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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

APPEAL NO.137 OF 2016

IN

LEAVE PETITION (L) NO.118 OF 2015

IN

SUIT (L) NO.527 OF 2015

Jupiter Dyechem Pvt. Ltd. & Anr.

..Appellants.

V/s.

M/s. Songa Shipping PTE Ltd. & Anr.

..Respondents.

Mr.Rahul Narichania, Senior Advocate with Mr.Rahul Mehta i/b.
KMC Legal for the appellants.

None for the respondents.

***CORAM: NARESH H.PATIL AND
NITIN W.SAMBRE, JJ.***

DATE : FEBRUARY 13, 2018

PC.:-

The learned senior counsel Mr.Narichania makes a request to grant him leave to incorporate the amended portion particularly para 36A to the pleadings in plaint. Leave is granted. Amendment to be carried out forthwith.

2. In response to a query, the learned senior counsel makes a categorical statement that in compliance with the order dated November 16, 2016, service on the respondents-original defendants is complete and affidavit of service is also tendered. The statement is accepted.

3. This appeal is by the original plaintiffs, who initiated a Suit (L) No.527 of 2015 against respondents-defendants along with Leave Petition (L) No.118 of 2015.

4. The learned Single Judge by the impugned order dated June 12, 2015 refused leave to sue the defendants-respondents for the joint and several liability. As such, this appeal.

5. Heard the learned senior counsel for the appellant. He would urge that the leave to initiate the suit was sought pursuant to clause 12 of the Letters Patent. According to him, while granting such leave, what is expected of the learned Single Judge is to consider the averments in the plaint and form *prima facie* opinion as to whether the Court has jurisdiction to try a suit. In addition,

by inviting the attention of this Court to the provisions of section 45 of the Arbitration and Conciliation Act, 1996, the learned senior counsel for the appellants would urge that the order refusing leave at the stage of lodging of the suit particularly, having regard to pleading in paras 36 and 36A of the plaint, is not sustainable. He would submit that what is required for granting leave under clause 12 of the Letters Patent is *prima facie* ascertaining from the pleadings in the plaint whether the cause of action is disclosed or not. He submits that the order impugned is not sustainable in view of the aforesaid submission.

6. Though served, none appeared for the respondents-defendants.

7. The learned Single Judge observed that defendant No.2 is registered in London and the communication dated June 13, 2014 issued by it in the capacity of agent of defendant No.1, seems to have been hand delivered in Mumbai to the plaintiff instead of having sent it by post or Registered A.D. According to the learned Single Judge, in view of the terms of the said communication, the

agreement between the parties will be governed by the English law and any dispute arising thereunder shall be subject to the exclusive jurisdiction of London LMAA Arbitration.

8. If the aforesaid observations made by the learned Single Judge in the impugned order are appreciated in the backdrop of the language coupled with clause XII of the Letters Patent, it is required to be observed that the learned Judge at the time of dealing with the prayer clause for grant of leave for initiating the suit will be *prima facie* required to ascertain the cause of action from the pleadings in the plaint. The probable defence of the respondent-defendant in our *prima facie* opinion can be looked into only after the defendants set up such plea.

9. The pleadings in the plaint particularly paragraphs 36 and 36A would disclose that there is *prima facie* material to infer that the Court at Bombay will have part jurisdiction.

10. Whether there exists an arbitration agreement or not will be the issue which would be gone into at an appropriate stage

having regard to the provisions of section 45 of the Arbitration and Conciliation Act, 1996.

11. We are fortified in our view particularly as regards the observations made hereinabove, as the Division Bench judgment of this Court in the matter of *Transasia Bio-Medicals Ltd. V/s. Revijay Clinical Laboratory & Hospital & Ors.*¹ particularly para 9 which reads thus :-

“9. Taking overall view of the matter, therefore, in our opinion, it would be appropriate for us to take up for consideration the petitions filed by the Plaintiff under Clause XII of the Letters Patent. A petition filed under Clause XII of the Letters Patent is to be considered on the basis of an averment made in the plaint and the documents accompanying the plaint. In so far as this aspect of the matter is concerned, in paragraph XII of Summary Suit No. 2385 of 2000 the Plaintiff has stated thus:”

12. As such, without expressing any opinion on the merits of the matter, it is observed that the order impugned passed by the learned Single Judge is not sustainable. As such, the same is quashed and set aside. The appeal stands allowed in terms of

¹ 2003 (6) Bom. C.R. 136

prayer clause (a) which reads as under :-

“a. That this Hon'ble Court be pleased to call for the records and proceedings of the Leave Petition (L) bearing No.118 of 2015 in Suit (L) No.527 of 2015 and quash and set aside the impugned order dated June 12, 2015 passed by the learned Single Judge rejecting the Leave Petition and allow the Suit to be numbered.”

(NITIN W.SAMBRE, J.)

(NARESH H.PATIL, J.)