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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ CS(COMM) 5/2022

PERNOD RICARD INDIA PVT.LTD. ..... Plaintiff

Through: Mr. Ankit Virmani, Ms. Ruchika Agarwala & Ms. Malvikka Arya, Advocates. [M:-9920090570]

versus

RAJ KUMAR & ANR. ..... Defendants

Through: Mr. Deepak Jain, Mr. K.B. Pradeep, Ms. Ambika, Advocates for D-2.

CORAM:
HON'BLE MR. JUSTICE PRATEEK JALAN

O R D E R

% **20.03.2024**

I.A. 16245/2023 (*Application on behalf of defendant No. 2 under Order VII Rule 11 of the CPC for rejection of the plaint*)

1. Defendant No.2 has filed this application under Order VII Rule 11 of the Code of Civil Procedure, 1908 ["CPC"] for rejection of the plaint as against him, on the ground that it does not disclose a cause of action.

2. The plaintiff's suit is against two defendants, namely, Mr. Raj Kumar [as sole proprietor of M/s Raj Kumar] and Mr. Shiv Lal. The plaintiff seeks recovery of an amount of ₹11,13,04,754/- from the defendants on account of goods supplied by it to defendant No. 1. The

cause of action against defendant No. 2 is based upon a purported Surety Bond executed by him by which he guaranteed payment of the monies that may become due to the plaintiff from defendant No. 1, alongwith interest at the rate of 18% per annum.

3. The contention of Mr. Deepak Jain, learned counsel for the applicant/ defendant No. 2 is that a perusal of the Surety Bond relied upon by the plaintiff would demonstrate that the cause of action as against him is illusory. He submits that the Surety Bond bears no date, contains a blank with regard to the limitation of liability, and is purportedly signed by defendant No. 2 on behalf of defendant No. 1 itself.

4. Mr. Ankit Virmani, learned counsel for the plaintiff, submits that these are matters of evidence which the Court cannot examine at the stage of an application under Order VII Rule 11 of the CPC. He draws my attention to the contents of the plaint to submit that the plaintiff has made out a cause of action as against defendant No. 2. Mr. Virmani further submits relying upon the decision of the Supreme Court in *Sejal Glass Ltd. vs. Navilan Merchants (P) Ltd.* [(2018) 11 SCC 780] and *Madhav Prasad Aggarwal & Anr. vs. Axis Bank Ltd. & Anr.* [(2019) 7 SCC 158], that rejection of the plaint against one of several defendants is not permissible under Order VII Rule 11 of the CPC.

5. In rejoinder to the last submission of Mr. Virmani, Mr. Jain relies upon an earlier judgment of the Supreme Court in *Church of Christ Charitable Trust and Educational Charitable Society represented by its Chairman vs. Ponniamman Educational Trust represented by its Chairperson/managing Trustee* [(2012) 8 SCC 706], wherein a decision

of the High Court dismissing the plaint against one of the defendants was upheld by the Supreme Court. Mr. Jain points out that, after considering all the three judgments of the Supreme Court, the Division Bench of the Bombay High Court has followed the view taken in *Church of Christ* [Supra], holding that the judgments in *Sejal Glass* [Supra] and *Madhav Prasad Aggarwal* [Supra] do not consider the said earlier judgment. Mr. Jain also points out that the Supreme Court by an order dated 22.10.2021 in SLP (C) 15635/2021 declined Special Leave to Appeal against the judgment of the Bombay High Court.

6. Turning first to the question of whether the plaint discloses a cause of action against defendant No. 2, reference may be made to the following averments in the plaint:-

> *"2. Defendant No.1, Mr. Raj Kumar, in the year 2017-18, inter-alia, was involved in carrying on business of wholesale of alcoholic beverages in the name and style of M/s. Raj Kumar, situated at Nuh, Mewat, Haryana. Plaintiff has supplied alcoholic beverages to Defendant No.1 from time to time, but Defendant No.1 has failed and neglected to make full payment against the said supplies.*
>
> *3.* ***<u>Defendant No.2, Mr. Shiv Lal, has executed a 'surety bond' guaranteeing payment of all sums of money that may be due to the Plaintiff on account of supply of goods or otherwise giving credit to Defendant No. 1, along with interest at 18% per annum till payment</u>****.*
>
> *xxxx xxxx xxxx*
>
> *6.* ***<u>Around the same time, Defendant No.2 executed the abovementioned 'surety bond' guaranteeing payment of all sums of money that may be due to the Plaintiff on account of supply of goods to Defendant No. 1 or otherwise giving credit to Defendant No. 1</u>****.*
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> *xxxx xxxx xxxx*
>
> *11. While the Defendant No. 1 made certain ad hoc on-account payments to Plaintiff, yet the entire amount has not been cleared till*

*date. Details of all such payments were recorded in an open, running and non-mutual account in the name of Defendant No. 1, maintained by Plaintiff in the regular course of business. In fact, on the basis of the account duly and regularly maintained by the Plaintiff in due and ordinary course of business, **a principal amount of Rs. 10,63,73,678/- (Rupees Ten crore sixty-three lacs seventy-three thousand six hundred and seventy-eight only) is due and payable by Defendant No.1 to the Plaintiff.***

xxxx xxxx xxxx

*13. In these circumstances, the Plaintiff, through its advocates, issued a Demand Notice dated 23.07.2021, calling upon the Defendants (**Defendant No.2 being the guarantor**) to pay the outstanding principal amount of Rs. 10,63,73,678/- (Rupees ten crore sixty three lakhs seventy three thousand six hundred and seventy eight only) along with interest at 18% per annum, which was the contracted rate of interest between the parties, within seven (7) days of the date of the Demand Notice.*

14. Defendants have however, neither made payment of the outstanding amount or any part thereof to the Plaintiff nor bothered to respond to the above notice."

7. The Surety Bond relied upon by the plaintiff [Document No. 2 in the plaintiff's list of documents] is also reproduced below:-

Bond

Indian-Non Judicial Stamp
Haryana Government

Date : 31/03/2017

Certificate No. G0312017C2125

Stamp Duty Paid : ₹ 100
(Rs. Hundred Only)

GRN No. 25982227

Penalty : ₹ 0
(Rs. Zero Only)

Deponent

Name : Pernod Ricard Indiapvtltd

H.No/Floor : B8a3floor Sector/Ward : Na Landmark : Dlf cyber city dlf ph 2

City/Village : Gurugram District : Gurugram State : Haryana

Phone : 1244915930

Purpose : SURETY BOND **to be submitted at Concerned office**

The authenticity of this document can be verified by scanning this QrCode Through smart phone or on the website https://egrashry.nic.in

To,
Regional Sales Manager,
Pernod Ricard India Pvt Ltd
Building 8A, 3rd Floor, DLF Cyber City
DLF Phase II, Gurgaon, Haryana

Dear Sir,

In consideration of your supplying goods or otherwise giving credit to Mr./Ms./Mrs./M/s **Raj Kumar** I hereby guarantee the payment of all sums of moneys that may be due to you on that account on demand with interest @ 18% P.A till payment but my liability shall not at any time exceed the sum of Rs.................................... with interest at the aforesaid rate. This is applicable for the supplies made during the financial year 2017-18.

I also agree that this guarantee, which is to be considered as a continuing guarantee, is not determinable on any payment or payments and shall continue to be in force in spite of any change in the constitution of your firm/Company and inspite of your granting to Mr./Ms./Mrs./M/s **Raj Kumar** time or any other such indulgence and shall survive me binding my heirs/successors/administrators and shall continue to be in force until one calendar months' notice to determine the same.

For M/s RAJ KUMAR

राज कुमार

Prop./Auth. Sign

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Bond

Indian-Non Judicial Stamp
Haryana Government

Date : 31/03/2017

Certificate No. G0312017C2126

Stamp Duty Paid : ₹ 100
(Rs. Hundred Only)

GRN No. 25982227

Penalty : ₹ 0
(Rs. Zero Only)

Deponent

Name : Pernod Ricard Indiapvtltd
H.No/Floor : B8a3floor Sector/Ward : Na Landmark : Dlf cyber city dlf ph 2
City/Village : Gurugram District : Gurugram State : Haryana
Phone : 1244915930

Purpose : SURETY BOND **to be submitted at Concerned office**

The authenticity of this document can be verified by scanning this QrCode Through smart phone or on the website https://egrashry.nic.in

I/we hereby bind myself/ourselves and my / our heirs, administrators, successors, and assigns, jointly and severally, firmly by these presents.

Yours Faithfully,
Raj Kumar (Licence no./code 22)

1. राज कुमार
2. Prop./Auth. Sign.
3.

Dated:
Place:

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8. As laid down by the Supreme Court in *Dahiben vs. Arvindbhai Kalyanji Bhanusali (Gajra) Dead through Legal Representatives & Ors.* [(2020) 7 SCC 366], the Court is entitled at this stage to examine the averments in the plaint and the documents filed by the plaintiff to determine whether the plaintiff has made out a cause of action. The position is to be tested on a demurrer – i.e., assuming the contents of the plaint to be correct – and without reference to any defence of the defendants.

9. The pleadings in the present case clearly contain averments that defendant No. 2 has executed a Surety Bond guaranteeing payment due to the plaintiff from defendant No. 1 and that the decree sought is in respect of payments due from defendant No. 1 in respect of the supplies made to him.

10. Mr. Jain, however, referred me to the copy of the Surety Bond itself to submit that the document is *ex facie* unreliable. Although the signature of defendant No. 2 on the document is disputed, it is difficult at this stage to determine the veracity of that submission. This is a question of evidence. The other discrepancies pointed out by Mr. Jain with regard to the Surety Bond – including the lack of a date, the blank therein and the doubt as to the capacity in which it was signed – would also have to be adjudicated.

11. Further, it may be noted that the right of defendant No. 2 to file a written statement has been closed by the order of the learned Joint Registrar dated 03.08.2023, which has attained finality.

12. The issues noted above will have to be considered at an appropriate stage, if at all issues are framed in that regard in the absence of any

written statement.

13. I do not, therefore, find the present case to be one where, upon a consideration of the plaint and documents filed therewith alone, it can be said that the plaint does not disclose a cause of action against defendant No. 2.

14. Mr. Jain argues that putting defendant No. 2 to the jeopardy of a trial, in the face of such a discrepant document, would be inequitable. However, I am of the view that this difficulty can be alleviated to some extent by making a suitable order of costs, as provided for under the Commercial Courts Act, 2015, in the event the plaintiff is ultimately unable to prove its case against defendant No. 2.

15. In view of this finding, it is unnecessary to enter into the question of whether the plaint could, in appropriate circumstances, have been rejected against one of the defendants alone.

16. For the aforesaid reasons, the application under Order VII Rule 11 is rejected.

I.A. 113/2022 (*Application on behalf of plaintiff under Order XXXIX Rule 1 and 2 for ex-parte ad interim reliefs*)

Mr. Virmani does not press this application.

The application is therefore disposed of.

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List before the learned Joint Registrar on 08.05.2024 for any further proceedings, if necessary.

List before the Court on 01.08.2024 for case management/framing of issues.

PRATEEK JALAN, J

MARCH 20, 2024/*'pv'/*