OD 1

ORDER SHEET
IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
ORIGINAL SIDE

APO 155 of 2023
with
WPO 1076 of 2021
IA GA 2 of 2023
HERITAGE INFRA SOLUTION PRIVATE LIMITED AND ANR.
Versus
THE KOLKATA MUNICIPAL CORPORATION AND ORS.

Present :
The Hon'ble Justice Debangsu Basak
-And-
The Hon'ble Justice Md. Shabbar Rashidi

For the Appellants	:	*Mr. Arindam Banerjee, Adv.* *Mr. Vivek Jhunjhunwala, Adv.* *Mr. Shounak Mitra, Adv,* *Mr. Zulfiqar Ali Al-Quaderi, Adv.*
For the Respondent	:	*Mr. Alak Kumar Ghosh, Adv.* *Mr. Gopal Chandra Das, Adv.*

HEARD ON	:	26.11.2024
DELIVERED ON	:	26.11.2024

DEBANGSU BASAK, J.:-

1. The appeal is directed against the judgment and order dated December 22, 2022 passed in WPO 1076 of 2021. By the impugned judgment and order, learned Single Judge dismissed the writ petition after holding that there were

disputed questions of fact involved in the writ petition and that, the claims made by the writ petitioner was barred by limitation.

2. The appeal is at the behest of the writ petitioner.

3. Learned advocate appearing for the appellants submits that, the issue of entertainability and maintainability were raised at the point of admission of the writ petition. He submits that, by an order dated November 22, 2021, the issue of entertainability of the writ petition was decided in favour of the writ petitioner while keeping open the issue of maintainability. He points out that, Corporation did not prefer any appeal against the order dated November 22, 2021.

4. Referring to the merits of the case he submits that, the contract was entered into between the appellant and the Kolkata Municipal Corporation (KMC) for supplying mechanical road sweepers. Such contract was extended till 2012. He contends that 12 mechanical road sweepers were supplied by the appellant. According to him, in terms of the contract, appellant was to supply spare parts for the road sweepers separately and provide for maintenance thereof.

5. Learned advocate appearing for the appellant submits that from time to time the appellant raised bills in respect of the mechanical road sweepers, spare parts supplied, and the maintenance provided on KMC. A portion of the amount became due and payable. He refers to the list of dates and also to documents annexed to the writ petition and submits that, there are several acknowledgement of liabilities issued by the KMC.

6. Learned advocate appearing for the appellant submits that, the claim of the appellant was not barred by limitation. The issue of limitation was answered incorrectly by the learned Single Judge. He refers to the averments made in the writ petition as well as in the affidavit-in-opposition. He submits that, the contents of the affidavit-in-opposition should be read in the context of the order dated November 22, 2021 passed by the learned Single Judge while admitting the writ petition. He points out that KMC was directed to mention the calculation of the account to prove the payment to the appellant and subsequently disbursed. Court also required KMC to state whether the payment in terms of the annexure P-10 at page 233 of the writ petition was made or not and what steps were taken by KMC against such sanction for payment.

7. Relying upon **(2023) 109 GSTR 402 (Godrej Sara Lee Ltd. vs. Excise and Taxation Officer-cum-Assessing Authority and Others)** learned advocate appearing for the appellant submits that, there is a distinction between the entertainability and maintainability of a writ petition. He submits that Supreme Court held that a writ petition cannot be said to be not maintainable if there exists statutory alternative remedy.

8. Learned advocate appearing for the appellant submits that, the claim of the appellant being acknowledged by the KMC and KMC not providing any document as called for by order dated November 22, 2021 passed in the writ petition while admitting the writ petition, learned Single Judge erred in holding the claim of the appellant was barred by limitation.

9. Learned advocate appearing for the appellant submits, that there are acknowledgements of liability made in writing by KMC authorities and that, such acknowledgements of liability are within the period of limitation prescribed. He refers to the various provisions of the KMC Act, 1980, including the provisions thereof. He submits that, last payment was made in 2020 and that, acknowledgement of liability was made in 2019 while the writ petition was filed in 2021. According to him, the account was a running, current and continuous account. Therefore, there was no question that the claim was barred by limitation.

10. Referring to the affidavit-in-opposition filed by the KMC before the learned Single Judge, learned advocate appearing for the appellant submits that, the pleadings made in the writ petition regarding the written acknowledgement of liability by KMC was not dealt with by KMC. He submits that, the paragraphs which deal with such averments of the writ petition, in the affidavit in opposition of KMC does not satisfy the test of traverse within the meaning of the Code of Civil Procedure, 1908.

11. The KMC authorities are represented.

12. Appellant seeks relief with regard to the contract entered into by the appellant with KMC. Averments made in the writ petition including the prayers made therein, would demonstrate that, appellant seeks relief with regard to the decision of KMC not to release any payment to the appellant as also the direction upon the KMC to pay a sum of Rs.2,87,63,815/-.

13. Issues of maintainability and entertainability of the writ petition were raised at the time of admission of the writ petition on November 22, 2021 when the learned Single Judge held that the writ petition was entertainable. Learned Single Judge, however, kept open the issue of maintainability.

14. By the order dated November 22,2021 where the issue of entertainability of the writ petition was decided, learned Single Judge directed the parties to file affidavits. Learned Single Judge sought certain information as recorded in such order. KMC authorities filed affidavit of opposition in the writ petition. The stands of KMC in such affidavit in opposition are primarily that the accounts are required to be determined and that, there were excess payments. The issue of limitation was set off.

15. At the final hearing of the writ petition, learned Single Judge found that, there was an issue of limitation involved as well as disputed questions of fact. Learned Single Judge refused to grant any relief to the writ petitioner.

16. The first prayer in the writ petition is a relief with regard to the decision taken by the KMC authorities not to release the dues of the appellant after ascertaining the total dues of the bills submitted by the appellant.

17. Entirety of the bills as submitted by the appellant pursuant to the contract, are not made available in the writ petition. Appellant is silent on such aspect in the affidavit in reply filed by it before the learned Single Judge. However, all the bills are sought to be produced through an application under Order 41 Rule 27 of the Code of Civil Procedure, 1908 filed in the appeal. Contracts were entered

into between the appellant and the KMC commencing from October 31, 2006. According to the appellant, such contracts were extended from time to time.

18. Expiry of the contracts, the extension thereof, and the working under such contracts are required to be ascertained. It would not be prudent to enter into such disputed arena of fact in the summary proceedings on the basis of affidavit-evidence. That is not to say that a writ Court cannot take witness evidence to ascertain the stand of the respective parties in a writ proceeding. Such course of action is available to a Writ Court. In the facts and circumstances, learned Single Judge did not exercise such option. Learned Single Judge also was not invited to exercise such option.

19. It is trite law that, issue of limitation is a mixed question of fact and law. In the facts and circumstances in the present case, the appellant claimed that the period of limitation stood extended by virtue of the accounts being running, current and continuous between the parties, payment being made by KMC on ad hoc basis and acknowledgement of liability in writing being made by KMC authorities. As noted above, the issue of limitation is a mixed question of fact and law. Ideally such issue is to be decided after allowing the respective parties an opportunity to adduce evidence at the trial. It is the contention of KMC that there are over payment made to the appellant and that, if true and proper accounts are taken, no payment is due and payable to the appellant. Moreover, there is obviously the issue of limitation involved.

20.No doubt, accounts between the parties are required to be taken. As noted above, entirety of the bills submitted by the appellants with KMC were not provided to the learned Single Judge. Entirety of the details of payment made in terms of bills submitted were also not before the learned Single Judge. Again, as noted above, they are sought to be provided in the application under Order 41 Rule 27 of the Code of Civil Procedure, 1908. Even if we are to allow the application under Order 41 Rule 27 of the Code of Civil Procedure, 1908 then also we would be required to evaluate each of the bills submitted by the appellants and the corresponding payment if any made. In short, we would be called upon to look into the accounts. At the basic minimum accounts between the parties are required to be taken. Such exercise, we are of the view, in the facts and circumstances of the present case, need not be undertaken by a Writ Court or in appeal.

21. There is an issue of limitation as noted above, involved. Again, ideally the parties should be allowed to lead evidence on such issue. Such an issue ideally again should not be decided in a summary manner on affidavit evidence.

22. **Godrej Sara Lee Ltd.** ***(supra)*** noted the distinction between entertainability of a writ petition and its maintainability. It is of the view that even if a writ petition is found to be entertainable, on a factual matrix, it could be held to be not maintainable. It goes on to say that existence of statutory alternative remedy is not a bar either on maintainability or entertainability of a writ petition.

23. The learned Single Judge decided the issue of granting reliefs to the writ petitioner on the basis of the factual matrix as obtaining before it. Learned Single Judge found that there are too many disputed questions of facts

involved for exercise of writ jurisdiction. Exercise of writ jurisdiction is discretionary. However, such discretion is to be exercised on legally noted parameters.

24. Finding of the Learned Single Judge on the issue of limitation may be debatable. However, such debate per se on the issue of limitation gives rise to disputed questions of facts and law. Apart from the issue of limitation the question of quantification of the receivable, if any, by the appellant is required to be answered, which ideally should be undertaken after allowing witness action.

25. Existence of disputed questions of fact is one of the grounds recognized in law as a valid ground for refusal to exercise writ jurisdiction.

26. Under such circumstances, we find no ground in the present appeal. Accordingly, APO 155 of 2023 along with all connected applications are dismissed without any order as to costs.

(DEBANGSU BASAK, J.)

27. I agree.

(MD. SHABBAR RASHIDI, J.)

TR/As.