A.No.1230 of 2022
in C.S.No.998 of 1999

Reserved on : 10.02.2023

Pronounced on : 03.03.2023

N.SESHASAYEE J.

1. This application is taken out by defendants 2 and 6 for deleting them from the suit. The brief note on the backdrop for this application is now provided:

- The suit is laid for recovery of a sum of Rs.5,28,23,501.90, being the value of the goods supplied by the plaintiff to the first defendant company. There is also a claim for future interest at the rate of 18% per annum. The defendants 2 to 6 were the Directors of the first defendant company at the time when the suit was laid. Presently, only the 6th defendant continues to be the Director of the first defendant company.
- The plaint elaborates about an agreement for supply of fuel by the plaintiff to the first defendant company, and also referred to various agreements entered into between the plaintiff and the first defendant company at various points of time, and it all boils down to the allegation that the first defendant company was liable to pay a sum of Rs.5.30 crores plus interest to the plaintiff as indicated above.

- Alongside the filing of the suit, the plaintiff had simultaneously invoked Section 434 of the Companies Act, 1956, by filing C.P.No.232 of 1998 for winding up of the company. This was ordered by the Company Court, and the said order was challenged in O.S.A.No.345 of 2011. It could be seen that during the pendency of the said proceedings, the principal amount had been deposited into the Court by the first defendant, and the same was also allowed to be withdrawn by the plaintiff. What remains to be contested in the suit, therefore, is the interest portion payable on the said sum.

2. It is in this backdrop, the second defendant and the sixth defendant have taken out this application for dropping them from the array of parties under Order I Rule 10(2) CPC. Necessary counters have been filed by the plaintiff to this application.

3.Opening his argument, Mr.S.R.Raghunathan, learned counsel appearing for the applicants has made the following submissions :

- The core allegation for justifying the impleadment of Directors of the first defendant company in the party array by the plaintiff is indicated in paragraph 31 of the plaint, where a sweeping allegation is made that these directors have siphoned off the funds of the first defendant company and diverted it for their personal advantage. It is on this solitary allegation of conversion of funds of the company by the Directors for their personal benefit, the plaintiff seeks their continuance in the party array. Indeed it relies on Sec. 542 of the Companies Act.

- Sec. 542 of the Companies Act is an enabling provision that authorises the liquidator of a company appointed in the course of winding up proceedings of the company, to proceed against the personal assets of the directors of the company for any perceived conversion of assets of the company by them for their personal benefit. But this can be invoked only in a winding up proceedings before a Company Court, and not in a civil suit. Since the institution of the suit, the Companies Act, 1956, was replaced by Companies Act, 2013 and Sec.542 of the earlier Act is now replaced by Sec. 339 of the present Act. However, this provision is not yet notified. But before this notification, the Insolvency Code had come into force in 2016. This code enables a Resolution Professional to proceed for recovery of any diversion of funds of the company under Section 66.

- It is not the case of the plaintiff that the first defendant company faces any prospects of liquidation. And no Resolution Professional has been entrusted with the responsibility of invoking Section 66 of the Insolvency and Bankruptcy Code either.
- Inasmuch as the basis for making allegation against the Directors of the company is now not available in law, a mere allegation that the directors have converted the funds of the company for their personal use cannot stand scrutiny in the civil suit.

Placing reliance on the ratio in ***Amrit Kumar Shaw & Anr.vs.Farida Khatoon & Anr.***[(2005) 11 SCC 403]; ***Mumbai International Airport Pvt. Ltd., vs.Regency Convention Centre & Ors.*** [(2010) 7 SCC 417] and the ***Order of this Court dated 23.12.2020 made in A.Nos.2077 to 2079, 2138 & 2139 of 2020 in C.S.No.166 of 2020,*** learned counsel submitted that when the allegation on the basis of which the defendants 2 and 6 were sought to be roped in the suit cannot be taken cognizance of in a civil suit, since there is utterly no need for them to be in the party array and defend the suit.

4. The learned Senior Counsel appearing for the plaintiff / respondent made three pointed submissions:

(a) That in paragraph 31 of the plaint, there is an assertion / allegation that the defendants 2 and 6 have converted the funds of 1st defendant company for their personal purposes, and in the context the reference to Sec. 542 of the Companies Act, 1956, is essentially intended to provide the principle and not the foundation for the proceedings against the personal assets of the directors of the 1st defendant company. This aspect has to be proved and indeed can be proved only during trial and the stage is too premature for the Court to contemplate on dropping defendants 2 and 6 from the party array.

(b) So far as the allegation that the liability of the defendants 2 and 6 is not disclosed in paragraph 33 is concerned, this paragraph merely sums up the facts constituting the cause of action for the suit. The cause for action is the default of the first defendant company in paying the debt-dues to the plaintiff and set in the context the allegations against the defendants 2 and 6 as disclosed in paragraph 31 of the plaint is more for executing the decree in the eventuality of the plaintiff succeeding in the action.

(c) The application is filed when the stage is well set for commencement of the trial, and almost after two decades with the solitary intent to delay it.

5.In response, the learned counsel for applicants / defendants 2 and 6 submitted that;

- An application for deleting the names of the parties is not necessary for the final adjudication of the suit, and can be filed at any time, as has been declared by the Hon'ble Supreme Court in ***Amit Kumar Shaw and another V.Farida Ktatoon and another*** [(2005) 11 SCC 403].
- That the cause of action for the suit admittedly is a dispute over non payment of value of the goods supplied by the plaintiff to the 1st defendant, and inasmuch as 1st defendant is a juristic person, its liability cannot be automatically telescoped to its directors unless

conditions emerges for the liquidator to contemplate it.

6. It is absolutely evident that defendants 2 and 6 are not necessary parties to the suit. The entire reading of the plaint indicates that the cause of action is essentially, if not exclusively, directed against the first defendant, but for certain strained and sweeping allegations made against defendants 2 to 6 in paragraph 31 thereof, there is hardly any need for them to stay in the party array. The foundation for paragraph 31 appears to be influenced by Sec. 542 of the Companies Act, 1956, (which corresponds to Sec. 339 of Companies Act, 2013) and as rightly contended by the counsel for the applicants, this provision enables the liquidator to go after the former directors of the company if they have converted any of the assets of the company for their purposes. While the learned counsel for the plaintiff would contend that the principle embodied in this provision can be used by a civil Court, this Court considers it is not permissible since the company has an independent juristic existence and its liability cannot be telescoped through its directors unless it becomes essential in circumstances embodied in Section 339 of the Companies Act, 2013. And, today this provision admittedly is not notified and also that the first defendant

company does not face any liquidation.

7. In conclusion, this application is allowed, and names of the applicants/defendants 2 and 6 are struck off from the array of defendants in the suit. Inasmuch as this paragraph 31 is irrelevant for adjudicating on the cause of action, it is also struck off from the plaint. The plaintiff is required to carry out necessary amendment to the plaint. No costs.

03.03.2023

ds

N.SESHASAYEE.J.,

ds

Pre-delivery order in
A.No.1230 of 2022
in C.S.No.998 of 1999

03.03.2023