

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 09.03.2022

CORAM:

THE HON'BLE MR.JUSTICE SENTHILKUMAR RAMAMOORTHY

A.No.2866 of 2021
in
C.S.(Comm. Div) No.337 of 2020

Codeyco S.P.A.

Having registered office at:

Santa Croce sull'Arna,

Vicolo del Grano

Italy

Represented by its Authorized Signatory

Mr.Arun Janakiraman

... Applicant/Plaintiff

Vs.

1. V.K.Enterprises,
AL-111, 3rd Street, Anna Nagar,
Chennai-800 040
Also at,
No.18, 2nd Floor, Thiruneermalai Road,
Ngalkeni, Chrompet-600 044.
2. Saleem Shahul Meeran
Partner. V K Enterprises,
Having office at:
AL-111, 3rd Street, Anna Nagar,
Chennai-800 040
3. Reddy Laxma Bobbala
Partner, V K Enterprises
Having office at:
AL-111, 3rd Street, Anna Nagar,
Chennai-800 40.

4. Vahida Banu
Partner, V K Enterprises,
Having office at:
AL-111, 3rd Street, Anna Nagar,
Chennai-800 040.
5. Karuna Devi,
Partner, V K Enterprises,
Having office at:
AL-111, 3rd Street, Anna Nagar,
Chennai-800 040. ... Respondents/Defendants

Prayer : This application is filed under Section XIV Rule 8 of O.S.Rules read with Section 151 of the Code of Civil Procedure, 1908 praying to direct the Respondents/Defendants to disclose by way of Affidavit the details of all the assets, immovable and movable properties and / or shares owned by the Respondents/Defendants, their Bank Account details/statements.

For Applicant : Ms.Deepika Murali

For Respondents : Mr.V.Kuberan for M/s.Rank Associates

ORDER

In a suit for recovery of a sum of Rs.2,04,80,180.40 along with interest thereon at 18% p.a, the plaintiff has filed this application under Section 151 of the Code of Civil Procedure 1908 (the CPC), seeking a complete list of the assets of the respondents.

2. The applicant asserts that the first defendant is a partnership firm and that defendants 2 to 5 are the partners thereof. According to the

plaintiff, the written statement filed by the defendants does not satisfy the requirements of the CPC as applicable to commercial disputes. On such basis, the plaintiff asserts that the defendants do not have a valid defence to the suit claim. The plaintiff further asserts that it reasonably apprehends that the defendants would alienate, encumber or otherwise dispose of their assets and frustrate the endeavour of the plaintiff to realize its dues. The present application is filed in these facts and circumstances.

3. In order to establish that the plaintiff has a strong *prima facie* case, the plaintiff refers to a sale agreement between the plaintiff and Kem Finishes. The plaintiff also refers to several invoices raised between 22.02.2016 and 20.12.2017 by its predecessor-in-interest, Kemiter srl, on the first defendant. The plaintiff draws reference to the e-mail correspondence from it to the defendants seeking payment towards invoices and, in particular, the plaintiff relies upon an e-mail of 24.10.2019 from Kem Finishes India Private Limited.

4. The plaintiff points out that goods were supplied to the first defendant by its predecessor-in-interest, Kemiter srl, to the first defendant, and that the first defendant was represented by the second and third

defendants for purposes of these transactions. It is stated that a merger took place between the plaintiff and Kemiter srl, and that the plaintiff is the resulting entity or transferee in the merger. Consequently, it is stated that the receivables of Kemiter srl became the receivables of the plaintiff.

5. With regard to the maintainability of the application, the plaintiff relies upon a judgment of the Hon'ble Supreme Court in *Rahul S Shah v. Jinendra Kumar Gandhi [2021 (4) KHC 148 (SC)] (Rahul S. Shah)*. In particular, the plaintiff relies upon paragraph 42 (9) of the order of the Hon'ble Supreme Court, wherein it was held as follows:

“In a suit for payment of money, before settlement of issues, the defendant may be required to disclose his assets on oath, to the extent that he is being liable in a suit. The Court may further, at any stage, in appropriate cases during the pendency of the suit, using powers under Section 151 CPC, demand security to ensure satisfaction of any decree.”

The plaintiff also points out that the above judgment of the Hon'ble Supreme Court was followed in two subsequent cases by the Hon'ble Kerala High Court.

6. The defendants refute the above contentions and raise several objections to the application. The first objection is on the ground of misjoinder of parties. The defendants assert that neither the second nor third defendant are partners of the first defendant. Therefore, it is contended that a joint and several decree cannot be prayed for against the second and third defendants. The second objection is on the ground that there is no privity of contract between the first defendant and the plaintiff. All the invoices on which the suit claim is founded were issued by Kemiter srl. According to the defendants, the plaintiff has failed to produce sufficient evidence to establish that it is entitled to step into the shoes of Kemiter srl and maintain the suit. The third objection is on the ground of limitation. The defendants contend that the plea of limitation was expressly raised in paragraph 10 of the written statement filed by defendants 1, 4 and 5. With specific reference to paragraph 10 of such written statement, the defendants contend that it was stated therein that several of the invoices are barred by limitation. In addition, the plaintiff's assertion that there was a running account between the parties was expressly denied. In light of these objections, the defendants contend that the plaintiff has failed to establish the primary requirement under Order XXXVIII Rule 5 of CPC of establishing a strong *prima facie* case. Consequently, it is contended that the present application is a roving

inquiry, which is untenable at the pre-decree stage.

7. Upon considering the submissions of parties, the first question that arises for consideration is with regard to the maintainability of the application. The sheet anchor of the plaintiff's case is the judgment of the Hon'ble Supreme Court in *Rahul S Shah*. In Paragraph 42(9) thereof, which was relied upon by the plaintiff, the Supreme Court held that “the defendant may be required to disclose his assets on oath to the extent that he is being liable in a suit”. Two aspects are noticeable: first, the liability should be established *prima facie*; secondly, it is discretionary. Therefore, the question to be examined is whether this is an appropriate case for exercise of such discretion.

8. As indicated above, the defendants have raised several defences and the defence of limitation is of particular significance. The defendants contended that the invoices were raised on dates extending from 22.02.2016 to 20.12.2017, and that several of the claims arising therefrom are barred by limitation. This contention merits consideration and cannot be brushed aside. In addition, the defendants have raised the issue of misjoinder of parties with specific reference to defendants 2 and 3 on the ground that they are not partners of the first defendant with whom the relevant transactions

took place. This contention is also not baseless. While the defendants also contend that the suit is not maintainable at the instance of Codeyco S.P.A., it appears *prima facie* that Kemiter srl merged with Codeyco S.P.A. However, no definitive conclusions can be drawn at this juncture on this issue and the plaintiff would be required to adduce evidence in course of trial.

9. In view of the multiple defences raised by the defendants, which cannot be disregarded as baseless and go to the root of the matter, this is not an appropriate case for the exercise of discretion, at this juncture, to direct the defendants to disclose assets. Therefore, A.No.2866 of 1021 is dismissed without any order as to costs.

Sd./-SKRJ.

09/03/2022

//Certified to be true copy//

Dated at Madras this the

day of

2022.

COURT OFFICER(O.S.)

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EVK 14/03/2022