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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
O.O.C.J.

NOTICE OF MOTION NO. **418** OF **2016**
IN
SUIT NO. 786 OF 2012

Malayam Banking Berhad ...Applicant/Deft.No.5

In the matter between

M/s MMTC Ltd. ...Plaintiff

vs

M/s Millennium Wires (P) Ltd. & Ors. ...Defendants

.....

Mr Rajiv Narula a/w Ms Naseem Patrawala I/b Patrawala & Co. for the Plaintiff

Ms Radha Bhandari a/w Ms Vimal Khandare I/b M.V.Kini & Co. for Defendant No.2.

Mr Rajesh Patil a/w Mr Parikshit Desai I/b Ms Meghana M Kadam for Defendant No.5 / Applicant to the Notice of Motion.

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CORAM : B. P. COLABAWALLA, J.
JUNE 25, 2019.

P.C. :

This Notice of Motion has been filed by the applicant / defendant No.5 for rejection of the plaint under Order VII Rule 11 of the Code of Civil Procedure, 1908 (for short "the CPC"), on the ground that the plaint as filed, does not disclose any cause of action and is barred by law.

2 Learned advocate appearing for the applicant/ defendant No.5 in support of his submission relied upon the provisions of

Section 41(e) of the Specific Relief Act, 1963 to contend that no injunction can be granted in the facts of the present case especially considering that the applicant/ defendant No.5 was the negotiating bank under the L/C which forms the subject matter of the suit. In support of this proposition, the learned advocate appearing for the applicant / defendant No.5 also relied upon a decision of the Supreme Court in the case of **Millennium Wires Pvt. Ltd.** Vs. **State Trading Corporation & Ors. {2015 (4) Scale, 62}.**

3 On the other hand, Mr Narula the learned advocate appearing on behalf of the plaintiff submitted that there is no merit in the contentions canvassed on behalf of the applicant / defendant No.5. In this regard Mr Narula pointed out that as far as the case of the plaintiff against defendant No.5 is concerned, the same is specifically pleaded in paragraph Nos.35A, 35B, 44A and 44B respectively. It is on the basis of these averments that the plaintiff seeks a decree either jointly and/or severally against defendant Nos.1,3,4 and 5 to pay to the plaintiff the Rupee equivalent of US.$.5,44,500/- towards reimbursement of the amount which the plaintiff would be liable to pay to defendant No.2. In these circumstances he submitted that the arguments canvassed by the applicant / defendant No.5 has no merit and the Notice of Motion be dismissed.

4 I have heard the learned counsel for parties at some length and have perused the papers and proceedings in the Notice of Motion. I have also gone through the plaint in quite some detail. The cause of action, as pleaded against the applicant/ defendant No.5, can be found in paragraphs 35A, 35B, 44A and 44B respectively which read thus -

" 35A. The plaintiff states that M/s Diffreight Agency (Defendant No.6) the Shipping Agent of supplier lodged police complaint with KLANG Police Station in Malaysia against Defendant Nos.3. Based on the said police complaint FIR was lodged and police recorded the statement of Shri Rajiv Singh MD of the Defendant No.3 and Smt Farida and Ms Vanitha Rathnam on 27th February 2012, when Shri Rajiv Singh admitted that there was some financial problem and that he had no option but to forge the B/L and discount L/C fraudulently. Hereto annexed and marked **Exhibit "A1" collectively** are the police report along with the Declaration filed before the police in Malaysia.

35B. The plaintiff state that the Defendant No.5 who was representing Defendant Nos.3 and 4 in connivance with each other has transferred the amount to the account of defendant Nos.3 and 4 in spite of being informed that the document furnished to the plaintiff were forged and fabricated. The defendant No.5 has filed written statement but has failed to give exact date when the amount was transferred to account of defendant No.3. However, in the appeal filed by defendant No.5 being Appeal No.(L) No. 574 of 2014, it was pointed out that payment was made by defendant No.5 on 12th December, 2011 i.e. the date of presenting L/C by defendant No.3. The acceptance of L/C was intimated to defendant No.5 by defendant No.2 only on 6th January, 2012. The said fact was not known to the plaintiff when suit was filed.

The fact that payment of L/C was made to defendant No.3 before acceptance itself gives rise to suspicion that defendant No.5 have colluded with defendant Nos.3 and 4 and have made gains for themselves and loss to plaintiff. Further, defendant No.5 has not disclosed any legal action taken by it against defendant Nos.3 and 4 who are its customers for recovery of the amount fraudulently encashed by defendant No.3.

44A. The plaintiff submits that serious financial fraud has been committed by defendant Nos.3 and 4 in collusion and connivance of defendant No.5 and its officers, which loss is likely to be suffered by the plaintiff (who is wholly owned by Government of India) to the tune of US. $.5,44,500/-. It is further submitted that the release of payment by (defendant No.2) to Defendant No.5 would be in contravention of the provisions of FEMA since the goods were never received in India which is in violation of the said Act. The plaintiff submits that they are likely to suffer losses and damages to the extent of Rupee equivalent of $5,44,500/- and are entitled to receive the same with interest thereon from the defendants herein viz. Defendant Nos.1,3,4 and 5.

44B. The plaintiff further submit that defendant No.1 who is the actual buyer of the material on Back to Back basis, to be supplied by defendant No.3 is liable to pay to the plaintiff the amount which the plaintiff will be forced to pay to defendant No.2 as the plaintiff was acting as facilitator of defendant No.1 and defendant No.1 as an actual buyer of the material on Back to Back basis has to bear all the losses suffered by the plaintiff due to fraudulent Act of Defendant Nos.3,4 and 5. The plaintiffs had accepted and agreed to open L/C on assurance of defendant No.1 that the defendant No.1 is dealing with defendant Nos.3 and 4 and known party. Defendant Nos.3 and 4 have applied similar modus operandi and have even duped STC another Government of India undertaking to the extent of US$ 14,87,000.00 and one M/s G E Conductors in the similar fashion. The plaintiff craves leave to refer to and rely upon the papers and proceedings in respect of suit filed by STC and G E Conductors against defendant

> Nos.1,3,4 and 5 when produced. Plaintiffs submit that they cannot be held liable in respect of payment of documents which are forged and fabricated to the knowledge of Defendant No.5 who is negotiating Bank on behalf of its Customer Defendant No.3."

It is on the strength of these averments, that prayer clause e(iii) seeks a money decree against defendant Nos.1,3,4 and 5 jointly and or severally. On reading the averments and as reproduced above, it is the specific case of the plaintiff that there has been a fraud and collusion between defendant Nos.1,3,4 and 5 respectively. It is specifically stated in the plaint that the payment was made by defendant No.5 to defendant No.3 on 15th December, 2011 (that is the date of presenting the L/C by defendant No.3) even though the acceptance of the L/C was intimated to defendant No.5 by defendant No.2 only on 6th January, 2012. The fact that the payment of the L/C was made to defendant No.3 before acceptance itself gives rise to suspicion that defendant No.5 had colluded with defendant Nos.3 and 4 and had made gains for themselves and loss to the plaintiff. On the basis of these averments a money decree is sought in the plaint *inter alia* against the applicant/ defendant No.5.

5 Looking at these averments, I do not think that the advocate for the applicant/ defendant No.5 is correct in his

submissions that no cause of action is disclosed in the plaint qua defendant No.5, so as to entitle me to reject the plaint under Order VII Rule 11 of the CPC. At the stage of rejection of the plaint under Order VII Rule 11 of the CPC, I have to merely look at the plaint and the averments contained therein and assume them to be true. If on reading the plaint itself, if the Court finds that there is no cause of action, only then the plaint can be rejected. Whether the cause of action can be proved or otherwise is irrelevant at this stage. This being the law and considering the averments made in the plaint which have been reproduced above, I do not think that it would be correct to hold that no cause of action is disclosed against the applicant/ defendant No.5. This being the case, I do not find any merit in this Notice of Motion.

6 This now only leaves me to deal with the decision of the Supreme Court in the case of **Millennium Wires Pvt. Ltd.** (supra) which was relied upon by the learned advocate appearing on behalf of the applicant / defendant No.5. I find that this judgment of the Supreme Court is wholly inapplicable to the facts of the present case. On reading this judgment it is quite clear that no money claim was made against the negotiating bank. Further, there were no specific allegations against the negotiating bank except a statement that the

bank seems to be hand in glove with Synergic Companies. After considering the law on the subject, especially with reference to Letters of Credit, the Delhi High Court came to the conclusion that no cause of action was pleaded against the negotiating bank, and therefore, rejected the plaint under Order VII Rule 11 of the CPC. This finding of the Delhi High Court was upheld by the Supreme Court in the aforesaid decision. In fact, the Supreme Court referred to the averments against the negotiating bank in paragraph 9 of its decision and thereafter came to the conclusion that there was no infirmity in the order passed by the Delhi High Court. As mentioned earlier, the pleadings in our case are quite different. I have set out those pleadings in detail earlier. I, therefore, do not see how this judgment can be of any assistance to further the case of the applicant / defendant No.5.

7 As far as Section 41(e) of the Specific Relief Act, 1963 (for short "the Act") is concerned, I find that the same is wholly inapplicable to the facts of the present case. Section 41(e) of the Act deals with, when injunction cannot be granted and *inter alia* states that an injunction cannot be granted to prevent a breach of contract, the performance of which would not be specifically enforced. I find that the reliance placed on this provision is wholly misconceived

inasmuch as the claim against the applicant/ defendant No.5 is not for specific performance but is claim in damages on the ground that defendant No.5 has, in collusion and connivance with defendant Nos.1,3 and 4 caused loss to the plaintiff. In these circumstances, even the reliance placed on this provision is of no assistance to the applicant / defendant No.5.

8 In view of the foregoing discussion, I find no merit in this Motion. It is accordingly dismissed. However, there shall be no order as to costs.

(B.P.COLABAWALLA, J.)