

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 31.07.2017

CORAM

THE HONOURABLE MR.JUSTICE RAJIV SHAKDHER
And
THE HONOURABLE MR.JUSTICE ABDUL QUDDHOSE

O.S.A.No.178 of 2017

M/s.Polyene General Industries Pvt Ltd.,
A11 and A12, Industrial Estate,
Guindy, Chennai - 600 032.
Represented by its Managing Director
Mr.M.Narayan ... Appellant/Plaintiff

Vs.

M/s.Great Western Industries Limited,
No.1, Alsa Windsor,
4, Kothari Road, Chennai - 600 004.
Represented by its Director
Mr.M.Narayanan ... Respondent/Defendant

Prayer:

Appeal filed under Order XXXVI Rule 1 of OS Rules read with Clause 15 of the Letters Patent praying to set aside the judgment and decree dated 22.03.2017 passed in the ordinary original Civil Jurisdiction of this court in C.S.No.112/2009 filed under order iv Rule 1 and 2 of the Original side rules read with order VII Rule (1) of code of Civil Procedure, praying this court to pay the plaintiff, a sum of Rs.32,82,344/- together with further interest on the above amount at 24% P.a from the date of suit till the date of realization and for costs.

For Appellant : Mr.K.K.Murralitharan

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J U D G M E N T

(Judgment of the Court was delivered by RAJIV SHAKDHER,J.)

1.This is an appeal preferred against the judgment and decree dated 22.03.2017 passed by the learned Single Judge.

2.The appellant before us, is the original plaintiff. The plaintiff had instituted a suit seeking recovery of a sum of Rs.32,82,344/-, along with interest, at the rate of 24% per

annum, from the date of the suit, till its realization. In addition, costs were also sought by the appellant/ plaintiff.

2.1.The recovery suit was initiated against the respondent/ defendant, qua supply of HDPE barrels. The respondent/ defendant had raised purchase orders, as it appears, in that behalf, for the period spanning between 2000-2002.

2.2.The supplies, were sought by the respondent/ defendant, to enable it to export "Gherkins".

2.3.Since monies were due, which were not paid, the appellant/ plaintiff instituted a Company Petition under Section 433 (e) of the Companies Act, 1956 (in short, the 1956 Act).

3.The Company Petition was filed on 11.12.2003. This Company Petition was disposed of on 29.10.2007. The appellant/ plaintiff, in the proceedings held before the Company Judge, was paid a sum of Rs.52,07,819/-. The details, interalia, pertaining to the dates, on which, payments were made, which totalled up to the aforementioned sum, were set out by the respondent/ defendant, in the counter statement, filed in Company Petition i.e., C.P.No.85 of 2004.

4.Mr.K.K.Murralitharan, who appears for the appellant/ plaintiff, does not deny this aspect of the matter. As a matter of fact, when the Company Petition was disposed of vide order dated 29.10.2007, the learned Company Judge, recorded the stand advanced before him, both, on behalf of the appellant/ plaintiff, as well as the respondent/ defendant.

4.1.To be noted, while the respondent/ defendant took the stand that with the payment of the aforementioned amount, both the principal and the interest have been paid, while the appellant/ plaintiff took a contrary position.

4.2.Accordingly, the learned Company Judge, in the operative part of his order dated 29.10.2007, made the following observations:

"3.However, while giving liberty to the petitioner to proceed against the respondent for interest if any, by filing appropriate proceedings before appropriate forum, liberty is also given to the respondent to contest the same on merits.

With the above direction, the above Company Petition is closed as no further order is necessary."

4.3.It is, because of the observations made by the learned Company Judge, that the appellant/ plaintiff chose to file a suit.

4.4.To be noted, in the suit, as indicated at the very outset, the claim made was only for a sum of Rs.32,82,344/-. This amount, even according to the appellant/ plaintiff, represented the interest on what it categorised as principal

amount i.e., Rs.52,07,819/-. The interest was calculated at the rate of 8%, albeit, for a period spanning between 24.07.2000 and 15.12.2008. The total sum, according to the appellant, as indicated above, worked out to Rs.32,82,344/-.

5.The appellant/ plaintiff did aver in the plaint that, while its invoices, which were served on the respondent/ defendant, entitled it to claim interest at the rate of 28% per annum, it had restricted its claim to 8% per annum, in the instant suit.

5.1.In the present suit, interest at the rate of 24% has been claimed on the sum of Rs.32,82,344/-, which represents, as indicated above, the alleged unpaid interest to the appellant/ plaintiff. Upon the respondent/ defendant filing its written statement and pleadings being completed in the matter, issues were drawn up.

5.2.The issues, which the Court framed, are as follows:

- "1.Whether the suit is maintainable?
- 2.Whether the plaintiff is entitled to interest on the principal amount of Rs.52,07,819/- and if so, what is the percentage and for what period the plaintiff is entitled to the interest component?
- 3.To what other relief, the plaintiff is entitled to?"

6.The matter, accordingly, went to trial. Both parties cited one witness each.

6.1.As was expected, the trial court, dealt with the first issue, in the very first instance, which related to the maintainability of the suit.

6.2.On the issue of maintainability, two aspects arose for consideration by the Court. First, with regard to jurisdiction. Second, with regard to limitation. On the aspect of limitation, the learned Single Judge came to the conclusion, that only a part of cause of action arose in Chennai, and therefore, leave under Clause 12 of the Letters Patent appeals ought to have been sought. Since, leave was, admittedly, not sought by the appellant/ plaintiff, according to the learned Single Judge, the suit could not be entertained. In this behalf the learned Single Judge relied upon the judgment of the Division Bench of this Court rendered in: The Clan Line Steamers Limited Vs. Gaordon Woodroffs and Co., (Madras) and others reported in 1979 (1) MLJ 349.

6.3.In so far as limitation was concerned, the learned Single Judge, after examining the submission advanced on behalf of the appellant/ plaintiff, that Section 14 of the Limitation Act, 1963, would apply, came to the conclusion, that the suit had been filed beyond the period of limitation.

6.4.The observations made by the learned Single Judge in this behalf are contained in paragraph nos.11 to 13.

7.Mr.K.K.Murralitharan, who appears for the appellant says that the impugned judgement and decree is flawed for the following reasons:

7.1.At the time, when the counter statement was filed, on behalf of the respondent/ defendant, via its Director the area of operation of the respondent/ defendant was shown as No.A-1, Alsa Windsor, 4 Kothari Road, Chennai - 600 004.

7.2.According to the learned counsel, since the respondent/ defendant was operating within the jurisdiction of Chennai, this Court would have the necessary jurisdiction to entertain and adjudicate upon the suit.

8.Furthermore, the learned counsel also sought to invoke Section 39 of the Sale of Goods Act, 1930.

8.1.In this behalf, it was submitted that the sale was completed in Chennai, when, the subject goods were handed over to the Carrier and therefore, the entirety of the cause of action arose in Chennai.

8.2.In other words, it was the contention of the learned counsel for the appellant/ plaintiff that no leave under Clause 12 of the Letters Patent appeals was required to be taken.

8.3.As regards limitation, the learned counsel sought to rely upon Section 19 of the Limitation Act, 1963. It was the contention of the learned counsel that when payment of purported principal amount was made in 2007, the period of limitation, would start only from that date and not at an earlier point of time.

9.We have heard the learned counsel appearing for the appellant/ plaintiff at great length and also perused the record.

10.According to us, in so far as the aspect of jurisdiction is concerned, we need not look further than the averments made in the relevant paragraphs of the plaint.

10.1.In this behalf paragraph nos.2, 3 and 14 of the plaint being crucial the same are extracted hereafter:

"2.The Defendant M/s.Great Western Industries Ltd. Represented by its Director Mr.Narayanan, Carrying on business at Bngalore and Mukkudal and operating at No.1, Alsa Windsor, 4 Kothari Road, Chennai - 600 034.

3.The Plaintiff states that the Plaintiff is engaged in the business of manufacture and supply of HDPE barrels. In the usual course of business, the Defendant had approached the Plaintiff for supply of HDPE black empty barrels to the Defendant's

units at Bangalore and Mukkudal for packing gherkins being produced by the Defendant which were intended for export to foreign countries.

14.The cause of action for the above suit arose at Chennai where from the Plaintiff effected supply of HDPE barrels to the Defendant as per the orders placed by the Defendant during 2000-02 and raised respective invoices on the Defendant within jurisdiction of this Hon'ble Court, on 24/3/2001, 29/3/2001, 27/8/2001, 5/9/2001 and 6/12/2001 when the Plaintiff sent reminders calling upon the Defendant to settle their outstanding dues for the supplies effected by the Plaintiff to the Defendant's Bangalore and Mukkudal (in Tirunelveli District) units, on 26.6.2003 when the Plaintiff caused a lawyer's notice to be sent on the Defendant calling upon the Defendant to settle the outstanding dues of Rs.52,07,819/-, in December 2003 when C.P.85 of 2004 was filed by the Plaintiff before this Hon'ble Court, on 29.10.07 when the Hon'ble Company Court passed final orders for closing the said C.P. with liberty to the Plaintiff to initiate appropriate civil proceeding for recovery of interest on the principal amount on payment of the principal amount by the Defendant and subsequently." (emphasis is ours)

11.A perusal of the aforementioned paragraphs would show that it is the appellant/ plaintiff's own case that the respondent/ defendant was carrying on business at Bangalore and Mukkudal.

11.1.The averment with regard to the respondent/ defendant's operations being carried down at No.A-1, Alsa Windsor, 4 Kothari Road, Chennai, is concerned, that is pivoted, based on an affidavit filed on behalf of the respondent/ defendant via its Director.

11.2.The evidence on record had revealed that, that is the residence of the Director and not the place of business of the respondent/ defendant, as is contented by the learned counsel for the appellant/ plaintiff.

11.3.Furthermore, paragraph 3 of the plaint also shows that it is the appellant/ plaintiff's own case that the HDPE barrels had to be supplied at the respondent/ defendant's units located at Bangalore and Mukkudal. Clearly, a part of cause of action

arose outside the jurisdiction of Chennai and therefore, as rightly held by the learned Single Judge, leave to sue under Clause 12 of the Letters Patent appeals had to be applied for and sought from the Court before the instituting the suit.

12. At this juncture, we may, also, deal with the submission advanced by the learned counsel for the appellant/ plaintiff that provisions of Section 39 of the Sale of Goods Act, 1930, would come to his aid.

12.1. According to us, no pleadings in terms of the ingredients of Section 39 of the Sale of Goods Act, 1930, are found incorporated in the plaint.

12.2. The appellant/ plaintiff itself, as noted above, has averred that HDPE barrels had to be supplied by it to the respondent/ defendant's units at Bangalore and Mukkudal. There is no reference to the subject goods being handed over to carrier in Chennai.

12.3. In these circumstances, this submission is untenable and is, thus, rejected.

13. As regards limitation, there are two aspects, which have to be considered. First, Whether Section 14 of the Limitation Act, 1963, would at all apply in the instant case. Second, assuming that time spent in prosecuting the Company Petition, could be excluded, by applying the provisions of Section 14 of the Limitation Act, 1963, whether the suit, would be, within time, as contented on behalf of the appellant/ plaintiff.

14. Section 14 of the Limitation Act, 1963, enables the exclusion of the period of limitation set forth qua a suit, if it is found that the plaintiff was prosecuting with due diligence, another civil proceeding,

whether in a Court of first instance or of appeal or revision against defendant provided the said proceeding relates to the same matter in issue and is prosecuted in good faith in a Court, which, on account of defect of jurisdiction or other cause of a like nature was unable to entertain it.

14.1. Clearly, the nature of the Company Petition and the suit is different. In a Company Petition under Section 433 (e) of the 1956 Act a petitioner can seek only the winding up of a Company, which is unable to pay its debts. Winding up proceedings, if, successful enure to the benefit of the entire body creditors and/or contributories, and not a particular creditor.

14.2. The suit in the instant case, is a suit for recovery. Furthermore, it was not as if, the Company Petition was returned, on account of defect of jurisdiction or for other cause of like nature. As a matter of fact, the appellant/ plaintiff received money towards debt claimed by it in the

Company Petition. Since, interest was also sought to be recovered, the learned Company Judge gave liberty to the appellant/ plaintiff to initiate proceedings in that behalf, before an appropriate forum. While doing so, the learned Company Judge, also, gave liberty to the respondent/ defendant to contest such proceedings if, instituted on merits. This was, especially so, as the respondent/ defendant had claimed that the money paid included, not only principal amount, but also a component of interest. Therefore, according to us, strictly speaking, Section 14 of the Limitation Act, 1963, is not be applicable in the given fact situation. The matter in issue and the reliefs available in a winding up action, as against recovery suit, are quite different. The two cannot be equated.

14.3. In the context of whether time spent in prosecuting the insolvency proceedings could be excluded under Section 14(2) of the Limitation Act, 1963, (which deals with applications as against suits, and otherwise, being similarly worded), the Supreme Court in the matter of : Yeswant Deorao Deshmukh V. Walchand Ramchand Kothari, AIR 1951 SC 16, made the following apposite observations:

".... There could be no exclusion of the time occupied by the insolvency proceedings which clearly was not for the purpose of obtaining the same relief. The relief sought in insolvency is obviously different from the relief sought in the execution application. In the former, an adjudication of the debtor as insolvent is sought as preliminary to the vesting of all his estate and the administration of it by the Official Receiver or the Official Assignee, as the case may be, for the benefit of all the creditors ; but in the latter, the money due is sought to be realized for the benefit of the decree-holder alone, by processes like attachment of property and arrest of person. It may be that ultimately in the insolvency proceedings the decreeholder may be able to realize his debt wholly or in part, but this is a mere consequence or result. Not only is the relief of a different nature in the two proceedings but the procedure is also widely divergent."

(In addition, also see the following judgements rendered in : Ajab Enterprises V. Jayant Vegoiles and Chemicals Pvt. Ltd., AIR 1991 Bom 35 and Niyagi Offset Printing Press Ltd. V. Doctor Morepen Limited, (2007) 2 Comp LJ 548).

14.4. Assuming that Section 14 of the Limitation Act, 1963, can be applied, clearly, the action instituted, was beyond the period of limitation.

14.5. In this behalf, we may, only quote the findings recorded by the learned Single Judge in paragraph 13 of the impugned judgment and decree hereunder:

"13. As stated above, the plaintiff had filed C.P.No.85 of 2004 on 11.12.2003 and the said Company Petition was finally decided on 29.10.2007. After 29.10.2007, the plaintiff had a balance of 4 months and 22 days, within which period, he should have instituted the suit. It must be again remembered that he instituted the Company Petition after a period of 31 months and 9 days. Normally, he had 36 months to file a suit for recovery of money. He had filed the Company Petition after 31 months and 9 days, giving him a balance of 4 months and 22 days. This period expired on 22.3.2008. The entire period during which the Company Petition was pending before the High Court has been excluded, as provided under Section 14 of the Limitation Act. After exclusion of that entire period, the plaintiff should have filed the suit on or before 22.3.2008. However, a perusal of the records show that he had filed the present C.S.No.112 of 2009 on 16.12.2008. Thus, it is after a delay of 9 months. The law of Limitation cannot be diluted by any Court of Law. It is an act of Parliament recognized by every Court. The rule of law must prevail. The Limitation Act speaks for itself. The period is three years. It cannot be extended. The Plaintiff had filed the suit well after the period prescribed. The suit is barred by the law of limitation."

14.6. None of the dates and events, referred to above, have been disputed by the learned counsel for the appellant/plaintiff.

15. Learned counsel for the appellant/plaintiff sought to invoke Section 19 of the Limitation Act, 1963. According to us, Section 19 of the Limitation Act, 1963, cannot come to the aid of the appellant/plaintiff.

15.1. The said Section, inter alia, provides that where payment on account of a debt or of interest on a legacy is made before the expiration of the prescribed period by the person liable to pay the debt or legacy or by his agent duly authorised in this behalf, a fresh period of limitation shall be computed from the time when the payment was made.

15.2. In this case, the cause of action, even according to the appellant/ plaintiff, arose for the first time, within the period spanning between 2000 and 2002.

15.3. Invoices referred to in paragraph 14 of the plaint, are dated 24.03.2001, 29.03.2001, 27.08.2001, 05.09.2001 and 06.12.2001. Clearly, the period of limitation expired in 2004. Payments were made by the respondent/ defendant, even according to the learned counsel for the appellant/ plaintiff, in October, 2007. These were payments made beyond the period of limitation.

15.4. In these circumstances, in our opinion, the period of limitation cannot be extended as urged by the counsel.

16. Accordingly, we find no error in the impugned judgment and decree. Resultantly, the appeal would have to be dismissed. It is ordered so. However, there shall be no order as to costs.

Sd/-
Asst. Registrar (CO)

/true copy/

Sub Asst. Registrar

To:
The Sub Assistant Registrar,
Original Side,
High Court, Madras.

+1cc to Mr, K.K. Muralitharan, Advocate sr. 64164

O.S.A.No.178 of 2017

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