Santosh

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
IN ITS COMMERCIAL DIVISION

SUMMONS FOR JUDGMENT NO. 86 OF 2019
IN
COMM. SUMMARY SUIT NO. 1415 OF 2019

Shar Metal Scrap Co. Ltd. ...Applicant
In the matter between
Shar Metal Scrap Co. Ltd. ...Plaintiff
Versus
Miraj Metals ...Defendant

Mr. Vishal Kanade, a/w Monil Punjabi and Dipti Kandkar, i/b Mr. Ramiz Shaikh, for the Plaintiff.
Mr. Tejas Mahamuni, a/w Indrajeet Hingane, i/b Ms. Priti Shinde, for Defendant nos.1 to 3.
Mr. Chetan Kapadia, a/w Mr. Pankaj Uttaradhi, i/b Ms. Sabeena Mahadik, Sagar Hate, for Defendant no.4.

CORAM: N. J. JAMADAR, J.
RESERVED ON : 10th NOVEMBER, 2022
PRONOUNCED ON : 2nd JANUARY, 2023

ORDER:-

1. This commercial division summary suit is instituted for recovery of a sum of Rs.8,62,27,620/- alongwith further interest at the rate of 18% p.a. on the sum of Rs.5,11,51,440.40 from the date of the respective invoices.

2. The material averments in the plaint can be stated in brief as under:

(a) Shar Metal Scrap Company Limited ("Shar"), the plaintiff, is a company incorporated under the laws of United Arab Emirates ("UAE"). Shar is a supplier of ferrous and non-ferrous metal scrap from Dubai, UAE, to several importers in India.

(b) The plaintiff, initially, averred that Miraj Metals Pvt. Ltd., defendant no.1, was a Company registered under the Companies Act, 1956, Mr. Hiten Mehta and Harita Hiten Mehta, defendant nos.2 and 3, respectively, were the Directors of Miraj Metals. Dena Bank, original defendant no.4, was the banker of defendant nos.1 to 3 and facilitated the transactions of import and export between the plaintiff's banker namely Arab Bank, based in Dubai, and defendant nos.1 to 3.

(c) Pursuant to the request of Hiten Mehta, defendant no.2, the plaintiff claimed to have supplied metal scrap to defendant no.1 during the period October, 2015 to February, 2016 under 27 distinct Bills of Lading and corresponding invoices. Out of them, original documents in respect of four consignments were returned by defendant no.4 – Bank on account of non-payment of the price thereof by defendant nos.1 to 3. Out of balance 23 invoices, the plaintiff received payment of US$ 818,292.50 as against nine invoices from defendant no.4, whereas payment of US$ 1200,231.35 against 14 invoices remained outstanding.

(d) The plaintiff avers that after the consignments under the respective Bills of Lading were shipped, the plaintiff through its bankers, Arab Bank, Dubai, UAE, forwarded to defendant no.4 Bank, the banker of defendant nos.1 to 3, the entire set of original documents under clear instructions that those documents were to be released by defendant no.4 – Bank to defendant no.1 or its representative only against payment to be made by defendant no.1 to defendant no.4 – Bank. The money so realized by defendant no.4 – Bank was to be remitted to the plaintiff through its banker Arab Bank. The plaintiff thus avers that transaction was to be effected through the procedure known in common business parlance as, "cash against documents" or "documents to be delivered against payments". Under the said procedure, defendant no.4 – Bank was enjoined to protect the rights of the plaintiff.

(e) In substance, it is the claim of the plaintiff that defendant no.4 – Bank dishonestly handed over the original documents to defendant nos.1 to 3, sans payment, in breach of its duty to collect the proceeds from defendant nos.1 to 3 against the respective invoices. The plaintiff refers to the correspondence exchanged between its banker Arab Bank and defendant no.4 Bank, initially, and the correspondence between the plaintiff and defendant no.4 – Bank, subsequently, in the wake of the controversy. Adverting to the facts which were unearthed thereby, the plaintiff asserts that defendant nos.1 to 3, with intent to defraud the plaintiff, have fraudulently obtained the original set of documents from defendant no.4 – Bank without making payment of the price of the goods supplied thereunder. Reference is made to the alleged fraud committed by the officers of defendant no.4 – Bank which eventually led to registration of FIR by CBI being RC 26(E)/2016/CBI/BS&FC/ Mumbai, for the offences punishable under Sections 120-B, 420, 467, 468 and 471 of the Indian Penal Code, 1860 ("the Penal Code") and Section 13(2) read with Section 13(1)(d) of the Prevention of Corruption Act, 1988 against defendant no.2 Hiten, his employee Mr. Harish Mantri, and Mrs. Yamini Mahesh Bangera, the Forex Manager of defendant no.4 – Bank, at the instance of the Zonal Manager of defendant no.4 - Bank.

(f) The plaintiff was thus constrained to institute this suit as defendant nos.1 to 3 committed default in payment of the price of the goods, the custody of which was fraudulently obtained, and defendant no.4 – Bank negligently or fraudulently parted with the mercantile documents in breach of specific instructions.

3. It would be contextually relevant to note that the plaintiff later on professed to amend the plaint so as to implead Mirj Metals as a proprietary concern of defendant no.2 Hiten Mehta. By an order dated 12th March, 2020, this Court permitted the plaintiff to amend the plaint keeping open all contentions of the defendants in relation to the merits of the amendment, including the issue that by joining Miraj Metals as defendant no.1 in place of Miral Metals Pvt. Ltd. (erstwhile defendant no.1), the claim was barred by Law of Limitation. In the meanwhile, as Dena Bank – defendant no.4 merged with Bank of Baroda under amalgamation of Viajay Bank and Dena Bank with Bank of Baroda Scheme, 2019, Bank of Baroda came to be substituted for Vijaya Bank.

4. Defendant nos.1 to 4 appeared upon service of Writ of Summons. Thereupon the plaintiff took out the Summons for Judgment.

5. Initially defendant nos.1 and 3 filed an affidavit-in-reply seeking an unconditional leave to defend the suit primarily on the ground that the transaction, if any, which the plaintiff had was with Miraj Metals and defendant nos.1 and 3 had no concern whatsoever with the said transaction. Post amendment, defendant nos.1 and 2 filed an affidavit-in-reply and contested the Summons for Judgment on the ground that the suit was hopelessly barred by limitation as the cause of action allegedly arose on 26th April, 2016 and defendant nos.1 and 2 came to be impleaded as party defendants to the suit in the month of March, 2020. On the merits of the matter, defendant nos.1 and 2 contend that the officers of defendant no.4 – Bank had assured defendant nos.1 and 2 to grant temporary overdraft facility and the banker would make payment to the supplier's banker directly. Despite having obtained the signatures of defendant no.2 on the documents for temporary overdraft facility, defendant no.4 failed and neglected to honour its obligation by not crediting the money to the plaintiff's account. Defendant no.2 further contends that defendant no.4 – Bank had laid a claim for an amount of Rs.48 Crores in OA/134/2017, before the DRT-II, Mumbai, against defendant nos.1 and 2, and the said amount, in fact, covers the amount claimed by the plaintiff in the instant suit.

6. Defendant no.4 – Bank has also sought an unconditional leave to defend the suit contending that the suit is not maintainable as a summary suit and it raises various triable issues which are not amenable to adjudication in a summary suit. It is contended that original import documents were forwarded by the banker of the plaintiff to defendant no.4 – Bank. When the plaintiff demanded the return of the original documents, it was realised that certain employees of defendant no.4 – Bank, in wrongful exercise of their powers, had released the original import documents to defendant no.2. After the fraud was unearthed, the Zonal Manager of defendant no.4 has registered FIR.

7. Defendant no.4 further contends that there is no privity of contract between the plaintiff and defendant no.4. Thus, a summary suit qua defendant no.4 is not maintainable as it does not fall within the ambit of the provisions contained in Order XVII Rule 1(2) of the Code of Civil Procedure, 1908.

8. Affidavits-in-rejoinder are filed on behalf of the plaintiff to deal with the contentions in the affidavit-in-reply filed by defendant nos.1 and 2, and defendant no.4.

9. In the wake of the aforesaid pleadings and the material on record, I have heard Mr. Kanade, the learned Counsel for the plaintiff, Mr. Mahamuni, the learned Counsel for defendant nos.1 and 2, and Mr. Kapadia, the learned Counsel for defendant no.4, at some length.

10. Mr. Kanade submitted that the fundamental fact of sale and delivery of the metal scrap by the plaintiff to defendant nos.1 and 2 is not in contest. In any event, according to Mr. Kanade, the Bills of Lading and invoices lend unflinching support to the claim of the plaintiff. Laying emphasis on the nature of the defences raised by defendant nos.1 and 2 in the affidavit-in-reply, post amendment in the plaint, Mr. Kanade would urge that the said affidavit-in-reply singularly lacks a specific denial as to the sale of the goods and receipt thereof by defendant nos.1 and 2 under the mercantile documents.

11. Mr. Kanade would urge that defendant nos.1 and 2 endeavoured to impress upon the Court that the mercantile documents were lawfully released after debiting the account of defendant no.1; whereas defendant no.4 – Bank contends that defendant nos.1 to 3 fraudulently obtained the custody of the original documents in connivance with the officers of defendant no.4 – Bank. These defences, according to Mr. Kanade, can only be said to be sham and frivolous.

12. Mr. Kanade heavily banked upon the Minutes of Meeting held on 26th April, 2016 wherein defendant nos.1 and 2 acknowledged the liability to pay the outstanding amount by 31st May, 2016. As the outstanding amount represents an admitted liability a decree must follow, urged Mr. Kanade.

13. As against this, Mr. Kapadia, the learned Counsel for defendant no.4 – Bank, submitted that there is no privity of contract between the plaintiff and defendant no.4 – Bank. Amplifying the submission Mr. Kapadia would urge that it is well recognized that a collecting bank does not owe any obligation to the principal. Inviting the attention of the Court to ICC Uniform Rules for Collection (URC 522) Mr. Kapadia submitted that, being a mere collecting bank, defendant no.4 – Bank did not incur any contractual liability.

14. Secondly, according to Mr. Kapadia, even if the case of the plaintiff that there was negligence or fraud on the part of officers of defendant no.4 – Bank, is taken at par, the plaintiff can have a claim in damages only. A summary suit for damages is not tenable. Mr. Kapadia would further urge that in the case at hand, there are several triable issues including the bar of limitation.

15. Mr. Mahamuni, the learned Counsel for defendant nos.1 and 2, also urged that impleadment of defendant nos.1 and 2 in the month of March, 2020 as party defendants to the suit, renders the suit clearly barred by limitation. Therefore, the defendants deserve an unconditional leave to defend the suit even if the case of the plaintiff on the aspect of sale and delivery of the goods is taken at its face value.

16. The plaintiff has approached the Court with a positive case that the cause of action arose on 26th April, 2016 when defendant nos.1 and 2 acknolwedged the amount outstanding under the invoices and promised to make the payment thereof on or before 31st May, 2016, under the Minutes of Meeting dated 26th April, 2016 signed by defendant no.2. As noted above, initially the suit was instituted against Miraj Metals Pvt. Ltd., and Mr. Hiten, defendant no.2 and Ms. Harita, defendant no.3, were impleaded as directors of defendant no.1 Company. By an order dated 12th March, 2020, in Interim Application No.1 of 2020 in Commercial Summary Suit No.1415 of 2019, the plaint was allowed to be amended so as to implead Miraj Metals as a proprietary concern and Mr. Hiten Mehta, defendant no.2, in the capacity of the proprietor thereof.

17. In the backdrop of the aforesaid unconvtroverted facts, the thrust of the submissions on behalf of defendant nos.1 and 2 and defendant no.4 was that the suit is hopelessly barred by limitation, as when a party is added, after the institution of the suit, the suit as against the said party is deemed to have been instituted when he was so made a party.

18. Under Order I Rule 10(2) the Court may direct striking out a party or addition of a party, whose presence is necessary in order to enable the Court to effectively and completely adjudicate upon and settle all the questions involved in the suit. Sub-Rule (5) of Rule 10 provides that, subject to the provisions of Section 21 of the Limitation Act, 1963 the proceedings as against any person added as defendant shall be deemed to have begun only on the service of the summons.

19. Sub-Section (1) of Section 21 of the Limitation Act reads as under:

> "**21**. Effect of substituting or adding new plaintiff or defendant.–
>
> (**1**) Where after the institution of a suit, a new plaintiff or, defendant is substituted or added, the suit shall, as regards him, be deemed to have been instituted when he was so made a party;
>
> Provided that where the court is satisfied that the omission to include a new plaintiff or defendant was due to a mistake made in good faith it may direct that the suit as regards such plaintiff or defendant shall be deemed to have been instituted on any earlier date."

20. A conjoint reading of the provisions contained in Order I Rule 10 (2) and (5) and Section 21 of the Limitation Act, makes it abundantly clear that ordinarily when a party is added the suit, qua such newly impleaded party, shall be deemed to have been instituted on the day he was so impleaded. However, the aforesaid rule may operate onerously in a case where on account of a *bona fide* mistake or inadvertent omission a party was not impleaded at an earlier point of time and by the time such mistake was realized, the period of limitation qua such party gets over. In order to mollify the rigor of such strict application, the proviso to Section 21(1) of the Limitation Act vests discretion in the Court to direct that the suit as against such newly impleaded party shall be deemed to have been instituted on an earlier date than the date of actual impleadment, if it is satisfied that the omission to include a new plaintiff or defendant was on account of a mistake made in good faith. If the Court while allowing impleadment of a party directs that the suit qua such party be deemed to have instituted at an earlier point of time, the bar of limitation would thus not operate, even if party is impleaded beyond the prescribed period of limitation. This benefitial nature of the proviso to Section 21 was expounded by the Supreme Court in the cases of ***Munshi Ram vs. Narsi Ram and another***[1] and ***Karuppaswamy and others vs. C. Ramamurthy.***[2]

1AIR 1983 Supreme Court 271.
2AIR 1993 Supreme Court 2324.

21. Evidently, in the case at hand, Miraj Metals, defendant no.1, a proprietary concern, was added as a party almost four years after the stated date of accrual of the cause of action i.e. 26th April, 2016. It thus become necessary to note as to how the Court dealt with the objection as to bar of limitation, while allowing the amendment in the plaint. The observations in paragraphs 2 to 4 of the order dated 12th March, 2020 are relevant and hence extracted below:

> "**2**. Mr. Kapadia, the learned advocate appearing on behalf of defendant no.4 has strongly opposed grant of this amendment mainly on the ground that (1) the applicant/plaintiff was always aware that Miraj Metals was a sole proprietary concern with whom the applicant/plaintiff had transactions and instead he joined Miraj Metals Pvt. Ltd. which is a corporate entity; (ii) that the cause of action against Miraj Metals (the sole proprietary concern) is hopelessly barred by the Law of Limitation.
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> **3**. Having heard the learned Counsel for parties and considering that this is only an amendment application, I am inclined to allow the same keeping all contentions of the defendants open. In these circumstances, the applicant/ plaintiff is allowed to amend the plaint and the Summons for Judgment as per the schedule tendered across the bar and marked "X" for identification. The amendment shall be carried out within a period of one week from today and the amended copy of the plaint and the Summons for Judgment shall be served on all the defendants within a period of one week thereafter. The defendants shall be entitled to file their additional affidavits in reply to the amended plaint and Summons for Judgment, if so required.
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> **4**. It is made clear that all contentions of the defendants in relation to merits of the amendment are kept open including but no limited to the issues that by joining Miraj Metals as defendant No.1 in place of Miraj Metals Pvt. Ltd., the claim made by the plaintiff is wholly time barred."

22. The aforesaid observations unmistakably indicate that the bar of limitation was specifically raised on behalf of the defendants, in opposition to the prayer for amendment, and this Court considered the same and, the question as to whether by such impleadment the suit would be barred by limitation was explicitly kept open. It is plain, at that stage, this Court did not exercise the discretion to direct that the suit as against the newly impleaded defendants be also deemed to have been instituted on the date of the institution of the suit.

23. Mr. Kanade attempted to wriggle out of the situation by canvassing a submission that Mr. Hiten Mehta, defendant no.2, has all along been a party to the suit. Miraj Metals (new defendant no.1), of which defendant no.2 is a proprietors, simply came to be substituted for Miraj Metals Pvt. Ltd. (original defendant no.1), a corporate entity. Therefore, according to Mr. Kanade, the suit cannot be said to be barred by limitation.

24. It is true that misdescription of the parties, which is subsequently corrected, does not amount addition of the parties. If it is a case of mere correction of misdescription, Section 21 of the Limitation Act, 1963 may not be attracted. In the facts of the case, the questions that would warrant consideration are, firstly, whether, the impleadment of a proprietary concern in the place of a corporate entity amounts to a mere correction of misdescription, and, secondly, whether the impleadment of Mr. Hiten Mehta, in a different capacity, falls within the ambit of misdescription of a party simplicitor?

25. In my view, since this Court has expressly kept the question of limitation open for consideration and the said order has not been varied, at this stage, the said question of limitation raises a triable issue, as Section 3 of the Limitation Act enjoins the Court to consider the question of limitation although limitation has not been set up as a defence. Thus, it does not matter that defendant nos.1 and 2 allegedly acknowledged the liability under the Minutes of Meeting dated 26th April, 2016. If the Court eventually records a finding that the suit is barred by limitation, the said admission would be of no avail.

26. On the aspect of the absence of privity of contract between the plaintiff and defendant no.4 – Bank, Mr. Kapadia was justified in placing reliance on a judgment of Delhi High Court in the case of ***M/s. Omse Jordan vs. Sudarshan Overseas Ltd. & ors.***[3]***,*** wherein, in a somewhat similar fact-situation of a collecting Bank being sued for non-payment of the amount against the mercantile documents, after adverting to the provisions contained in Uniform Rules for Collection (URC), a

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32012 SCC Online Del 3204.

learned Single Judge of the Delhi High Court held that the submission that a collecting Bank is liable to make payment did not merit acceptance. Reliance was also placed on a judgment in the case of ***Grosvenor Casinos Ltd. vs. National Bank of Abu Dhabi***[4]***,*** wherein it was held that the provisions of URC 522 do not create privity of contract between the principal and the collecting bank.

27. The matter can be looked at from a slightly different perspective so far as the leave sought by defendant no.4 – Bank. The plaintiff's case qua defendant no.4 – Bank wavered from that of negligence to fraud on the part of defendant no.4's officers, in the matter of delivery of the documents to defendant no.2, without payment. In the very nature of the things, the allegations of fraud are rooted in thicket of facts. When such allegations of fraud are made and there is material to indicate that those allegations led to registration of FIR and investigation by CBI, defendant no.4 – Bank deserves an opportunity to defend.

28. An useful reference in this context can be made to a judgment in the case of ***State Bank of Hyderabad vs. RABO Bank***[5] wherein, in the backdrop of the allegations of fraud, the

42008 Bus LR D 95.
5(2015) 10 Supreme Court Cases 521.

Supreme Court had granted an unconditional leave to defend the suit. The observations in paragraphs 20 to 22 are material and hence extracted below:

> "**20**. We are in total agreement with the view taken by this Court in Raj Duggal Vs. Ramesh Kumar Bansal, 1991 Suppl.(1) SCC 191 that leave to defend the Summons for Judgment shall always be granted to the defendant when there is a triable issue as to the meaning or correctness of the documents on which the claim is based or the alleged facts are of such nature which entitle the defendant to interrogate or cross-examine the plaintiff or his witnesses.
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> **21**. In the case on hand, we have perused the material on record including the FIR dated 9th August, 1999 registered by the CBI at the instance of Chief Vigilance Officer, SBH and also the Charge Sheet filed by the CBI. The charge sheet indicated the involvement of Mr. Sudhir Behra, Chief Manager of the appellant Bank at Burra Bazar Branch, Calcutta. Acting at the requests of representatives from the Indian clients of the respondent's constituent, the Chief Manager had induced some officers of the appellant Bank who were In-charge of Foreign Exchange Department to issue tested telex messages of co-acceptance. The charge sheet further alleges that these officers were not authorized to issue such co-acceptances and the motive behind their illegal and unauthorized action was to enable the constituent of the respondent to get their bills discounted by jeopardizing the interests of the appellant Bank. It is also on record that the trial of the said case was at the stage of evidence as on 13th November, 2014.
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> **22**. Apart from these, the substantial revelations of the defendant (appellant) in the affidavit coupled with the views expressed by the Division Bench of the High Court makes it clear that there are certain triable issues for adjudication and the defendant/appellant is entitled to defend the Suit. The appellate side of the High Court ought to have taken into consideration the factual matrix of the case before recording its finding. Taking into consideration the totality of the facts and circumstances of the case, we are of the opinion that the defendant/appellant has made out a prima facie case of triable issues in the Suit which needs to be adjudicated. Therefore, the defendant is entitled to grant of unconditional leave to defend the Suit."

29. In the totality of the circumstances, though the defendants are entitled to an unconditional leave to defend the suit, in the sense that none of them can be called upon to make a deposit, yet having regard to the nature of the claim and particularly the defence sought to be put-forth by defendant no.2, in my considered view, it would be appropriate to direct that pre-trial proceedings be completed within a stipulated period and the hearing of the suit is also expedited.

30. Hence, the following order:

: O R D E R :

(i) Unconditional leave is granted to defendant nos.1 to 4 to defend the suit.

(ii) Defendant nos.1 to 4 shall file their written statement within a period of 30 days from today.

(iii) Discovery and inspection and pre-trial formalities be completed within a period of two months thereafter.

(iv) The hearing of the suit stands expedited.

(v) Subject to above directions, the Summons for Judgment stands dismissed.

[N. J. JAMADAR, J.]