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Jaytee Export Vs. Natvar Parekh Ind. Ltd. and Ors

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Court : Kolkata

Decided On : Aug-02-2017

Judge : Soumen Sen

Appellant : Jaytee Export

Respondent : Natvar Parekh Ind. Ltd. and Ors

Judgement :

ORDER
SHEET CS481of 2000 GA2067of 2017 IN THE HIGH COURT AT CALCUTTA Ordinary Original Civil Jurisdiction ORIGINAL SIDE JAYTEE EXPORT Versus NATVAR PAREKH IND.

LTD.& ORS BEFORE: The Hon'ble JUSTICE SOUMEN SEN Date : 2nd August, 2017.

Appearance: Mr.Ratnanko Banerji, Sr.Adv.Mr.Aniruddha Mitra, Adv.Mr.Sudipta Sarkar, Adv.Ms.Soma Rai, Adv.Mr.Jishnu Saha, Sr.Mr.Srenik Singhvi, Mr.Ishan Saha, Ms.Sananda Ganguli, Mr.Shubradip Roy, Adv.Adv.Adv.Adv.Adv.The Court : The plaintiff has filed this application for adducing additional evidence.

The plaintiff has filed a suit on 25th November, 2000 claiming a money decree against the defendants jointly and severally.

The defendants entered appearance and filed their written statement.

Although the written statement apparently shows that all the defendants have filed written statement jointly, but it is argued that the defendant Nos.1, 2 and 3 have only filed the written statement disclosing their defence.

The issues were framed on 8th January, 2016.

The plaintiff filed its affidavit of documents on 14th January, 2011 and disclosed its documents on 24th January, 2011.

The defendant filed its affidavit of documents on 14th April, 2011.

The Judges Brief of Documents was prepared thereafter and served upon the defendant Nos.1, 2 and 3 on 27th June, 2014.

The plaintiff filed further affidavit of documents on 1st February, 2016, 4th February, 2016 and 8th July, 2016 and thereafter additional Judges Brief of Documents was filed.

By an order dated 5th February, 2016 an advocate commissioner was appointed to take evidence of the parties.

The commission work was ultimately concluded on 21st February, 2017.

The commissioner filed the report on 17th March, 2017.

The suit was fixed on 28th April, 2017 for argument when the defendant Nos.1, 2 and 3 commenced their argument.

Since the defendants contended that the suit is liable to be dismissed as against the defendant Nos.1, 2 and 3 on the ground that the defendant No.4 is a disclosed principal and the suit is liable to be dismissed in view of Section 230 of the Indian Contract Act, the defendants were asked to make submission with regard to the said issue as it goes to the root of the matter.

Thereafter, the suit was heard on 17th May, 2017.

On 21st June, 2017 the plaintiff/petitioner filed this application to bring on record documents being annexure A, B and C of the petition.

The plaintiff says that during evidence the plaintiffs witness could not produce few documents on the ground that those documents were either lost or misplaced in transit as the plaintiff was in a process of shifting its office.

The plaintiff alleged that sometimes in the fiRs.week of May, 2017 the plaintiff discovered and/or found an annual report of the defendant No.1 for the year ending 31st March, 1999 from its old record/paper and files.

The said report would show that the defendant No.4 company is a wholly owned subsidiary of the defendant No.1.

The plaintiff seeks to rely on the said document.

The plaintiff also says that in the month of May, 2017 the plaintiff made searches in different websites to get information to get the status of the defendant No.4.

During said search it was found that the defendant No.4 was incorporated in Singapore on 14th July, 1996.

One of the directors of defendant No.4 was Apurva Natvar Parikh, the defendant No.2 herein.

Another director of defendant No.4 was Azad Natvarlal Parikh, who is the father of Sujan Azad Parikh, the defendant No.3.

The defendant No.3 is one of the directors of defendant No.1.

The plaintiff further came to learn that defendant No.4 company has been closed on or about 29th May, 2009 and was subsequently Struck Off.

The last annual return was filed on 31st March, 1998 and the directors were not appointed after 12th June, 2004.

The above fact with regard to closure of the defendant No.4 company was not within the knowledge of the plaintiff during the couRs.of examination of the

plaintiffs witness and only came to the plaintiffs knowledge from the above documents.

The plaintiff have further caused searches in the website of Registrar of Companies, West Bengal to get hold of other Annual Accounts and Balance Sheet of defendant No.1.

Requisite fees for such search was paid.

Upon search, the plaintiff found the Annual Report and Balance Sheet of defendant No.1 as on 31.03.2004.

From such documents it is evident that defendant No.4 is a wholly owned subsidiary of defendant no.1.

The above documents were not available with the plaintiff at a prior point of time.

Inspite of due diligence, the plaintiff could not have produced the aforesaid documents at an early point of time.

The above documents are extremely essential and/or vital for determining the real questions in controveRs.between the parties.

It is submitted that the aforesaid documents would show that the defendant No.4 was not in existence and could not have been sued.

Moreover, since incorporation the defendant No.4 is the wholly owned subsidiary of defendant No.1.

The defendant Nos.2 and 3 and/or their family members were directors and had controlling shares both in defendant Nos.1 and 4.

The aforesaid documents are extremely essential and necessary for proper adjudication and determination of the real questions in controveRs.between the parties.

The defendant Nos.1, 2 and 3 have filed an affidavit-in-opposition.

In the affidavit the defendants have narrated the events that had taken place till the filing of the suit.

The defendants contend that the instant application has been taken out after completion of discovery, examination and cross-examination and after argument had commenced and had been made substantially.

The application is grossly belated.

The plaintiff has failed to demonstrate due diligence which is essential for considering as to whether at this stage the plaintiff should be permitted to rely on further evidence.

The power of the Court to direct production of evidence notwithstanding omission of Order 18 Rule 17A of the Code of Civil Procedure, 1999 is no more res integra in view of the decision of the Honble Supreme Court in Salem Advocate Bar Association versus Union of India and was subsequently reiterated in the second Salem Bar Association case, (2005) 6 SCC344 The Honble Court, while considering a host of amendments being carried out in the 1999 Act by deletion, opined that notwithstanding such deletion, the Court in an appropriate case if satisfied that a party inspite of due diligence could not produce an evidence should not be debarred to produce such additional evidence at any stage of the proceeding.

The purpose of omission of Rule 17-A is to prevent filing of applications designed to prolong trial.

The observation of the Honble Supreme Court in this regard could be found in Paragraph 13 in the second Salem Bar Association case which reads :13.

In Salem Advocate Bar Assn.

case it has been clarified that on deletion of Order 18 Rule 17-A which provided for leading of additional evidence, the law existing before the introduction of the amendment i.e.17-2002, would stand restored.

The Rule was deleted by Amendment Act of 2002.

Even before insertion of Order 18 Rule 17-A, the court had inbuilt power to permit parties to produce evidence not known to them earlier or which could not be produced inspite of due diligence.

Order 18 Rule 17-A did not create any new right but only clarified the position.

Therefore, deletion of Order 18 Rule 17-A does not disentitle production of evidence at a later stage.

On a party satisfying the court that after exercise of due diligence that evidence was not within his knowledge or could not be produced at the time the party was leading evidence, the court may permit leading of such evidence at a later stage on such terms as may appear to be just. However, the Court needs to be satisfied that the party applying for such evidence could not produce such evidence inspite of due diligence.

This view was reiterated in a subsequent decision in K.K.Velusamy Vs.N.Palanisamy reported at (2011) 11 SCC275 In paragraph 13 of the aforesaid decision the Honble Supreme Court dealing with Order 18 Rule 17-A of the Code of Civil Procedure made the following observation :13.

The Code earlier had a specific provision in Order 18 Rule 17-A for production of evidence not previously known or the evidence which could not be produced despite due diligence.

It enabled he court to permit a party to produce any evidence even at a late stage, after the conclusion of his evidence if he satisfied the court that even after the exercise of due diligence, the evidence was not within his knowledge and could not be produced by him when he was leading the evidence.

That provision was deleted with effect from 1-7-2002.

The deletion of the said provision does not mean that no evidence can be received at all, after a party closes his evidence.

It only means that the amended structure of the Code found no need for such a provision, as the amended Code contemplated little or no time gap between

completion of the evidence and commencement and conclusion of arguments.

Another reason for its deletion was the misuse thereof by the parties to prolong the proceedings under the pretext of discovery of new evidence. Mr.Jishnu Saha, learned Senior Counsel appearing on behalf of the defendants submits that the trial court does not enjoy the same power as that of an appellate court under Order 41 Rule 27 of the Code of Civil Procedure as the appellate court may permit additional evidence at the belated stage for any other substantial cause which is however absent in Order 18 Rule 17-A of the unamended code.

Mr.Saha has referred to the averments made in the plaint with regard to the cause of action disclosed against the defendants and submits that the plaintiff has admitted in paragraph 4 of the plaint that the defendant No.1 has signed the said bill of pleading as agent of defendant No.4 carrying on business outside India.

The averments in the plaint are required to be read as a whole.

The plaintiff in paragraph 4 and also in subsequent paragraph has categorically stated that the defendant No.1 is bound as a principal.

There is a categorical statement to that effect in paragraph 4 coupled with a further statement that the defendant Nos.1 and 4 are one and the same and all acts and/or defaults of the defendant No.4 are binding on the defendant No.1.

The plaintiff in the suit is seeking to establish that the defendant No.1 and the defendant No.4 are the one and same person.

The defendant No.4 is nothing but an alter ego of the defendant Nos.1, 2 and 3.

The additional documents disclosed in this proceeding is an attempt to establish such nexus at the trial.

It is trite law that a party cannot be allowed to adduce any evidence of which there is no foundational pleading.

Had there been no such pleading in the plaint and an evidence to that effect, the Court would have declined to allow such additional evidence to be adduced at this

stage.

The examination-in-chief of the plaintiffs witness would also show that the plaintiff is seeking to establish that the defendant no.1 is the real person.

Whether the plaintiff would ultimately succeed at the trial is not required to be gone into at this stage.

The plaintiff has produced some documents at the trial.

The plaintiff feels at this stage that this further documents would support their case and would firmly establish that the defendant No.1 is also bound as a principal.

The deletion of Order 18 Rule 17-A of the Code of Civil Procedure does not in any way affect the power and jurisdiction of the Court to allow production of additional documents and to that extent it exercises the same power that an appellate court would have exercised to do substantive justice and for any substantial cause.

In Vadiraj Naggappa Vernekar versus Sharadchandra Prabhakar Gogate reported at (2009) 4 SCC410while considering an application under Order 18 Rule 17 of the Code of Civil Procedure, the Honble Supreme Court observed that some of the principles akin to Order 47 may be applied when a party makes an application under the provisions of Order 18 Rule 17 but it is ultimately within the Courts discretion if it deems fit to allow such application.

Similar is the case with regard to Order 18 Rule 17A.

the power is inherent and object is to do substantive justice.

The discretion to permit additional evidence is to be exercised where the ends of justice require admission of such evidence.

The subsequent facts came into existence after the suit was filed likely to affect the decision of the case in one way or the other.

The explanation offered for not being able to produce annexure A to the petition is acceptable to this Court although it does not find any mention in the complaint

lodged with the local police station.

The other documents perhaps the plaintiff could have produced earlier but having regard to the nature of the controveRs.and that evidence would be limited to the issues as to whether the suit would be maintainable against the defendant Nos.1, 2 and 3, in my view an opportunity should be given to the plaintiff to adduce such evidence.

The endeavour of the Court is to find out the truth and in this regard the approach should not be technical.

The Court is respected since the Court is in a position to deliver justice.

Preventing a party to produce an evidence which could have a bearing on the issue would result in miscarriage of justice.

The defendants would not be prejudiced by such disclosure.

However, the production of additional evidence should be on terMs.The plaintiff shall be allowed to produce documents being annexures A, B and C of the petition and annexure A to the affidavit-in-reply which may be treated as D upon payment of cost of Rs.25,000/- to the State Legal Services Authority.

The entire expenses of the commission for reexamination and cross examination of the plaintiffs witness shall be borne by the plaintiff.

In view of the aforesaid, the defendant shall also be entitled to adduce if they so desire.

The earlier advocate commissioner namely Ms.Manali Bose, Advocate is reinstated as commissioner for the purpose of recording the evidence of the witnesses of both the parties and return the commission along with evidence to be recorded in terms of this order in a sealed envelope within a period of five weeks from the date of communication of this order to the commissioner.

In case the defendants want to lead fresh evidence, the defendants shall bear the cost of the commission.

The advocate commissioner shall be entitled to a remuneration of 500 GMs for each sitting which shall not be less than two hours and shall conclude the proceeding within the aforesaid time.

The Registrar, High Court, Original Side is directed to depute an Assistant Registrar attached to this Court for the purpose of carrying the original papers and documents during recording of the evidence and also an Assistant Registrar (Court Recording).The original papers and documents shall be kept in the safe custody of the Assistant Registrar who shall be deputed by the Registrar, High Court, Original Side.

Leave is given to file the additional Judges Brief of Documents.

The suit shall appear on 15th September, 2017.

GA2067of 2107 stands disposed of.

However, there shall be no order as to costs.

(SOUMEN SEN, J.) R.Bhar

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