IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 15.02.2021

PRONOUNCED ON : 15.03.2021

CORAM :

THE HONOURABLE MR.JUSTICE C.V.KARTHIKEYAN

A.No. 2438 of 2020

in

C.S.No. 70 of 2020

1.Malalur Sudhindra Sriharsha

2.Supreme Overseas Exports India Private Limited,
[Applicants 1&2 are at No.44/1, 16th Cross,
K.R.Road, Jayanagar, 7th Block,
Bangalore, K.A.-560 082, INDIA.

Also at:
11/1, 24th A Cross, K.R.Road,
Banasankari II Stage,
Bangalore - 560 070. ... Applicants/Defendants 3&4

Vs.

1. Techno Chem Distributors,
Atkinson Palace, First Floor,
No.4, Jothi Venkatachalam Road,
Vepery, Chennai - 600 007,
Represented by its Partner Paresh Pratap Vasa ... 1st Respondent/Plaintiff

2.Sura Leathers Private Limited,
No.108/1, Gudiyatham Road,
Periyavarigam Village,
Thuthipet (Post), Ambur,
Pincode - 635 811.
Represented by its RP, V.Duraisamy,
No. 387, Third Floor,
Precision Plaza, Anna Salai,
Teynampet, Chennai - 600 018.

3. Satnur Ramachandra Rao Ramprasad ... Respondents/defendants 1&2

Prayer:

This application is filed under Order XXXVII Rule 3 (5) of CPC to grant leave to the applicants 1&2/defendants 3&4 to defend the suit in C.S.No.70 of 2020.

Applicants : Mr.B. Thilak Narayanan

Respondents : Mr.R.Vasudevan

ORDER

Application has been filed by the defendants under Order 37 Rule 3(5) of the Code of Civil Procedure seeking leave to defend the suit.

2. The suit had been filed by the plaintiff Techno Chem Distributors, a registered Partnership Firm against the four defendants, namely Sura Leathers Private Limited, a Company incorporated the Companies Act, 1956 and its

Directors Satnur Ramchandra Rao Ramprasad and Malalur Sudhindra Sriharsha and also against Supreme Overseas Exports India Private Limited also a Company incorporated under the Companies Act, 1956, seeking a judgment and decree against the 2nd to 4th defendants to pay a sum of Rs.4,12,65,254/- together with interest at 24% p.a. on the principal amount of Rs.2,43,16,814/- from the date of the suit till the date of realization and also for costs of the suit and for a direction to lift the corporate veil of the 1st defendant and declare that the 1st defendant is s fraudulent entity in the hands of the 2nd to 4th defendants.

3. It had been stated that originally, a partnership firm under the name Supreme Overseas, was started by the father of the third defendant/father-in-law of the second defendant and had dealings with the plaintiff from early 1970's. Later, the fourth defendant was incorporated. However, the second and third defendants purchased leather chemicals under the name Supreme Overseas. The plaintiff had been supplying such leather chemicals continuously. They were informed in the year 2011 that the bills should be raised in the name of the first defendant. It was claimed that the defendants were part of the Supreme Group of Companies. It was stated that the first defendant was used as a cloak to defraud creditors. It was stated that amounts fell due from the year 2014 onwards. The first defendant requested the plaintiff to give a discount on the outstanding of Rs.2,43,16,914/- as on 30.09.2016. A Memorandum of

Understanding dated 14.07.2017 was entered into between the plaintiff and the defendants. The amount due was crystalised to Rs.2,00,00,000/-. It was stated that the said amount would be cleared by the defendants in installments. It was stated that if the amounts were not so cleared then the plaintiff can lay a claim for the actual amount due, namely, Rs.2,43,16,914/-. It was stated that the amount as aforesaid were not paid. In the meanwhile, the first defendant was declared insolvent by the Bengaluru Bench of NCLT. It was stated that the second, third and fourth defendants deliberately permitted the first defendant to be declared as insolvent. It was stated that the defendants had purchased chemicals on credit basis from the plaintiff for a considerable period of time and the transactions were maintained in the ledger of the plaintiff's company and also in the accounting software. A Legal notice was issued on 20.05.2019. A reply was sent on 30.05.2019. Thereafter, several E-mail communications were also sent as reminders.

4. The plaintiff had filed an application under Section 9 of the Insolvency Bankruptcy Code 2016 before the National Company Law Tribunal, Bengaluru Bench in CP(IB)/No.26/BB/2019 against the first defendant. The application was dismissed by order dated 11.03.2019 on the ground that the claim was barred by limitation. However, liberty was given to initiate and seek other remedies.

5. The plaintiff filed an Appeal before NCLAT, New Delhi in Company Appeal (AT) (Ins) No.472 of 2019. Before the matter could be taken up, another company, Vansun Intermediaries Pvt. Ltd., had filed Corporate. Insolvency Petition and a moratorium was declared by order dated 31.05.2019. The plaintiff was given liberty to raise a claim before the Interim Resolution Professional. It was stated that the defendants are due and liable to pay to the plaintiff the amount claimed in the suit.

6. It had transpired that the NCLT, Bengaluru Bench had also appointed the second defendant as Interim Resolution Professional and an order of moratorium was declared and prohibitions imposed under Section 14 of the Insolvency and Bankruptcy Code, 2016. It was stated that subsequent to the institution of the suit, the second defendant had been appointed as Liquidator of the first defendant and liquidation had also been ordered.

7. The plaintiff had approached the second defendant laying a claim of Rs.3,98,74,409/-. The second defendant had rejected the claim as time barred. The suit had been filed taking advantage of Order 37 of the Code of Civil Procedure.

8. The present application has been filed by the defendant seeking leave to defend the suit under Order 37 Rule 3(5) of the Code of Civil Procedure.

9. In the affidavit filed in support of the said application, it had been stated that the contentions raised in the plaint had not been stated before the National Company Law Appellate Tribunal, Bengaluru Bench and before the National Company Law Appellate Tribunal, New Delhi, in the earlier round of litigation.

10. The plaintiff had moved the National Company Law Tribunal, Bengaluru, against the first defendant seeking to initiate Corporate Insolvency Resolution Process under Section 9 of the Insolvency and Bankruptcy Code, 2016, contending that the plaintiff had supplied leather chemicals to the first defendant between April 2014 and June 2015 and that payments were due. The claim was rejected as being time barred. Thereafter, an appeal had been filed before the Company Law Appellate Tribunal. In the meanwhile, another company, Vansun Intermediates Private Limited also filed Corporate Insolvency proceedings against the first defendant in the Company Law Tribunal at Bengaluru Bench. That claim was admitted. The second defendant was appointed as Interim Resolution Professional and an order of Moratorium was

declared in accordance with Section 14 of the Insolvency and Bankruptcy Code,

2016. The National Company Law Appellate Tribunal disposed of the appeal filed by Techno Chem Distributors and granted liberty to raise a claim before the Interim Resolution Professional. Accordingly, a claim was laid and a sum of Rs.1,10,00,100/- was admitted. It had been stated that therefore, the issues in the present suit had already been determined and it is pending for consideration in Corporate Insolvency Proceedings. Further, since Moratorium had been declared and is still in effect, the suit is barred by operation of law. It had also been stated that the defendants have sufficient grounds to defend the claim made by the plaintiff. It had been stated that the suit has no cause of action. It is under these circumstances that leave to defend had been sought by the defendants. The averments in the plaint had been denied.

11. A counter affidavit had been filed on behalf of the plaintiff stating that the insolvency proceedings and the present proceedings in the civil suit are totally different. In a Corporate Insolvency Resolution Process remedies sought under Section 9 of the Insolvency and Banking Code alone can be adjudicated whereas before this Court a claim is raised for determination. It had been stated that the Interim Resolution Professional is not a final authority in deciding the claim of the plaintiff. It had been stated that sufficient pleadings had been stated in the plaint regarding the manner in which the plaintiff had been defrauded by the defendants. It had been stated that the issue regarding lifting of the corporate veil would survive in view of the fraudulent actions, particularly by the fourth defendant. The 2nd, 3rd and 4th defendants are the shareholders of the first defendant and the 2nd and 3rd defendants are the Directors of the 1st and 4th defendants. In all the transactions the 2nd and 3rd defendants had been involved. It had been stated that the plaintiff had supplied materials to the first defendant on trust. Therefore, it had been stated that the applications seeking leave to defend should be dismissed.

12. Heard Mr.B.Thilak Narayanan, learned counsel for the applicants/third and fourth defendants and Mr.R.Vasudevan, learned counsel for the respondent/plaintiff. For the sake of convenience the parties are herein referred to as the plaintiff and the defendants.

13. The plaintiff is a partnership firm. They are suppliers of leather chemicals. They have been supplying leather chemicals originally to a partnership firm Supreme Overseas which was started by the father of the third defendant/father-in-law of the second defendant. The second and third defendants were the partners of the first defendant. The fourth defendant was then incorporated. The second and third defendants are the Directors of the fourth defendant. The plaintiff continued to supply leather chemicals to the fourth defendant. Thereafter, it is claimed, that the plaintiff was directed to raise bills in the name of the first defendant. Leather chemicals were supplied and the bills were raised in the name of the first defendant. The second and third defendants were the directors of the first defendant. The amounts due to the plaintiff increased. The first defendant did not make any payment. One of the creditors Vansun Intermediates Pvt. Ltd., had filed insolvency proceedings against the first defendant in CP.(IB) No: 41/BB/2019 before the NCLT, Bengaluru Bench. The said Bench declared the first defendant as insolvent. The second defendant was appointed as Interim Resolution Professional. He was later appointed as Liquidator. Order of liquidation was passed against the first defendant.

14. The plaintiff had also filed CP(IB)/No.26/BB/2019 against the first defendant before the NCLT, Bengaluru Bench. The application was dismissed on 11.03.2019. The plaintiff filed CA(AT)(Ins) No. 472 of 2019 before the NCLAT, New Delhi, which directed the plaintiff to approach the Liquidator. The plaintiff approached the Liquidator appointed, namely, the second defendant claiming a sum of Rs.5,34,95,097/- but it was rejected as time barred.

15. The plaintiff claimed that a Memorandum of Understanding had been reached with the defendant on 14.07.2017 wherein the outstanding amount

was crystallised to a sum of Rs.2,00,00,000/- and a commitment was made under the Memorandum of Understanding to clear the said sum within a specified period and if it was not so cleared, the plaintiff can claim the actual amount due. The actual amount due was Rs.2,43,16,914/-. The amount agreed under the Memorandum of Understanding was not paid by the first defendant.

16. The main ground on which leave to defend the suit is that the National Company Law Appellate Tribunal, Bengaluru Bench had appointed the second defendant herein as the Interim Resolution Professional of the first defendant. The plaintiff had laid a claim before the Interim Resolution Professional. The claim had been adjudicated. It had been rejected as time barred.

17. It is the contention of the learned counsel for the defendants that the present suit is an indirect form of reagitating the same claim. However, it is the contention of the learned counsel for the plaintiff that liberty had been granted to approach the Civil Court and irrespective of that fact, the proceedings before the Company Law Tribunal was only to examine the status of the first defendant *vis-a-vis* the Creditors and the capacity of the first defendant to pay the creditors their dues. When the liabilities of the first defendant had increased, then, to administer the first defendant an Interim Resolution Professional had

been appointed to examine the issues and redress the claiming the creditors of the first defendant. However, it is claimed by the plaintiff that in the present suit the plaintiff is seeking the amounts payable which are due owing to materials already supplied.

18. However, I hold that the defendants will necessarily have to be given an opportunity to put forth their defence and the issue whether that inspite of the proceedings before the NCLT, this civil suit could be continued or not will have to be decided only on examination of the evidence adduced by the witnesses. Opportunity will have to be given to the plaintiff initially to substantiate their claim. The documents filed by the plaintiff will have to be spoken to by competent witnesses. The documents will have to clear the test of admissibility. They will then have to be examined whether they are relevant. They will have to be proved in manner known to law. There are complicated bundles of facts in the present suit. The fact that the plaintiff had supplied materials cannot be denied or disputed by the defendants. The fact that the plaintiff has dues pending again cannot be denied or disputed by the defendants. However, the issue of limitation and issue of re-agitation stares in the face of the plaintiff. That can be addressed only on evidence being adduced by the witnesses for the plaintiff and analysed by the cost.

19. Further, a burden is caused upon the plaintiff to establish that the first defendant was only a cloak created by the 2nd and 3rd defendants to defraud the creditors and that the leather chemicals were actually utilized by the 2nd and 3rd defendants on behalf of the 4th defendant.

20. This is yet another relief sought in the plaint. It is seen that quite apart from claiming the amounts due under the bills, the plaintiff has also called upon the Court to lift the corporate veil. That can be done only on evidence being adduced and when such evidence is adduced, the defendants must be given an opportunity to test that evidence through cross examination. The Court can never come to the *prima facie* conclusion regarding the corporate structure of the defendants and the *inter se* play among them. It would be in the interest of the plaintiff that the allegations based in the plaint are adduced in the form of evidence and substantiated. This would only strengthen the case of the plaintiff. Further, the defendants also have a probable case owing to the earlier proceedings before the National Company Law Tribunal and Appellate Tribunal. They are Tribunals established by law. The claim of the plaintiff had approached the Interim Resolution Professional who had also adjudicated the claim presented by the plaintiff. Whether such adjudication had brought the entire process to a final conclusion or whether the plaintiff can still proceed to institute a suit and claim the amounts due, are issues which can be decided only when the parties are given an opportunity to explain the respective stands on oath.

21. In view of all these reasons, I hold that the application has to be allowed and the defendants will necessarily have to be given an opportunity to file a written statement relating to the averments made in the plaint.

22. In the result, the Application No.2438 of 2020 is allowed. No costs.

Sd/-C.V.K.J
15.03.2021

// Certified to be true copy//
Dated at Madras this day of 2021.

Court Officer(O.S.)

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