

COMMERCIAL NOTICE OF MOTION NO.286 OF 2017
WITH
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WITH
COMMERCIAL NOTICE OF MOTION NO.290 OF 2017
WITH
COMMERCIAL NOTICE OF MOTION NO.291 OF 2017
WITH
COMMERCIAL NOTICE OF MOTION NO.298 OF 2017
IN
COMMERCIAL SUIT NO.57 OF 2017

Vs.

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Mr. Amey Gokhale a/w. Mr. Vaibhav Singh and Ms. Radhika Indapurkar I/b. Shardul Amarchand Mangaldas and Company for defendant nos.1,9,12,13,14 and 17/applicant in all notices of motion.

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CORAM : K.R.SHRIRAM, J.
DATE : 8th JANUARY 2019

P.C.:

2 Mr. Gokhale, counsel for applicant submitted that excepting
2 specific averments in paragraphs 3 and 56 as far as five applicants except

defendant no.1, there are no other specific averments in the plaint and generically everybody has been referred to as defendants.

3 I have perused the plaint with the assistance of both the counsel. It is settled law as held by the Apex Court in ***Liverpool and London S.P and I Association Limited V/s. m.v. Sea Success I and Anr.***¹ that at the hearing of an application under Order 7 Rule 11, the Court cannot reject a plaint on the ground that averments in the plaint are not sufficient to prove the facts stated therein for the purpose of obtaining relief claimed in the suit. So long as the claim discloses some cause of action or raises some questions fit to be decided by a Judge, the mere fact that the case is weak and not likely to succeed is no ground for striking it out. What is required to be seen is whether the averments disclose a cause of action or a triable issue as such. It will be useful to reproduce paragraphs 147, 149, 151, 152 and 155 which read as under :

147. In D. Ramachandran Vs. R.V. Janakiraman & Ors. [(1999) 3 SCC 267], this Court held:

"It is well settled that in all cases of preliminary objection, the test is to see whether any of the reliefs prayed for could be granted to the appellant if the averments made in the petition are proved to be true. For the purpose of considering a preliminary objection, the averments in the petition should be assumed to be true and the court has to find out whether those averments disclose a cause of action or a triable issue as such. The court cannot probe into the facts on the basis of the controversy raised in the counter."

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149. In D. Ramachandran Vs. R.V. Janakiraman & Ors. [1999] 3 SCC 267, it has been held that the Court cannot dissect the pleading into several parts and consider whether each one of them discloses a cause of

1. (2004) 9 SCC 512

action.

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151. In ascertaining whether the plaint shows a cause of action, the court is not required to make an elaborate enquiry into doubtful or complicated questions of law or fact. By the statute the jurisdiction of the court is restricted to ascertaining whether on the allegations a cause of action is shown. In *Vijay Pratap Singh Vs. Dukh Haran Nath Singh* [AIR 1962 SC 941] this Court held:

"By the express terms of r. 5 clause (d), the court is concerned the ascertain whether the allegations made in the petition show a cause of action. The court has not to see whether the claim made by the petitioner is likely to succeed: it has merely to satisfy itself that the allegations made in the petition, if accepted as true, would entitle the petitioner to the relief he claims. If accepting those allegations as true no case is made out for granting relief no cause of action would be shown and the petition must be rejected. But in ascertaining whether the petition shows a cause of action the court does not enter upon a trial of the issues affecting the merits of the claim made by the petitioner. It cannot take into consideration the defences which the defendant may raise upon the merits; nor is the court competent to make an elaborate enquiry into doubtful or complicated questions of law or fact. If the allegations in the petition, *prima facie*, show a cause of action, the court cannot embark upon an enquiry whether the allegations are true in fact, or whether the petitioner will succeed in the claims made by him."

152. So long as the claim discloses some cause of action or raises some questions fit to be decided by a Judge, the mere fact that the case is weak and not likely to succeed is no ground for striking it out. The purported failure of the pleadings to disclose a cause of action is distinct from the absence of full particulars. [See *Mohan Rawale* – AIR 1962 SC 941 : 1962 All LJ 634]

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155. The reason for the aforementioned conclusion is that if a legal question is raised by the defendant in the written statement, it does not mean that the same has to be decided only by way of an application under Order 7 Rule 11 of the Code of Civil Procedure which may amount to prejudging the matter.

4 The Court, while ascertaining whether the plaint shows a cause of action, is not required to make an elaborate enquiry into doubtful or complicated questions of law or fact. I have considered the plaint and

paragraphs 46, 47, 48, 50 and 51 of the plaint read as under :

46. Defendant no.1 owns, controls and dominates defendant no.2 with its shareholding in these companies and even otherwise.

47. The defendant nos.3 to 5 effectively controls the board of the defendant nos.1 and 2 and all appointments are made by them. It is submitted that the defendants cannot hide behind the corporate personality of defendant no.2. Defendant no.2 is merely a front created by the defendants for administrative purposes to manage clients engaging in commodity trading and as aforesaid, all the defendants either directly or indirectly interacted with the plaintiff and provided advice. As such the corporate personality of the defendant no.2 is a mere sham and cloak of convenience. The plaintiff verily believe that the defendants were well aware of the problems in the NSEL investment and therefore used the defendant no.2, a company with very few assets and capital as the front for dealing with the plaintiff for the trading on NSEL including by having agreements executed through the defendant no.2.

48. The unity of identity of the defendant nos.1 and 2 is apparent from the fact that the employees of the defendant nos.1 and 2 used to all interact with the plaintiff and make representations to the plaintiff from time to time as aforesaid. In fact, from the correspondence exchanged with the plaintiff, it is apparent that there were common employees between defendant nos.1 and 2 who were performing diverse functions in the defendant nos.1 and 2. This clearly exposes the fact that defendant nos.1 and 2 were acting as a single entity and therefore they cannot be permitted to use the corporate veil of defendant no.2 to avoid their liability.

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50. The plaintiff is therefore entitled to recover the amounts due to them not only from defendant no.2 but, in the circumstances set out hereinabove, also from the other defendants as well. In the circumstances, it is respectfully submitted that it is imperative in the interest of justice that this Hon'ble Court be pleased to grant the plaintiff the orders and reliefs as more specifically set out hereinafter.

51. The plaintiff submits that the facts set out hereinabove, clearly show that defendant nos.1 to 3 acting through their respective directors and principal shareholders have participated either by acts of commission, deliberate omission or negligence in perpetrating the fraud and/or permitting the fraud referred to above from being perpetrated, which has resulted in losses to the plaintiff. It is submitted that the defendants above named had a fiduciary duty to safeguard the interest of its clients trading on the NSEL, through it.

5 Mr. Raheja, counsel for plaintiff in fairness stated that there are no specific allegations against defendant nos.9 and 17 in the plaint as to how they were involved in the transaction. So far as defendant nos.12, 13 and 14 are concerned, there are averments to the effect that they have participated as principal shareholders in the acts of commission, deliberate omission or negligence in perpetrating the fraud referred to from being perpetrated which has resulted in losses to plaintiff. It is also stated that these defendants had a fiduciary duty to safeguard the interest of its clients who would include plaintiff.

6 Mr. Gokhale relied upon the judgment of the Apex Court in *Church of Christ Charitable Trust and Educational Charitable Society V/s. Ponniyamman Educational Trust*² to submit that if on a meaningful and not formal reading of a plaint it is manifest that the plaint is vexatious or meritless in the sense of not disclosing a clear right to sue, trial Court should exercise its power under Order VII, Rule 11, Code of Civil Procedure, and should reject the plaint. Mr. Gokhale submitted that the cause of action is a bundle of facts which taken with the law applicable to them gives plaintiff the right to relief against defendant. Every fact which is necessary for plaintiff to prove to enable him to get a decree should be set out in clear terms. Mr. Gokhale submitted that in the plaint, plaintiff has not set out in clear terms how each of the defendant will be liable.

2. 2012 (8) SCC 706

7 It is true that the cause of action is a bundle of facts and what is the cause of action has to be set out in clear terms. In my view, there is no cause of action set out in clear terms as against defendant nos.9 and 17. So far as the remaining applicants are concerned, paragraphs 46 to 51 of the plaint clearly set out the cause of action. Whether the averments in the plaint are sufficient to prove the facts stated therein for the purpose of obtaining reliefs claimed in the suit can be decided at the trial of the suit. Mr. Gokhale did submit that a shareholder cannot be liable or director cannot be liable in law but those are issues which require to be considered at the trial of the suit. The averments of course indicate a cause of action and a triable issue as such.

8 In the circumstances, the following order is passed :

- (a) notice of motion no.286 of 2017, notice of motion no.290 of 2017, notice of motion no.291 of 2017 and notice of motion no.298 of 2017 are dismissed;
- (b) notice of motion no.287 of 2017 and notice of motion no.289 of 2017 are allowed and accordingly disposed;
- (c) defendant no.9 and defendant no.17 be struck off and the amendment to the cause title to be carried out accordingly within three weeks from today. Re-verification dispensed with.

9 In view of the above, the issues settled on 19th December 2018 to be modified as under :

“Wherever defendant no.9 and defendant no.17 are mentioned, the same to be deleted.”

Rest of the issues will remain unaltered.

10 The time schedule indicated in paragraph 2 (a) and (b) of the order dated 19th December 2018 is extended by one week from today. Rest of the directions remain unaltered.

(K.R. SHRIRAM, J.)