$~1(Appellate)

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ CM(M) 261/2022

SHREYSHA TEXTILES PVT. LTD. ..... Petitioner
Through: Mr. Anuj Kumar Gupta and Ms. Iti Aggarwal, Advs.

versus

VISS INCORPORATION & ORS. ..... Respondent
Through: Mr. Shiv B. Chetry, Adv. for R-1 & R-2.

CORAM:
HON'BLE MR. JUSTICE C.HARI SHANKAR

O R D E R (ORAL)

% **28.10.2022**

1. CS (Comm) 51/2020 was instituted by the petitioner as plaintiff against five defendants. Respondents 1 and 2, M/s Viss Incorporation and Mr. Sekhar Balasubramanium, proprietor of Viss Incorporation (hereinafter "Viss") were Defendants 1 and 2 in the suit. By the impugned order dated 22nd December 2021, the learned District Judge (Commercial Court) ("the learned Commercial Court"), has allowed the application of Respondents 1 and 2, preferred under Order I Rule 10 of the Code of Civil Procedure, 1908 (CPC) for deletion of their names from the array of parties in the suit.

2. Aggrieved thereby, the petitioner, as the plaintiff in the suit, has approached this Court under Article 227 of the Constitution of India.

3. Quite obviously, the issue of whether Respondents 1 and 2 were necessary parties in the suit would have to be gleaned from the averments in the suit.

4. CS (Comm) 51/2020 sought recovery, from the defendants jointly and severally of USD 103333.28. The plaint averred that the petitioner was engaged in the manufacturing and export of textile made ups. In 2015-2016, it was alleged that Viss the Respondent 1 approached through its proprietor Respondent 2 ("Sekar", hereinafter), pursuant to which Purchase Orders were placed on the petitioner by Respondent 3. Pursuant thereto, according to the plaint, the fabric purchased from Viss was fabricated by the petitioner into cushion covers as per the Purchase Orders issued by Respondent 3. In the process, according to the plaint, the petitioner availed bank loan of ₹ 1,00,00,000/-.

5. The plaint further averred that the cushion covers manufactured by the petitioner were approved by Sekar and, thereafter, supplied through Respondent 3 to the US. 13 such shipments were alleged have been made during the period 2nd June 2015 to 7th November 2015, valued at USD 329891.53. Against these shipments, the plaint averred that interim payments were made by the respondents in respect of which the petitioner maintained a running account. According to the plaint, the respondents had made a total payment of US$ 226558.25, leaving an amount of USD 10333.28 outstanding. At the said amount being not liquidated by the respondents despite repeated requests by the petitioner, the petitioner instituted the aforementioned suit.

6. The averment involving Respondents 1 and 2 are to be found in the following passages of the aforementioned suit:

> "3. The Defendant No. 1 is a firm running its business at its above mentioned address at 51, (1st Floor), Pratap Nagar, Street No.2, Mayur Vihar Phase-1, Delhi - 110091 through its proprietor/authorised representative Mr. Sekar Balasubramaniam (Defendant No. 2) who is resident of G-49, 2nd Floor, Kalkaji, New Delhi 110019. The defendant no. 2 has been known to Mr. Mohit Agrawal, the director of the plaintiff company, for the last several years.
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> 6. In early financial year 2015-16, the Defendant No. 1 (through the Defendant No.2) approached the plaintiff company and conveyed that they are buying agents in India for the Defendant No. 3 company situated at USA and that the Defendant No. 3 company was looking for a fabricator in India to fabricate large quantities of cushion covers for export.
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> 7. During course of meetings at its office at Mayur Vihar, Delhi, the Defendant No. 1/2 assured that they are buying officials at India for the Defendant No. 3 company situated at USA being run and managed by the Defendant No. 5 who is a US Citizen. The Defendant No. 1/2 conveyed to the officials of the plaintiff company that the Defendant No. 3 company is looking for a fabricator at India to fabricate large quantity of cushion covers and a condition was put before the plaintiff company that the cushion covers must be fabricated by the plaintiff company only from a particular fabric being manufactured by a company namely M/s. Daanishk Incorporation, a textile manufacturing company having its registered office at 16/1550, Mahesh Nagar, Ist Floor, Ichalkaranji, (Distt. Kolhapur), Maharashra - 416115 (INDIA) being run and managed by the Defendant No. 4. Suspecting no malice, the plaintiff company, being genuine fabricators, agreed to fabricate the desired cushion covers out of the fabric manufactured by M/s. Daanishk Incorporation. However, much later, sometime in 2017, it got discovered that

Defendant No. 4 is none other than wife of Defendant No.5.

8. The Defendant No. 1, through defendant No. 2 and his employee Ms. Divya Chopra, sent several emails to the officials of the plaintiff company during the entire period of dealings regarding purchase orders, terms of sale / transactions / dealings, the delay in payments, etc. The details of the purchase orders are mentioned in the chart attached herewith. The copies of purchase orders are also attached to the said chart. The prints of emails are all attached herewith. All the meetings between the parties were held at the above mentioned Mayur Vihar Office of the defendant No. 1/2.

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10. The cushion covers fabricated by the plaintiff company were first approved by the Defendant No. 1 /2 at their Mayur Vihar office and thereafter the shipment was sent to the Defendant No. 3 company being run, managed and controlled by the defendant No. 4 and 5 as its directors. The shipment was sent from Delhi to USA, either directly from Delhi or through the ports at Mumbai. The invoices raised alongwith respective packing list, airway bill / Bill of Lading, payment received (if any), and proof of landing of goods are also attached to the shipment chart.

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13. Vide email dated 22.10.2016 exchanged between defendant no. 2 and 5, it was undertaken by defendant no.5 to clear the outstanding dues at the earliest.

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16. When with discovery of such information, it got realised that the defendants had hatched a conspiracy in connivance with each other to play fraud upon the plaintiff company. Accordingly, a complaint dated 18.8.2017 was lodged by the plaintiff company with Police Station Rani Bagh, Delhi which was entered at DD Entry No. 47B dated 18.8.2017.

17. When the defendants got to know about the complaint lodged against them, in retaliation, they instituted a baseless suit for recovery of money in the name of M/s. Daanishk Incorporation against the plaintiff company. The plaint of the

said false suit was for a baseless claim of recovery of Rs. 20,56,074/, signed by defendant no. 5 as attorney holder of defendant no. 4's firm M/s. Daanishk Incorporation. The same has been filed by the defendant without jurisdiction and with mere intent to avoid payment of legitimate outstanding towards the plaintiff company, to harass the plaintiff company and to extract money from it. The facts clearly sets forth that a fraud was played upon by the Defendants over the plaintiff company in as much as they in connivance with each other and under a conspiracy got their unfinished raw material (textile) processed through the plaintiff company and instead of making payment for such processing have sued the plaintiff company in suit for recovery of money.

18. The plaintiff company used to raise invoices for the shipments and the defendant used to make on-account interim payments. AS per the running account, the defendants are running under liability of USD 1,03,333.28 towards the plaintiff company. Vide several emails the defendants undertook to clear the liability in due course but till date the amount has not been cleared. The defendants are also jointly and severally liable to pay the outstanding amount along with interest 18% per annum on the amount outstanding claimed in this suit."

7. During the pendency of the suit, Viss and Sekar moved applications before learned Commercial Court under Order 1 Rule 10 CPC for deletion of their names from the array of parties of the suit. The said application stands allowed vide order dated 22nd December 2021, aggrieved by which the petitioner has approached this Court.

8. I have heard Mr. Anuj Gupta, learned Counsel for the petitioner and Mr. Shiv B. Chetry, learned Counsel for the respondent at length and have perused the material placed on record.

9. The learned Commercial Court, in passing the impugned order, has proceeded on the premise that Viss and Sekar were merely agents of Respondents 3 to 5. It is observed in the impugned order that there is no allegation, in the suit, of any money outstanding against Viss and Sekar, or of Viss and Sekar having any personal interest in the transactions with the petitioner. The outstanding payments, even as per the plaint, were due from Respondents 3 to 5. The learned Commercial Court has referred to Sections 182, 186 and 203 of the Indian Contract Act, 1882 as well as the judgment of High Court of Bombay in ***Midland Overseas v. M.V. "CMBT Tana***"[1].

10. The learned Commercial Court has further referred to Section 230 of the Indian Contract Act, which delineates the circumstances in which an agent would be personally liable towards the third party, for acts committed on behalf of the principal. It is further observed in the impugned order that the assurance held out by Sekar, as per the emails exchanged with the petitioner were only on behalf of Respondents 3 to 5. Para 6 of the impugned order concludes thus:

> "6.6 In the circumstances, it is clear that the applicants/defendants No. I and 2 were merely acting as agents of defendants No. 3 to 5. Though it has been alleged in the plaint that all the defendants in connivance with each other had committed fraud upon the plaintiff but a reading of the plaint suggests that the present suit has been filed for the recovery of the balance amount due upon defendants No. 3 to 5 for the work done by the plaintiff on their behalf. In such circumstances, there cannot be a personal liability or joint or several liabilities of the applicants/defendants No. 1 and 2, they being mere agents of defendants No. 3 to 5. Hence, this Court is of the view that they have wrongly been arrayed as co-defendants in the present suit.

[1] **AIR 1999 Bom 401**

> 6.7 For the foregoing discussion, the application of defendants No. I and 2 is allowed and their names are directed to be deleted from the array of the parties.
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> Application stands disposed of."

11. Mr. Chetry has taken me through the averments in the plaint, in an effort to convince me that there were no independent allegations against Viss and Sekar and that, the allegations of fraud etc. were vague and merely raised *in terrorem*. Such vague allegations, he submits, could not be made a justifiable basis to involve Viss and Sekar in the litigative dispute between the petitioner and Respondents 3 to 5. No exception, he submits, can be taken to the impugned order passed by the learned Commercial Court.

12. Having heard learned Counsel and perused the material on record, I am unable to subscribe to the view expressed by Mr. Chetry, which is also reflected in the impugned order.

13. A holistic reading of the plaint, especially the passages extracted in paras 3, 6, 7, 8, 10, 13, 16, 17 and 18 *(supra)*, there are specific allegations of involvement of Respondents 1 and 2 in the exercise to allegedly deprived the petitioner of the payments due to it. Whether these allegations are true or false or whether they have any substance, would have to be decided by the Court concerned with the matter, consequent on trial. It cannot, however, be said that the plaint is silent regarding the individual role played by Respondents 1 and 2 in the matter.

14. A party against whom allegations of *mala fides*, or connivance, are levelled, has necessarily to be impleaded in the proceedings. In ***State of Bihar v. P.P. Sharma***[2], it was held thus:

> "It is a settled law that the person against whom malafides or bias was imputated should be impleaded eo nomine as a party respondent to the proceedings and given an opportunity to meet those allegations. In his/her absence no enquiry into those allegations would be made. Otherwise it itself is violative of the principle of natural justice as it amounts to condemning a person without an opportunity."

This enunciation was extracted, with approval, in ***Girias Investment Pvt. Ltd. v. State of Karnataka***[3]. Bald, frivolous and apparently unsubstantiated allegations of *mala fides* or connivance which deserve rejection outright *ex facie* may, in a given case, not require impleadment of the person against whom such allegations are made. Had, for example, in the present case, the plaintiff merely averred, as in para 16 of the plaint, that the respondents were connivance with each other, perhaps, it could be said that the impleadment of Viss and Sekar was not necessary. The plaint, however, does not rest with the allegation of connivance contained in para 16, insofar as the Viss and Sekr are concerned. There are specific averments regarding communications made by them as well as their inter relationship, familial and otherwise, and the fact that many of the transactions took place at the premises of Viss and Sekar.

15. The extent to which Viss and Sekar could, in these

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[2] **1992 Supp (1) SCC 222**
[3] **(2008) 7 SCC 53**

circumstances, be mulcted with liability as already noted, is a matter of trial. Nonetheless, in view of the said allegations, it cannot be said that Viss and Sekar were unnecessarily impleaded as parties in the proceedings.

16. The impugned order does not address these aspects. It proceeds on the sole premise that Viss and Sekar were merely agents of Respondents 3 to 5. Indeed, in my considered opinion, while adjudicating on an application under Order I Rule 10 of the CPC, the learned Commercial Court ought not, perhaps, to have returned the findings contained in para 6 regarding lack of complicity of Viss and Sekar. Findings on merits are not justified while examining an application under Order I Rule 10. The cardinal test, governing Order I Rule 10, is whether the presence of the parties is necessary to effectively adjudicate on the real controversy in issue in the proceedings. Any *a priori* observation on the merits of the controversy would, therefore, ordinarily be inapposite. The learned DJ could, therefore, have allowed the application of Viss and Sekar by observing that their presence was not necessary for adjudicating on the controversy before him (though, on merits, as this judgement holds, such a finding would not be justified). He ought not, however, to have returned a finding, while doing so, that Viss and Sekar were not complicit in any manner, as that would amount to deciding, against the petitioner, one of the allegations in the plaint without trial or hearing. The complicity, or otherwise, of Viss and Sekar, is an aspect which would have to be examined consequent on evidence being led in the matter and arguments being heard.

17. As these findings constitute the basis of the allowing, by the learned Commercial Court, of the application of Viss and Sekar, moved under Order I Rule 10 CPC, the impugned order cannot sustain. It is, accordingly, quashed and set aside. The application filed by Respondents 1 and 2 under Order I Rule 10 of the CPC stands dismissed.

18. The present petition is accordingly allowed, with no order as to costs.

C.HARI SHANKAR, J

OCTOBER 28, 2022/hk