

Present: Sri Dev Kumar Sukul (JO Code- WB00766)

Judge, Commercial Court at Alipore.

Money Suit 14/2019

CNR no. WBSP18-000028-2019

Order no. 66

02.02.2023

In the matter of :

*Suit for recovery of money,
damages valued at
Rs. 1,08,30,783/- plus
interest.*

And

In the matter of :

M/S C.R.C. Exports Pvt. Ltd.

Vs.

In the matter of :

*M/s. MGA Realtors Pvt. Ltd.
& 3 ors.*

Appearance for the Plaintiff:

Mr. Samrat Mukherjee ... Ld. Counsel.

Appearance for the Defendants no. 1 & 3:

Mr. Pranab Bhattacharya ... Ld. Counsel.

ORDERED

- 1. Today is fixed for passing order in connection with the application under Order VII Rule 11 read with Section 151 CPC being I.A. no. 04/2021.*
- 2. Plaintiff and Defendant no. 3 file haziras.*

I.A. no. 04/2021

- 3. At this stage, the instant application under Order VII Rule 11 read with Section 151 CPC being I.A. no. 04/2021 is taken up for hearing.*
- 4. Heard both sides.*
- 5. Perused and considered the instant application, written objection, affidavit-in-reply as well as the respective written notes of argument submitted by both sides.*

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6. *The facts of the case in brief are as follows:*

- i. Plaintiff is a company duly registered under the Companies Act, 1956 whereas Defendant no. 1 is a private limited company established in the year 2010 and is engaged in the business of real estate activities and Defendants no. 2 & 3 are directors of the Defendant no. 1 Company whereas Defendant no. 4 is the sub-contractor.*
- ii. Plaintiff is the absolute owner of the plot of land measuring 5.09 cottahs situated at 388, Prantick Pally, KMC Ward no. 107, Br. XII, PS-Kasba, Kolkata-700107 (hereinafter referred to as the "suit premises").*
- iii. Pursuant to a meeting of the Board of Directors of the Plaintiff Company on or about 30.09.2010, it was decided to build a G+4 building on the suit premises and accordingly approached Defendant no. 1 as their building contractor for the said purposes.*
- iv. Defendant no. 1 submitted their quotation on 10.06.2010 for construction of the said building @ Rs.1,600/- per square foot alongwith other costs and conditions, to the Plaintiff Company. However, after verbal discussion between the parties, the said rate was revised to Rs.1,350/- per square foot in terms of revised offer dated 06.10.2010. Subsequently, upon further discussion, both parties agreed to the mutual rate of Rs.1,300/- per square foot for construction of the said building on the suit premises.*
- v. Accordingly, Plaintiff agreed to the total cost of Rs.95,29,000/- on account of construction on the terms and conditions as appended in the revised letter of intent dated 06.10.2010.*
- vi. Thereafter, on the basis of the pre-contractual relationship with the Defendants, Plaintiff paid a sum of Rs.10,00,000/- to the Defendant no. 1 via cheque on 28.10.2010. However, even*


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after expiry of 28 months after such payment, Defendants no. 1 to 3 did not even commence the construction work.

vii. Plaintiff's earnest persuasion to the Defendants no. 1 to 3 yielded little results and sometimes in the month of February, 2013, the said Defendants started demanding further payments from the Plaintiff for expediting the construction work. Accordingly, Plaintiff further made payments on various occasions between 25.02.2013 to 24.06.2013 and as on 26.06.2013, made a total payment of Rs.35,10,000/- to the Defendants no. 1 to 3 without even commencement of the construction work.

viii. After expiry of 17 months of the above payments, vide letter dated 18.11.2014, Defendants no. 1 to 3 demanded escalation of price quoting thereby the rate per square foot of Rs.1,850/- instead of Rs.1,300/- and also indicated that the approximate construction area would be around 9,241 sq. ft. and estimated a total cost of Rs.1,70,95,850/- and further mentioned various other terms and conditions in the said letter dated 18.11.2014.

ix. Thereafter, upon further discussions between the parties, Plaintiff agreed to such proposed price escalation only if Defendants no. 1 to 3 agreed to pay interest @ 10% per annum on the paid amount of Rs.35,10,000/- and to consider such paid amount together with usual interest as first installment to be paid to them. The interest was calculated at Rs.7,52,000/- and Defendants no. 1 to 3 agreed to accept the sum of Rs.42,62,000/- as first installment to the tune of 25% of the total cost of construction.

x. Defendants no. 1 to 3 agreed to the above condition and Plaintiff also agreed to their demand of price escalation with an understanding that the above amount of Rs.42,62,000/-


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would be considered as first installment under the revised letter of intent dated 18.11.2014.

xi. On or about 16.01.2015, the building plan was sanctioned and construction work started in the month of February. 2015.

xii. In addition to the abovementioned first installment, from February, 2015 till August, 2015, Plaintiff further paid a sum of Rs.72,00,000/- in ten installments to the Defendants no. 1 to 3. After the bare construction of the 4th floor, Plaintiff from October, 2015 to May, 2016 further issued cheques to the tune of Rs.26,00,000/- and Rs.9,000/- in cash in five installments.

xiii. In the meantime, upon inspection of the project site, Plaintiff came to know from the sub-contractor / Defendant no. 4 herein, that due to lack of payment, the said construction work was stalled from March, 2016 to June, 2016, even after all the abovementioned payments being made upto date by the Plaintiff to Defendants no. 1 to 3.

xiv. Accordingly, Plaintiff promptly called upon the Defendants no. 1 to 3 for discussions on 22.08.2016 and during such meeting, Defendant tried to create confusion with regard to the total constructed area falsely alleging that the total constructed area should be 9,453 sq. ft. including the wardrobes whereas the Defendant no. 4 confirmed that the total constructed area would be 8,867 sq. ft. only.

xv. Further, vide letter dated 25.08.2016, Plaintiff sought for clarification from the Defendant no. 1 about such difference in total constructed area and also indicated that if such difference was correct, then they were charged Rs.10,84,100/- extra and Defendants no. 1 to 3 are liable to pay back the same.

xvi. In response to the above letter, Defendants no. 1 to 3 by a letter dated 03.09.2016 denied the said difference in

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measurement of the constructed area and also made an area calculation of 9,577 sq. ft. for construction on the said suit premises as on the date of sanction plan. Furthermore, they have allegedly stated that as per revised plan submitted before the KMC, the total constructed area as on September, 2016 stands at 9,899 sq. ft. However, Defendant no. 4 being the sub-contractor has denied all such statements made by the Defendants no. 1 to 3.

xvii. Thereafter, Plaintiff decided not to carry out further construction work through the Defendants no. 1 to 3 and further resolved to terminate the contract with Defendant no. 1 and accordingly issued a termination notice dated 26.09.2016 and further demanded return of excess money already paid to them for irregularities of the construction work and other reasons.

xviii. Plaintiff further requested Defendant no. 4 directly to complete the construction work and Defendant no. 4 also agreed to complete such works @ Rs.1,450/- per sq. ft. and also requested to pay separately for extra work.

xix. Plaintiff thereafter paid to Defendant no. 4 a total sum of Rs.1,55,00,000/- in 29 installments for the balance construction work and Defendant no. 4 furnished the final bill on 08.05.2017 wherein they admitted that they received a sum of Rs.53,70,000/- only on account of construction work from Defendant no. 1 whereas Plaintiff paid a total sum of Rs.1,33,19,000/- to the Defendants no. 1 to 3.

xx. Accordingly, Plaintiff is now entitled to refund of sum of Rs.1,08,30,783/- together with interest and is also entitled to claim further damages.

xxi. Plaintiff issued a demand notice upon Defendants no. 1 to 3 on 04.05.2018 claiming to refund a sum of Rs.66,81,887/- together with interest and penalty @ 18% per annum within a

period of 15 days from the date of receipt of such notice and Defendants no. 1 to 3 via reply dated 05.06.2018, have denied and disputed all such claims.

xxii. Accordingly, the present suit has been filed by the Plaintiff praying for a decree for a sum of Rs.1,08,30,783/- from the Defendants alongwith interest and other consequential reliefs.

7. Now, from the submission of the Ld. Counsel for the Defendants no. 1 & 3/Petitioners, it appears that:

i. Despite there being a specific order of this Court, Plaintiff has persistently failed and/or neglected to supply the Petitioners any material document in connection with the alleged pleadings made in the plaint supporting their averment that Defendant no. 4 agreed to complete the entire work @ Rs.1,450/- per sq. ft. and also requested to pay seperately for extra work. Such allegation as made in the plaint is a mere ipse dixit and has been made in surmise and conjecture which gives sufficient reason to draw adverse inference against the Plaintiff under Order XI Rule 5(4) CPC as amended under Section 16 of the Commercial Courts Act, 2015.

ii. No termination has yet been made by the Plaintiff till the date of issuance of the partial completion certificate dated 17.04.2018. Thus, the alleged pleadings made in the plaint are contrary to the material documents relied thereupon and consequently, the cause of action based on such pleadings are sham and illusory and ipso facto makes the plaint liable to be rejected at its threshold.

iii. Plaintiff in paragraph-14 of the plaint has alleged that Defendant no. 1 to 3 have agreed to the conditions set by the Plaintiff for alleged price escalation and in return, Plaintiff has also agreed to such price escalation. However, the alleged hand written note as supplied by the Plaintiff neither shows or


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contains any of such alleged agreement or understanding between the said parties.

- iv. Accordingly, upon meaningful reading of the pleadings of the plaintiff as well as the purported documents relied thereupon, the plaintiff manifestly appears to be frivolous, vexatious, harassing and meritless and also leads to suppression of several material facts and accordingly, Defendants have filed the instant application for rejection of the plaintiff with costs.
- v. In course of hearing, Ld. Counsel for the Defendants no. 1 & 3/Petitioners have referred the decisions in **Union of India v. Ibrahim Uddin & Anr.** as reported in (2012) 8 SCC 148, in **Manish Bhattacharya & anr. vs. Suprabhat Bhattacharya** as reported in 2014(2) CLJ (Cal) 604, in **T. Arivandandam vs. T.V. Satyapal & anr.** as reported in (1977) 4 SCC 467, in **I.T.C. LIMITED Vs. THE DEBTS RECOVERY APPELLATE TRIBUNAL & ORS.** as reported in AIR 1998 SC 634 and in **Srihari Hanumandas Totala vs. Hemant Vithal Kamat & ors.** as reported in (2021) 9 SCC 99.

8. By filing written objection to the instant application, Plaintiff/Respondent has denied and disputed each and every allegation of the Defendants/Respondents on the following grounds:

- i. Plaintiff had initially entered into an agreement with the Defendants no. 1 to 3 for construction of a building on the suit premises and thereafter, due to various disputes between the parties, such agreement was terminated by way of a letter dated 26.09.2016 by the Plaintiff. By the said letter, Plaintiff had also demanded return of the excess money already paid earlier to the said Defendants.
- ii. The present suit has been filed by the Plaintiff for recovery of the said excess money against the Defendants no. 1, 2 & 3

mainly and no relief has been claimed against Defendant no. 4.

iii. All documents relied on by the Plaintiff in the instant plaint have been duly handed over to the Defendants in due compliance with all the requirements provided under the Code of Civil Procedure, 1908 as amended till date and there has not been any laches and/or shortfall either on behalf of the Plaintiff or in the plaint itself. The provisions of Order XI Rule 5(4) CPC as amended under Section 16 of the Commercial Courts Act, 2015 are not applicable in such circumstances.

iv. The absurd grounds as provided by the Defendants no. 1 & 3 in the instant application under the provisions of Order VII Rule 11 CPC are at best can be clubbed as probable defences and can only be adjudicated after completion of trial.

v. Accordingly, Plaintiff/Respondent has prayed for dismissal of the instant application with costs.

vi. In course of hearing, Ld. Counsel for the Plaintiff/Respondent has relied upon the decisions in **British Airways vs. Art Works Export Ltd. & ors.** as reported in MANU/WB/0022/1986, in **Nishit M. Prabhu Verlekar vs. Chandranath Vinayak Dhume & ors.** as reported in MANU/MH/0164/1986, in **Venkatesh Foundation Pvt. Ltd. vs. Jalan Carbons & Chemicals Pvt. Ltd. & ors.** as reported in MANU/WB/1081/2021, in **Sejal Glass Ltd. vs. Navilan Merchants Pvt. Ltd.** as reported in MANU/SC/1098/2017 and in **Gurdev Singh vs. Harvinder Singh** as passed in SLP(C) no. 19018/2022.

9. On perusal of the decisions relied upon by the Defendants no. 1 & 3/Petitioners, I find that:

i. In **Union of India v. Ibrahim Uddin & Anr.** as reported in (2012) 8 SCC 148, the Hon'ble Apex Court has been pleased


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to observe that in case one party has asked the Court to direct the other side to produce certain documents and the other side failed to comply with the court's order, the court may be justified in drawing the adverse inference under Order XI CPC. However, all the pros and cons must be examined before the adverse inference is drawn and such presumption is permissible, only if other larger evidence is shown to the contrary.

ii. In **Srihari Hanumandas Totala vs. Hemant Vithal Kamat & ors.** as reported in (2021) 9 SCC 99, the Hon'ble Supreme Court laid down that in order to reject a plaint on the ground that the suit is barred by any law, only the averments in the plaint will have to be looked into and the defence made out by the Defendant in the suit must not be considered by the Court while deciding an application under Order 7 Rule 11(d) CPC.

iii. In **I.T.C. LIMITED Vs. THE DEBTS RECOVERY APPELLATE TRIBUNAL & ORS.** as reported in AIR 1998 SC 634, the Hon'ble Apex Court held that clever drafting creating illusions of cause of action are not permitted in law and a clear right to sue should be shown in the plaint. Similarly the Court must see that the bar in law of the suit is not camouflaged by devious and clever drafting of the plaint. Moreover, the provisions of Order VII Rule 11 CPC are not exhaustive and the Court has the inherent power to see that frivolous or vexatious litigations are not allowed to consume the time of the Court.

iv. In **T. Arivandandam vs. T.V. Satyapal & anr.** as reported in (1977) 4 SCC 467, the Hon'ble Supreme Court has been pleased to observe that if on a meaningful reading of the plaint, the same appears to be manifestly vexatious and meritless in the sense of non-disclosure of a clear right to sue,


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then the Court should exercise its powers under Order VII Rule 11 CPC.

v. In **Manish Bhattacharya & anr. vs. Suprabhat Bhattacharya** as reported in 2014(2) CLJ (Cal) 604, the Hon'ble High Court at Calcutta held that an application raising maintainability of a suit is not dependent upon filing of written statement by the Defendant and pending such application, Court cannot post a suit in exparte board and shall decide the point of maintainability first.

10. On perusal of the decisions cited by the Plaintiff/Petitioner, I find that:

i. In **British Airways vs. Art Works Export Ltd. & ors.** as reported in MANU/WB/0022/1986, the Hon'ble High Court at Calcutta has held that the plea that there is no cause of action for the suit is not the same as to say that the plaint does not disclose any cause of action, which is a ground for rejection of the plaint and a plaint cannot be rejected simply on the said ground.

ii. In **Nishit M. Prabhu Verlekar vs. Chandranath Vinayak Dhume & ors.** as reported in MANU/MH/0164/1986, the Hon'ble High Court of Bombay held that once a summons for settlement of issues has been served, the Defendants are duty bound to file their defence and the Court should not permit the Defendants for deviating from such course of action as permissible under law by filing other applications.

iii. In **Venkatesh Foundation Pvt. Ltd. vs. Jalan Carbons & Chemicals Pvt. Ltd. & ors.** as reported in MANU/WB/1081/2021, the Hon'ble High Court at Calcutta has been pleased to reiterate that the Court while deciding an application under Order VII Rule 11(d) CPC shall only consider the plaint on a plain reading as well as the documents annexed thereto.

iv. In **Sejal Glass Ltd. vs. Navilan Merchants Pvt. Ltd.** as reported in **MANU/SC/1098/2017**, the Hon'ble Apex Court has discussed the scope of Order VII Rule 11 CPC and further held that there is no provision under the Code of Civil Procedure for rejection of a plaint in part and it is well settled law that the plaint as a whole alone can only be rejected under Order VII Rule 11 CPC.

v. In **Gurdev Singh vs. Harvinder Singh** as passed in **SLP(C) no. 19018/2022**, the Hon'ble Supreme Court held that plaint cannot be rejected under Order VII Rule 11 CPC simply on the ground that the Plaintiff is not entitled to any relief in the suit.

11. Before deciding on the merits of the present application, I think it would be better to reciprocate the provisions under Order VII Rule 11 CPC for rejection of plaint as follows:

11. Rejection of plaint.— The plaint shall be rejected in the following cases:—

(a) where it does not disclose a cause of action;

(b) where the relief claimed is undervalued, and the plaintiff, on being required by the Court to correct the valuation within a time to be fixed by the Court, fails to do so;

(c) where the relief claimed is properly valued, but the plaint is returned upon paper insufficiently stamped, and the plaintiff, on being required by the Court to supply the requisite stamp-paper within a time to be fixed by the Court, fails to do so;

(d) where the suit appears from the statement in the plaint to be barred by any law;

(e) where it is not filed in duplicate;

(f) where the plaintiff fails to comply with the provisions of rule 9;


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[Provided that the time fixed by the Court for the correction of the valuation or supplying of the requisite stamp-paper shall not be extended unless the Court, for reasons to be recorded, is satisfied that the plaintiff was prevented by any cause of an exceptional nature from correcting the valuation or supplying the requisite stamp-paper, as the case may be, within the time fixed by the Court and that refusal to extend such time would cause grave injustice to the plaintiff.]

12. Now, the main contention of the Defendants no. 1 & 3/Petitioners for filing the present application is that the Plaintiff has failed an/or neglected to supply the Petitioners any material document in connection with the alleged pleadings made in the plaint and such failure is sufficient to draw adverse inference against the Plaintiff under Order XI Rule 5(4) CPC as amended under Section 16 of the Commercial Courts Act, 2015 for having shortfall in the plaint itself thereby making the cause of action being sham and illusory and without having any cause of action.

13. Furthermore, according to the Defendants no. 1 & 3/Petitioners, no termination has ever been made by the Plaintiff at any point of time and accordingly, no right of recovery of any money claim or damages remains and accordingly, the instant suit has no basis at all and is liable to be rejected.

14. But fact remains that while considering an application under Order VII Rule 11 CPC, only the averments of the plaint can be held to be sacrosanct and any subsequent submissions are irrelevant as laid down by the Hon'ble High Court at Calcutta in **Venkatesh Foundation case (supra)**.

15. The issue of non-compliance of Order XI Rule 5(4) CPC as amended under Section 16 of the Commercial Courts Act, 2015 as raised by the Defendants for non-supply of relevant documents, cannot be entertained at this stage without having full trial. This


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view of mine gains support in (2012) 8 SCC 148 (*supra*), wherein the Hon'ble Apex Court has held that such presumption is permissible, only if other larger evidence is shown to the contrary.

16. With regard to the issue regarding non-disclosure of cause of action in the plaint as raised by the Defendants/Petitioners, it is pertinent to note the decision of the Hon'ble High Court at Calcutta in **British Airways case** (*supra*), wherein the Hon'ble Court clearly laid down that the plea of no cause of action for the suit is something different from saying that the plaint itself did not disclose any cause of action and the plaint cannot be rejected merely for such ground. Moreover, Paragraph-31 of the plaint clearly mentions the cause of action as on 28.06.2016. Hence, such issue is not tenable in the eyes of law and has no merits at all.

17. Similarly, the issue of termination is also not tenable at this stage, since the veracity of any document can only be established by way of taking evidence and at this initial stage, this Court has no scope to leap beyond such course of law.

18. In regard to the point of limitation as raised by the Defendants/Petitioners, this Court opines and reiterates that this is an application under Order VII Rule 11 CPC and the scope of rejection of plaint is very limited. When the question of limitation comes into play at the time of rejection of a plaint, it is not desirable to dismiss the suit as barred by limitation without framing of proper issues and that should be decided after considering the evidence of the parties as the point of limitation is a mixed question of law and fact. Ex-facie, on reading of the plaint, a suit cannot be held to be barred by limitation. Parties relegated to contest the suit; it shall be open to Defendant/Petitioner to raise any plea available to it under the law including the plea of limitation, maintainability etc. This


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view of mine gains authoritative support from the decision of the Hon'ble Apex Court in **Balalaria Construction (P) Ltd. vs. Hanuman Seva Trust and Ors.** As such merely because of point of limitation, which is to be tried, a plaint cannot be rejected at this very primary stage. Accordingly, such issue is kept open to be adjudicated in course of trial.

19. In light of the foregoing discussions and regards being had to the provisions of law as well as the materials on record, in my considered opinion, I find no merits in the instant application under Order VII Rule 11 read with Section 151 CPC being I.A. no. 04/2021 and the same deserves to be dismissed.

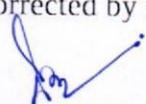
20. **Accordingly, the instant application under Order VII Rule 11 read with Section 151 CPC being I.A. no. 04/2021 as filed by Defendants no. 1 & 3 is dismissed on contest but without any orders as to costs.**

21. **I.A. no. 04/2021 be disposed off.**

22. **Fix 06.03.2023 at 11.30 a.m.** for fixing schedule of hearing in connection with I.A. no. 05/2021.

23. Both sides shall act of the basis of the downloaded copy of this order from the Website / Ecourts App.

Dictated and corrected by me,


Judge, Commercial Court at Alipore,
For South 24 Parganas, Purba Midnapore,
Paschim Midnapore & Jhargram
JUDGE
COMMERCIAL COURT AT ALIPORE


Judge, Commercial Court at Alipore,
For South 24 Parganas, Purba Midnapore,
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