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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED 22.03.2017

CORAM

THE HONOURABLE MR.JUSTICE C.V.KARTHIKEYAN

C.S.NO.112 of 2009

M/s.Polyene General Industries Private Limited,
A11 and A12, Industrial Estate,
Gunidy,Chennai - 600 032.
represented by its Director
Mr.M.Narayan ..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 ..Defendant

Prayer: Civil Suit filed under Order IV Rule 1 and 2 of the Original Side Rules r/w 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 or realization and for costs.

For Plaintiff :M/s.K.K.Muralidharan

For Defendant : Mr.V.Ramakrishnan Viraraghavan
Senior Counsel
for Mr.G.Sivashankaran

JUDGEMENT

This Civil Suit has been filed seeking a judgement and decree against the defendant for a sum of Rs.32,82,344/- together with interest at the rate of 24% p.a from the date of suit till the date of realization and for costs.

2.The plaintiff is a company incorporated under the Companies Act. The defendant is also a company and has been described in the plaint as carrying on business at Bangalore and Mukoodal and operating at No.1, Alsa Windsor, No.4, Kothari Road, Chennai- 600 034. It is the case of the plaintiff that they are engaged in the business of manufacture and supply of HDPE barrels The defendant is in the business of exporting Gherkins and for such export, they approached the plaintiff placing orders for purchase of HDPE barrels for exporting gherkins. A quotation was submitted and purchase orders were placed by the defendant in the year 2000-2002. Supplies were effected by the plaintiff from their factory at Chennai and goods were supplied to the defendant. Invoices were raised. Invoices were also endorsed by the Central Excise Officials. It was stated that on failure to make payment within a period of sixty days, interest at the rate of 28% pa would be charged. The goods were supplied to the defendant at Bangalore and Mukoodal. The goods were accepted by the defendant. They did not complain about the quality, but they did not make any payment. After much persuasion, the defendant made part payment of Rs.9 lakihs in September 2000 against the outstanding of Rs.54.31 lakhs. This was acknowledged by the plaintiff by letter, dated 18.9.2000 and the defendant was requested to make further payment of at least Rs.15 lakhs. The defendant did not reply. The defendant did not make payment. The plaintiff demanded payment of Rs.25 lakhs by letter, dated 4.12.2000 and pointed out that the plaintiff had to borrowed huge amounts of money in order to honour their commitment to supply the barrels for the defendant. The defendant made part payment of Rs.2 lakhs on 23.12.2000, even though they had assured to pay a sum of Rs.20 lakhs on or before 13.12.2000. The Plaintiff made further demands against the defendant and finally, a sum of Rs.10 lakhs was paid in January 2001. In the meanwhile, the Sales Tax Authorities also issued an Assessment Notice demanding tax at 8% and penalty at 150%. Again the plaintiff requested the defendant to make payments. Letters were issued on 24.03.2001, 29.3.2001, 27.8.2001, 5.9.2001 and again on 6.12.2001.The defendant did not make payment. They did not provide the forms required leading to tax liability being imposed against the plaintiff. The Plaintiff again wrote letters, dated 13.4.2002, 15.5.2003 and 10.6.2003. They also made payment every now and then. It was informed to the defendant that the plaintiff was paying interest to the creditors and also incurred additional tax liabilities by way of penalty imposed by the Sales Tax Authorities. It has been stated that the defendant was liable to pay a sum of Rs.15,93,105/- towards supply effected to the defendant at Bangalore and another sum of Rs.36,14,714/- towards supplies effected at Mukoodal, totalling a sum of Rs.52,07,819/- and interest at the rate of 28% p.a was also due on the above said sum. Finally, a legal notice, dated 26.6.2003 had been issued. In the meanwhile, the defendant shifted the registered office to Mukoodal and another legal notice was issued which was returned with the endorsement ''company closed''. Consequently, the plaintiff filed C.P.No.85 of 2004 seeking to wind up the defendant-company. This petition was filed in the Madras High Court. Thereafter, the Director of the defendant-company Mr.M.Narayanan came forward to settle the matter and the defendant effected payment of Rs.52 lakhs towards the outstanding principal amount. This was recorded by the High Court and by order, dated 29.10.2007, the Company Petition was closed, granting liberty to the plaintiff to file appropriate civil suit for the interest amount. This Suit had been filed seeking balance interest amount. The plaintiff was entitled to receive payment of interest at the rate of 28% p.a. according to the invoices. However, they have restricted the claim of interest at 8% p.a on the principal sum of Rs.52,07,819/- for the period from 24.7.2000 to 15.12.2008, amounting to Rs.32,82,344/-. It has been stated that the suit had been filed within the period of limitation and consequently, the plaintiff sought a decree for the said sum of Rs.32,82,344/- together with interest and costs.

3.In the written statement, the defendant denied liability to pay interest at the rate of 28% p.a since there was no agreement between the parties. It had been stated that in the notices, the plaintiff demanded 18% p.a interest, but in the invoices, it was mentioned that the interest was 28% p.a, but the suit had been filed claiming interest at 8% p.a.. It had been further stated that the demand was with respect to supplies made during the year 2000-2002.The suit has been filed in December 2008. It has been stated that even if the benefit under Section 14 of the Limitation Act is granted to the plaintiff, the suit is barred by the law of limitation. It had been further stated that the defendant is not residing or carrying on business within the jurisdiction of the Madras High Court and the plaintiff did not obtain leave to sue the defendant at Madras High Court and consequently, the suit has to be dismissed on that ground also. It had been further stated that the address of the defendant shown in the plaint is a residential address of one of the Directors of the defendant-company. The defendant denied that the plaintiff had suffered loss with the creditors and with the Sales Tax Authorities owing to non-payment of amount by the defendant. The defendant denied their liability to pay interest and prayed that the suit should be dismissed.

4.On the basis of the above pleadings, this Court framed the following issues on 12.01.2012:

> *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?*

5.To substantiate their rival claims, both parties went on trial. The plaintiff examined V.Srivatsan, who claimed to be the authorized signatory of the plaintiff/company as P.W.1. The said witness filed proof affidavit repeating the averments made in the plaint. He filed Ex.P1 to Ex.P26. Among the said exhibits, the material exhibits which are necessary for discussion in this case are Ex.P2(Series) which are xerox copies of the invoices sent by the plaintiff to the defendant, Ex.P4 which is the certified true copy of the calculation statement for the suit claim, Ex.P23, which is the certified copy of the balance-sheet of the defendant, Ex.P24 which is the certified copy of Form-21 of the defendant filed with the Registrar of Companies, Ex.P25 which is the certified copy of the Petition in C.P.No.85 of 2004 and Ex.P26 which is the certified copy of the order, dated 29.10.2007 passed by this Court in C.P.No.85 of 2004. The other documents filed by the plaintiff are various letters issued on various dates, demanding payment of the amount stated by the plaintiff as payable by the defendant.

6.The defendant examined M.Narayanan, the Director of the defendant/company as D.W.1, who also filed his proof affidavit and marked as Ex.D1 to Ex.D5 which are the certified copies of Form-18 issued by the Registrar of Companies. During cross-examination of D.W.1, the plaintiff also marked Ex.P27.

Issue No.1

7.The fact that the plaintiff had supplied HDPE barrels to the defendant and that the defendant also received them and used them for the export of gherkins are all admitted facts. Ex.P2-invoices, which are denied by the defendant reflected supply of barrels to the defendant- factory. The supplies were made from Chennai to the defendant factory either at Bangalore or at Mukoodal in Tirunelveli District. These facts are not contested by both the sides. However, there is an issue with respect to maintainability of the suit. This issue has arisen out of the two contentions raised by the defendant in their written statement. The first contention is that the plaintiff have not obtained leave to sue the defendant before actually instituting the suit in the High Court. This has been raised by the defendant, since it is stated that the address of the defendant, which is disclosed in the plaint, is actually a residential address of the Director of the defendant-company. It has been pointed out during the arguments that the defendant, has a registered office and the place to sue the defendant would be the jurisdictional court, wherein, the registered office is situated. it had also been contested by the defendant that since part of cause of action arose within Chennai by supply of goods from Chennai, the plaintiff should have obtained leave to sue defendant before instituting the suit. It had been further pointed out that the fact of not obtaining leave is fatal to the suit. The second contention on which maintainability is challenged is the ground of limitation. Limitation is a mixture of facts and law. Primarily, it has been contended by the defendant that the goods were supplied during the year 2000-2002.The plaintiff had consistently demanded payment of the amounts due. Subsequently, the plaintiff had instituted a Company Petition. The Company Petition ended in a compromise. Even if that period is excluded, it is contended by the defendant that the suit is barred by law of limitation. Both these contentions which go to the root of the suit claim have to be decided in the first place.

8.The plaintiff is a private limited company, having registered office at A-11 and A12, Industrial Estate, Guindy, Chennai - 600 032. It is from that place that the goods were supplied from Chennai. A perusal of the plaint reveals that the plaintiff has given the address of the defendant as carrying on business at Bangalore and Mukoodal and operating at No.1, Alsa Windsor, 4, Kothari Road, Chennai-600 034. Since the address of the defendant was within the territorial jurisdiction of the Madras High Court, the office while perusing the suit papers did not raise any objections, with respect to the territorial jurisdiction. Office also did not insist that leave to sue must be obtained before the suit is numbered. However, the learned Senior Counsel appearing for the defendant had thrown the issue vide open and stated that the address of the defendant which is given within Chennai and which is repeated in the list of statement of address filed under Order 6 Rule 14(a) C.P.C., is actually the residential address of the Director of the defendant/company. The learned Senior Counsel has seriously objected for providing this address, since it had been further stated in the plaint that the defendant was actually carrying on business at Bangalore and Mukoodal which are both outside the territorial jurisdiction of the Madras High Court. The usage of word ''operating'' does not convey any meaning, since no business was conducted by the defendant at the address given, which was the residential address of the Director of the defendant company. To substantiate these facts, the defendant filed Ex.D1, Ex.D2, Ex.D3, Ex.D4 and Ex.D5.These exhibits Ex.D1, Ex.D2, Ex.D4 and Ex.D5 are certified copies of Form -18 issued by the Registrar of Companies. A perusal of these documents which have been submitted by the Registrar of Companies Act, indicate that the Registered office of the defendant-company was changed from 280, Main Road, White-filed, Bangalore-560 066 to No.340/2, Sumanthilampedu Village, Irunkattukottai, Sriperumpudhur Taluk, Chengai MGR District w.e.f.22.10.1996 as seen in Ex.D1 and that address to 14th Ward, 20/BCD, Mukoodal 627 601, Tirunelveli District, Tamil Nadu w.e.f. 9.2.1999, as seen from the Ex.D2 and as seen from Ex.D4 and again changed to No.5/1, Residency Road, Bangalore 560 025 w.e.f. 13.9.1993 and had been changed to No.280, Main Road, White-field, Bangalore 560 066 w.e.f 2.12.1994. These documents effectively substantiate the contention of the defendant that their Registered Office was never within the territorial jurisdiction of the Madras High Court. It is true that a part of cause of action arose within the jurisdiction of the Madras High Court. A perusal of the invoices which had been filed as Ex.P2(series) show that the goods were supplied from Chennai and had been assessed by the Superintendent of Central Excise, 1E, Range Division, Chennai. However, they were sent to Bangalore and Mukoodal. The defendant had to be sued at the place where the registered office is situated. It is the contention of the learned Senior Counsel for the defendant that the plaintiff had deliberately concealed the registered office. In this connection, Clause-12 of the Letters Patent of the Madras High Court is as follows:

''12.Original jurisdiction as to suits:-- And

We do further ordain that the said High Court of Judicature at Madras, in exercise of its ordinary original civil jurisdiction, shall be empowered to receive, try, and determine suits of every description if, in the case of suits for land or other immovable property, such land or property shall be situated, or, in all other cases, if the cause of action shall have arisen, either wholly, or, in all other cases, if the cause of action shall have arisen, either wholly, or in case the leave of the Court shall have been first obtained, in part, within the local limits of the ordinary original jurisdiction of the said High Court; or if the defendant at the time of the commencement of the suit shall dwell or carry on business or personally work for gain, within such limits; except that the said High Court shall not have such original jurisdiction in cases falling within the jurisdiction of the Small Cause at Madras, in which the debt or damage, or value of the property sued for does not exceed one hundred rupees.''

9.It had been held by Madras High Court in the case of ***The Clan Line Steamers Limted .vs. Gordon Woodroffe and Co., (Madras) and others reported in 1979(1) MLJ 349*** delivered by the Division Bench of this Court that if leave to sue was not obtained at the time of institution of the suit, the defect cannot be cured by subsequently granting leave to sue. The relevant portion in para 8 of the above said judgement reads thus:

''8...........................As far as the first defendant is concerned, undoubtedly, if

> *leave to sue was required under clause 12 of the Letters Patent and if it had not been obtained at the time of institution of the suit, that defect cannot be cured by subsequently granting leave to sue under clause 12 of the Letters Patent. That is a well- settled proposition of law which cannot be disputed.''*

10.In this connection, during his cross-examination, questions were put to P.W.1, with respect to the place of business of the defendant/company. P.W.1 admitted that Ex.P2, Ex.P3, Ex.P5, Ex.P6, Ex.P7, Ex.P8,Ex.P10, Ex.P11, Ex.P12, Ex.P13,Ex.P15, Ex.P16,Ex.P16, Ex.P17 and Ex.P18 have all been addressed to the defendant's registered office in White-field, Bangalore. He further admitted that Ex.P24 is the order of the Company Law Board shifting the registered office from the State of Karnataka to the State of Tamil Nadu. He further admitted that in Ex.P25, the address of the registered office of the defendant was given as Mukoodal, Tirunelveli District. He further admitted that the registered office of the defendant/company, according to the records of Registrar of Companies is White-field, Bangalore. He further admitted that he had not filed any evidence to show that the defendant- company is operating at No.1, Alsa Windsor, 4,Kothari, Chennai-34. The above admissions by the witness for the plaintiff had directly affect the case of the plaintiff. I hold that the plaintiff having not obtained leave to sue, as rendered in Clause-12 of

the Letters Patent cannot seek relief from the Court when the

Court itself was not conferred with jurisdiction to try the issue.

11.The second contention raised by the learned Senior Counsel for the defendant is with respect to the bar of the suit claim by the law of limitation. Naturally, this involves examining the dates on which the cause of action for the suit arose and the dates on which the suit was really presented in Court seeking reliefs on the basis of the said cause of action. According to Ex.P2(series) which are invoices raised by the Plaintiff to the defendant seeking for supply of goods, the last invoice was dated 4.5.2001.Therefore 4.5.2001 onwards, within a period of three years, the plaintiff had the right to file a suit seeking payment of money due by the defendant.

The plaintiff, instead of filing the suit, filed C.P.No.85/2004 for winding up of the defendant company. This was filed on 11.12.2003. The time period between 4.5.2001 and 11.12.2003 is 31 months and 9 days. The plaintiff should institute a suit seeking money claim within three years. The Plaintiff had a balance of 4 months and 22 days, within which to institute the suit. The Company Petition was finally disposed of on 29.10.2007.In the said Company Petition, this Court had ordered as follows:

> *''However, while giving liberty to the Petitioner to proceed against the respondent for interest if any, by filing appropriate proceedings before the appropriate forum, liberty is also given to the respondent to decide the same on merits''.*

12.This observation by this Court in the said Company Petition had been interpreted by the plaintiff as a liberty granting the plaintiff to institute the suit for recovery of interest and that he is protected under Section 14 of the Limitation Act. Section 14 of the Limitation Act deals with exclusion of time of proceeding bona-fide in Court without jurisdiction. It is as follows:

''14.Exclusion of time of proceeding bona-fide in Court without jurisdiction:--(1) In computing the period of limitation for any suit the time during which the plaintiff has been prosecuting with due diligence another civil proceeding, whether in a Court of first instance or of appeal or revision, against the defendant shall be excluded, where the proceeding relates to the same matter in issue and is prosecuted in good faith in Court which, from defect of jurisdiction or other cause of a like nature, ; unable to entertain it.

(2)In computing the period of limitation for any application, the time during which the applicant has been prosecuting with due diligence another civil proceeding, whether in a Court of first instance or of appeal or revision, against the same party for the same relief shall be excluded, where such proceeding is prosecuted in good faith in a Court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it.

(3)Not withstanding anything contained in Rule 2 of Order XXIII of the Code of Civil Procedure, 1908(5 of 1908), the provisions of sub-section (1) shall apply in relation to a fresh suit instituted on permission granted by the Court under Rule 1 of that order, where such permission was granted on

the ground that the first suit must fail by reason of a defect on the jurisdiction of the Court or other cause of a like nature.

Explanation:--For the purposes of this section,--

(a) in excluding the time during which a former civil proceeding was pending, the day on which that proceeding was instituted and the day on which it ended shall both be counted;

(b) a plaintiff or an applicant resisting an appeal shall be deemed to be prosecuting a proceeding.

(c)mis-joinder of parties or of causes of action shall be deemed to be a cause of a like nature with defect of jurisdiction.''

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. Consequently, with respect to issue No.1 on the question of maintainability relating to instituting the suit without obtaining the leave as prescribed under Clause 12 of the Letters patent and instituting the suit after excluding the period taken up for prosecuting the C.P.No.85 of 2004, but keeping up the period of limitation as three years, I hold that the suit as presented is not maintainable. Consequently this issue No.1 is answered against the plaintiff.

Issue Nos2 and 3:-

14.Once the suit is decided as not maintainable both on the grounds of institution and jurisdiction and that it is also barred by law of limitation, other issues namely, whether the plaintiff is entitled to the suit claim become redundant. Accordingly, issue Nos.2 and 3 are answered against the plaintiff.

15.In view of the above findings, the Civil Suit stands dismissed. No costs.

sd/.C.V.K.J
22.03.2017

//Certified to be a true copy//
Dated this the day of 2017.

COURT OFFICER

From 25.09.2008 the Registry is issuing certified copies of the Order/Judgment Decree in this format.