AGK

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
CIVIL REVISION APPLICATION NO. 77 OF 2018

M/s. M. Pallonji & Co. Pvt Ltd. ...Applicant

Versus

Kirti N. Kapadia & Ors. ...Respondents

Mr Arif Doctor, with Deeshank Doshi, i/b Thakore Jariwala & Associates, for the Applicant.

Mr Shashank P Borade, for Respondent No. 2.

Mr. Vipul Bilve, i/b Mulla & Mulla, for Respondent No. 3.

CORAM: Smt. Bharati Dangre, J.

DATED: 8th December 2021

P.C.:-

1. I have heard the learned Counsel for the Applicant and the learned Counsel appearing for the contesting Respondent, i.e. the Plaintiff.

The suit is instituted by the Plaintiff, seeking following relief:

> "(a) That this Hon'ble Court may be pleased to order, decree and direct the Defendant No. 1 to pay a sum of

> Rs. 61,50,743.61 together with interest @ 12% per annum and the Defendant No. 1 be further ordered and directed to pay further interest @ 12% per annum on the said sum of Rs. 45,35,990.61 from the date of the filing of the suit till payment and/or realization and cost of the suit."

In the aforesaid suit, the Plaintiff has impleaded three Defendants, namely, M/s. Shree Krishna Stevedories Private Limited, M/s. M. Pallonji & Co. Private Limited, and the Tata Power Co. Limited.

2. On the suit being filed, the Defendant No. 2 (present Applicant) took out Notice of Motion No. 1497 of 2015 seeking dismissal of Suit against him and for rejection of the plaint, *qua* him. The Notice of Motion was supported by an Affidavit where a specific averment is made to the following effect:

> "8. I, therefore, say and submit that it is in the interest of justice, the Suit be dismissed with costs against these Defendants viz. Defendant No. 2 and Plaint be rejected against these Defendants viz. Defendant No. 2.
>
> 9. I say and submit that if Defendant No. 2 is made to face trial, the same will be travesty of justice and will cause irreparable harm, loss and injury to the Defendant No. 2 and will cause inconvenience to the Defendant No. 2 and the Defendant No. 2 will be forced to incur

costs of the trial, when there is no reason for Defendant No. 2 to incur the same."

3. Under the impugned order, the learned City Civil & Sessions Court, Greater Mumbai has rejected the Notice of Motion by referring to a decision of this Court in the case of ***Bina Allhad Naik v Devu Keshav Naik*** reported in ***2008(6) Mh.L.J. 815*** and the decision of the Apex Court in the case of ***Bhaurao vs. Janaksingh & Ors*** reported in ***AIR 2012 SC 3023***. The learned Judge record in his order that the prayer clause clearly reveal that no relief is claimed against Defendant No. 2 nor do the documents annexed to the plaint has any trace of Defendant No. 2. However, he record that this by itself, is not suffice to throw the plaint at the threshold by drawing inference that no cause of action is disclosed against Defendant No. 2. The learned Judge has chosen to gainfully refer to the primorial paragraph in the plaint, where there is a mention of Defendant No. 2. After referring to the said paragraph the conclusion deduced is that the presence of not only Defendant No. 2 but also Defendant No. 3 is necessary for effective adjudication. It is also recorded that admittedly the Defendant No. 1 has denied privity of contract between the Plaintiff and Defendant No. 2 and as such by concluding that the presence of Defendant No. 2 is necessary to the Suit, the Notice of Motion is rejected.

4. With the assistance of the respective Counsel, I have carefully perused the plaint and restricted myself to it, since at the stage of rejection of the plaint, the written statement or stand of the Defendants need not be looked into.

On perusal of the plaint what is apparent is that the suit is filed for recovery of the amount against Defendant No. 1 and the pleadings in the plaint along with the cause of action are in aid and assistance of the said relief In paragraph 1 of the plaint, while introducing the parties including the Plaintiff and the Defendants, the Plaintiff is described as a party carrying on business as Clearing and Forwarding Agents in the name of M/s. J.K. Service Agencies. Defendant No. 1 is introduced as a private limited company, which is taken over by Defendant No. 1. Defendant No. 2 is introduced as a private limited company who had entrusted the work of clearing and forwarding of Steaming Coal for and on behalf of Defendant No. 3.

The averments in the plaint then proceed to narrate that Defendant No. 1 gave contract to the Plaintiff for the purpose of clearing and forwarding agents of the said goods from Haji Bunder / Tata Jetty at the rate of Rs. 4/- per tonne as clearing charges. Barring the introduction of Defendant No. 1 in paragraph 1 of the plaint, the entire plaint do not contain a single averment against the Defendant No. 2. The narration of

the facts in support of the relevant claim in the suit, from paragraph 2 onwards set out the relationship between the Plaintiff and Defendant No. 1 and the agreement that was arrived between the two, pursuant to which the Defendant No. 1 paid the amounts in the bill, to the Plaintiff at the rate of Rs. 4/- per tonne for the cargo at Haji Bunder and at Rs. 3/- per tonne for the cargo arrived at Tata Jetty. It is further pleaded that a sum of Rs. 45,35,990,61 is payable by the Defendant No. 1 to the Plaintiff and the said statement was forwarded by the Defendant No. 1 himself to the Plaintiff. It is then pleaded that in spite of persistent follow up with the Defendant No. 1, regarding payment of balance amount, there was a failure to make payment of the legitimate claim.

5. Based on this, the cause of action pleaded in paragraph 14 of the plaint is that despite repeated reminders by the Plaintiff to the Defendant No. 1, there was failure and neglect to pay the sum as demanded or any part thereof or any interest thereon to the Plaintiff and hence, the suit is being filed for recovery of the amount of Rs. 61,50,743.61 in respect of the invoices along with interest at the rate of 12% per annum from the date of respective invoice till payment and/or realization. In Exhibit 'L' the particulars of claim of the Plaintiff are specifically set out. In paragraph 17, the Plaintiff state that he is entitled to receive the said amount under various bills as per his account at Mumbai and, therefore, the Court in

Mumbai has jurisdiction to try the suit. Thus, the above can be clearly inferred from the pleadings set out in the plaint. At the sake of repetition, it can be noted that there is no averment or any demand being pleaded against the Defendant No. 2 (present Applicant) and not even a relief is sought involving Defendant No. 2 but it is restricted q*ua* Defendant No. 1 himself.

6. The learned Judge is right in relying upon the decision of the Apex Court in the case of ***Bhaurao*** but it is not only the sole judgment which lay down the proposition of law, that while considering the application for rejection of plaint, the plaint has to be read as a whole and the pleas taken by the Defendant in the written statement are irrelevant. The law on this aspect is no more *res integra,* that plaint will be read as it is, to ascertain whether it contain or does not contain, a cause of action.

7. Applying the said position of law to the case in hand, when the plaint is plainly read in the light of the pleadings contained therein, along with the cause of action pleaded therein which justify the relief sought in the prayer clause, there is no averment in the plaint, discerning the role attributed, in the backdrop of the claim stated in the suit, to the Defendant No. 2. The scope of the pleadings cannot be extended beyond what is pleaded at the time when it is

instituted. The evidence to be adduced will be dependent on the pleadings and needless to state that the issues are also settled based on the pleadings in the plaint along with the defence that comes on record from the contesting Defendants.

In the light of above, the learned Judge has clearly fallen into an error when he refer to the introduction of Defendant No. 2 as a chronology of sequence by introducing the Defendants in the suit. If there are no pleadings justifying the impleadment of Defendant No. 2 in the suit nor any relief is sought against him, he cannot be unnecessarily made to undergo the rigmarole of the trial on a fanciful consideration that he is not a necessary party but he is a proper party.

8. The learned Judge has, therefore, clearly fallen into an error, which need to be rectified by exercising the jurisdiction Court under Article 227 of the Constitution of India by rectifying the same.

9. For the aforesaid, Application is allowed. The impugned order is quashed and aside.

(**Smt. Bharati Dangre, J.**)