

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 26.11 2018

Date of Decision : 12.12.2018

CORAM

THE HON'BLE MR.JUSTICE M.SUNDAR

Application No.6445 of 2018
in
C.S.No.750 of 2009

Expo Freight Pvt. Ltd.,
29, Josier Street,
Nungambakkam,
Chennai-600 034.

.. Applicant

Vs.

Supreme Overseas Exports (India) Pvt. Ltd.,
11/1, 24, 'A' , Cross K.R. Road,
Banashankari II Stage,
Bangalore-560 070,
represented by its Managing Director,
M.S.Sriharsha

.. Respondent

This application is filed under Order XIV Rule 8 of the Original Side Rules read with Order VII Rule 11(d) of the Civil Procedure Code seeking to reject the plaint as barred by limitation.

For Applicant : Mr.K.Bijai Sundar

For Respondent : Mr.S.Vasudevan

ORDER

In the main suit, i.e., C.S.No.750 of 2009, there is a sole plaintiff

and there are three defendants. This Commercial Division is informed by both sides without any dispute or disagreement that the main suit has been dismissed as against second and third defendants. Therefore, Expo Freight Pvt. Ltd. which was first defendant at the time of inception of the main suit has now become sole defendant. Therefore, in this order, 'Expo Freight Pvt. Ltd., Chennai' shall be referred to as 'defendant, for the sake of convenience and clarity.

2 Expo has taken out the instant application under Order VII Rule 11(d) of 'The Code of Civil Procedure, 1908' ('CPC' for brevity) with a prayer to reject the plaint on the ground that it is barred by limitation. To be noted, the core prayer as set out in the Judge's summons reads as follows :

“Why this Honourable should not be pleased to reject the plaint as barred by limitation?”

3 In this application, sole plaintiff has been arrayed as lone respondent. As mentioned supra, as the main suit has been dismissed against defendants 2 and 3, they have not been arrayed as co-respondents in the instant reject plaint application.

4 Sole respondent in the instant reject the plaint application shall be referred to as 'Plaintiff' based on its rank in the main suit for the sake of convenience and clarity. In other words, 'applicant' in the instant application shall be referred to as 'defendant' and lone 'respondent' in the instant reject plaint application shall be referred to as 'plaintiff'.

5 Before this Commercial Division proceeds with

discussion on this reject the plaint application, it is necessary to set out the factual matrix in the main suit in a nutshell (sans unnecessary details). In other words, factual matrix in a nutshell will contain bare minimum facts which are absolutely essential for appreciating this order.

6 Factual Matrix in a nutshell :

(a) Plaintiff company is a manufacturer and exporter of finished leather garments and according to plaint, it is a recognised trading house having been so recognised by Government of India.

(b) Defendant is an international freight forwarder in Chennai engaged in the business of clearing, forwarding and shipping. In other words, first defendant is in the business of providing services of transportation of goods by Air and Sea.

(c) According to plaint, erstwhile second defendant (against whom suit has now been dismissed) is first defendant's agent in New York, United States of America. Erstwhile, third defendant (against whom also, suit has now been dismissed) is a Company in United States of America and it had placed orders with the plaintiff for the purchase of certain leather garments. To be precise, it placed orders with plaintiff for 3348 Men's leather jackets and opened a transferable irrevocable letter of credit for the same.

(d) Pursuant to the aforesaid purchase order, plaintiff entrusted the export consignment of 3348 Men's leather jackets to the defendant being freight forwarder for delivery at New York in United States of America.

(e) From the narrative in this factual matrix thus far, it will come to light that plaintiff is consignor / shipper, defendant is the shipping, clearing and forwarding agent, erstwhile second defendant is the first defendant's agent in New York and erstwhile third defendant is consignee / purchaser.

(f) The complaint in the plaint is that defendant delivered the aforesaid cargo / consignment to erstwhile third defendant without receiving original bills of lading resulting in erstwhile third defendant taking delivery of cargo / consignment without making payment to plaintiff. Alleging that such action on the part of defendant is a clear tortious act, main suit has been filed by plaintiff claiming the value of consignment / cargo being over Rs.1.02 Crores together with future interest from all defendants, i.e., clearing, forwarding and freight agent (defendant), its agent in New York and the consignee/ purchaser in New York (erstwhile second and third defendants respectively).

(g) Pending suit, defendant took out an application in A.No.4991 of 2009 under Section 8 of 'The Arbitration and Conciliation Act, 1996' ('A and C Act' for brevity) seeking a reference of dispute in the suit to arbitration by stating that bills of lading covering the aforesaid consignment / cargo contain an arbitration clause. This application under Section 8 of A and C Act came to be dismissed by a learned Single Judge of this Court after full contest vide order dated 18.12.2009. There is no dispute or disagreement before this Commercial Division that this order has been given a legal quietus

and has attained finality.

(h) Thereafter, instant application has been taken out by plaintiff with a prayer for rejection of plaint on the ground that it is barred by limitation. Plaintiff who is the lone respondent in the instant reject the plaint application has filed a counter affidavit dated 04.10.2018, defendant has filed a rejoinder dated 10.11.2018 and pleadings are thus complete in the instant reject plaint application.

7 Rival Submissions :

(I) Mr.K.Bijai Sundar, learned counsel on record for defendant, who is the protagonist of this reject the plaint application made submissions which can be captured and encapsulated as follows :

(a) Transportation of cargo which is the subject matter of the suit is covered by 'The Multimodal Transportation of Goods Act, 1993 (28 of 1993)' (hereinafter referred to as 'MTG Act' for brevity), the limitation under MTG Act is nine months from the date of delivery of goods (as per Section 24 of MTG Act), this suit has been filed beyond nine months period and is therefore, barred by law.

(b) Though the prayer in the instant reject the plaint application itself is restricted only to a prayer for rejection on the ground that the suit is barred by limitation,

it was argued that the primary ground on which the application under Section 8 of A and C Act was dismissed was that erstwhile defendants 2 and 3 were not parties to arbitration clause, they were, therefore, not parties within the meaning of Section 2(h) of A and C Act, post dismissal of Section 8 application, the suit has been dismissed against erstwhile defendants 2 and 3 (for plaintiff not taking steps to serve them) and therefore, the arbitration clause now stands revived.

(c) Erstwhile defendants 2 and 3 are not merely proper parties to the lis, but are necessary parties to the lis and plaintiff allowing the suit to be dismissed against erstwhile defendants 2 and 3, that too for not taking steps to serve them, leaves the plaint hit by non joinder of necessary parties resulting in plaint being barred by proviso to Order I Rule 9 of CPC.

(d) In the two bills of lading, which constitute the primordial documents in terms of contract between parties which is nucleus of this lis, there is a Clause Paramount, i.e., Clause 27 and according to clause Paramount, any dispute arising out of any carriage from or to USA, should be referred to District Court for the southern district of New York in accordance with the laws of United States of America.

(II) In response to the aforesaid submissions of learned counsel for first defendant, Mr.S.Vasudevan, learned counsel on record for sole plaintiff (in his capacity as sole respondent in the instant reject plaint application) made submissions which can be summarised, encapsulated and set out as follows :

(a) MTG Act does not apply to the instant transaction. On the contrary, 'The Indian Carriage of Goods by Sea Act, 1925 (26 of 1925)' ('Sea Act' for brevity) will apply and according to Article III of Sea Act, limitation is one year and not nine months.

(b) The order of dismissal of application under section 8 of A and C Act has been given a legal quietus and therefore, defendant cannot resurrect the same now.

(c) Suit being dismissed against defendants 2 and 3 cannot be brought within the sweep of proviso to Order I Rule 9 CPC.

(d) Clause Paramount, i.e., Clause 27 in the bills of lading can at best be construed only as an additional forum and that does not oust the jurisdiction of this Court.

(a) I heard learned counsel on both sides on the aforesaid rival submissions. The debate in the hearing proceeded on the basis of elaboration on the aforesaid rival submissions by both sides and this Commercial Division shall allude to the same infra.

(b) As the debate is set out, the deliberation on the same together with dispositive reasoning will also be dovetailed with it.

(c) The first point of debate is that the entire lis is covered by MTG Act and therefore, the limitation is nine months. Elaborating on this, learned counsel for defendant submitted that limitation has been prescribed in Section 24 of MTG Act and Section 24 of MTG Act reads as follows :

“24.Limitation on action.--The multimodal transport operator shall not be liable under any of the provisions of this Act unless action against him is brought within nine months of--

- (a) the date of delivery of the goods, or
- (b) the date when the goods should have been delivered, or
- (c) the date on and from which the party entitled to receive delivery of the goods has the right to treat the goods as lost under sub-section (2) of section 13.”

(d) Referring to Section 24 of MTG Act, Mr.Bijai Sundar, learned counsel for defendant submitted that according to plaint, particularly, paragraphs 9 and 16 of the plaint, the dates of delivery of cargo / goods / consignment are 22.10.2008 and 25.10.2008. Nine months from these two dates are 21.07.2009 and 24.07.2009. Even if the later date, i.e., 24.07.2009 is taken as the point at which rights get extinguished owing to limitation, the suit is barred by limitation as the instant suit was presented only on

21.08.2009. To support his contention further, learned counsel for defendant relied on two bills of lading which constitute the entire cargo / consignment, they are in triplicate and two bills of lading in triplicate have been filed by plaintiff along with plaint as plaint document Nos.9 to 14. To be noted, Bill of Lading No.002627 in Triplicate dated 13.09.2008 are plaint document Nos.9,10 and 11. Likewise, the second Bill of Lading No.002634 dated 20.09.2008 in Triplicate are plaint document Nos.12,13 and 14. To be noted, these two bills of lading have been described supra as primordial documents constituting nucleus of this lis.

(e) Learned counsel for defendant submitted that this being an application for rejection of plaint, plaint averments and plaint documents can be looked into. It was pointed out that the terms and conditions which constitute the contract between parties have been set out on the reverse of the aforesaid bills of lading under the caption 'Standard Conditions governing Multimodal Transport Documents issued in accordance with Multimodal Transportation of Goods Act, 1993'. Referring to the aforesaid two bills of lading, i.e., plaint document Nos.9 to 14 (to be noted, the two bills of lading are in triplicate and therefore, the reference is to 6 plaint documents), learned counsel for defendant pointed out that the document itself is captioned 'Multimodal Transport Document'. Likewise, the standard conditions referred to on the reverse of bills of lading also refer to MTG Act. This itself will show that it is MTG Act and not Sea Act which applies to the instant case.

(f) To buttress and bolster this submission that transaction is covered by MTG Act, learned counsel for first defendant referred to plaint

document Nos.5 and 6 which are invoices and pointed out that invoices show that pre-carriage was by truck. It was further submitted that even according to plaint and plaint documents, not only is the transaction covered by MTG Act, but it is clear that the consignment / cargo has been transported both by surface (by truck) and Sea. In this regard, attention of this Commercial Division was drawn to the terms of 'multimodal transportation' and 'multimodal transport contract'. It was submitted that both these terms / expressions are terms of art as they are defined under sub-clauses (k) and (l) of Section 2 of MTG Act which are as follows :

“(k)”multimodal transportation” means carriage of goods, by at least two different modes of transport under a multimodal transport contract, from the place of acceptance of the goods in India to a place of delivery of the goods outside India;

(l)”multimodal transport contract” means a contract under which a multimodal transport operator undertakes to perform or procure the performance of multimodal transportation against payment of freight;”

(g) Responding / countering the aforesaid submission,

learned counsel for plaintiff submitted that the entire transaction does not get covered by MTG Act merely because the bills of lading make a reference to multimodal transport document or merely because the terms and conditions in the said documents make a reference to MTG Act in the caption. It is the pointed submission of learned counsel for plaintiff that one has to go in to the details of actual nature of transport to ascertain whether it is multimodal transport at all. To support his contention, learned counsel for plaintiff again

referred to bills of lading, i.e., plaint document Nos.9 to 14 and pointed out that in the bills of lading, mode of transport has been shown as Sea. It was, therefore, submitted that the mode of transport is Sea only and merely because, the consignment / cargo was brought to the Port in a truck, it does not make it multimodal transportation. It is his specific submission that the shipment by two vessels does not constitute two modes of transportation as both vessels carried the consignment / cargo only by one mode, namely, Sea.

(h) On a careful consideration of the rival submissions, this Commercial Division notices that the issue of limitation turns heavily on whether the entire transportation is governed by MTG Act or Sea Act. If it is governed by MTG Act, limitation is nine months and if it is governed by Sea Act, the limitation is one year. The starting point for the limitation is the date of delivery of goods and there is no dispute or disagreement that the dates of delivery, according to plaint, are 22.10.2008 and 25.10.2008. The main important aspect of the matter is, the plaint has been presented on 21.8.2009, 10 months after the date of delivery of goods. In other words, the suit has been presented beyond nine months, but within one year. This leads us to a sequitur that if Section 24 of MTG Act applies, it may be barred by limitation, whereas, it will not be barred by limitation, if the transaction is governed by Sea Act. Therefore, one has to necessarily come to a clinching conclusion as to whether the entire transport of cargo in the instant case was by one mode only or by more than one mode. More importantly, one has to come to a conclusive finding about whether transportation in the instant suit qualifies as multimodal transportation within the meaning of section 2(k) of

MTG Act.

(i) From the narrative supra, it will be clear that a conclusive finding in this regard can be given only in trial. Therefore, this Commercial Division is of the considered view that the question of limitation should be left open to be decided in trial if there be one. Therefore, with regard to the first point of debate, namely whether the suit is barred by Section 24 of MTG Act, it does not enure to the benefit of defendant in the instant application.

(j) The next point of debate is with regard to the application taken out by first defendant under Section 8 of A and C Act. As mentioned supra, an application being A.No.4991 of 2009 was taken out by defendant under Section 8 of A and C Act and the same, after full contest, came to be dismissed by a learned Single Judge of this Court in and by an order dated 18.12.2009. There is no dispute or disagreement before this Commercial Division between the two learned counsel that this order has been given a complete legal quietus and it has attained finality. Notwithstanding this position, learned counsel for first defendant drew my attention to paragraph 18 of the aforesaid order of learned Single Judge in the order of dismissal of Section 8 application, which reads as follows :

“18.I would like to point out that there could be no quarrel over such propositions, but here what I would observe is that the clause containing arbitration itself would at the most bind the plaintiff and D1, and a dispute cannot be bifurcated and part of it be sent for arbitration and the remaining be retained by the Court.....”

(k) Adverting to the aforesaid paragraph, it was argued by learned counsel for defendant that the primary and primordial ground on which the application under Section 8 of A and C Act came to be dismissed was that defendants 2 and 3 are not parties to the arbitration clause. It was his further submission that the ground on which Section 8 application came to be negated was that two of the parties, namely, erstwhile defendants 2 and 3 are not parties within the meaning of Section 2(h) of A and C Act. Now that the suit has been dismissed against erstwhile defendants 2 and 3 and now as the contest is only between plaintiff and defendant and in the light of there being no dispute or disagreement that the arbitration clause is certainly between plaintiff and defendant as it is a clause in the bills of lading, arbitration will now apply is his say.

(l) In response to this argument, learned counsel for plaintiff submitted that mere existence of an arbitration clause in bills of lading cannot be construed as bar for filing this suit. To be noted, this submission was made by learned counsel for plaintiff on a demurrer.

(m) Be that as it may, on a careful consideration of rival submissions, learned counsel for defendant wants to revisit the order made by another learned Single Judge. Rewriting an order of another learned Single Judge in the light of changed circumstances is per se impermissible. At best, if at all, it can be a ground for review. It is impermissible for another learned Single Judge, as a matter of judicial discipline to re-write the order made by another learned Single Judge, on the ground that there are changed

circumstances. Therefore, the second point raised by learned counsel for defendant does not carry the defendant any further in the instant reject plaint application. However, if defendant chooses to seek a review of the aforesaid order and if it is permissible in law, this order will not impede the same and such review petition will obviously be heard and disposed of on its own merits.

(n) With regard to the third point of debate, as mentioned supra, learned counsel for defendant submitted that the suit is hit / barred by proviso to Order I Rule 9 CPC for non joinder of necessary parties. It was pointed out that the suit was dismissed against erstwhile second and third defendants solely because plaintiff did not take steps to serve erstwhile second and third defendants. According to learned counsel for defendant, erstwhile second and third defendants are necessary parties to this lis and as the suit today stands, necessary parties to the lis are absent and therefore, it is barred by proviso to Order I Rule 9 CPC.

(o) In response to this, learned counsel for plaintiff submitted that this is procedural aspect of the matter and cannot be a ground for rejection of plaint.

(p) In this regard, it is necessary to look at the proviso to Order I Rule 9 CPC and the same reads as follows :

“9.Mis-joinder and non-joinder.--No suit shall be defeated by reason of the mis-joinder or non-joinder of parties, and the Court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it:

Provided that nothing in this rule shall apply to non-joinder of a necessary party.”

(q) The classic distinction between a proper party and necessary party is too well settled. However, for the purpose of clarity, this Commercial Division reminds itself that proper party is one whose presence is necessary for throwing light on the litigation, whereas necessary party is one whose presence is imperative for conclusively deciding the lis and arriving at a meaningful, workable order / decree to be passed in a suit. In the instant case, from the factual matrix that has been narrated, there can be no two opinions about the obtaining position that the fulcrum of this entire lis is, the erstwhile third defendant consignee taking delivery of the cargo / consignment without presentation of original bills of lading by the erstwhile second defendant who is none other than the agent of the defendant. In other words, the factual fulcrum, particularly, critical aspect of the factual fulcrum for the plaintiff to be entitled to a decree is to demonstrate that the erstwhile third defendant has committed a tortious act by lifting the cargo / consignment without original bills of lading. Therefore, lifting of the consignment by the erstwhile third defendant who is indisputably and undisputedly a consignee is a fact which is non negotiable for the plaint to survive qua cause of action pleaded and the prayer made therein. This is clearly articulated in the plaint and relevant paragraphs in the plaint are as follows :

“Relevant portion in paragraph 9 :

9.....The First Defendant through its agent namely the second Defendant has deliberately and fraudulently delivered the consignments to the third defendant without the receipt of the original bills of lading but after collecting the freight payable under the bills of lading and the third Defendant has also

illegally and fraudulently taken delivery without making payment to the Plaintiff. The First and second defendant have played fraud upon the Plaintiff and committed breach of the contract of carriage as well as the terms and conditions of the Bills of lading. The first and second Defendants have acted negligently in deliberately delivering the consignments to the third Defendant without receipt of the original bills of lading thereby causing heavy loss to the Plaintiff. The Plaintiff has not been paid for the value of the exported cargo and it is also paying huge interest to its bankers for non realization of the letter of credit. The third Defendant being the buyer has also committed fraud upon the Plaintiff, by taking delivery of the cargo and utilising it without making payment to the Plaintiff. The Plaintiff was officially informed by their bankers State Bank of Travancore about the non realisation of the Letter of credit and the return of the original bills of lading by Wells Forge Bank N.A rejecting payment on 12.3.2009. The Plaintiff has not received the payment amounting to US \$ 1,78,200/- despite the consignments under the respective invoices and the Bills of Lading having been delivered to the third Defendant.

Paragraphs 11 and 13 :

11.The first Defendant being the company to whom the consignment was entrusted for carriage and which issued the bills of lading, the Second Defendant being the agent of the First Defendant at New York in United States of America who has delivered the consignments to the Third Defendant without receipt of the original Bills of lading, the third Defendant being the buyer of the cargo from the Plaintiff who has taken delivery without producing the original bills of lading and without making payment to the Plaintiff are jointly and severally liable to pay the value of the cargo as well as the other losses suffered to the Plaintiff. Due to the breach of contract, fraud and the tortious acts committed by all the Defendants, the Plaintiff has suffered huge losses for which the Defendants

are jointly and severally liable to compensate the Plaintiff.

13. Clause 25 of the respective Bills of lading issued by the First Defendant contains an arbitration clause, but the Second and Third Defendants are not parties to that agreement. The Plaintiff has sought relief in this suit against all the Defendants jointly and severally. Hence the Plaintiff cannot refer the dispute to arbitration and the arbitration clause found in clause 25 of the respective bills of lading issued by the First Defendant is not applicable."

(Underlining made by Court to supply emphasis)

(r) In the light of the aforesaid averments / statements in the plaint, it emerges very clearly that there is non joinder of necessary parties, namely defendants 2 and 3 (plaint as it stands today). For this purpose, it is also necessary to have a close look at the language in which clause (d) of Rule 11 of Order VII of CPC (which deals with the rejection of plaint on the ground of being barred by law) is couched. The reasons for which the plaint can be rejected are adumbrated in various clauses under Rule 11. Clauses (b) and (c) are not applicable to this Commercial Division as this is a Chartered High Court exercising ordinary original civil jurisdiction. It therefore follows that clause (d) of Order VII Rule 11 is not made inapplicable. Clause (d) reads 'where the suit appears from the statement in the plaint to be barred by any law'. The language in which clause (d) is couched makes it clear that for rejection of plaint under clause (d), the suit should appear to be barred by any law from a/the statement/s in the plaint. To be noted, this expression 'from the statement in the plaint' does not find place in the other grounds of rejection adumbrated in other clauses of Rule 11 of Order VII

CPC.

(s) Be that as it may, statements in the plaint which have been extracted and reproduced supra make two aspects of the matter very clear and put those two aspects of the matter beyond any pale of doubt. One aspect is, both defendants 2 and 3 are necessary parties to this suit. Second aspect is, the cause of action qua these necessary parties and the erstwhile first defendant who is now sole defendant is so intertwined and dovetailed that the suit cannot but be defeated in the absence of defendants 2 and 3.

(t) Two case laws placed before this Court are of relevance. Learned counsel for defendant pressed into service a judgment of Hon'ble Supreme Court reported in **AIR 1977 SC 2421** being **T.Arivandandam Vs. T.V.Satyapal** case. This case law, i.e., **T.Arivandandam** case was delivered by Hon'ble Mr.Justice V.R.Krishna Iyer. Though facts of **T.Arivandandam** case may be on a different footing, the principle is, powers under Order VII Rule 11 CPC may have to be exercised to weed out litigation and suits, pendency of which will serve no purpose other than adding to and swelling the docket explosion.

(u) The other judgment referred to by learned counsel for defendant is a judgment dated 23.07.2018 (authored by me) in S.A.No.1779 of 1996 [**Arulmony and others Vs. Thresammal (died) and others**]. To be noted, this case is one where a partition suit was held to be liable for dismissal for non joinder of one of the coparceners. This was on the time honoured Constitution Bench decision being **Kanakarathanammal Vs. V.S.Loganatha Mudaliar and another [AIR 1965 SC 271]** that in a suit for

partition, all sharers are necessary parties and that partition suit is liable to be dismissed for non joinder of any one or some of the sharers. Therefore, on facts, this judgment does not help defendant and therefore, I am making my inferences and conclusions based on independent reasoning. Independent reasoning leads me to the decision that erstwhile defendants 2 and 3 are necessary parties as alluded to supra.

(v) Therefore, it becomes indisputably clear without any speck of doubt from the plaint averments / statements in the plaint that the presence of erstwhile third defendant and second defendant (in that order of importance) is imperative for this plaint to survive in the light of the cause of action and prayer therein. In this view of the matter, this Commercial Division with the object of giving an opportunity to the plaintiff in this regard, put it to learned counsel for plaintiff as to whether the plaintiff would be interested in taking steps to restore the suit against the erstwhile second and third defendants. To this, learned counsel for plaintiff submitted that he does not have instructions to do so. This means that plaintiff wants to proceed with the suit on the basis of the plaint as it stands today, i.e., with the erstwhile first defendant as sole defendant. This means, lifting of the cargo by the consignee (erstwhile third defendant) without original bills of lading from the erstwhile second defendant cannot be established without the presence of the parties concerned, i.e., defendants 2 and 3.

(w) In this regard, it is to be noticed that the erstwhile second defendant is said to be an agent of erstwhile first defendant (sole defendant now), whereas third defendant is an independent entity and

therefore, presence of third defendant consignee is imperative and non derogable for the plaint to survive. To put it metaphorically, plaintiff cannot jettison third defendant and expect the plaint Vessel to sail (metaphoric as the lis pertains to cargo being carried by sea). Even though the degree of proof required in civil suits is preponderance of probability, it cannot be established clinchingly that third defendant lifted the cargo much less lifted without original bills of lading without the presence of third defendant in the suit. As the stated position of plaintiff is that it has no instructions to take steps to restore the suit against erstwhile second and third defendants, it follows as an inevitable sequitur that the plaint as it stands today is certainly hit by proviso to Order I Rule 9 CPC owing to absence of necessary parties.

(x) In the light of the narrative supra, this Commercial Division has no hesitation in holding that this plaint is barred by law, i.e., barred by proviso to Order I Rule 9 CPC and is therefore, liable to be rejected. In the normal circumstances, this would have been the last lap of voyage in this order in the instant application for rejection of plaint. However, for the purpose of completion of facts and for the purpose of making the debate, deliberation and dispositive reasoning as comprehensive as possible, the fourth rival submission between the parties is also discussed infra.

(y) The fourth point of the debate centres around Clause 27 of bills of lading which is captioned clause paramount. Sub clause (4) of the same reads as follows :

“4)If carriage includes carriage to, from or though the United states of America, the consignor or consignee may refer any claim or dispute to the United states District court for the southern district of new York in accordance with the laws of the United States of America.”

(z) Learned counsel for defendant argued that even if a suit has to be filed, it can be filed only in the District Court of New York, as mentioned supra.

(aa) Learned counsel for plaintiff in response to the same submitted that it provides an additional forum. However, in support of his argument, learned counsel for defendant pressed into service a judgment of this court rendered by a learned Single Judge in **Vestas RRB India Ltd. Vs. Danmar Lines** reported in **2008 (3) CTC 823**, which was confirmed by a Division Bench judgment being **M/s.Danmar Lines Vs. Vestas RRB India Ltd.** Reported in **2011-5-L.W. 827**. Relying on the aforesaid judgment, learned counsel for defendant submitted that a clause paramount will prevail and other jurisdictions if any will automatically stand excluded. Learned counsel for plaintiff submitted that the aforesaid two judgments in the **Danmar Lines** case are clearly distinguishable on facts as there was no arbitration clause in the said case.

(ab) Learned counsel for plaintiff pointed out that in the instant case, plaintiff has pitched himself on clause 25 and argued that there

is an arbitration agreement between the parties. It was pointed out that even while relying on arbitration clause, namely Clause 25 of bills of lading and filing application under Section 8 of A and C Act, defendant did not ask for a reference to the District Court in New York. The most important aspect of the matter is the language in which sub clause (4) of Clause 27, i.e., clause paramount is couched. To be noted, sub clause (4) of clause 27 has already been extracted supra. Clause that was interpreted in aforementioned **Danmar Lines** case is clause 12 of Sea Way Bill, which reads as follows :

- “(1) Except as otherwise provided specifically herein any claim or dispute arising under this Sea Way Bill shall be governed by the law of the federal Republic of Germany and determined in the Hamburg Courts to the exclusion of the jurisdiction of the Courts of any other place.
- (2) In case the carrier intends to sue the merchant the Carrier has also the option to file a suit at the merchant's place of business.
- (3) In the event this clause is inapplicable under local law then jurisdiction and choice of law shall lie in either the Port of Lading or Port of discharge at Carrier's option.”

(ac) A careful analysis of the Sea Way bill in **Danmar Lines** case reveals that Clause 12 therein is clause which clearly excludes the jurisdiction of all Courts other than Courts in Hamburg, Germany. In other words, Clause 12 of Sea Way Bill in **Danmar Lines** case is clause which ousts the jurisdiction of all other courts. Such clause is completely different from sub clause (4) of Clause 27, which is Clause Paramount in the instant case. For the purpose of clarity, this Commercial Division deems it

appropriate to extract the entire clause 27 in its entirety and the same reads as follows :

“27.”USA Clause Paramount”

1)If carriage includes carriage to, from or through a port on the United states of America, the MTD shall be subject to the United states carriage of goods by sea Act of 1936 (US COGSA”), the terms of which are incorporated herein and shall be paramount throughout carriage by sea and the entire time that the goods are in the custody of the MTO or his sub-contractor at the sea terminal in the united states or being transportation to or from the united states.

2)The MTO shall not be liable in any capacity whatsoever for loss, damage or delay to the goods, while the goods are in the United States away from the sea terminal and are not in the actual custody of the MTO. At these times the MTO acts as agent only to procure carriage by person (one or more) under the usual terms and conditions of these persons. If for any reason the MTO is denied the right to act as agent only at these times, his liability for loss, damage or delay shall be governed by US COGSA.

3)If US COGSA applies the liability of the MTO shall not exceed \$500 per package or customary freight unit (in accordance with section 1304(5) thereof.

4)If carriage includes carriage to, from or though the United states of America, the consignor or consignee may refer any claim or dispute to the United states District court for the southern district of new York in accordance with the laws of the United States of America.”

(ad) A careful reading of clause 27 in the instant case reveals that it is not a case of ouster of all jurisdictions other than the jurisdiction of District Court of New York. Therefore, as rightly pointed out by

learned counsel for plaintiff, it is only at best an additional forum. More importantly, as there is no ouster of jurisdiction of all other courts as in **Danmar Lines** case, the principle laid down in **Danmar Lines** case does not apply to the instant case and it is clearly distinguishable. In other words, **Danmar Lines** case dealt with the ouster of jurisdiction clause, whereas there is no ouster of jurisdiction clause in the instant case. Therefore, **Danmar Lines** case is clearly distinguishable on facts and the clauses concerned are completely different. For the purpose of clarity, it is to be stated that Clause 12 of Sea Way Bill and Clause 27 in the bills of lading which was captioned 'USA Clause Paramount' are completely different as there is no ouster of jurisdiction of other Courts in the instant case. The law is well settled that ouster of jurisdiction should always be complete, comprehensive and clear.

(ae) In this view of the matter, the last and fourth point of debate fails.

9 Conclusion :

Owing to all that have been set out supra and in the light of the narrative above, this Commercial Division has no hesitation in coming to the conclusion that the plaint in the instant suit, i.e., C.S.No.750 of 2009 is liable to be rejected as being barred by law, to be specific, barred by proviso to Rule 9 of Order I CPC. Therefore, this Commercial Division concludes that the prayer in the reject the plaint application being A.No.6445 of 2018 deserves to be acceded to on the ground that the plaint is liable to be rejected

owing to non joinder of necessary parties.

10 Decision :

A.No.6445 of 2018 is allowed. Consequently, the plaint in the suit in C.S.No. 750 of 2009 is rejected. Resultantly, the suit is dismissed. Parties are left to bear their respective costs.

12.12.2018

Speaking order

Index : Yes

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M.SUNDAR, J.

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order in
Application No.6445 of 2018
in
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