

**IN THE HIGH COURT AT CALCUTTA
CIVIL REVISIONAL JURISDICTION
APPELLATE SIDE**

PRESENT:

THE HON'BLE JUSTICE AJOY KUMAR MUKHERJEE

C.O. 2350 of 2021

**Sonic Thermal Private limited
Vs.
Sri Ashok Kumar Dutta**

For the Petitioner : Mr. Aniruddha Chatterjee
Mr. Rajarshi Dutta
Mr. Pankaj Agarwal
Ms. Pallavi Roy
Mr. Sarbojit Mukherjee

For the Opposite party : Mr. Probal Kumar Mukherjee
Mr. Indranth Mitra
Mr. Suhrid Sur

Heard on : 12.12.2022

Judgment on : 19.12.2022

Ajoy Kumar Mukherjee, J.

1. Being aggrieved by order No. 56 dated 19.07.2021 and order No 59 dated 16.11.2021 passed by Learned Judge, Commercial Court at Asansol in Money Suit No. 06 of 2020 present application has been preferred.

2. Petitioner contended that the petitioner filed a money suit for recovery of Rs. 8,63,64,478/- against the defendant /petitioner in the court of the learned Civil Judge(Senior Davison), Bankura which was registered as Money Suit No. 25 of 2015. The proceedings of the suit continued and evidences were placed and cross examination was continuing. On 28.11.2019 the defendant/petitioner filed an application under section 15(2) of the Commercial Courts Act, 2015 for transfer of the case to the Designated commercial Court at Asansol and it was accordingly transferred and renumbered as Money Suit No. 6 of 2020.

3. The petitioner /defendant filed an application for rejection of plaint before the learned Commercial Court at Asansol inter alia on the ground of limitation stating that the alleged claim which the plaintiff had put forth pertained to period prior to September, 2011 and the plaint was filed on September 30, 2015 and as such the claim ought to have been made within three years from the date when such payment became due and the plaintiff by clever drafting cannot make or create illusion in the mind of the learned Court as the plaint case is hopelessly barred by the laws of limitation and accordingly prayed for rejection of the plaint.

4. The Court below rejected the aforesaid application for rejection of plaint by the impugned order no. 56 dated 19.07.2021 and referred the matter to mediation. Thereafter petitioner herein/defendant filed an application for recalling the aforesaid order no. 56 dated 19.07.2021 and the opposite party/plaintiff filed their objection thereto. The learned commercial court at

Asansol vide other impugned order being order no. 59 dated 16.11.2021 also rejected the said application under section 151 of the code of Civil Procedure, 1908 pertaining to recalling the order no. 56 dated 19.07.2021.

5. Mr. Chatterjee learned counsel appearing on behalf of the petitioner submits that in order to consider the application under Order VII Rule 11 (d) the court can look into the averments in the plaint and from the annexures it appears that the bills against which the claim has been made, are undated and pertaining to the period prior to 2012. Though by clever drafting the plaintiff/opposite party has created the illusion of a cause of action in the mind of the learned Court but practically plaintiff has no cause of action to institute the said suit. If the contents of plaint is taken in its true and proper perspective, the learned court would have arrived at a conclusion that the plaint is manifestly vexatious and meritless in the sense of not disclosing a clear right to sue and he ought to have rejected the plaint. He further pointed out that suit ought to have been filed on or within 19.04.2014 but instead of that the suit has been filed by plaintiff on 30.09.2015. In fact as per the plaint case, plaintiff's alleged claim against the defendant based upon non-payment of bills bearing No.1 to 24 relating to several works purportedly done by the plaintiff for the defendant. Petitioner submits that the alleged claims of the plaintiff have allegedly arose against said purported bills bearing no. 1 to 24 under memo no. 145 and 149 dated September 21, 2011. He has also drawn attention of the court in respect of the bills and of the annexure to show that except one bill other bills do not disclose any date. In this context he relied

upon judgment reported in **2020 (7) SCC 366** and argued that court below has to determine whether plaint prima facie discloses cause of action.

6. Learned counsel appearing on behalf of the opposite party contended that from the statement of the plaint it is evident that the plaintiff has been engaged as contractor by the defendant/company and the relationship continued upto January 2015. The defendant vide their letter bearing reference No. STPL /AD/256/14-15 dated 07.02.2015 communicated to the plaintiff that contracts between plaintiff and the defendant had been cancelled on and from 01.02.2015. Opposite party further contended that thereafter the plaintiff demanded payment against the disputed bills by his letter dated 28.03.2015, in reply to which the defendant issued a letter dated 09.04.2015. He further contended that when relationship continued up to 31.01.2015 and defendant had received few bills on 23.02.2015, the suit cannot be held to be barred by limitation . He further argued that the date of submission of R/A bills is not the criteria for the purpose of determination of period of limitation and on the contrary the date of completion of the work should be the relevant factor. He also contended that this is not a money suit for non-payment of final bill but this suit is instituted for non-payment of R/A bills and in this context he submits that section 18 of the Limitation Act is to be read conjointly with Article 113 of the Limitation Act. Furthermore from the letter dated 07.02.2015 issued by the defendant, it appears that contract has been cancelled with effect from 01.02.2015.

7. Learned Counsel for the opposite party also made an additional argument regarding maintainability of this revisional application and contended that such application is barred under section 8 of the Commercial Courts Act and section 13 of the Act provides that against any order or judgment, appeal only lies before the appellate forum and as statute clearly bars against preferring revisional application, High Court's power of supervision under Article 227 does not apply in this context. He accordingly relied upon the judgment of the Apex Court passed in **2019 (9) SCC 538**. In reply, learned counsel for the petitioner submits that proviso to section 13 of the said act makes it clear that only orders specifically enumerated under Order XLIII of the code are appealable and the others are revisable. Accordingly present application under Article 227 is maintainable before this court.

8. Having heard learned counsel for both the parties and upon going through the record I find that the prayer for rejection of the plaint under Order VII Rule 11 has been made on two grounds

- (i) that the plaintiff has failed to make out any cause of action in the plaint .
- (ii) the claim made in the plaint is barred by limitation.

9. Before going through the details let me reproduce order VII Rule 11 of the Code of Civil Procedure:-

Rejection of plaint.- The plaint shall be rejected in the following cases:-

- (a) Where it does not disclose a cause of action;
- (b) Where the relief claim is undervalued, and the plaintiff, on being required by the Court to correct the valuation within a time to be fixed by the court, fails to do so;

(c) Where the relief claimed is properly valued but the plaint is written upon paper insufficiently stamped, and the plaintiff, on being required by the Court to supply the requisite stamp-paper within a time to be fixed by the Court, fails to do so;

(d) Where the suit appears from the statement in the plaint to be barred by any law;

(e) Where it is not filed in duplicate;

(f) Where the plaintiff fails to comply with the provisions of rule 9: (Provided that the time fixed by the Court for the correction of the valuation or supplying of the requisite stamp-paper shall not be extended unless the Court, for reasons to be recorded, is satisfied that the plaintiff was prevented by any cause of an exceptional nature for correcting the valuation or supplying the requisite stamp-paper, as the case may be, within the time fixed by the Court and that refusal to extend such time would cause grave injustice to the plaintiff.)

10. On perusal of the plaint it appears that in paragraph 10 of the plaint plaintiff has disclosed the cause of action as follows:-

“That the cause of action for the suit arose gradually within the jurisdiction of this court at Barjora within District Bankura, police Station Barjora, on an from 01.02.2015 from the date of cancellation of contracts without paying all dues and further on 09.04.2015 when the defendant company denied the claim of plaintiff’s company and lastly on 11.05.2015 when the defdt. Company three tened by sending a reply through their Advocate by saying for initiate criminal proceeding and thereby demanding the dues by the plaintiff’s company and on any other dates and the cause of action still subsists.”

11. From the aforesaid averments in the plaint it is clear that cause of action has been disclosed in the plaint by stating that it arose on and from 01.02.2015 which is the date of cancellation of contract without paying all dues and 09.04.2015 when defendant company denied the plaintiffs’ claim and lastly on 11.05.2015 when defendant/company threatened by sending a reply through their advocate, to initiate criminal proceeding against them and on many other dates for which cause of action still subsist.

12. It is now well settled in plethora of judgments that for the purpose of deciding an application under the provisions of Order VII Rule 11 C.P.C., the averments made in plaint are germane, the pleas taken by the defendant in the written statement or in the written objection would be wholly irrelevant at that stage. Accordingly for the purpose of determination as to whether the plaint discloses a cause of action or not, the cause of action of the suit as has been mentioned by the plaintiff in paragraph 10 of the plaint is to be taken as relevant and accordingly plaint clearly discloses cause of action. Mr. Chatterjee on behalf the petitioner submits that it is a clever drafting on the part of the plaintiff, but if one reads the plaint along with the annexure it clearly reveals that the claim of the plaintiff is vague and does not constitute any cause of action.

13. In this context it is needless to reiterate that there is a difference between non disclosure of cause of action in the plaint and absence of cause of action for bringing the suit. In ***M.V. Sea Success Vs. Liverpool and London Steamship Protection and Indemnity Association and Limited and another*** reported in **AIR 2002 Bom 151** it was held in paragraph 51

“51. The cause of action has a well defined legal connotation, though not defined, which means bundle of essential facts, if traversed, has to be proved by the plaintiff to entitle him to the relief. It reflects to the media upon which the plaintiff asks the Court to arrive at a conclusion in his favour. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved to entitle the plaintiff to the decree. The consistent legal position which is also mandatorily enacted by Order 7, Rule 11(a) CPC is, that the Court must reject the plaint which does not disclose cause of action. Obviously there is a difference between the non-disclosure of cause of action in the plaint and the absence of cause of action for the suit. The ground for rejection of plaint is failure to disclose a cause of action and not

that there is no cause of action for the suit. It is not competent for the Court to go into the correctness or otherwise of the allegations constituting the cause of action. In other words, the correctness or otherwise of the allegations constituting the cause of action is beyond the purview of Order 7, Rule 11(a), CPC. However, to find out whether the plaint discloses cause of action or not, the Court has to consider the allegations made in the plaint intelligently and meaningfully and need not be influenced by ingenious and clever drafting creating illusion of cause of action. The ritual of repeating a word or creation of an illusion in the plaint can certainly be unravelled and exposed by the Court while dealing with an application under Order 7, Rule 11(a). The Court must scan and scrutinise the allegations made in the plaint to find out whether forensic cleverness while drafting the plaint has been employed to get out of clutches of Order 7, rule 11, C.P.C. and if on a careful scan and scrutiny of the pleading the conclusion of the Court is in affirmative, the consequence of rejection of plaint must follow. The Court has to see while exercising its power for rejection of plaint, which it must whether, the allegations in the plaint as they stand, fail to prove, the cause of action. While considering the question whether the plaint discloses any cause of action or not, the Court has to find out from the allegations made in the plaint itself and not beyond it as to whether a bogus, wholly vexatious or frivolous litigation has been initiated by the plaintiff or that the claim made by the plaintiff is a legally recognisable claim. What is required to be disclosed by the plaintiff is a clear right to sue and failure to do so must necessarily entail in rejection of the plaint.”

14. In the present case plaintiff clearly discloses in his plaint about his right to sue. He has specifically averred in the plaint that cause of action arose *inter alia* with termination of contract and with the denial of defendant in respect of plaintiff's claim which took place in 2015 and on 11.05.2015 when defendant company threatened by sending reply through their Advocate. In this context reliance can be placed in paragraph 14 & 15 of the judgment of Apex Court in ***Daya Singh and another Vs. Gurudev Singh & others*** reported in **(2010) 2 SCC 194** which runs as follows:-

“14. *In support of the contention that the suit was filed within the period of limitation, the learned Senior Counsel appearing for the appellant-plaintiffs before us submitted that there could be no right*

to sue until there is an accrual of the right asserted in the suit and its infringement or at least a clear and unequivocal threat to infringe that right by the defendant against whom the suit is instituted. In support of this contention the learned Senior Counsel strongly relied on a decision of the Privy Council in Bolo v. Koklan [(1929-30) 57 IA 325 : AIR 1930 PC 270] . In this decision Their Lordships of the Privy Council observed as follows: (IA p. 331)

“... There can be no ‘right to sue’ until there is an accrual of the right asserted in the suit and its infringement, or at least a clear and unequivocal threat to infringe that right, by the defendant against whom the suit is instituted.”

“15. *A similar view was reiterated in C. Mohammad Yunus v. Syed Unnissa [AIR 1961 SC 808] in which this Court observed: (AIR p. 810, para 7)*

“7. ... The period of six years prescribed by Article 120 has to be computed from the date when the right to sue accrues and there could be no right to sue until there is an accrual of the right asserted in the suit and its infringement or at least a clear and unequivocal threat to infringe that right.”

In C. Mohammad Yunus [AIR 1961 SC 808] , this Court held that the cause of action for the purposes of Article 58 of the Act accrues only when the right asserted in the suit is infringed or there is at least a clear and unequivocal threat to infringe that right. Therefore, the mere existence of an adverse entry in the revenue records cannot give rise to cause of action.”

15. As regards the claim of the petitioner that the suit is hopelessly barred under the law of limitation as the suit has not been filed within three years from the cause of action and as such plaint is liable to be rejected under order VII Rule 11 (d) of the code, it appears that there is allegation and counter allegation made by the parties. While plaintiff has contended that cause of action arose on and from 01.02.2015 i.e. from the date of cancellation of contract without paying dues and further on 09.04.2015 when defendant/ company denied the claim of plaintiff and lastly on 11.05.2015 and also as some other dates, the petitioner/defendant’s contention is that from the annexure /bills it is apparent that all those bills were issued prior to 2012.

16. In the present context the question of limitation is not a pure question of law but it is mixed question of law and fact. In fact Rule 11 (d) of Order VII, of the code clearly stipulates that where the suit appears from the statement in the plaint to be barred by any law. Here the words “suit appears from the statement in the plaint” are important. In the present context statements made in the plaint at least do not disclose that the suit is barred by limitation. In

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reported in **AIR 1995 AP 43**, relevant portion in paragraph 5 runs as follows:-

“5. The bar of limitation has so many ingredients. If a party to the litigation sets up a contention that the suit is barred by limitation, the court has first of all to examine (1) the cause of action in the suit, (2) when the cause of action commences, (3) when the parties act in a particular fashion as to fix the cause of action and (4) ultimately what is the result flowing from such cause of action. Even while operating Articles 18 and 25 of the Limitation Act, the Court was bound to examine as to when the parties stood at conditions to fulfil their obligations, and when the money became liable to be paid. These are questions of fact to be examined on the basis of the evidence produced by the parties in the case based on the pleadings. If we go through the pleadings in the suit, it is very clear that the parties have remained at issues on several matters. Particularly when the cause of action was specifically set up in the plaint which was challenged by the defendants in the written statement, it emanates many questions of fact which were in controversy the court was bound to decide them based upon the evidence produced. Without resorting to probe such serious matters, learned Sub Judge very lightly treated the question of limitation as if it is a pure question of fact. The learned Advocate Mr. Prabhakar Reddy putting serious efforts to probe into the matter has taken this court through the exposition of the great author Salmond on Jurisprudence (12th Edition, pages 65 to 75). The jurisprudential concept of question of fact, question of law and mixed question of law-and fact are well detailed in lucidity in the said authoritative expressions of the learned author and item that there remains no doubt that the question of limitation would be a mixed question of law and fact. Under the circumstances, the learned Sub Judge was not right in deciding the question of limitation as a preliminary issue.”

17. In view of aforesaid discussion and considering the fact that the plaint discloses cause of action which shows plaintiff's right to sue and that the question of limitation comprises mixed question of law and fact in view of allegations and counter allegations as made through affidavit by the parties I find nothing to interfere with the ultimate conclusion made by the court below.

18. C.O. 2350 of 2021 is accordingly dismissed.

19. However there will be no order as to costs.

20. I am informed that trial court has already framed issue as to whether suit is barred by limitation or not and whether plaintiff has any cause of action to file the suit or not. In the event of framing such issues trial court shall decide those issues at the time of final adjudication of the suit on the basis of oral and documentary evidence and without being influenced by any observation made by this court, since I have not gone into the merits of the case.

Urgent photostat certified copy of this judgment, if applied for, be supplied to the parties upon compliance with all requisite formalities.

(AJAY KUMAR MUKHERJEE, J.)