IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CIVIL REVISION APPLICATION NO. 209 OF 2019

M/s. National Electrical Industries ...Applicant

versus

Bharat Insulation Company (I) Ltd. ...Respondent

.....
Mr. Amol R. Joshi, advocate for the applicant
Mr. P.V. Barde advocate for respondent
.....

CORAM : V. K. JADHAV, J.

Date of Reserving the Order : 31.01.2020

Date of pronouncing the Order : 11.02.2020

O R D E R :-

1. By this civil revision application, the applicant-original defendant is challenging the order dated 5.7.2019 passed by the Joint Civil Judge, Senior Division, Aurangabad below Exh.17 in Special Civil Suit No. 130 of 2017 (old) commercial suit No. 47 of 2019 whereby the application under Order VII Rule 11 of Civil Procedure Code 1908 filed by the applicant was rejected.

2. Brief facts giving rise to the present civil revision application are as follows-

The respondent-plaintiff has instituted the suit for recovery of amount of Rs.12,78,214/- before the Civil Judge, Senior Division, Aurangabad. The applicant-defendant has filed an application under Order VII Rule 11 (a) and (d) of C.P.C. It has been stated in the said application that there is no cause of action and the suit is barred by the provisions of Limitation Act. After hearing the parties, the learned trial court has rejected the said application below Exh.17 by the impugned order dated 05.07.2019. Hence, this civil revision application.

3. Learned counsel for the applicant-original defendant submits that the impugned order is ex-facie untenable, misconceived and bad in the eyes of law. Learned counsel submits that no cause of action is disclosed from the pleadings and the suit is barred by limitation. Learned counsel submits that as per the pleadings, the respondent-plaintiff is manufacturer of Enameled Copper Winding Wires, for the submersible pumps motor, power and flexible cables etc. The applicant-defendant used to purchase the Enameled Round Winding Wires made of Copper manufactured by the respondent-plaintiff company on credit from time to time. The respondent-plaintiff has further pleaded that the plaintiff company has filed invoices for the sale of goods to the defendant from time to time and the plaintiff company is maintaining the account in the electronic form. The particulars of the transaction between the parties are given in detail in para 4 of the plaint and as it appears from the said details, the last transaction is of 10.9.2013. It has been further pleaded in para 9 of

the plaint that the plaintiff company requested the defendant company for confirmation of balance as on 31.3.2016. In pursuance to the request of the plaintiff company, the defendant has confirmed the balance due and payable by it to the plaintiff company as on 31.3.2016. In view of the same, the cause of action is shown to have been initially arisen on 24.9.2013 and lastly on 7.12.2016 i.e. the date on which the defendant company has confirmed the balance outstanding at the foot of their account. Learned counsel submits that there are no documents on which cause of action is a base. In absence of any cause of action shown as against the applicant-defendant, the suit cannot be proceeded further for recovery of money. Learned counsel submits that the averments made in the plaint as a whole, attracts the provisions of clause (d) of Rule 11 of Order VII of C.P.C. Learned counsel submits that even if Article 26 of the Limitation Act is considered, the statement of account as detailed in para 5 of the plaint has been done after claim becoming barred. Learned counsel submits that entire alleged debt has become barred by time and as such, the settlement of account made thereafter would not furnish the cause of action nor could provide a fresh starting point of limitation, unless it amounts to express promise within the meaning of section 25(3) of the Contract Act. Learned counsel submits that considering the last transaction as on 10.9.2013, the statement of account is shown to have been done on 7.12.2016, which is beyond the period of three years. Learned counsel submits that so far as the clause (d) of Rule 11 of Order VII of C.P.C. is concerned, the said clause squarely applies and as such the trial court ought to have allowed the application to the extent that the suit is barred by limitation. The learned Judge of the trial court has however, not considered the same and passed the impugned order erroneously.

Learned counsel for the applicant-defendant in order to substantiate his submissions, placed reliance on the following cases:-

i) The Church of Christ Charitable Trust and Educational Charitable Society vs. Poniamman educational Trust, reported in 2012 (3) RCR (Civil) 811,

ii) Hardesh Ores pvt. Ltd. vs. Hede and Company reported in (2007) 5 SCC 614,

iii) Nithayya Thevar vs. Subramaniam Ambalakarar, delivered in C.R.P. No. 222 of 1969 dated 3.3.1970.

iv) Sarjerao Dhondiba Sarode and Ors. vs. Kamal Kerubhau Pachange and others, delivered by this Court in C.R.A. No. 637 of 2016 dated 18.3.2018.

v) Bhagirath Prasad Singh vs. Ram Narayan Rai, reported in AIR 2010 Patna 189

vi) Prabhakar Fatoo Dessai vs. Vassudeva Narayan Sarmalkar and others, reported in AIR 1976 Goa, Daman and Die 53.

(Goa High Court)

4. Learned counsel for the respondent-plaintiff submits that in terms of the pleading of the plaintiff, the suit whether barred by limitation, is a triable issue, cannot be rejected at the threshold. Learned counsel submits that the civil suit could not be dismissed under Order VII Rule 11 (d) of C.P.C. as barred by limitation without proper pleadings, framing of issue on limitation and taking evidence, for question of limitation is a mixed question of fact and law and on ex-facie reading of the plaint it could not be held that the suit was barred by time. Learned counsel submits that the starting point of limitation has to be ascertained which is entirely question of fact. Learned counsel submits that the applicant-defendant by confirmation letter dated 7.12.2016 confirmed the balance as on 31.3.2016. In view of the same, the trial court has rightly rejected the application. No interference is required and the revision application is liable to be dismissed.

Learned counsel for the respondent-plaintiff in order to substantiate his submissions placed reliance on the following cases:-

i) Chhotanben and another vs. Kiritbhai Jalkrushnabhai Thakkar and Ors. Reported in AIR 2018 SC 2447,

ii) Vaish Aggarwal Panchayat vs. Inder Kumar and others, reported in 2015 AIR (SC) 3357,

iii) Ramesh B. Desai and Ors. vs. Bipin Vadilal Mehta and others, reported in AIR 2006 SC 3672

iv) M/s Hindustan Distributors and Anr vs. Maharashtra Antibiotics and Pharmaceuticals Ltd. Nagpur, reported in 2007 (3) ALL MR 694

5. In terms of the pleadings of the respondent-plaintiff, the applicant-defendant has purchased various types of materials and plaintiff company has filed invoices of the sale of goods to the defendant from time to time. The plaintiff company has maintained the account with the defendant in the electronic form i.e. computerized form in the regular course of its business. In the said account whatever the goods, which the applicant-defendant has purchased, value of the same is debited and whenever the payments made, the same has been credited in the account. It is also specific pleading that the plaintiff company has maintained the accounts of the defendant firm and the said account was an open and current account. The balance due to the plaintiff towards the said account was ascertained at the end of every year for the convenience of the parties and the same was carried forward to the next year as opening balance. The computer print outs are filed alongwith the plaint and the plaintiff's claim is based upon the debit and credit entry as made in the regular course of business with the defendant company. It is also specific pleading that in case if bills are not paid within 30 days

from the date of its bill, the interest at the rate of 12% p.a. will be charged on the due amount. In the backdrop of these pleadings, I do not find any substance in the submissions made on behalf of the applicant-original defendant that there is no subsisting agreement between the parties to which the cause of action is a base.

6. So far as the second contention about the rejection of plaint on the ground of limitation is concerned, prima facie, it appears from the plaint that it is mixed question of law and fact. It is well settled that all relevant facts, which need to be looked into for deciding the application under Order VII Rule 11 of C.P.C. are the averments in the plaint and the pleas taken by the defendant in the written statement would be wholly irrelevant at that stage. Learned counsel for the applicant-defendant has vehemently submitted that items on which the account was stated clearly barred by time when the settlement of the account was made on 7.12.2016. Prima facie, the character of the items is not an essence of account stated and there is specific pleading of the plaintiff in the plaint supported by the documents that the applicant-defendant agreed with the balance amount. Thus, the question would arise whether it creates new debt or new cause of action. Furthermore, even if the transaction in the year 2013 are concerned, if communication is made about reconciliation of the account within three years i.e. up to 2016, then it is for the trial court to consider the issue of limitation at the conclusion of trial of the suit.

7. Though counsel for the parties have relied upon various cases, as detailed above, however, the legal position pertaining to the provisions of Order VII Rule 11 of C.P.C. and its clauses is not disputed. However, in the facts of the instant case, the question about limitation is a mixed question and the same cannot be decided at the threshold of the provisions of Order VII Rule 11 (d) of Civil Procedure Code. There are many arguable points available to both sides and at this stage the applicant-defendant's contention with regard to the averments made in the written statement cannot be considered. In view of the same, I proceed to pass the following order:-

O R D E R

Civil Revision Application is hereby dismissed.

(V. K. JADHAV, J.)

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