

Vindhya Telelinks Ltd. Vs. State Bank of India and ors.

Vindhya Telelinks Ltd. Vs. State Bank of India and ors.

SooperKanoon Citation : sooperkanoon.com/508523

Court : Madhya Pradesh

Decided On : Feb-21-1995

Reported in : 1995(0)MPLJ575

Judge : A.K. Mathur and ;R.S. Garg, JJ.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Order 7, Rule 11 - Order 14, Rule 2
- Order 39, Rules 1, 2 and 4

Appeal No. : F.A. No. 261 of 1993

Appellant : Vindhya Telelinks Ltd.

Respondent : State Bank of India and ors.

Advocate for Def. : R.K. Sanghi, Adv.

Advocate for Pet/Ap. : K.S. Wadhwa, Adv.

Disposition : Appeal allowed

Judgement :

R.S. Garg, J.

1. This first appeal under Section 96 of the Code of Civil Procedure has been filed by the plaintiff against the order, dated 26-10-1993 passed by the Second Additional District Judge, Rewa, in Civil Original Suit No. 15-A of 1990, whereby,

the Court below, granting the application of defendant No. 3 respondent No. 1, State Bank of India, has rejected the plaint under Order 7, Rule 11, Civil Procedure Code.

2. Brief facts leading to the case are that the defendant No. 2, the Emirates Telecommunication Corporation Ltd., floated a tender inviting offers from suppliers and manufacturers for the supply of telephone cables and wires. Under the conditions of the tender, the tenderers were required to submit a tender bond in form of Bank guarantee in a sum of one lac U. A.R. Dirhams, irrevocable and unconditional with the stipulation that the tender bond submitted by the prospective supplier would authorise the defendant No. 1 to withdraw the total amount of guarantee on its first demand without recourse, if the tenderer fails to enter into a contract within the stipulated period or if the tenderer withdraws his tender wholly or in part before the expiration of the validity of the guarantee or if the tenderer fails to deposit the performance bond as specified in the tender enquiry para 3.3 within ten calendar days of the contract.

3. The plaintiff, with a view to comply with the conditions, made a request to the defendant No. 3, State Bank of India, to issue a bank guarantee, as required under the tender enquiry. The State Bank of India contracted defendant No. 2, the Bank of Oman at Abu Dhabi. On the request of the State Bank of India, the Bank of Oman issued the required Bank guarantee for an amount of one lac U.A.R. Dirhams and the State Bank of India on 8-3-1990 gave a counter Bank guarantee to the Bank of Oman under similar terms. The bank guarantee was to remain valid upto 30-9-1990. The plaintiff wanted to withdraw from the agreement, alleging that due to eruption of war in the Middle East the raw material supplies were adversely affected and, therefore, he wanted the agreement to be suspended for such period as it amounted to Force Majeure conditions under Section 313 of the conditions of tender form.

4. The defendant No. 1 as alleged by respondent No. 1 invoked the bank guarantee with the Bank of Oman which, in its turn, invoked the bank guarantee with the State Bank of India.

5. The plaintiff filed a suit alleging that, there was no concluded contract and, therefore, he was not answerable for making the payment under the bank guarantee. While seeking a declaration, he also sought relief of permanent injunction against the defendants, including both the banks. The plaintiff filed an application under Order 39, Rules 1 and 2, Civil Procedure Code, seeking a temporary injunction in the same terms, restraining the defendants from invoking the bank guarantee and/or remitting the amount from the State Bank of India to the Bank of Oman. The trial Court, by its order dated 24-9-1990, passed an *ex parte* order of interim injunction against the State Bank of India and also restrained defendant No. 1 and the Bank of Oman from claiming encashment of the bank guarantee. The order of temporary injunction passed *ex parte* 24-9-1990, was conditionally confirmed by order dated 8-3-1991 and it was further directed that the order may be varied or vacated as the situation may permit on the application of the defendants. The State Bank of India, under these circumstances, moved an application under Rule 4 of Order 39, Civil Procedure Code, under the shelter of the order dated 8-3-1991, with a prayer that in view of the circumstances, the order of injunction be vacated, discharged or set aside.

6. The trial Court, by its order dated 27-11-1991, refused to vary, discharge or set aside the order dated 8-3-1991 and confirmed the earlier order. Being aggrieved by the order dated 27-11-1991, the State Bank of India respondent No. 1 in the present appeal, preferred Misc. Appeal No. 637 of 1991 before this Court which was heard and decided by a learned single Judge of this Court.

7. By judgment dated 30-11-1992, this Court held that before granting injunction, the Court is required to consider the existence of a *prima facie* case which would also imply *prima facie* consideration of the jurisdiction of that Court. There would not be a *prima facie* case, if the Court considering has apparently no jurisdiction to entertain the suit. We are clear in our mind that the observations made by the learned single Judge are perfectly justified. For consideration of the existence of a *prima facie* case, the Court must consider its own jurisdiction while considering the *prima facie* case. If the Court holds that it does not possess jurisdiction and/or the suit is barred under some provisions of law and/or the suit is otherwise not maintainable, then certainly the Court considering the *prima facie* case has to hold

that there is no prima facie case in favour of the plaintiff. Every Court must bear this aspect in mind and seek its prima facie satisfaction that it has jurisdiction to entertain the suit before it proceeds to pass an order injunctioning the defendant. Once the Court is satisfied that it has jurisdiction prima facie, then, the Court would be called upon to consider a prima facie case on the facts of the case. If the Court is of the opinion that in view of the prima facie case, which ordinarily means a triable issue for consideration of the Court, then, the Court will have to proceed further and make an order under the circumstances of the case.

8. It is also correct to say that if on appearance of the defendant, jurisdiction of the Court is challenged either by an application filed under Order 7, Rule 11, Civil Procedure Code, or by certain pleadings in reply to the application for grant of injunction, then too, the Court must decide about its jurisdiction. However, if the Court is of the opinion that the question of jurisdiction is prima facie question of law, then certainly it can be decided as a preliminary issue. But, if the Court is of the opinion that the issue of jurisdiction of the Court is a question depending on the facts or is a mixed question of law and facts, then certainly it cannot be decided as a preliminary issue. Under this eventuality, the Court would be called upon to record evidence and will have to decide the question of jurisdiction of the Court while deciding the suit finally with other issues. In any case the issue relating to jurisdiction which is dependent on facts cannot be decided as a preliminary issue.

9. If, on an application filed under Order 7, Rule 11, Civil Procedure Code, the Court is of the opinion that it does not possess jurisdiction to entertain the suit, then it has power to reject the plaint. But, while considering the prima facie case, the Court has to form a prima facie opinion about its jurisdiction. The decision of any issue and forming opinion for holding prima facie case are two different and distinct acts. This Court, in *State Bank of India v. Vindhya Telelike Ltd.*, Misc. Appeal No. 637 of 1991, decided on 30-11- 1992, relying upon the decision of the Supreme Court in *Hakam Singh v. Gammon (India) Ltd.*, AIR 1971 SC 740, held that it is not open to the parties to confer by their agreement jurisdiction on a Court, which it does not possess under the Code, but where two Courts or more have jurisdiction to try a suit or proceedings, an agreement between the parties

that the dispute between them shall be tried in one of such Courts is not contrary to public policy. Such an agreement does not contravene Section 28 of the Contract Act. This Court in its earlier judgment also held that the Court exercising jurisdiction in the typical facts and circumstances of the case was required to consider the effect of its order under the International Law. This Court further held that the impugned order dated 27-11-1991, in its effect, was in fact the order confirming the order dated 24-9-1990 and 8-3-1991. Ultimately, this court, without considering the contentions of the parties regarding the jurisdiction of the Court, remanded the case back to the trial Court on the ground of non-consideration and non-determination by the trial Court of the question of its jurisdiction and competence to entertain the suit. The trial Court was directed to pass a fresh order after determining its jurisdictional competence to entertain the suit in view of the observations made by this Court. The parties were directed to appear in the Court below.

10. After remand of the matter, it appears from the record that the trial Court heard the parties on the interlocutory application No. 4, purported to be filed under Order 7, Rule 11, Civil Procedure Code for rejection of the plaint. After hearing the parties, the trial Court, by its order dated 26-10-1993 rejected the plaint, holding that it does not possess jurisdiction to entertain the suit. Being aggrieved by this order, the plaintiff has filed this appeal under Section 96 of the Code of Civil Procedure. With the agreement of the parties, the appeal was finally heard.

11. It was contended on behalf of the plaintiff that the trial Court has failed to exercise the jurisdiction vested in it by law, by even not understanding the directions given to it under the remand order. It was also contended that the trial court, after misinterpreting the order of this Court, has, under a very cryptic, casual and cursory manner, rejected the plaint. It was also argued that the order passed by the trial Court is not a speaking order. It does not consider the legal position and even it does not refer to the authorities cited before it. On the other hand, counsel for the respondent No. 1 submitted that the order passed by the trial Court is perfectly justified and it does not call for any interference. According to respondent No. 1, the trial Court has scrupulously followed the directions issued by this Court. We have heard both the parties in detail and have perused the

record.

11 A. The order of remand passed by this Court in Misc. Appeal No. 637 of 1991, did not decide anything about the jurisdiction of the Court, but in fact left the matter for a decision to be given by the trial Court. It was expected of the trial Court that it would cautiously go through the order of remand, understand its meaning and only thereafter decide the matter in accordance with law. It appears from the order of the trial Court' that the learned trial Judge has merely referred to the order of this Court passed in Misc. Appeal No. 637/1991. In place of understanding the order and appreciating the observations made by this Court, it merely translated the same and without even referring to the arguments of the parties, has held that the Court did not possess jurisdiction. Paragraph 6 of the order of the trial Court shows that the trial Judge, without application of the mind, has merely referred to paras 12 and 13 of the remand order. The trial Court did not express its opinion as to why it did not possess jurisdiction. The observations made by this Court were for the guidance of the trial Court. Those were not conclusive. If the observations were absolutely decisive and final, this Court would have directed the trial Court to dismiss the suit straightway. This Court after making the observations for guidance of the trial court, had remanded the matter, to the trial Court for reconsideration of the jurisdictional aspect. In para 7 of its judgment, the Court below has merely stated that:-

^vr% mijks ifjfLFkfr vkSj blh ekeys esaekuu; mPp U;k;ky; ds vfHker ds izdk'k esa ;g lqLi'V gS fd bl U;k;ky; dksbl nkos dh lquokbZ dk {ks=kf/kdkj izklr ugha g SA**

It is apparent from para 7 of the order of the trial Court that it did not apply its mind in coming to the conclusion that it did not possess jurisdiction.

12. In para 8, the arguments of the plaintiff's counsel were rejected merely on the ground that the arguments were negatived by the High Court and, therefore, the arguments did not have any force. It is unfortunate that the trial Court did not try to understand the true meaning of the order of remand. This Court neither rejected the arguments of the plaintiff, nor accepted the arguments of the respondent No. 1. It made certain observations for the guidance of the trial Court. As said above, the observations were not conclusive. It was within the jurisdiction of the trial Court

and it is apparent from the order of remand that it had to decide whether it has jurisdiction or not. Unfortunately, the trial Court, without appreciating the order of remand, passed the order holding that it did not have jurisdiction. The order dated 26-10-1993 is patently wrong. It suffers with the vice of non-application of the mind. It cannot be held to be a legal order, the order is liable to and is accordingly set aside.

13. The matter is remanded back to the trial Court with the direction that keeping in view the observations made by this Court in Misc. Appeal No. 637/1991, it has to decide the question of jurisdiction for disposal of the interlocutory application No. 4 filed under Order 7, Rule 11, Civil Procedure Code. It is also made clear that the trial Court is free to take its own decision in relation to the question of jurisdiction and competence of the Court to entertain the suit so also for grant of modification of injunction.

14. The suit was dismissed on a preliminary issue. The plaintiffs were called upon to pay Court-fee in this first appeal. As the order passed by trial Court is being set aside, it is further directed that the appellant would be entitled to a certificate for refund of the Court-fee. The appellant-plaintiff and the respondent No. 1 are directed to appear before the trial Court on 13-3-1995. In view of the above discussion, the appeal is allowed. The parties shall remain present before the trial Court on 13-3-1995. The Registry is directed to issue a certificate in the name of the appellant for refund of the court-fee. There shall be no order as to costs.