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\* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

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Delivered on : 24<sup>th</sup> October, 2019

+ **RFA 313/2018**

MASYC PROJECTS PVT LTD

..... Appellant

Through : Mr.Tarun Sharma, Ms.Akanksha  
Kapoor and Mr.Pradeep Singh,  
Advocates.

versus

NILACHAL IRON AND POWER LTD

..... Respondent

Through : Mr.Gaurav Kejriwal and  
Mr.Gurpreet Hora, Advocates.

**CORAM:**

**HON'BLE MR. JUSTICE YOGESH KHANNA**

**YOGESH KHANNA, J.**

1. This appeal is preferred by the appellant against the judgment and decree dated 19.12.2017 passed by the learned Additional District Judge-06/West District, Rohini Courts, Delhi (hereinafter referred as the learned 'Trial Court') in CS No.11280/2016 whereby the suit filed by appellant for recovery of Rs.20,37,506/- was dismissed, primarily, on grounds of territorial jurisdiction.

2. The brief facts which led to the filing of the suit, as are noted in impugned judgment are as under:-

*"1. xxxxxxxx the plaintiff company is engaged in manufacture of material handling equipments like belt, conveyors, conveying and systems etc. The defendant placed a purchase order bearing no. NIPL/47/2003-2004 dated 02.07.2003 on the plaintiff for system design, detail design, manufacture and supply complete material handling system for a 350 TFD sponge iron plants to be located at*

Kandra near Jamshedpur in Jharkhand at the price of Rs.1,37,33,000/-. It is contented that vide letter dated 25.08.2003, plaintiff conveyed to the defendant of change in the length in the conveyor as advised by the defendants consultant TGS (Tata Group). Therefore, the purchase order was increase to Rs.1,42,30,303/-, thereafter several other orders have been placed by the defendant during the business. It is contented that on the regular insistence of the defendant, the plaintiff gave performance bank guarantee prior to erection commissioning for 10% (5% + 5%) of the basis supply of value amounting to Rs.13,73,000/-. It is contented that defendant was now threatening to encash the bank guarantees on the basis of non execution of work in time which were against the terms for which the said performance bank guarantees were given and had there been any delay in execution of work (supply of equipment) on the part of the plaintiff in terms of purchase order dated 02.07.2003, defendant could have invoked clause no.11.0 stipulated liquidated damages of said purchase order while releasing the final payment of Rs 13,73,000/- by cheque no.049950 dated 22.11.2004 to the plaintiff but defendant did not do so because they were well aware that there was no delay on part of the plaintiff for execution of work stipulated in their purchase order dated 02.07.2003 whereas defendant themselves delayed the supplies due to various reason including non compliance of various terms by the defendant and also there was variation in design at the defendant in as much it has been changed and varied the length arid conveyors for which the defendant amended the purchase order only on 03.11.2004 vide their letter of even date whereas plaintiff has requested these documents since 25.08.2003 therefore, plaintiff had filed a suit bearing no.244/2005 on 23.11.2005 alongwith the application U/o 39 rule 1 and 2 CPC seeking ex parte stay order for invoking performance bank guarantees. Vide order dated 03.12.2005 the Sh D C Anand, Ld ADJ was pleased to decline to grant injunction in favour of plaintiff resulting into appeal bearing, FAO No.425/2005 preferred but the same was also dismiss by the Hon'ble High Court of Delhi and subsequently SLP was also dismissed as such interim stay was vacated and the defendant has encashed the said bank guarantees. The earlier suit vide dated 09.12.2006 has been dismissed for non prosecution.

2. It is contented that the said bank guarantees have been encashed on the ground that the work of erection has been delayed whereas work of period was given by a separate purchase order by the defendant on M/s Elcoma Engg Pvt Ltd which no doubt is a group of companies of plaintiff but is a separate entity in law. In any event, in the work of erection there was no condition of bank guarantee; to be given by the said M/s Elcoma Engg. Pvt India and as such on account of any such delay on the part of M/s Elcoma Engg. Pvt Ltd the aforesaid bank guarantees given by the plaintiff could not have been encashed. Furthermore, the total value of the work of Rs.6,80,000/- and could not entitle the defendant to encash the bank guarantees of Rs.13,73,000/-. Thus, judged from any angle, the defendant illegally and wrongly encashed the bank guarantee by taking advantage of the fact that the injunction was not granted to the plaintiff. It is contented that the plaintiff is also entitled for sum of Rs.6,64,506/- as the defendant failed to provide C form despite notice raised from 10.04.2004- 12.12.2004 resulting into the invoice was increased 4% CST being charged against the C Form resulting into filing the present suit."

3. The respondent / defendant filed written statement in the suit and took various objections besides Delhi Courts have *no territorial jurisdiction* to entertain the suit and the suit being filed without any cause of action. However, the respondent admitted in its written statement that conveyor systems supplied by the appellant herein, have been running *successfully*.

4. On 02.03.2017 the respondent was proceeded *ex parte* by the learned Trial Court.

5. Various issues, including of *territorial jurisdiction* was framed by learned Trial Court per order dated 12.12.2012. In support of its case, the appellant examined *PW1* its authorised representative; witness from Bank of India as *PW2*; and two other witnesses. Despite the respondent being proceeded *ex parte* two legal issues were considered: a) qua suit being barred under Order II Rule 2 CPC and b) this Court has no territorial jurisdiction to entertain the suit.

6. The learned Trial Court came to a conclusion it has no territorial jurisdiction per clause No.15 of the purchase order Ex.*PW1/3* which say *all the disputes pertaining to the transaction against the acceptance of offer of execution of the contract shall have the jurisdiction of Kolkata*. The learned Trial Court on examining various judgments decided this issue against the appellant herein stating *inter alia* Kolkata Court has exclusive jurisdiction and the present suit is not maintainable in Delhi. Not only the learned Trial Court had decided the issue of territorial jurisdiction, but also held the suit is barred under Order II Rule 2 CPC as claim for recovery of the amount of bank guarantees wrongfully

encashed was made available to the appellant during the pendency of the earlier suit for permanent injunction, filed for restraining the respondent from encashing such bank guarantee.

7. Qua applicability of Order II Rule 2 CPC, I may only say the cause of action for filing the suit for permanent injunction against encashment of bank guarantees was distinct than this suit for recovery filed by appellant herein after alleged wrongful encashment of such bank guarantees. Since the cause of action in both the suits were different and as this suit for recovery could have been filed only after wrongful encashment of such bank guarantees, hence, this suit could not have been said to be barred per Order II Rule 2 CPC.

8. The issue raised before me is when the learned Trial Court had come to a conclusion that it lack territorial jurisdiction, whether it was incumbent to decide other issues or the Court ought to have acted per order VII rule 10/10A CPC.

The provisions under Order VII Rule 10 and 10(A) CPC are as under:-

*“Order VII PLAINT*

*Rule 10. Return of plaint: -- (1) Subject to the provisions of rule 10A, the plaint shall at any stage of the suit be returned to be presented to the Court in which the suit should have been instituted.*

*(2) Procedure on returning plaint- On returning a plaint, the Judge shall endorse thereon the date of its presentation and return, the name of the party presenting it, and a brief statement of the reasons for returning it.*

*10A. Power of Court to fix a date of appearance in the Court where plaint is to be filed after its return*

*(1) Where, in any suit, after the defendant has appeared, the Court is of opinion that the plaint should be returned, it shall, before doing so, intimate its decision to the plaintiff.*

*(2) Where an intimation is given to the plaintiff under sub-rule (1), the plaintiff may make an application to the Court-*

*(a) specifying the Court in which he proposes to present the plaint after its return,*

*(b) praying that the Court may fix a date for the appearance of the parties in the said Court, and*

*(c) requesting that the notice of the date so fixed may be given to him and to the defendant.*

*(3) Where an application is made by the plaintiff under sub-rule (2), the Court shall, before returning the plaint and notwithstanding that the order for return of plaint was made by it on the ground that it has no jurisdiction to try the suit, -*

*(a) fix a date for the appearance of the parties in the Court in which the plaint is proposed to be presented, and*

*(b) give to the plaintiff and to the defendant notice of such date for appearance.*

*(4) Where the notice of the date for appearances is given under sub-rule (3), -*

*(a) it shall not be necessary for the Court in which the plaint is presented after its return, to serve the defendant with a summons for appearance in the suit, unless that Court, for reasons to be recorded, otherwise direct, and*

*(b) the said notice shall be deemed to be a summons for the appearance of the defendant in the Court in which the plaint is presented on the date so fixed by the Court by which the plaint was returned.*

*(5) Where the application made by the plaintiff under sub-rule (2) is allowed by the Court, the plaintiff shall not be entitled to appeal against the order returning the plaint.*

**In *M/s. Alphabetics Private Limited vs Lohia Jute Press* AIR 2004 Delhi**

**374 wherein it was held:-**

*"5. In terms of Order 14 Rule 2 CPC once a suit has been tried on all the issues, it is required of the Court to give findings on all such issues. However, in my opinion, the facts and circumstances of a case may warrant the court to refrain itself from giving findings on all the issues as it may prejudice the trial of the case in the Court where it is filed after the plaint is returned. Once the court comes to a finding that it had no jurisdiction to try the suit, in my opinion, it would have been an exercise in futility to decide other issues on the merits of the case. The findings on the other issues after the plaint was directed to be returned for presentation in appropriate court would have prejudiced one of the parties and the trial court has rightly not given findings on other issues framed by it. I am, therefore, not in agreement with learned counsel for the appellant that the impugned judgment is bad only because the findings on other issues have not been given by the learned Trial Court.*

8. *Learned counsel for the appellant states that her oral request may be considered by this Court as request/application under Order 7 Rule 10A CPC. Counsel for the respondent has agreed that the respondent would not insist upon a notice being served upon them by the Bombay Court and the respondents would appear in the Court in Bombay pursuant to the directions given by this Court. Learned counsel for the appellant is, however, not aware as to in which court in Bombay the plaint is to be presented after it is returned by the Court in Delhi. She requests for a short adjournment to inform the Court as to in which Court the plaintiff intends to present the plaint after it is returned by the Court in Delhi. At request, adjourned to 19th August, 2003."*

9. Thus, the learned Trial Court, if had come to a conclusion it had no territorial jurisdiction to try and decide the suit, then it was not required to decide other issues, including that under order II rule 2 CPC. The could have rather acted under order VII rule 10 and 10(A) CPC, per *M/s.Alphabetics Private Limited* (supra). Appeal being a continuation of the suit, hence an oral prayer is made by the learned counsel for appellant under Order VII Rule 10 and 10(A) CPC for return of plaint along with documents / evidence etc to be filed before the appropriate Court.

10. Another issue now raised is *if return of plaint would lead to a de-novo trial?* The answer is in *M/s Excel Careers and Another vs Frankfinn Aviation Services Private Limited* SLP (C) No.16893/2018 decided on 13.09.2013 wherein the Supreme Court noted:-

*"9. xxxxx The relevant observations of this Court in Joginder Tuli vs. S. L. Bhatia (1997) 1 SCC 502 are as follows:*

*"5 Normally, when the plaint is directed to be returned for presentation to the proper Court perhaps it has to start from the beginning but in this case, since the evidence was already adduced by the parties, the matter was tried accordingly. The High Court had directed to proceed from that state at which the suit stood transferred. We find no illegality in the order passed by the High Court warranting interference.*

*12. In our view, this will not make any difference in so far as the powers conferred on Court under Order VII Rule 10 and 10A of CPC are concerned. While sub-rule (1) of Rule 10 of Order VII envisages that a plaint can be returned at any stage of the suit to be presented to the Court in which the suit should have been instituted, the explanation*

*thereto provides that the power of return of plaint can be exercised even by an appellate court or a revisional court after setting aside the decree passed in the Court. Order VII Rule 10 A provides that where in any suit, after the defendant has appeared, the Court is of the opinion that the plaint should be returned, the plaintiff may make an application specifying the Court in which he proposes to present the plaint after its return, pray that a date may be fixed for appearance of the party in the said Court and request that notice of the date fixed be given to the plaintiff as well as to the defendant. The Court can thereafter fix a date for appearance and the new Court need not summon the defendant again if such notice had been given. In Joginder Tuli case (supra), the Court directed that the evidence already recorded be taken into consideration whereas in Modern Construction case (supra) a different view was taken.*

*13. The Courts in India are burdened with a lot of litigation. We see no justifiable reason why the proceedings which may have taken place in a Court even if it has no jurisdiction, cannot be transferred to the new Court having jurisdiction. Unless a party can prove that it has been actually prejudiced by some proceedings before the Court not having jurisdiction, it would not be in the larger interest to start the proceedings de novo. We may refer to certain provisions of the CPC in this regard. Section 21 of the CPC provides that no objection as to the territorial or pecuniary jurisdiction shall be allowed to be raised in an appellate or revisional court unless such objection was taken in the Court of first instance or at the earliest possible opportunity and, in any event, before the framing of issues. The further requirement is that there should be consequent failure of justice. It has repeatedly been held that the objections with regard to the pecuniary or territorial jurisdiction are technical objections and unless raised at the earliest possible opportunity, cannot be entertained in appeal or revision for the first time (Seth Hiralal Patni v. Sri Kali Nath, AIR 1962 SC 199, R.S.D.V. Finance Co. Pvt. Ltd v. Vallabh Glass Works Ltd, AIR 1993 SC 2094)*

*17. In our view, the same principles which govern Section 21 and Order XIV CPC should apply to Order VII Rule 10 and 10A CPC also and the time of the Court, the parties and the witnesses should not be wasted. When the Court orders a return of the plaint, we prima facie feel that the Court exercising its inherent jurisdiction should return the plaint, which is the property of the plaintiff, to the plaintiff but should also transfer the other material on record to the Court to which the plaintiff applies for transfer in terms of Order VII Rule 10A. This would avoid duplicity of proceedings, evidence and contradictions in pleadings and evidence, if two sets of pleadings and evidence are allowed in the same set of proceedings. In the case in hand, the case was fixed for rebuttal evidence, if any, and arguments. Pleadings and evidence are over. Why should the clock be turned back by 6 years, which it took to reach this stage?"*

11. Thus in the circumstances, the appeal stands allowed and the impugned judgment and decree dated 19.12.2017 is set aside. *Per order*

VII Rule 10 and 10(A) CPC, the plaint is ordered to be returned by the learned trial court to appellant to be presented to the court in which the suit should have been instituted, alongwith documents/evidence etc. Admittedly, the respondent was proceeded *exparte* before the learned trial court. It is the submission of the learned counsel for the respondent an opportunity be afforded to the respondent to challenge such *exparte* order, since the respondent company has now changed its management. Needless to say the respondent in these peculiar circumstances shall be at liberty to move an application seeking permission to participate in the proceedings, as per law, before the concerned court.

12. The parties to appear before the Registrar, Original Side, High Court, Kolkata, West Bengal on 15.12.2019 at 10.00AM for placing of the suit before the Court of competent jurisdiction.

13. Copy of this order be communicated to the Registrar, Original Side, High Court of Judicature, Kolkata, West Bengal.

14. No order as to costs.

15. Order *dasti*.

**YOGESH KHANNA, J.**

**OCTOBER 24, 2019**

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