IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

Sr. No. 209 CR-33-2013 (O&M)

Date of decision : 20.11.2019

M/s AAA Apparels Manufacturing Company ..... Petitioner

VERSUS

Mantra Inc. ..... Respondent

CORAM: HON'BLE MR. JUSTICE DEEPAK SIBAL

Present: Mr. Ashwani Kumar Chopra, Senior Advocate, with
Mr. Ashutosh Jerath, Advocate, for the petitioner.

Mr. Naveen S. Bhardwaj, Advocate, for the respondent.

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DEEPAK SIBAL, J. (ORAL)

The present petition is directed against the order dated 25.08.2012, passed by the Additional District Judge, Gurgaon (for short, the Appellate Court), allowing the appeal filed by the respondent to challenge therein judgment and decree dated 21.08.2010, passed by the Civil Judge (Junior Division), Gurgaon (for short, the Trial Court), through which the Trial Court had allowed an application filed by the petitioner under Order 7 Rule 11 CPC, resulting in rejection of the respondent's plaint.

The facts, in brief, which are required to be noticed for adjudicating upon the present petition are that the respondent filed a suit seeking therein to be declared half owner of the movable and immovable properties as set out by it in Schedule-I annexed with the plaint and thereafter sought partition of such properties as per the declared share. A further prayer was also made by the respondent for appointment of a Local Commissioner, preferably a Chartered Accountant, to give a report after examining the records/accounts of the petitioner and then as per such report passing of a decree for the sums which may be found due to the respondent. During the pendency of the suit a direction was sought to be issued to the petitioner and its agents etc. to maintain *status quo* with regard to the properties mentioned in Schedule-I of the plaint.

Inter alia, the case set up by the respondent was that it was engaged in the business of sale of garments in New York in the United States of America. Since the year 1997 the parties were having business relations. With the passage of time they were unable to meet the growing demand for the goods which were being manufactured by the petitioner and traded by the respondent. Therefore, they decided to set up a bigger manufacturing unit with joint funds. As per the agreement arrived at between them, for setting up the new factory, the petitioner applied to the Haryana Urban Development Authority, Gurgaon (for short, the Authority) for the allotment of an industrial plot and in pursuance to such application, a plot bearing No. 295, Udyog Vihar, Phase VI, Gurgaon (for short, the property in question) was allotted by the Authority in the petitioner's name. Thereafter the parties entered into a Memorandum of Understanding (for short, the MOU) which laid down the terms as per which they were to carry out their joint business. Amongst other terms, the MOU specifically referred to the assets of the joint venture of the parties which included the land in question as also the plant and machinery to be installed thereupon. The parties further agreed to be 50-50 owners of the new factory and decided to share the profits in the ratio of 66.70% and 33.30% amongst the petitioner and respondent respectively.

It was further the case of the respondent that after the parties entered into the aforesaid MOU the new factory was set up on the property in question with funds provided by both parties. The details of payments made by the respondent to the petitioner and acknowledgment of the same by the petitioner through emails were also referred. The respondent further went on to aver that through email dated 02.06.2005 the petitioner acknowledged that for the financial year 2003-04 an amount of US$ 57,08,679 was the profit earned through the running of the new factory but failed to pay to the respondent the agreed share. According to the respondent, formal formation of a new company in which both parties were to have equal ownership was also derailed by the petitioner on the pretext that there were certain rules of the Authority which did not permit so.

On being put to notice, the petitioner who was the sole defendant, appeared before the Trial Court and filed a written statement as also a counter-claim. An application under Order 7 Rule 11 CPC was also filed by the petitioner through which it sought rejection of the respondent's plaint. Since the issue to be decided in the present petition is with regard to the orders passed on the application filed by the petitioner under Order 7 Rule 11 CPC, the stand taken by the petitioner in its written statement or its counter-claim is not being referred to.

In the application filed by the petitioner under Order 7 Rule 11 CPC rejection of the respondent's plaint was sought *inter alia* on the ground that no suit for partition at the respondent's behest was maintainable as the property in question was neither owned by the respondent nor was it a co-sharer therein. The prayer made by the respondent for rendition of accounts was also sought to be outrightly rejected for the reason that no joint company had ever come into existence and therefore there was no question of rendition of accounts of a non-existent entity.

The Trial Court through judgment and decree dated 21.08.2010 agreed with both the above issues raised by the petitioner and allowed its application resulting in rejection of the respondent's plaint. The respondent challenged the aforesaid rejection of its plaint by way of an appeal which was accepted by the Appellate Court through the order under challenge in the present proceedings.

Learned counsel for the parties have been heard.

A reading of the respondent's plaint reveals that the case set up by the respondent is that since the year 1997 the parties had business relations in the course of which the petitioner was manufacturing garments in India which were being exported by the respondent in the United States of America. Over a period of time business flourished and both parties needed more items to be manufactured in India to be exported. Therefore, they jointly decided to set up a bigger factory than the one from which the petitioner was then manufacturing from. Accordingly, the petitioner applied to the Authority for allotment of an industrial plot. On a favourable consideration of such application, the property in question was allotted in the petitioner's name and after such allotment the parties entered into a written MOU. Clauses 1, 2, 3 and 6 of the said MOU which are relevant, read as under: -

> "1. That the first party is assured for on going production for mutual interests of foreign buyer called second party.
> 2. That the first party is reassured factory will prioritize production & buyer (called here second party) can maintain say in sharing of its designs (Intellectual property) with other buyers for the benefit of new company.
> 3. That principal assets of the new company will be:

A) Land (basis cost)	Rs.30.00 lacs
18% interest of 3 years	Rs 6.00 lacs or actual
Enhancement and incidental expenses	Rs.3.85 lacs or actual
Total says	Rs.40.00 lacs (Approx)
B) Building construction including mezzanine floor (including furniture for office block) 25000 sq. feet approx.	Rs.1.25 crores
C) 100 sewing machine	Rs.20.00 lacs or actual
D) Generator sets	Rs.12.00 lacs or actual
E) Electricity Connection	Rs.13.00 lacs or actual
F) Table, steam presses, washing plant, Fans, tube light etc. etc.	Rs.15.00 lacs or actual

> Total Approx. Rs.2.25 crore (or incurred actual cost)
> What ever will be added here after in the new factory at Gurgaon will be shared equally i.e. 50% factory partner and 50% buyer equally.
> New Partnership factory had assets of Land, Building and Plant & Machinery at Gurgaon.
> This investment shall be borne by both parties equally. Proceeds of sale of land, building and plant & Machineries shall be distributed equally, Note: both parties will pay for 50% of factory and land each (We can pay upon signature of the M.O.U.) but the balance shall be financed through the company. In this way the finance cost of the other expenses will be treated as additional expenses of the company. In case sufficient fund is not generated by the new company, the short fall has to be raised by both or any one party at reasonable rate of interest, so that production will not hampered.
> 4. xxx xxx xxx
> 5. xxx xxx xxx
> 6. If the turn-over of factory doesn't exceed Rs.five crore then First party is not obliged to share any portion of new m/up with Second Party (here turnover on FOB basis).
> New m/up (profit) will be shared as follow:

(Here profit means after taxation)
First party 66.70%
Second party 33.30%
Any distribution of proceeds are due at the end of each financial year. As discussed total turn over include the output of Gurgaon factory and other local existing units on date April 2003. (as Khanpur may be specializing in some process or treatment that are most cost effective to be produced at this location rather than at new Gurgaon). It is also understood that First Party owns wholly the land, building and machines at Khanpur location and Second Party has no right to land, building at Khanpur. The cost of maintenance and business expenses will be shared by the new company as agreed by the both parties."

As per the afore quoted terms of the MOU, the parties decided to jointly form a new company. The assets of the new company were clearly referred therein. It was further agreed that the funds for setting up and running the joint business will be contributed by both of them in the ratio of 50-50 and that the profits shall be shared in the ratio of 66.70%-33.30% between the petitioner and the respondent respectively. As per Clause 3 of the MOU the parties acknowledged that the new jointly owned factory already owned and possessed land (the land in question), building, plant and machinery at Gurgaon.

The respondent further went on to aver in its plaint that after signing of the aforesaid MOU lakhs of US dollars were given by it to the petitioner which was part of its contribution in setting up of the joint business. The acknowledgment of such payment by the petitioner, through email, has also been specifically averred. It is further the pleaded case of the respondent that after the new factory had been established on the property in question with joint funds, the petitioner, through email dated 02.06.2005, acknowledged that for the financial year 2003-04 such factory had earned a profit of US$ 57,08,679 but the petitioner failed to share 33.30% of such profit with the respondent as had been agreed between them. The excuses made by the petitioner to formally incorporate a new company for running of the joint business of the parties has also been pleaded.

In para 45 of the plaint the respondent details its cause to file its suit which reads as under: -

> "45. That the cause of action arose on 2.06.2005 when the Defendant had acknowledged 57,08,679 US$ on account of the profit generated out of the New factory as per Clause 6 of the MOU for the financial year 2003-04. The cause of action again arose on 26.10.2005 when certain issues regarding meeting of expenses qua of factory account was brought by defendant. The cause of action again arose in December, 2005 when an amount of US$30,000 paid by the plaintiff were not reflected accurately and had been subsequently credited in plaintiff's account in three installments of US$10,000 each. The cause of action further arose on 31.3.2006 when defendant had acknowledged settlement of the account in respect of the supplies made by the defendant to the plaintiff. The cause of action again arose when e-mails dated 1.4.2006 and 3.4.2006 were sent by the defendant to the plaintiff. The cause of action again arose on 20.10.2006 when defendant had put certain arbitrary conditions for dispatching supplies. The cause of action again arose on 21.10.2006 when the Plaintiff had made the payment towards the supplies. The cause of action again arose on 23.10.2006 when the Defendant had acknowledged the payment and made the supplies. The cause of action again arose on 3.11.2006 when defendant declined any payment to new factory account of the plaintiff. The cause of action again arose when the Defendants shown an alleged outstanding of 2 crores. The cause of action is continuing on day to day basis."

In the light of above averments, the respondent sought a decree of partition after declaring it of having half share in the movable and immovable properties as set out in Schedule-I annexed with the plaint which contained the property in question as also the plant and machinery installed thereupon. The respondent had further prayed for appointment of a Chartered Accountant to examine the books of accounts of the petitioner and then on the basis of such examination award to the respondent whatever is found due towards it. A direction was also sought to be issued to the petitioner and its agents etc. to maintain *status quo* with regard to the aforesaid alleged joint properties of the parties.

The first prayer made by the respondent is that after declaring the petitioner to be half owner of the properties specified in the plaint the same be partitioned as per the declared share.

The property in question on which the parties allegedly jointly set up a new factory, in the records of the Authority, is solely owned by the petitioner and therefore, if a simpliciter suit for partition had been filed by the respondent for partitioning of such property, the same would not be maintainable. However, if the respondent's prayer is carefully read the same is to first declare the respondent as half owner of the property in question and then partitioning of the same is prayed for as per the declared share. In the light of the afore facts pleaded by the respondent in its plaint such a prayer cannot be rejected at the threshold.

In the light of averments made by the respondent in its plaint with regard to it making contribution of lakhs of dollars for setting up and running of the parties' joint business and acknowledgment by the petitioner, through its email, with regard to the profits earned by the joint business set up by the parties as also the non-denial by the petitioner with regard to the entering of the aforesaid MOU between them, the respondent's second prayer for appointment of a Chartered Accountant to go into the petitioner's accounts and then hold the respondent entitled to what ever is found due towards it is also worth further consideration.

The argument raised on behalf of the petitioner that the respondent's suit would be barred in view of Section 4 of the Benami Transactions (Prohibition) Act, 1988, at this stage, needs to be rejected particularly in the light of the averments made by the respondent in its plaint that it had not paid the entire funds for which the property in question was purchased but had contributed towards setting up of a joint business in terms of the MOU entered into between the parties. Even otherwise, this issue can be decided only after evidence is led by both sides in this regard.

In view of the above, no merit is found in the present petition and the same is accordingly dismissed.

The respondent's suit was filed in the year 2006 and therefore it is considered just and appropriate to direct the Trial Court to decide the same expeditiously.

Needless to add that since the above observations have been made by this Court to decide the issue with regard to rejection of the petitioner's application under Order 7 Rule 11 CPC the same shall not bind the Trial Court at the time of final decision of the respondent's suit.

20.11.2019 [DEEPAK SIBAL]
shamsher JUDGE

Whether speaking/reasoned	:	Yes / No
Whether reportable	:	Yes / No