

16.08.2023
Sl. No.20(DL)
srm

C.O. No. 1402 of 2023
Dolphin Hosiery & Garments
Versus
Delta Fabrics Private Limited

Mr. Debajyoti Basu,
Mr. Triptimoy Talukder,
Mr. Diptomoy Talukder,
Mr. Dibyendu Ghosh

...for the Petitioner.

The revisional application arises out of an order dated January 31, 2023 passed by the learned Commercial Court at Rajarhat, North 24-Parganas in Money Suit No.11 of 2021.

By the order impugned, the learned court below rejected an application for recalling of the order dated July 28, 2021. The defendant filed the said application on November 21, 2022, *i.e.* almost one and half years after the court had passed orders granting leave to the plaintiff to continue with the suit without complying with the mandate of Section 12A of the Commercial Courts Act, 2015 (hereinafter referred to as the said Act).

Along with the plaint and simultaneously with the same, an application was filed for leave to proceed with the suit without exhausting the remedy of pre-institution

mediation and settlement. In view of the urgency pleaded, the court was pleased to grant leave as prayed for. The plaintiff also filed an application under Order XXXVIII Rule 5 of the Code of Civil Procedure. Thereafter, an application for recalling and another application under Order VII Rule 10 of the Code of Civil Procedure for return of the plaint, was filed by the defendant. According to the defendant, as per the definition of a commercial dispute, the present suit should have been heard by the court of civil jurisdiction as a money suit and not by the commercial court. The application for recalling as also the application under Order VII Rule 10 of the Code of Civil Procedure were heard simultaneously and both the applications were rejected.

The learned court found that a prayer seeking leave for dispensation with the provision of Section 12A of the said Act could be included in the plaint at any time, but such omission would not result in failure of the suit on the ground of non-inclusion of such prayer for leave in the plaint. In the case in hand, the plaintiff, simultaneously, filed an application seeking leave from complying with the provision of Section 12A of the said Act and such application for leave was allowed.

The law does not mandate that the leave could not have been prayed for by way of a separate application. Moreover,

the basis for seeking such leave and the urgency involved in the suit which would not permit any delay, had been elaborately stated in paragraphs 19 to 21 of the plaint.

In paragraph 21, it has been categorically mentioned that the plaintiff apprehended that if the defendant was to succeed in their malicious plan and design in the interim period, the entire suit would become infructuous and would cause irreparable loss and injury to the plaintiff. Thus, the plaintiff was advised to file not only an application under Order XXXVIII Rule 5 of the Code of Civil Procedure, but also an application for leave seeking exemption from complying with Section 12A of the said Act.

In paragraphs 19 and 20, it has been categorically mentioned that the defendant was trying to dispose of the immovable and movable properties and it would become impossible for the plaintiff to recover the money, which was in the nature of a debt, amounting to Rs.30,69,557/-.

Thus, this Court is of the view that sufficient pleadings were available in the plaint to establish the urgency justifying why the process of pre-institutional mediator would defeat the whole purpose in filing the suit. In order to avoid the consumption of time by way of a pre-institutional mediation, exemption from compliance of Section 12A had been prayed for by filing a separate application. The application filed by the

defendant for recalling of the leave granted after one and half years, is an afterthought.

It appears that the written statement was filed by the defendant along with the counter-claim. Thereafter, the application was filed for recall of the order granting leave to proceed with the suit without complying with Section 12A of the said Act. The court found that the said application for recalling was misconceived as the basis for claiming such leave was already averred in the plaint and an application had been separately filed seeking such leave.

The decision in *Bachhaj Nahar vs. Nilima Mandal & Anr.* reported in (2008) 7 SCC 491, as relied upon by the learned Counsel for the petitioner, does not apply. It was held that a plaint must contain all the reliefs prayed for, or all the claims made in the suit. The decision does not indicate that any leave prayed for, was a relief claimed in the suit. Thus, such contention of the petitioner that the leave should also have been prayed for the plaint, does not impress this Court. When a separate application seeking such leave was already filed and the court had granted leave on the basis thereof, way back in July, 2021, the issue had reached finality.

Secondly, with regard to the objection raised that the dispute was not a commercial dispute, the learned court had come to a *prima facie* finding that the dispute between the

parties involved commercial activities. The defendant used to supply raw materials to the plaintiff and the plaintiff used to produce fabric. Such commercial transactions continued between the parties. The court had also found that in the usual course of business, GST invoices were raised by the plaintiff towards the defendant and time and again the debt was cleared by the defendant. Running bills were raised by the plaintiff, which was lastly paid by the defendant sometime in January, 2021. There was an outstanding claim of Rs.30,69,557/- which the plaintiff claimed as a debt arising out of the business transactions. Thirdly, the defendant also filed a counter-claim over one crore against the plaintiff, arising out of such business transactions.

Thus, on the bare reading of the plaint, consideration of the counter-claim and the definition clause, the court found that there was enough material to proceed with the suit as a commercial suit. The question raised by the learned counsel as to whether the definition of a commercial dispute was fulfilled in its entirety on the averments in the plaint, cannot be raised at this stage as the court has considered the materials and found enough reason not to return the plaint for presentation before the ordinary civil court, *inter alia*, holding that the plaint and the written statement adequately disclosed that there was a commercial relationship between the parties and commercial

transactions had taken place in respect of which payments were made.

Under such circumstances, this Court does not find any reason to interfere with the order impugned.

The decision in Patil Automobile Private Limited & Ors. vs. Rakheja Engineers Private Limited reported in 2022 SCC OnLine SC 1028, does not indicate that a leave had to be prayed along with other reliefs in the plaint. A separate application seeking leave is maintainable. Patil Automobile Private Limited (supra), is a decision on the mandatory nature of Section 12A of the said Act. However, the law also permits that leave may be obtained by the party from the court, if the pre-institutional mediation would cause inordinate delay, resulting in destruction, damage or wastage of the suit property and an immediate intervention of the court was necessary.

Under such circumstances, the order impugned is upheld.

Whether the suit is a commercial suit or not, will be decided as an issue in the final hearing.

The observations made hereinabove are only tentative.

The revisional application is, thus, dismissed.

There shall be no order as to costs.

Parties are to act on the basis of the server copy of this order.

(Shampa Sarkar, J.)