

ORDER SHEET

IN THE HIGH COURT AT CALCUTTA
Ordinary Original Civil Jurisdiction
ORIGINAL SIDE

IA NO.GA/2/2018 (Old No.GA/3106/2018)
In
CS/40/2018

RELIABLE ROADWINGS PVT LTD
Versus
BEVCON WAYORS PVT LTD & ORS

AND

IA NO.GA/1/2018 (Old No.GA/2282/2018)
In
CS/40/2018

RELIABLE ROADWINGS PVT LTD
Versus
BEVCON WAYORS PVT LTD & ORS

BEFORE:

The Hon'ble JUSTICE DEBANGSU BASAK
Date : 23rd February, 2021.

(Via Video Conference)

Appearance:

Mr. K.C. Garg, Adv.
Ms. Sunita Agarwal, Adv.

Mr. Sarosij Dasgupta, Adv.
Mr. Avijit Dey, Adv.

The Court: Two applications are taken up for analogous hearing as they are in the same suit.

The first in point of time is IA NO.GA/1/2018 (Old No.GA/2282/2018), which is at the behest of the plaintiff. In such application, the plaintiff seeks final judgment for a sum of Rs.56,20,000/- under Chapter XIII A of the Original Side Rules of this Court.

The second in point of time is IA NO.GA/2/2018 (Old No.GA/3106/2018) which is at the behest of the defendants. By such application, the defendants seek revocation of leave granted under Clause 12 of the Letters Patent, 1865 and dismissal of the suit.

Since the application of the defendants relates to the jurisdiction of the Court, it is taken up for consideration first.

The plaintiff filed the instant suit for recovery of money from the defendants after obtaining leave under Clause 12 of the Letters Patent, 1865. The cause title of the plaint will demonstrate that the plaintiff is situated within the territorial jurisdiction of this Hon'ble Court. The first defendant is outside the jurisdiction of this Hon'ble Court. The defendant nos. 2 to 5 are also outside the jurisdiction of this Hon'ble Court.

In the plaint, the plaintiff claims that the defendant no.1 engaged the plaintiff for transportation of goods and materials. The defendant nos.2 to 5 are Directors who stood as guarantors for making payment of the transportation charges. According to the plaintiff, the defendants approached the plaintiff at the office of the plaintiff within the territorial jurisdiction of this Hon'ble Court for carriage of the goods. The plaintiff executed the contract of carriage by delivering goods from the point of origin to the point of destination at the instance of the defendants. These were outside the jurisdiction of this Hon'ble Court. The defendants agreed to pay the transportation charges to the plaintiff at the office of the plaintiff within the jurisdiction of this Hon'ble Court. The plaintiff raised diverse bills on the defendants which remains unpaid. According to the plaintiff, the defendants paid a sum of Rs.4 lakh to the plaintiff on June 30, 2017 at the office of the

plaintiff within the territorial jurisdiction of this Hon'ble Court. The plaintiff claims a sum of Rs.56,30,000/- from the defendant inclusive of interest.

According to the defendants, no part of the cause of action of the suit arose within the jurisdiction of the Hon'ble Court. The plaintiff does not disclose any cause of action against the defendants. The plaintiff has no cause of action against the defendant nos. 2 to 5. According to the defendants, the suit is barred by law. The plaintiff filed the instant suit with ulterior motive and collateral purposes. The names of the defendant nos. 2 to 5 should be struck off from the plaint. The defendant nos. 2 to 5 do not have any personal liability in respect of the transactions between the defendant no.1 and the plaintiff.

In an application under Order 7 Rule 11 of the Code of Civil Procedure, 1908, the Court is to proceed on the basis of a meaningful reading of the plaint. As noted above, the claim of the plaintiff is on account of bills raised for transportation charges. The plaintiff is situated within the territorial jurisdiction of this Hon'ble Court. The plaintiff claims that the contract was entered into within the jurisdiction of this Hon'ble Court. The defendant made part payments to the plaintiff at the office of the plaintiff within the territorial jurisdiction of this Hon'ble Court. The defendants did not deny the factum of payment. According to the plaintiff, a part of cause of action of the instant suit arose within the jurisdiction of this Hon'ble Court. In fact, it cannot be said that no part of the cause of action of the plaintiff within the territorial jurisdiction of this Hon'ble Court. Therefore leave under Clause 12 of the Letters Patent, 1865 granted cannot be revoked as prayed for by the defendants.

The defendants have not cited any law, under which the claim of the plaintiff stands barred.

So far as the claim for guarantee of the defendant nos. 2 to 5 is concerned, the same is an issue of fact. At this stage, the Court need not decide such issue finally without affording the parties an opportunity to lead evidence.

The defendants in support of the contention that the Hon'ble Court has no jurisdiction to try, entertain and determine the suit, relies upon purchase orders which the defendants placed on the plaintiff, containing a forum selection clause.

The purchase orders which the defendants rely upon are not signed by the plaintiff although there is a portion in the purchase order which allows the plaintiff to sign. The defendants rely upon the order dated August 31, 2016. The order is of two pages. The order contains the terms and conditions at the first page. At the second page, the service order claims itself to include two annexures. Annexure 1 to the service order are of two pages. None of the two pages are signed by the plaintiff. The order contains a clause that the Courts of Hyderabad in India shall have jurisdiction to deal with and decide the matter arising out of a proposed contract/work order.

The forum selection clause which the defendant relies upon speaks of a proposed contract/work order. It pre-supposes that the plaintiff would accept the terms and conditions for a contract to come into being. Therefore, there is a space for the signature of the plaintiff. The plaintiff did not subscribe its signature at that space in Annexure 1 to the service order. In such circumstances, I am not in a position to accept the contention of the

defendant that there exist a valid forum selection clause between the parties.

In such circumstances, I find no merit in this application being IA NO.GA/2/2018 (Old No.GA/3106/2018).

So far as the application being IA No. G.A. No. 1 of 2018 (Old No.GA/2282/2018) is concerned the plaintiff acted on the basis of the orders of the defendants for transportation. It transported materials on behalf of the defendants. The plaintiff raised bills on the defendants aggregating to a sum of Rs.51,70,555.25/-. The defendants made a part payment of Rs.4,00,000/- after adjusting such part payment a sum of Rs.47,70,555.25/- became due and payable by the defendants to the plaintiff.

The defence in the affidavit-in-opposition to the application under Chapter 13A of the Original Side Rules is that, the defendants suffered huge losses and damages on account of short supply of the materials by the plaintiff. In the affidavit-in-opposition, the defendants raise a claim of Rs.91,85,000,- against the plaintiff. Significantly, the defendants adjusted the claim of the plaintiff of Rs.47,70,555.25/- against the claim on account of damages by the defendants.

Adjustment is possible only when the amount due to the plaintiff by the defendants is admitted.

In support of the claim that the defendants suffered losses and damages, four electronic mails are relied upon. The electronic mails are from March 3, 2016 till February 12, 2017. There is no follow up action by the defendants on such electronic mails. Electronic mails complain of short

delivery of certain items. The value of the short delivery are not specified in the electronic mails. The defendants did not take any steps contemporaneously to realize the value of the short delivered items. The defendants unconditionally paid a sum of Rs.4,00,000/- to the plaintiff towards part payment of the billing amount on June 13, 2017 much after the complaints of short delivery. Moreover, as the claim of the defendants on account of damages suggests, it is in excess of Rs.90,00,000/-. As on date, such claim is barred by limitation. The defendants did not take any steps for realizing such claim on account of damages from the plaintiff. In such circumstances, the defence sought to be raised by the defendants are found to be moonshine and of no substance.

The defendant nos. 2 to 5 are the Directors of the defendant no. 1. The plaintiff claims that the defendant nos. 2 to 5 are the guarantors of the payment of the defendant No. 1. The defendant nos. 2 to 5 claims that they did not guarantee payment to the plaintiff and moreover, they acted as Directors and cannot be held liable as guarantors. There is no written document of guarantee on record. The defence of the defendant nos. 2 to 5 is plausible and can succeed at the trial.

The defendants rely upon **(2017) 1 SCC 568 (IDBI Trusteeship Services Ltd. v. Hubtown Ltd.)** and submits that, the defendants come within clauses (a) and (b) of paragraph 18 of such judgment and, therefore, entitled to unconditional leave to defend. **IDBI Trusteeship Services Ltd. v. Hubtown Ltd. (supra)** considers various authorities on the provisions of Order XXXVII Rule 3 of the Code of Civil Procedure, 1908 and is of the following view:-

“18. Accordingly, the principles stated in paragraph 8 of Mechelec’s case will now stand superseded, given the amendment of Order XXXVII Rule 3, and the binding decision of four judges in Milkhiram’s case, as follows:

- a. If the Defendant satisfies the Court that he has a substantial defence, that is, a defence that is likely to succeed, the Plaintiff is not entitled to leave to sign judgment, and the Defendant is entitled to unconditional leave to defend the suit;*
- b. if the Defendant raises triable issues indicating that he has a fair or reasonable defence, although not a positively good defence, the Plaintiff is not entitled to sign judgment, and the Defendant is ordinarily entitled to unconditional leave to defend;*
- c. even if the Defendant raises triable issues, if a doubt is left with the trial judge about the Defendant’s good faith, or the genuineness of the triable issues, the trial judge may impose conditions both as to time or mode of trial, as well as payment into court or furnishing security. Care must be taken to see that the object of the provisions to assist expeditious disposal of commercial causes is not defeated. Care must also be taken to see that such triable issues are not shut out by unduly severe orders as to deposit or security;*
- d. if the Defendant raises a defence which is plausible but improbable, the trial Judge may impose conditions as to time or mode of trial, as well as payment into court, or furnishing security. As such a defence does not raise triable issues, conditions as to deposit or security or both can extend to the to the entire principal sum together with such interest as the court feels the justice of the case requires.*
- e. if the Defendant has no substantial defence and/or raises no genuine triable issues, and the court finds such defence to be frivolous or vexatious, then leave to defend the suit shall be refused, and the Plaintiff is entitled to judgment forthwith;*
- f. if any part of the amount claimed by the Plaintiff is admitted by the Defendant to be due from him, leave to defend the suit, (even if triable issues or a substantial defence is raised), shall not be granted unless the amount so admitted to be due is deposited by the Defendant in court.”*

In the facts of the present case, in my view, the plaintiff is entitled to a decree against the defendant No. 1 for a sum of Rs.47,70,555.25/- being the principal amount of the claim after adjusting a sum of Rs.4,00,000/- paid by the defendants. So far as interest is concerned, since the transactions between the parties are commercial in nature, the plaintiff will be entitled to interest at the rate of 12% per annum from the date of institution of the suit on the sum of Rs.47,70,555.25/- till realisation. The claim on account of

interest for the period prior to this date is relegated to the trial of the suit. So far as the claims as against the defendant nos. 2 to 5 are concerned, the same are relegated to suit.

The defendants are at liberty to file written statement within one week from date.

IA No.: G.A. No. 1 of 2018 (Old No.GA/2282/2018) is disposed of accordingly.

Learned Advocate appearing for the defendants seeks stay of operation of the judgment and order. Such prayer is considered and refused.

(DEBANGSU BASAK, J.)

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