dated February 24, 2015, noting that no witness of the plaintiff (appellant) was present, right of the plaintiff to lead evidence was closed. OA No.171/2015 filed against said order has been dismissed by the learned Single Judge vide impugned order dated May 05, 2015. Challenge in the appeal is to the order dated May 05, 2015 with the prayer that the Chamber Appeal registered as OA No.171/2015 filed against the order dated February 24, 2015 should be allowed after setting aside the order dated May 05, 2015. The two orders have been passed in the suit filed by the appellant registered as CS (OS) No.1815/2010.

2. Having heard learned counsel for the parties and having perused the record of the suit, we are constrained to pass an order which would be totally out of tune with the appeal filed and the defence raised as also the order

dated February 24, 2015 and May 05, 2015. The reason is, as conceded to by learned counsel for the parties, that neither counsel understood how the issues were required to be settled and apologize for waste of judicial time. The demand of justice warrants us to issue directions which are apparently unconcerned with the impugned orders, but are the directions which need to be issued to do justice to the parties.

3. What am I saying? Why am I saying? What am I required to say? Answering the aforesaid three questions in a harmonious manner is the essence of pleadings. During the classical period of Roman law, disputes were defined in the *formula*, which was ‘a written statement setting out in brief language what was the exact issue between the parties’. The procedure was that the complainant issued an *in jus vocatio*, an informal statement of the nature of the claim, initiating process and summoning the defendant to appear in court before the Praetor (a high-ranking magistrate). The parties presented their legal pleas orally, in turn. It was for the Praetor to see that those pleas were acceptable in law and justified by some evidence. Once the pleadings had been heard, they were reduced into writing as the *formula*. Issue of the *formula* was *litis contestatio* (joinder of issue) which prohibited alteration of the pleadings and barred any further future action on the same issue between the parties. The *formula* stipulated the *judex* (judge), who was a non-lawyer, and the second stage of the system was trial of the *formula* before him. The *formula* was thus the instructions to the *judex* detailing what facts he had to establish and how the case should be decided as a consequence. An issue not in the *formula* could not be raised at the trial but, within that boundary, the *judex* was judge of fact and law and exercised a wide discretion.

4. English law was much less sophisticated in its early days than classical Roman law. Ordeals of fire and water, wager of law and judicial combat settled matters and required no pleadings. Supernatural proofs and the oaths which they tested were absolute and inscrutable; no legal questions were asked, no reasons given, no facts found, no rules declared. However, in the twelfth century, the advent of the jury as a more rational way of settling civil disputes brought pleadings with it. This was because, just as the Roman *judex* had needed the *formula*, the jury had to know what issues it had to decide. The pleadings served another function too because they disclosed whether the issue was one of fact for the jury or one of law for the judge. Pleadings were conducted orally at the bar of the court and moderated by the judge until the fifteenth or sixteenth century. The plaintiff first set out the facts of his complaint in what was known as the '*declaration*', '*narration*' or '*count*'. The defendant then had four options in making his defence, which was known as his '*plea*'. He could make a general traverse which amounted to a denial of all the facts and make an issue of all of them; or he could make a special traverse which was a denial of one material fact which was thereby put in issue; or he could demur; or he could make a confession and avoidance.

5. A demurrer admitted the facts but denied they amounted to a case in law, producing an issue of law without any facts in dispute. Confession and avoidance admitted the facts but introduced new ones to explain them and make out a defence. Confession and avoidance did not, therefore, produce an issue and required the plaintiff to respond with the same four options. This response was known as the '*replication*'. The pleadings continued (called '*rejoinder*', '*sur-rejoinder*', '*rebutter*' and '*sur-rebutter*') until the

parties came ‘*to a point which is affirmed on one side and denied on the other, they are then said to be at issue; all their debates being at last contracted into a single point, which must now be determined either in favour of the plaintiff or of the defendant*’. It was not permissible to advance alternative causes of action or defences and parties were obliged to maintain one single consistent line.

6. It would strike that the origin of pleadings was in the context of the society which existed then and the nature of disputes brought before a trier of fact for adjudication. Commercial transactions were oral. In 99% cases, 100% evidence was oral. Very seldom was a claim predicated on a written document. Today, the position is nearly reversed. Save and except family disputes relating to partition and succession, all commercial disputes are litigated on written documents; may be a written agreement or a series of letters or e-mails exchanged. Thus, the word ‘*pleading*’ which is a generic term to describe the formalized process by which each party states its case prior to trial, has virtually led to the demise of the word ‘*pleading*’ and it would be more appropriate to call the modern day pleadings as ‘*statement of case*’ of the litigating parties.

7. The observations of the Supreme Court in the decision reported as 1988 (4) SCC 534 *Bharat Singh vs. State of Haryana*, though relevant to a writ pleading, have assumed relevance to a pleading contemplated by Code of Civil Procedure in relation to a plaint or a written statement. The observations in para 13 of the judgment are:-

“13. In our opinion, when a point which is ostensibly a point of law is required to be substantiated by facts, the party raising the point, if he is the writ petitioner, must plead and prove

such facts by evidence which must appear from the writ petition and if he is the respondent, from the counter-affidavit. If the facts are not pleaded or the evidence in support of such facts is not annexed to the writ petition or to the counter-affidavit, as the case may be, the court will not entertain the point. In this context, it will not be out of place to point out that in this regard there is a distinction between a pleading under the Code of Civil Procedure and a writ petition or a counter-affidavit. While in a pleading, that is, a plaint or a written statement, the facts and not evidence are required to be pleaded, in a writ petition or in the counter-affidavit not only the facts but also the evidence in proof of such facts have to be pleaded and annexed to it.”

8. Order 2 Rule 1 of the Code of Civil Procedure requires the suit to be drafted so that by a single decision all subjects in dispute are decided to prevent further litigation concerning them. The rules of pleading are contained in Order 6 of the Code of Civil Procedure and Rule 2 thereof requires pleadings to contain *statement in a concise form of the material facts*.

9. What are material facts? All such facts which constitute a cause of action are material facts. What constitutes a cause of action? All facts, if traversed, requiring to be proved to sustain a claim would constitute a cause of action. Rule 4 of Order 6 of the Code of Civil Procedure requires that apart from pleading material facts *material particulars* have also to be pleaded wherever necessary and by way of illustration guides that misrepresentation, fraud, breach of trust, willful default or undue influence are the kind where material particulars have to be pleaded. To put it simply, particulars may be described as the details of the case set out and it would

depend upon the facts of each case as to what degree of particulars is required. Rule 6 of Order 6 requires to distinctly and specifically plead conditions precedent, the performance or occurrence of which is intended to be contested. If legality or insufficiency in law of a contract is to be pleaded, it is not enough to simply deny the contract for the mandate of Rule 8 of Order 6 CPC is that denial of a contract means that as a matter of fact its existence is denied and not as a matter of law. In today's context of pleadings Rule 9 of Order 6 is the most important rule which requires to state the effect of the contents of any document which are material and it is this rule which, in today's context requires pleadings to be virtually the same as was highlighted by the Supreme Court in Bharat Singh's case. The legislature in India is sleeping but we find that in England reforms in pleading have been put in place under the: 'Civil Procedure Rules 1998' The word *pleading* has been given a timely demise and in place we find the expression '*statement of case*'.

10. On November 12, 2013, following issues were settled in the suit filed by the appellant:-

“(i) Whether the Plaintiff is entitled to a decree in the sum of ₹32,15,976? OPP

(ii) Whether the Plaintiff is entitled to interest @ 24% per annum from the date of filing of the suit till its realization? OPP

(iii) Whether the Plaintiff has suppressed material facts and the effect thereof? OPP

(iv) Whether the Defendant is in breach of the terms of the agreement dated 19th January 2011?

OPP

(v) Whether the Plaintiff is entitled to ₹17,00,940 from the Defendant on account of repairs carried out on the returned machines?

OPP

11. On same day following issues were settled in the counter claim filed by the respondent:-

(i) Whether the Defendant is entitled to a decree in the sum of ₹9,06,667? OPD

(ii) Whether the Defendant is entitled to interest @ 24% per annum from the date of filing of the counter claim till its realization? OPD

(iii) Relief.”

12. What caught our eye was the fact that the suit was filed in the year 2010 and issue No.(iv) settled in the suit was whether the defendant is in breach of the terms of the agreement dated January 19, 2011. Was there a typographic error? For how come a suit filed in the year 2010 allege breach by the defendant of an agreement dated January 19, 2011. This led us into reading the pleadings of the parties, and we find a complete mess created when the issues were settled. The issues do not bring out the real dispute between the parties and for which the major burden of the blame lies on learned counsel for the plaintiff.

13. Case of the plaintiff is that on February 12, 2008 the defendant No.2, carrying on business as sole proprietor of defendant No.1, placed an order on the plaintiff to supply machinery described in the purchase order at a value of ₹37,44,000/- (Rupees Thirty Seven Lacs and Forty Four Thousand) and paid ₹10,00,000/- (Rupees Ten Lacs only) in advance. Three post dated cheques, two in sum of ₹10,00,000/- (Rupees Ten Lacs only) each and the

third in sum of ₹7,44,000/- (Rupees Seven Lacs and Forty Four Thousand only) were issued. The machines were supplied and an invoice was raised. The defendants requested plaintiff not to present the post dated cheques pleading lack of funds, and the plaintiff accommodated. That the defendants thereafter paid a sum of ₹6,00,000/- (Rupees Six Lacs only) on three different dates and in said manner the plaintiff received only ₹16,00,000/- (Rupees Sixteen Lacs only), leaving a balance of ₹21,44,000/- (Rupees Twenty One Lacs Forty Four Thousand only). How this amount got morphed to ₹21,43,984/- (Rupees Twenty One Lacs Forty Three Thousand Nine Hundred and Eighty Four only) has not been brought out in the plaint, but the prayer is to pass a decree for outstanding sum of ₹21,43,984/- (Rupees Twenty One Lacs Forty Three Thousand Nine Hundred and Eighty Four only). Pre-suit interest @ 24% per annum amounting to ₹10,71,992/- (Rupees Ten Lacs Seventy One Thousand Nine Hundred and Ninety Two only) has been claimed. The suit amount is therefore ₹32,15,976/- (Rupees Thirty Two Lacs Fifteen Thousand Nine Hundred and Seventy Six only). Pendente lite and future interest @ 24% per annum on said amount has been prayed for.

14. The defendants filed a written statement cum counter claim and admitted having placed the purchase order and received the machinery with liability to pay ₹37,44,000/- (Rupees Thirty Seven Lacs and Forty Four Thousand only). Admitting having paid ₹10,00,000/- (Rupees Ten Lacs only) as pleaded in the plaint towards advance payment and further admitting having paid another sum of ₹6,00,000/- (Rupees Six Lacs only) as pleaded in the plaint, it was further pleaded that another sum of ₹45,000/- (Rupees Forty Five Thousand only) was paid. It was pleaded that it was

thereafter mutually agreed that the machinery and the equipment supplied by the plaintiff to the defendants would be returned and that the plaintiff would pay to the defendants ₹8,00,000/- (Rupees Eight Lacs only). The counter claim was in sum of ₹9,06,667/- (Rupees Nine Lacs Six Thousand Six Hundred and Sixty Seven only), being ₹8,00,000/- (Rupees Eight Lacs only) to be paid on return of the machinery which was pleaded to have been returned and the balance as pre-suit interest @ 24% per annum till when the counter claim was filed.

15. In the replication to the written statement filed by the defendants and the written statement to the counter claim filed by the defendants, the plaintiff admitted that in January, 2011 it was agreed that the plaintiff would buy back the machinery and the equipment sold by the plaintiff to the defendants and would pay to the defendants ₹8,00,000/- (Rupees Eight Lacs only). Denying liability to pay back ₹8,00,000/- (Rupees Eight Lacs only) it was pleaded that ₹17,00,940/- (Rupees Seventeen Lacs Nine Hundred and Forty only) had to be spent by the plaintiff to restore the machinery to a working condition. The plaintiff admitted that apart from the amounts which were pleaded in the plaint as having been received from the defendants it had received another sum of ₹45,000/- (Rupees Forty Five Thousand only) also.

16. Now the reader of our opinion can understand why issue No.(v) was settled in the suit filed by the plaintiff. But if these are the pleadings of the parties culled out from the plaint, written statement and the replication thereto as also the counter claim and the written statement filed thereto, issue No.1 becomes wholly irrelevant for the reason the plaintiff cannot sue for the unpaid price of the goods sold and at the same time predicate a claim

for money spent to restore the machines to a working condition after the subsequent agreement in January, 2011 was entered into.

17. The pleadings of the parties would show that they are ad idem on the fact that plaintiff sold to the defendants machinery and spares at the agreed price of ₹37,44,000/- (Rupees Thirty Seven Lacs and Forty Four Thousand only) and received ₹10,00,000/- (Rupees Ten Lacs only) as advance and thereafter ₹6,45,000/- (Rupees Six Lacs and Forty Five Thousand only). Thereafter it was agreed that the plaintiff would not claim balance sale price but would buy back the machinery from the defendants and would pay to the defendants ₹8,00,000/- (Rupees Eight Lacs only). The machines were accordingly returned to the plaintiff. No issue needs to be settled qua these admitted facts. The disputed fact is whether what was returned was so badly damaged that it required the plaintiff to spend ₹17,00,940/- (Rupees Seventeen Lacs Nine Hundred and Forty only) to make the machines worthy. The dispute is thus on the second agreement.

18. If the plaintiff spent ₹17,00,940/- (Rupees Seventeen Lacs Nine Hundred and Forty only) to make the machines worthy, the plaintiff would be entitled to adjust ₹8,00,000/- (Rupees Eight Lacs only) which the plaintiff agrees to be payable by it to the defendants and thus would be entitled to a decree only in sum of ₹9,00,940/- (Rupees Nine Lacs Nine Hundred and Forty only).

19. Learned counsel for the parties, in view of the pleadings which we have crystallized hereinabove, concede as above.

20. As a matter of fact, the moment the written statement was filed, since after the plaint was instituted the parties entered into a completely new agreement, which the plaintiff admits, the plaint ought to have been

amended forthwith to bring out the real issue between the parties which we have highlighted as above and thereafter issues should have been settled.

21. To do justice, the clock has to be set back, and since the plaint has yet to be amended, we dispose of the appeal with consent of learned counsel declaring that the issues settled on November 12, 2013 in the suit and the counter claim be treated as void. All proceedings thereafter be treated infructuous. Within 4 weeks from today the plaintiff would amend the plaint with reference to the subsequent agreement dated January 19, 2011 pursuant where to the plaintiff admits having received back the machines. To the amended plaint a written statement would be filed. Thereafter the issues would be settled afresh and the suit and the counter claim would proceed to trial.

22. No costs.

(PRADEEP NANDRAJOG)
JUDGE

(MUKTA GUPTA)
JUDGE

MARCH 18, 2016

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