OCD-9

IA No.GA/2/2023
CS/197/2022

IN THE HIGH COURT AT CALCUTTA
Ordinary Original Civil Jurisdiction
ORIGINAL SIDE

PRANOY KUMAR SAHA

-Versus-

RABINDRA NARAYAN DAS

BEFORE
The Hon'ble Justice ARINDAM MUKHERJEE
Date: 22nd June, 2023

APPEARANCE
Mr. Kumar Jyoti Tewari, Adv.
Mr. Nilay Sengupta, Adv.
...for the applicant/defendant.

Mr. Anupam Dasadhikari, Adv.
Mr. Suvam Sinha, Adv.
Mr. Altamas Alim, Adv.
...for the respondent/respondent.

The court: This is an application for rejection of the plaint by revoking the leave granted under Section 12A of the Commercial Courts Act, 2015 for instituting the suit in this Court. The defendant alleges that on a reading of the plaint no contemplation of urgent interim relief can be culled out. Even in the application for judgment of admission with a prayer for injunction, plaintiff according to the defendant, has not been able to give any justification even prima facie which will show that the plaintiff can or could have contemplated urgent interim relief apart from the fact that such application was never proceeded after being filed in the Computer Section of this Court.

The defendant has referred to several paragraphs of the plaint which is annexed to his application being GA/2/2023 at page 5 thereof. Referring to these paragraphs, the defendant says that the cause of action, if any, in favour of the plaintiff to file the above suit had arisen for the first time with the alleged failure on the part of the defendant in paying the invoices raised by the plaintiff or immediately on 14th August, 2019 upon receipt of the termination notice. Two of the invoices, are dated 2nd September, 2019 and the other is dated 14th September, 2019. The right to sue, if any, in favour of the plaintiff, therefore, first arose immediately after 14th September, 2019. The defendant also says that in paragraph 15 of the plaint, the plaintiff has averred to have admittedly received a notice from the defendant dated 14th August, 2019. So, the plaintiff ought to have approached the Court immediately after the bills raised by the plaintiff were left unpaid by the defendant or within a reasonable time from the receipt of the notice dated 14th August, 2019 if the same was not withdrawing by the defendant. The plaint, according to the defendant, is also silent about the period subsequent to 14th September, 2019 and up till 26th July, 2021. In paragraph 43 of the plaint, the plaintiff has suddenly alleged that the defendant has been denying the plaintiff's original, legitimate entitlement on and from 26th July, 2021. The defendant, therefore, says that the suit should be dismissed on the ground that no urgent interim relief was contemplated particularly in view of the fact that the same is a money claim made after about two years from the right to sue first accrued in favour of the plaintiff, if any.

On behalf of the plaintiff, it is submitted that the plaintiff contemplated urgent interim relief as pleaded in paragraphs 38, 39, 44 and 48 of the plaint. The suit, therefore, cannot be dismissed by revoking the leave under Section 12A of the Commercial Courts Act, 2015. According to the plaintiff, the pleadings as contained in the plaint has to be taken to be true and correct at the stage of an application for rejection of the same. The pleadings, according to the plaintiff, in support of his contemplation of urgent interim relief require evidence to be taken before it can be discarded. The plaint, therefore, cannot be rejected and the suit be dismissed under the provisions of Order 7 Rule 11 of CPC.

After hearing the parties and considering the materials on record, I find by restricting myself only to a meaningful reading of the plaint, it is clear that the alleged monetary claim of the plaintiff arose immediately after 14th September, 2019 when there was a failure on the part of the defendant in paying the bills raised by the plaintiff. It is well-settled position in law that unless there is an agreed credit period, a party is entitled to immediate payment upon presentation of the bill. The failure to pay the bills, gives the party entitled to payment a right to sue. The right to sue, therefor, arose for the first time in September, 2019 on the defendant's failure to pay as held in the judgment reported in ***2011 (9) SCC 126***

[Khatri Hotels Private Limited and Anr. Vs. Union of India and Anr.]. The cause of action, if any, in respect of the termination of the contract arose with the service of the notice of termination dated 14th August, 2019. The plaintiff on receipt thereof replied to the said notice on 9th September, 2019. On the failure of the defendant in withdrawing the termination notice pursuant to plaintiff's reply gives rise to right to sue, if any on this ground. The right to sue also does not get deferred due to subsequent events as held in the judgment reported in ***2016 (13) SCC 1 [Sundaram Finance Limited vs. Noorjahan Beevi and Anr.]***. The subsequent events may extend the limitation of the claim and allow a litigant to file a suit prior to expiry of the limitation period or may give rise to successive cause of action for which a suit can be based on subsequent events and permit a litigant to maintain the same but the first right to sue on having accrued does not get deferred.

In the instant case with the expiry of 14th September, 2019, the right to sue in favour of the plaintiff arose as the defendant did not pay the bill of the plaintiff. The right to sue for damages for allegedly suffering monetary loss as claimed in the suit for being allegedly prevented from carrying out the work also accrued immediately after 14th August, 2019 when the plaintiff admittedly received the notice from the defendant to desist from carrying out further work. The right to sue on this ground also did not get deferred due to subsequent events. No subsequent event till 26th July, 2021 has been alleged in the plaint.

Assuming without admitting that the plaintiff was unable to quantify the damages which it has claimed in the suit, then also the right to sue did not get deferred as the plaintiff could have instituted the suit after obtaining leave under Order II Rule 2 of the Code of Civil Procedure, 1908 to claim damages subsequently on being able to qualify the same.

After considering the ratio in Khatri (supra) and Sundaram Finance (supra) and the provisions of Order 39 Rules 1 and 2 of the Code of Civil Procedure, 1908 (in short CPC). I find a clear distinction as to urgent interim relief as contemplated under Section 12 A of the Commercial Courts Act, 2015 and interim order of injunction to be passed under the provisions of Order 39 Rules 1 and 2 of CPC. As the right to sue does not get deferred after it first accrues, the contemplation of urgent interim relief under the provisions of Section 12 A of 2015 Act has to be read as an urgent interim relief required when the right to sue first accrues. A litigant, therefor, has to file a suit at the time when the right to sue first accrues by demonstrating the requirement of urgent interim relief. If the said litigant waits after the accrual of the first right to sue, his/her claim does not get barred by limitation and at the same time the litigant is not precluded from filing a suit based on successive cause of action but then in that case after the first right to sue has accrued and no suit is filed he/she cannot later on urge that after accrual of any of the successive cause of action he/she has felt the necessity of urgent interim relief to seek dispensation of the formalities under Section 12 A of the 2015 Act. If this procedure is permitted then the legislative intent of pre-institution mediation which has now also been held mandatory by the Hon'ble Supreme Court in ***2022 (10) SCC 1 [Patil Automation Private Limited & Ors. vs. Rakheja Engineers Pvt. Ltd.]*** is otiose. Every litigant will attempt to take such route to render a mandatory provision nugatory. This, however, does not eliminate the sufferings of a litigant as in every likelihood the adversary during the time spent in pre-institution mediation may take such steps to cause jeopardy and irreparable injury to the plaintiff. The Court, therefore, has to judge each case on the basis of individual facts and leave the issue of protection during the time consumed during pre-institution mediation upon the legislature.

In the light of the discussion as aforesaid, in my view the safest course open to the litigant is to file the suit at the time when his/her right to sue first accrues and then can move an interlocutory application for ad-interim relief as under the provisions of Order 39 Rule 1 and 2, Order 38 Rule 5 or Order 40 of CPC as the case may be if during the pendency of the suit he/she finds the necessity of an urgent interim relief. If a litigant takes a chance by waiting for more than a reasonable period after his/her right to sue first accrues has to suffer for the same even if pre-institution mediation may be time consuming and a fruitless venture which may give the adversary sufficient time to perpetrate further mischief. A litigant of such nature should not be permitted to canvass contemplation of urgent interim relief after expiry of a reasonable period from the accrual of right to sue for the first time.

It is also now well-settled in view of the judgment reported in *Patil Automation (supra)* that provisions of Section 12 A of the 2015 Act are mandatory. The legislative intent is pre-suit mediation with the window of dispensation of the formalities under the said Section only in case of urgent interim reliefs being contemplated. As examples a suit to resist invocation of bank guarantee, a suit where on party is trying to change the nature, and character or possession of the subject matter or in case of infringement of intellectual property rights where damages may not be adequate compensation be cited as suits of such category, where litigant interim reliefs are often called for provided a litigant approaches at the first instance.

It is also clear from the judgment in *Patil Automation (supra)* that a suit can even be dismissed suo moto by applying the provisions of Order VII Rule 11 of the Code. So in the event there is a failure on the part of the plaintiff to establish that it requires urgent interim relief for which the provision for pre-institution mediation has to be dispensed with can be dismissed either suo moto or on an application from the defendant even after the suit has been instituted by obtaining leave as held in *Patil Automation (supra).*

Considering the averments made in the plaint, in the light of the ratio laid down in the judgment referred to hereinabove along with the discussion hereinabove, I do not find any contemplation on the part of the plaintiff in seeking urgent interim relief at the time of institution of the suit.

The plaint has been presented and admitted after the judgment in *Patil Automation (supra)* was delivered, and, as such, the ratio laid down therein is also applicable in case of the present suit though it may have been filed in the computer section prior to the judgment in *Patil Automation (supra)* being delivered. Contemplation of urgent interim relief at the time of instituting the suit in the instant case is also not traceable for the plaintiff's first interlocutory application which for reasons best known to the plaintiff was not moved after being filed in the department.

The application being GA/2/2023 is accordingly allowed and the plaint filed in CS/197/2022 is rejected. The rejection of the plaint will, however, not be an embargo on the plaintiff in instituting a suit as against the defendant on the self-same cause after complying with the pre-institution mediation, if otherwise permissible in law.

The Registry is directed to de-register the suit number from the records after observing the requisite formalities.

(ARINDAM MUKHERJEE, J.)

A/s.