

**IN THE HIGH COURT AT CALCUTTA
COMMERCIAL APPELLATE JURISDICTION
APPELLATE SIDE**

Before:

**The Hon'ble Justice T. S. Sivagnanam
and**

The Hon'ble Justice Hiranmay Bhattacharyya

FA 32 of 2022

Nantu Lal Das.

Vs.

Anjali Estates and Developers & anr.

For the Appellant : Mr. Debdutta Sen,
Ms. Suchismita Chatterjee,
Mr. Malay Kr. Seal Advocates

For the Respondent No. 2 : Mr. Ashoke Kr. Banerjee, ... Sr.Advocate
Mr. Debanjan Mukherjee,
Mr. Subhojit Roy,
Ms. Atasi SahaAdvocates

Heard on : 12.04.2022

Judgment on : 18.05.2022

Hiranmay Bhattacharyya, J.:-

1. This appeal is at the instance of the plaintiff and is directed against the deemed decree dated April 16, 2021 passed by the

learned judge, Commercial Court at Alipore in Money Suit no. 11 of 2020.

2. By the impugned judgment and deemed decree, the application filed by the defendant no. 2/respondent no. 2 herein was allowed thereby rejecting the plaint as against the defendant no. 2 with a direction to delete the name of the defendant no. 2 from the cause title of the plaint.
3. The case made out in the plaint is summarized hereunder as follows-
 - a) Plaintiff is a civil contractor carrying on business in the name of M/s. N.S. Enterprise.
 - b) The Defendant no. 1 is a partnership firm represented by Ananya Chowdhury and Anargha Chowdhury.
 - c) The Defendant no. 2 is a company substantially related to Smt. Ananya Chowdhury and Shri Anargha Chowdhury and Ananya Chowdhury is a livewire of both the defendants *vis a vis* controlling authority and responsible for the day to day affairs of both the defendants.
 - d) Ananya Chowdhury entrusted the plaintiff with the work of a project of the defendant no. 2 at 6A, Diamond Harbour Road, Kolkata- 700 008 (for short “the Seal Para project”). Plaintiff completed the work of Seal Para project to the satisfaction of the defendant and a cordial business relationship developed

between the parties though three bills in respect of the Seal Para project remained outstanding.

- e) On the promises and assurances of payment of the pending bills, the plaintiff was offered to undertake the Arambagh project of the defendant no. 1 and entrusted the plaintiff with the job of piling at the site at Arambagh.
- f) Being satisfied with the piling work at Arambagh the defendants entrusted the plaintiff with the work of construction of the G+4 storied building as a whole at Arambagh and issued work order therefore.
- g) During continuance of the project at Arambagh, the plaintiff raised bills from time to time and was paid the amount as certified at the instance of the defendants but whenever the plaintiff raised the issue of payment of the bills pending in connection with Seal Para project, the plaintiff was assured by the defendants that the same would be paid along with the payment of the bills of the Arambagh project and the plaintiff did not have any option but to accept such assurance from time to time.
- h) The plaintiff completed the construction from plinth area to ground floor roof level but the bill amount was not paid by the defendants.

- i) Since the defendants were delaying in payment of bills in spite of requests made by the plaintiff and/ or assurances given on part of the defendant from time to time, plaintiff suffered huge financial damages and thereafter pandemic started which also caused serious suffering to the plaintiff.
- j) One Sukdeb Banerjee representing himself as new contractor appointed by the defendants visited the site at Arambagh in or around May, 2020 and communicated to the plaintiff that he has been appointed by the defendant as a contractor to carry on the construction work at the Arambagh site.
- k) The parties exchanged their stand by way of letters issued by their respective advocates and a meeting took place at the office of the learned advocates for the plaintiff wherein Anargha Chowdhury and ors. were present along with their learned advocate and the matter was amicably discussed and the parties agreed to have comprehensive settlements of all the issues relating to Seal Para and Arambagh sites.
- l) On or about 25.11.2020, plaintiff received an information from Arambagh that the construction at the site has been started by the defendants through someone else without any information given to the plaintiff. The plaintiff claims that he is entitled to a decree for recovery of money on account of the bills raised by the plaintiff for both the sites. The instant suit was filed claiming a sum of Rs. 34,07,617 together with

interest at the rate of 18% in respect of Seal Para project and a further sum of Rs. 1, 87, 06 973 together with interest in respect of Arambagh project. The plaintiff also prayed for a decree for permanent injunction restraining the defendants, their men and agents from carrying out any construction at the Seal Para project.

4. The defendant no. 2 filed an application under Order 7 Rule 11 read with Section 151 of the Code of Civil Procedure (for short "CPC") praying for rejection of the plaint. It was specifically stated in the said application that the plaintiff does not have any cause of action as against the defendant no. 1 and the plaint discloses no cause of action against the said defendant. It was further stated therein that two legal entities have allegedly entered into separate, independent and different contracts with the plaintiff. Thus, the plaintiff could not have joined both the defendants in the same suit and also could not have joined the disputes alleged to have arise out of two separate contracts in the same suit. In other words, according to the defendant no. 2, the suit is liable to be dismissed on the ground of misjoinder of parties and causes of action. Thus, on the aforesaid grounds the defendant no. 2 prayed for rejection of plaint.
5. Appellant contested the application for rejection of plaint by filing a written objection denying the material allegations contained in the said application.

6. The learned trial judge, by the impugned judgment and deemed decree, allowed the application for rejection of plaint thereby rejecting the plaint as against the defendant no. 2 with a direction to delete the name of the defendant no. 2 from the cause title of the plaint. Being aggrieved the plaintiff has preferred this appeal.
7. Mr. Sen, the learned counsel for the appellant took this court through the plaint and contended that the partners of the defendant no. 1/ partnership firm have controlling authority over the defendant no. 2 company. He further contended that on assurance of payment of pending bills of the Seal Para project by the defendants, the plaintiff was offered by the defendants to undertake the work of the Arambagh project of the defendant no. 1, the instant suit cannot be said to be hit either by the principles of misjoinder of causes of action or of parties. He, further, submitted that defect of misjoinder of parties and causes of action cannot be a ground for rejection of plaint. In support of such contention, Mr. Sen, placed reliance on a decision of the Hon'ble Supreme Court of India in the case of *Prem Lala Nahata and Anr. vs. Chandi Prasad Sikaria* reported at AIR 2007(SC) 1247. He further submitted that the plaint discloses cause of action against both the defendants, as would appear from the averments made in the plaint and the learned trial judge erred in law by rejecting the plaint. He referred to the decision of the Hon'ble Supreme

Court of India in the case of *Mayar (H.K.) Ltd. and Ors. vs. Owners & Parties, Vessel M.V. Fortune Express and Ors.* reported at (2006) 3 SCC 100, in the case of *Kuldeep Singh Pathania vs. Bikram Singh Jaryal* reported at (2017) 5 SCC 345 and in the case of *Popat and Kotecha Property vs. State Bank of India Staff Association* reported at (2005) 7 SCC 510 in order to highlight the scope of enquiry under Order 7 Rule 11 of CPC. He also referred to the decision of the Hon'ble Supreme Court in the case of *Sukanya Holdings (P) Ltd. vs. Jayesh H. Pandya and Another* reported at (2003) 5 SCC 531 in support of his contention that though there exists an arbitration agreement in respect of one of the contracts between the parties the dispute involved in the instant suit cannot be referred to arbitration as there is no provision in the Arbitration and Conciliation Act, 1996 for splitting the cause or parties and referring the subject matter of the suit to the arbitrators. He also referred to a decision of the Hon'ble Supreme Court in the case of *Vidya Drolia and Ors. vs. Durga Trading Corporation* reported at (2021) 2 SCC 1 in support of his contention that an arbitration agreement as an alternative public fora should not be enforced when it is futile, ineffective and would be a no result exercise. Mr. Sen also referred to a decision of the Hon'ble Supreme Court in the case of *Delhi Development Authority vs. Skipper Construction Company (P) Ltd. and another* reported at AIR 1996(SC) 2005 in support of his contention that when the corporate character is employed

for the purpose of committing illegality or for defrauding others, the court would ignore the corporate character and will look at the reality behind the corporate veil so as to do justice between the parties.

8. Mr. Banerjee, learned Senior Counsel for the defendant no. 2/ respondent no. 2 herein submitted that no cause of action has been pleaded in so far as the defendant no. 2 is concerned. He submitted that the plaintiff, by way of clever drafting tried to create illusions of cause of action and there is no real cause of action in the plaint insofar as the defendant no. 2 is concerned. In support of his contention that a plaint should be rejected when no real cause of action is pleaded, Mr. Banerjee relied upon a decision of the Hon'ble Supreme Court of India in the case of I.T.C. Limited vs. Debts Recovery Appellate Tribunal and Others reported at (1998) 2 SCC 70. Thus, he submitted that the learned trial judge was perfectly justified in rejecting the plaint against the defendant no. 2. He further contended that the instant suit is also barred by law as the same is hit by the principles of misjoinder of causes of action as well as parties as the plaintiff, has united two causes of action- one in respect of Seal Para project and the other in respect of Arambagh project in this suit when two separate contracts were entered into by the plaintiff against two different legal entities.

9. Mr. Banerjee also referred to a decision of the Hon'ble Supreme Court in the case of State of *Rajasthan vs. Ganeshi Lal* reported at AIR 2008 (SC) 690 in support of his contention that one additional or different fact may make a world of difference between conclusions in two cases and disposal of cases by blindly placing reliance on a decision is not appropriate. According to Mr. Banerjee, the facts of the case on hand is clearly distinguishable from the facts of the cases cited by Mr. Sen and as such the decision relied upon by Mr. Sen are not applicable to the case on hand.
10. Heard the learned advocates for the parties. This court has perused the plaint, the application filed under Order 7 Rule 11 as well as the written objection filed thereto. On a meaningful reading of the plaint, this court finds that the case of the plaintiff is that Smt. Ananya Chowdhury and Shri Anargha Chowdhury who are the partners of the defendant no. 1 firm also have controlling authority in respect of the defendant no. 2 company. Both of them are responsible for the day to day affairs of the defendant no. 1 firm as well as the defendant no. 2 company. It is the case of the plaintiff that Ananya Chowdhury who is substantially related to the defendant no. 2 company entrusted the plaintiff with the Seal Para project. The assurance of payment of the pending bills of Seal Para project by the defendant led the plaintiff to accept the offer of the defendant to undertake the Arambagh project of the defendant

no. 1 and he was ultimately entrusted with the construction work of Arambagh project. It has been averred in the plaint that, from the exchange of correspondence between the parties it will be evident that the offer for payment of the dues of the plaintiff by the defendant has been admitted. Thus, upon reading the plaint as a whole this court is of the considered view that the persons who have controlling authority and responsible for day to day affairs of the defendant no. 1 firm and the defendant no. 2 company entrusted the work of construction to the plaintiff in respect of two projects and the assurance given by the persons substantially related to both the entities for payment of the outstanding dues in respect of the Seal Para project was the reason behind the plaintiff accepting the offer of the defendant to enter into the contract in respect of the Arambagh project. Though defendant no. 1 firm entered into the contract of Arambagh site and the defendant no. 2 company entered into the contract of Seal Para project, but the case made out in the plaint is that the persons who are controlling the affairs of both the entities are same. Thus, it cannot be said that the plaint fails to disclose any cause of action against the defendant no. 2 or that the instant suit is hit by the principles of misjoinder of causes of action or parties as contended by the learned senior counsel respondent no. 2 herein.

11. At the time of considering an application for rejection of plaint, Court has to confine itself only to the averments made therein. Whether the plaintiff will succeed or not is a matter of trial and not the subject matter of enquiry under Order 7 Rule 11 CPC.
12. Moreover, even if the argument of Mr. Banerjee is accepted that two causes of action namely one in respect of Seal Para project and the other of Arambagh project are separate and could not have been united in the same suit or that the defendant no. 1 firm and the defendant no. 2 company could not have been joined together in one suit, the plaint could not have been rejected on such ground as it is well settled that the same cannot be a ground for rejection of a plaint under Order 7 Rule 11 of the Code of Civil Procedure. The Hon'ble Supreme Court in the case of *Prem Lala Nahata* (supra) held thus-

"14. The Privy Council in Mahant Ramdhan Puri v. Chaudhury Lachmi Narain [AIR 1937 PC 42 : 1937 All LJ 556] pointed out : (AIR p. 45)

"It is desirable to point out that under the rules as they now stand the mere fact of misjoinder is not by itself sufficient to entitle the defendant to have the proceedings set aside or action dismissed."

15. It is well understood that procedure is the handmaid of justice and not its mistress. The scheme of Order 1 and Order 2 clearly shows that the prescriptions therein are in the realm of procedure and not in the realm of substantive law or rights. That the Code considers

objections regarding the frame of suit or joinder of parties only as procedural, is further clear from Section 99 of the Code which specifically provides that no decree shall be reversed in appeal on account of any misjoinder of parties or causes of action or non-joinder of parties unless a court finds that the non-joinder is of a necessary party. This is on the same principle as of Section 21 of the Code which shows that even an objection to territorial jurisdiction of the court in which the suit is instituted, could not be raised successfully for the first time in an appeal against the decree unless the appellant is also able to show consequent failure of justice. The Suits Valuation Act similarly indicates that absence of pecuniary jurisdiction in the court that tried the cause without objection also stands on the same footing. The amendment to Section 24 of the Code in the year 1976 confers power on the court even to transfer a suit filed in a court having no jurisdiction, to a court having jurisdiction to try it. In the context of these provisions with particular reference to the rules in Order 1 and Order 2 of the Code, it is clear that an objection of misjoinder of plaintiffs or misjoinder of causes of action, is a procedural objection and it is not a bar to the entertaining of the suit or the trial and final disposal of the suit. The court has the liberty even to treat the plaint in such a case as relating to two suits and try and dispose them of on that basis.”

13. The Hon'ble Supreme Court in *Prem Lala Nahata* (supra) has held that the objection of misjoinder of parties or misjoinder of causes of action is only a procedural objection and it is not a bar to the entertaining of suit or the trial and final disposal of suit. Thus, this court is of the considered view that the learned trial judge erred in law by rejecting the plaint upon holding

that there is no scope to club different causes of action in the same suit.

14. The learned trial judge held that the plea of involvement of promise and assurance of Smt. Ananya Chowdhury and Shri Anargha Chowdhury is not established in any documents. The learned trial judge, in our considered view, failed to take note of the provision laid down in Order 6 Rule 2 of the CPC which lays down that every pleading shall contain, and contain only, the statement in a concise form of the material facts on which the party pleading relies for his claim or defense as the case may be but not the evidence by which they are to be proved. Thus, according to the rules of pleading, evidence by which the material facts pleaded are to be proved need not be stated in the plaint and the same is a matter of trial.

15. It is well settled that the court while deciding an application under Order 7 Rule 11 of CPC is to accept the averments made in the plaint to be true. The Hon'ble Supreme Court in the case of *Kuldeep Singh Pathania* (supra) held as follows:-

“12. From the aforesaid, it is apparent that the plaint cannot be rejected on the basis of the allegations made by the defendant in his written statement or in an application for rejection of the plaint. The court has to read the entire plaint as a whole to find out whether it discloses a cause of action and if it does, then the plaint cannot be rejected by the court exercising the powers under Order 7 Rule 11

of the Code. Essentially, whether the plaint discloses a cause of action, is a question of fact which has to be gathered on the basis of the averments made in the plaint in its entirety taking those averments to be correct.
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16. The Hon’ble Supreme Court in *Kuldeep Singh Pathania* (supra) further held that the correctness of the allegations and evidence in support of the allegations can be considered only at the stage of trial.

17. Thus, this court is of the considered view that the learned trial judge erred in law by embarking upon the merits of the case at the stage of deciding the application under Order 7 Rule 11 of CPC by holding that the averments in the plaint is not supported by any evidence in that regard. The learned trial judge also overlooked the aforesaid well settled proposition of law laid down by the Hon’ble Supreme Court on the scope of enquiry under Order 7 Rule 11 CPC.

18. In *ITC Ltd.* (supra) it was held that the basic question to be decided while dealing with an application filed under Order 7 Rule 11 of the Code is whether a real cause of action has been set out in the plaint or something purely illusory has been stated with a view to get out of Order 7 Rule 11 of CPC.

19. After taking note of the decision of the Hon’ble Supreme Court in the case of *ITC Ltd.* (supra), the Hon’ble Supreme Court in *Mayar (H.K.) Ltd.* (supra) held that so long as the plaint

discloses some cause of action which requires determination by the court, the mere fact that in the opinion of the judge the plaintiff may not succeed cannot be a ground for rejection of plaintiff. The Hon'ble Supreme Court further held that Order 7 Rule 11 of the Code does not justify the rejection of any particular portion of a plaintiff. The Hon'ble Supreme Court held thus-

"11.In Roop Lal Sathi v. Nachhattar Singh Gill [(1982) 3 SCC 487] this Court has held that where the plaintiff discloses no cause of action, it is obligatory upon the court to reject the plaintiff as a whole under Order 7 Rule 11 of the Code, but the rule does not justify the rejection of any particular portion of a plaintiff. Therefore, the High Court therein could not act under Order 7 Rule 11(a) of the Code for striking down certain paragraphs nor the High Court could act under Order 6 Rule 16 to strike out the paragraphs in the absence of anything to show that the averments in those paragraphs are either unnecessary, frivolous or vexatious, or that they are such as may tend to prejudice, embarrass or delay the fair trial of the case, or constitute an abuse of the process of the court."

20. The learned trial judge, by the impugned deemed decree rejected the plaintiff as against the defendant no. 2. It necessarily implies striking off the averments in the plaintiff insofar as it is directed against the defendant no. 2 which is not permissible

under Order 7 Rule 11 CPC as held by the Hon'ble Supreme Court in *Mayar (H.K.) Ltd.*(supra).

21. For the reasons as aforesaid, this court is of the considered view that the impugned judgment and deemed decree rejecting the plaint as against the defendant no. 2 is liable to be set aside.
22. It is well settled that disputed questions cannot be decided at the time of considering an application filed under Order 7 Rule 11 of the Code. The Hon'ble Supreme Court in *Popat and Kotecha Property* (supra) held that Clause (d) of Rule 11 of Order 7 applies in those cases only where the statement made by the plaintiff in the plaint, without any doubt or dispute shows that the suit is barred by any law for the time being in force.
23. From the statement made in the plaint it does not appear that the instant suit is barred by any law. This Court is also of the considered view that the cause of action pleaded in the plaint requires determination by the Court. The cause of action pleaded is a real one and cannot be said to be illusory, as contended by the learned Senior Counsel for the respondent no. 2.
24. There is, however, no quarrel to the proposition of law laid down in *Ganeshi Lal* (supra) that a decision is a precedent on its own facts and the only thing in a judge's decision binding a party is the principle upon which the case is decided. What is of essence in a decision is its ratio and not every observation

found therein nor what logically flows from the various observations made in the judgment. However, the said decision is of no assistance to the respondent no. 2 in the instant case as the ratio of the decisions of the Hon'ble Supreme Court has been applied by this court and not what may logically flow from the observations made in the judgment.

25. The decision of the Hon'ble Supreme Court in the case of *Sukanya Holdings* (supra) and *Vidya Drolia* (supra) are not relevant for the purpose of deciding the issue involved in the instant appeal and may be relevant at a later stage and as such those decisions are not dealt with by this court in details.

26. In *Delhi Development Authorities* (supra) the Hon'ble Supreme Court held that when the corporate character is employed for the purpose of defrauding others, the court would ignore the corporate character and will look at the reality behind the corporate veil so as to enable it to pass appropriate orders to do justice between the parties concerned. Since this court has already held that the plaint of the instant suit is not liable to be rejected for the reasons as stated hereinbefore, this court do not wish to make any comment on the applicability of the said decision at this stage.

27. For the reasons as aforesaid the impugned judgment and deemed decree dated April 16, 2021 is set aside and quashed. The instant appeal, thus, stands allowed without, however, any

order as to costs. Since this suit is for recovery of money arising out of a commercial dispute, the same should be disposed of expeditiously. The learned judge, Commercial Court at Alipore is requested to dispose of Money Suit no. 11 of 2020 as expeditiously as possible without granting any unnecessary adjournments to either of the parties.

28. Urgent photostat certified copies, if applied for, be supplied to the parties upon compliance of all formalities.

I agree.

(T.S. Sivagnanam, J.)

(Hiranmay Bhattacharyya, J.)

(P.A.- Sanchita)