

IN THE HIGH COURT AT CALCUTTA
ORDINARY ORIGINAL CIVIL JURISDICTION
[COMMERCIAL DIVISION]

IA No. GA/6/2023
In
CS/42/2021
ZILLION INFRAPROJECTS PVT. LTD.
VERSUS
SASHASTRA SEEMA BAL (SSB) AND ORS.

BEFORE:

The Hon'ble JUSTICE ARINDAM MUKHERJEE

Date: 19th July, 2023.

Appearance:

Mr. Dhruba Ghosh, Sr. Adv.

Mr. Soumen Das, Adv.

Mr. Altamash Alim, Adv.

For the plaintiff.

Mr. Rudraman Bhattacharya, Adv.

Ms. Anamika Pandey, Adv.

For the defendant no.1.

Mr. Mohit Gupta, Adv.

Mr. Jit Ray, Adv.

Mr. S.S. Chakraborty, Adv.

For the defendant no.2.

The Court:- This is an application by the defendant no.2 for rejection of
plaint. The grounds urged for rejection are summarized as follows:-

- i] The defendant no.2 is the agent of the defendant no.1, a disclosed
principal to the notice and knowledge of the plaintiff and as such
the suit as framed by making the defendant no.2 as a party is
defective. No suit against an agent of a disclosed principal is

maintainable in view of the provisions of Section 230 of the Indian Contract Act, 1872.

- ii] There cannot be partial rejection of plaint. The entire claim in the suit after amendment to the plaint is against defendant No.2 and as such the plaint has to be rejected as a whole and the suit to be dismissed.
- iii] The person who has verified and affirmed the plaint for instituting the suit was not an authorized or competent person to file the plaint for instituting the suit. The defendant no.2 has further submitted that the plaint has been filed through a person claimed to be competent, but in view of the provisions of Section 28[1][f] of Insolvency and Bankruptcy Code, 2016 in absence of the approval of the Committee of Creditors, the said person is not authorized to institute the suit as against the defendants. The plaint has, therefore, been improperly filed. The same should be rejected and the suit dismissed.

To elucidate the argument in respect of point no.(i) above the defendant no.2 has relied upon the provisions of Section 230 of the Indian Contract Act, 1872 and several judgments in this regard. The defendant no.2 has cited the judgments reported in **83 CWN 75 (Union of India & Ors.-Versus-Central Gulf Steamship Corporation and Ors.)** and **AIR 1982 Cal. 365 (Union of India and Another-Versus-Chinoy Chablani and Co.)** to submit the

suit is not maintainable as framed as the defendant No.2 is the agent of the disclosed principal.

The plaintiff on the other hand has objected to the application by contending that the contract between the plaintiff and the defendant no.2 is an independent contract, completely separate from the agreement between the defendant no.1 and the defendant no.2 and as such the defendant No.2 is not the agent of defendant No.1 as envisaged under Section 230 of the Indian Contract Act, 1872. In order to show that the agreements are in fact different, the plaintiff has referred to various clauses to agreements. The plaintiff has also tried to defend the attack on the competence of the person through whom the plaint was filed and the suit was instituted. The plaintiff says that a Resolution Professional (RP) appointed under the provisions of Insolvency and Bankruptcy Code, 2016 cannot undertake to perform all the work by himself. The RP, therefore, is entitled to delegate his power and authority to any third person. In the instant case the delegation was properly made and as such the plaint filed through the person authorized is maintainable. That apart and in any event the Committee of Creditors have approved the authorization and has ratified the decision of filing the suit through the person authorized.

After hearing the parties and considering the materials on record as also the judgments cited at the Bar, I find that the following facts are admitted:-

- a) The defendant no.1 engaged the defendant no.2 as a contract for performing certain civil work as described in the agreement dated 13th March, 2015. The said agreement in clause 11 thereof has clearly described the responsibility of SSB. It is absolutely clear that the defendant no.1 had declined to take any responsibility as to any agency that may be engaged by the defendant no.2. The agreement between the defendant no.1 and the defendant no.2 also provides for resolution of disputes through arbitration.
- b) On a perusal of the agreement between the plaintiff and the defendant no.2 it is clear that the considerations are not only different, but provides for a separate mechanism for resolution of disputes. The defendant No.2 upon being engaged by the defendant No.1 appointed the plaintiff as a sub-contractor and as such the defendant no.2 is not an agent of the defendant No.1 although the defendant No.1 is the principal. There is no privity of contract between defendant No.1 and the plaintiff.

On a perusal of the two agreements, it appears that the plaintiff is correct in its submission that there exists a separate agreement between the defendant no.1 and the defendant no.2. Subsequent to the said agreement dated 10th March, 2015, the agreement

between the defendant no.2 and the plaintiff was executed on 13th March, 2015. In the agreement between the plaintiff and the defendant no.2, the defendant no.2 has been described as the employer and the plaintiff as the contractor while in the agreement between the defendant nos. 1 and 2, the defendant no.1 has been described as the principal while the defendant no.2 as the contractor. The said agreement between defendant no.1 and 2 contains an arbitration clause being clause-8 thereto. In clause 11 the responsibility of defendant no.2 (HSCL) has been described very clearly and without any ambiguity. The payment mode in the two agreements is different. It is not also the case that payment by the defendant no.2 to the plaintiff is either back to back or is dependent on realization of fund from the defendant no.1.

Going by this factual position it is inconceivable that the defendant no.2 is an agent of the defendant no.1 and as such the plaintiff's suit for realization of money from the defendant no.2 under the contract between itself and the defendant no.2 dated 13th March, 2015 is not maintainable in view of the provisions of Section 230 of the Indian Contract Act, 1872. The clear differentiation in the two agreements coupled with one containing the arbitration agreement for resolution of dispute while the other providing for adjudication by the Court also makes it clear that the two agreements are separate. Once the agreement between the plaintiff

and the defendant no.2 is held to be a separate and independent contract, the plaint on the ground of being barred under the provisions of Section 230 of the Indian Contract Act, 1872 is also eliminated. There is no dispute as to the ratio laid down in the judgments cited by the defendant No.2 but the ratio laid down therein has no application to the facts of the instant case in view of the discussion made hereinabove.

So far as the competence of the person who has filed the suit is concerned, the same cannot at this stage non-suit the plaint. The plaintiff has produced and relied upon certain documents in the plaint which prima facie goes on to show that the person through whom the plaint has been verified and affirmed is competent to do so. Admittedly, there is no dispute as to the provisions of Section 28[1][f] of the Insolvency and Bankruptcy Code, 2016 but the statement made in the plaint coupled with the documents annexed to the plaint and those filed for instituting the suit does not clearly demonstrate at this stage that the person who has verified and affirmed the plaint had no authority. The allegation of the defendants that there was no authorization by the Committee of the Creditors to file the suit is a matter of evidence. That apart the judgment cited by the plaintiff reported in **2018 SCC OnLine Hyd 315 (M/s. Golden Jubilee Hotels Limited-Versus-M/s. EIH Ltd. & Another)** clearly says that the RP cannot undertake all the work

assigned to him and is entitled to assistance of the house. The RP prima facie appears to have taken such assistance from the person who has affirmed and filed the plaint. Thus, factually the plaint cannot be rejected at this stage. So far as the judgments relied upon by the defendants are concerned, there is no dispute as to the proposition laid down therein, but the ratio if applied to the facts of the case does not give any additional advantage to the defendant no.2 for rejection of the plaint and dismissal of the suit. That apart and in any event, defects, if any, as to the verification/jurat are construed as irregularities and not illegalities and can be cured as held in **2006 (2) SCC [Vidyabati Gupta vs. Bhakti Hari Nayak]** which according to me shall also apply to suits filed in the Commercial Division of this Court unless there is a specific bar. These defects are such that the same will not compel this Court to non-suit the plaintiff by rejecting its plaint.

There is also another aspect of the matter. Assuming without admitting that the plaintiff cannot maintain a suit by impleading the defendants Nos.1 and 2 as party defendants as the defendant No.2 is the agent of the defendant No.1 which is, however, not the case over here as already held then also the suit cannot be dismissed by rejecting the plaint. It can at the highest be held that the defendant No.2 is not the necessary and proper party and should be expunged from the array of defendants.

In the facts and circumstances as aforesaid, the application fails.

IA No. GA 6 of 2023 in CS No. 42 of 2021 is, accordingly, dismissed, however, without any order as to costs.

(ARINDAM MUKHERJEE, J.)