

04 **14.06.
2022**
Ct. No. 37

Ab

IN THE HIGH COURT AT CALCUTTA
Civil Appellate Jurisdiction
(Commercial Division).

FA 100 of 2022
With
IA No. CAN 1 of 2021
IA No. CAN 2 of 2022

M/s. Tata Steel BSL Limited
Vs.
M/s. Mala Roy and others.

Mr. Probal Kumar Mukherjee,
Mr. Bhaskar Mukherjee,
Ms. Debjani Ghosh,
Ms. Nafisa Yasmin.

... for the appellant.

Mr. Debdut Mukherjee,
Mr. Dibesh Dwivedi,
Mr. R. Agarwal,
Mr. Vidhya Upadhyay.

... for the respondents.

Re: CAN 2 of 2022

This is an application for substitution of the name of the appellant necessitated by an order of amalgamation.

After perusing the averments made in the instant application, we do not find any grounds for rejection thereof and, accordingly, the same is allowed.

Let the necessary amendment in the cause title be made by the department immediately.

After hearing the parties and considering the points involved in the instant appeal, we find that it would be simply burdening the docket of the Court in keeping the appeal alive and the consideration is restricted on an application filed by the plaintiff/appellant. We, therefore, decided to hear out the appeal without

observing the procedural formalities required therefor and invited the respective Counsels to address us on the merit of the said appeal.

This appeal arises from the judgment and order dated 23rd August 2021 passed by the Commercial Court at Alipore in Money Suit No. 9 of 2020 by which an application under Order VII Rule 11 of the Code of Civil Procedure filed by the defendants/respondents was allowed.

The little prelude to the genesis of the dispute is required to be adumbrated.

The plaintiff/appellant is a Company known for manufacturing and marketing of steel strips and sheets, precision, tubes, pipes billets etc. and required the iron ores fines and sized from the intending supplier. The defendants/respondents carrying out the mining business approached the plaintiff for supply of the goods as required by the plaintiff from the mines situated at Jalahuri Iron & Manganese Mines in village Khandbandh under Champua Sub-Division of Keonjhar District - Odisha. It was represented to the plaintiff that the defendants/respondents have long-term mining lease and have acquired substantial goodwill and reputation in the market. Pursuant to the same, a purchase order was issued on 21st February, 2013 for supply of 6 rakes of iron ore on the agreed terms and conditions. After the supply of the first rake of the sized iron ore on 8th March, 2013, an additional sum of Rs.66,00,000/- was demanded against the purchase order, but that was not accepted by the plaintiff/appellant. Subsequently second rake was released on 1st April, 2013 but thereafter the defendants/respondents unilaterally cancelled the agreement and did not intend to supply the third rake of iron ore.

The plaint proceeds that since the lease was due to expire in the near future, the defendants/respondents were facing difficulty in supplying the iron ore, but later on an agreement was made that they will honour the indent on or before the expiry of the said mining lease. It is stated in the plaint that the divulged amount as an advance has been given to the defendants/respondents to secure the supply of goods and ultimately they did not supply the goods as contemplated in the purchase order and thereafter a demand was made for refund of the money lying in excess with the defendants/respondents. It is averred in the plaint that several discussions and communications were made between the parties and ultimately an e-mail was forwarded to the plaintiff/appellant by the defendants/repondents containing the reconciled amount but did not indicate therein further refund of Rs.10,00,000/- made on 1st November, 2017. It is further averred in the plaint that by virtue of acknowledgement having made through e-mail, the period of limitation is extended and the partial payments were made, which is also to be taken into account for the purpose of period of limitation.

In the cause of action paragraph it is indicated though cause of action initially arose on the date of cancellation of the purchase order but the period of limitation was subsequently extended from time to time on the basis of the unequivocal admission made verbally or through documents and the suit is within the period of limitation as the period for limitation for filing the suit expires during the pandemic and in view of the Suo Motu Writ Petition (Civil) no. 3 of 2020 the Supreme Court was pleased to extend the period of limitation for filing of the suit.

In the backdrop of the aforesaid facts having

pleaded in the plaint, an application under Order VII Rule 11 of the Code was taken out by the defendants/respondents alleging that the suit is palpably barred by limitation. A shelter appears to have been taken on the cause of action paragraph pleaded in the plaint and the fact that the acknowledgement was made beyond the expired period of limitation, therefore, no protection can be extended under Section 18 of the Limitation Act.

The Commercial Court proceeded to allow the application under Order VII Rule 11 of the Code holding that the suit is palpably barred by limitation on the basis of the fact that the cause of action for filing a suit for recovery of money accrued in the year 2013 and no credence could be given to the e-mail dated 23rd July, 2016 even if the same is construed as an acknowledgement to the dues but beyond the expired period of limitation.

Mr. Probal Kumar Mukherjee, learned Senior Advocate appearing on behalf of the appellant, submits that the meaningful reading of the plaint would evince that not only the acknowledgement to the dues have been made by the defendants/respondents but in fact refund of the excess amount was made from time to time until 1st November, 2017 and, therefore, the Trial Court has wrongly held that the acknowledgement was beyond the period of limitation. It is further submitted that Section 19 of the Limitation Act was not pressed in action before the Trial Court where the part payment of the debt constitutes fresh cause of action and, therefore, the Trial Court ought to have held that the suit is within the period of limitation. Lastly, it is submitted that the moment it is found from the averments made in the plaint that the limitation assumes character of mixed questions of fact and law, the Court ought to have

dismissed the application filed under Order VII Rule 11(d) of the Code.

On the other hand, learned Advocate for the respondents submits that there is no sufficient pleadings made in the said plaint indicating the payments having made on divulged dates by the defendants/respondents and in absence of any specific averments, the Trial Court cannot look into the other aspects. It is further submitted that the acknowledgement must be made before the expiration of the period of limitation and admittedly the e-mail was beyond the period of limitation. It would not safe nor would constitute an accrual of fresh cause of action under Section 18 of the Limitation Act.

On the conspectus of the aforesaid contentions raised before us the only point which boiled down is whether the Trial Court was justified in rejecting the plaint under Order VII Rule 11 of the Code solely on the ground of limitation.

It admits no ambiguity that at the stage of Order VII Rule 11(d) of the Code the Court has to restrict its scrutiny on the peripheral of the plaint and should not consider the defence taken by the defendants/respondents or a new case made out in an application for rejection of the plaint. It admits no ambiguity that in order to avail the provisions contained under Order VII Rule 11(d) of the Code the defendants/respondents have to accept the statements made in the plaint to be true, correct and sacrosanct and thereafter have to demonstrate before the Court that the suit is barred by law.

We have succinctly jotted down the case made out in the plaint herein before and we have no hesitation to say that the suit was filed for recovery of the excess amount paid to the defendants/respondents to secure

the supply of iron ore; in other words, the price of the goods to be supplied was paid in advance and the money was sought to be refunded as the defendants/respondents unilaterally cancelled the contract. The purchase order was issued as far back as on 21st February 2013 for supply of 6 rakes of the iron ore.

It is not in dispute that the defendants/respondents could not supply the entire quantity of the goods but supplied 2 rakes and ultimately cancelled the third one. The plaintiff/appellant further observed that the excess money is lying with the defendants/respondents and if they intend to cancel the purchase order, they are liable to make refund.

It would discern from the plaint that several discussions were made in this regard and the defendants/respondents were supposed to pay back the said amount and ultimately on 22nd March 2017, the defendants/respondents through e-mail supplied its own ledger account on the request of the plaintiff/appellant and admitted the credit to the tune of Rs.1,66,07,341/- as due and payable to the plaintiff/appellant.

Though it is stated that the accounts as submitted by the defendants/respondents would reveal that the payments were made yet there was no particular pleading in this regard. But, it appears from the plaint that such document was annexed thereto and forms part thereof. The plaintiff/appellant alleged that the last payment was made by the defendants/respondents on 1st November 2017, which is conspicuously absent in the reconciled account. Such being the facts emanates from the plaint, we failed to understand why Section 18 or 19 would not come into play for the purpose of

approval of the cause of action or the extension thereof. The reconciled documents annexed to the plaint would reveal that the refund was made on divulged dates and the last payment shown therein was made on 2nd November 2016 to the tune of Rs.5,00,000/-. If such being the position then the period of limitation under Section 19 of the Limitation Act would reckon from 2nd November 2016 and would expire sometimes in the month of November 2019.

It is alleged in the plaint that further refund was made on 1st November 2017, which is required to be proved by way of evidence. If the fresh period of limitation is to be reckoned from the said date then the period of limitation expires during the pandemic time and in view of the judgment of the Supreme Court in *Suo Motu Writ Petition* the same was extended from time to time and the plaint filed within such extended period cannot be thrown to have been filed beyond the period of limitation.

We are not unmindful of the proposition of law that the plea of limitation is essentially a mixed questions of fact and law unless it is apparent from the averments made in the plaint and the documents annexed thereto. The moment the Court finds that such pleading of limitation is required to be proved by evidence, oral and documentary, the provision under Order VII Rule 11(d) of the Code does not contemplate the rejection of the plaint.

We find that the manner in which the case has been made out and upon meaningful reading of the pleadings made in the plaint, the limitation assumes character of mixed questions of fact and law and, therefore, we do not find that the judgment of the Trial Court is legal, proper and does not require any interference.

Accordingly, the impugned order is set aside and the plaint is readmitted to file.

The Trial Court is directed to proceed with the case.

It goes without saying that the observations made herein above are restricted to an application under Order VII Rule 11 of the Code and shall not have any persuasive effect at the time of deciding the suit on merit upon full-fledged trial.

With these observations, the appeal is disposed of.

In view of the disposal of appeal itself, the connected application being CAN 1 of 2021 has become infructuous and the same is also disposed of.

(Harish Tandon, J.)

(Shampa Dutt (Paul), J.)