**SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com**

**M/S. Texem Engineering Vs. M/S. Texcomash Export**

**M/S. Texem Engineering Vs. M/S. Texcomash Export**

**SooperKanoon Citation** : sooperkanoon.com/919341

**Court** : Delhi

**Decided On :** Apr-29-2011

**Judge** : Vikramajit Sen; Siddharth Mridul, Jj.

**Acts** : Code of Civil Procedure (CPC), 1908 - Order 7 Rule 11; Foreign Exchange Regulation Act (FERA), 1973

**Appeal No.** : RFA(OS) No.80/2009

**Appellant** : M/S. Texem Engineering

**Respondent** : M/S. Texcomash Export

**Advocate for Def.** : Mr. C. Mukund; Mr. Ashok Jain; Mr. Amit Kasana, Advs.

**Advocate for Pet/Ap.** : Mr. D.S. Narula; Ms. Vandana; Mr. Angad S. Narula, Advs.

**Judgement** :

1. This Appeal assails the Order dated 13.8.2009 whereby the learned Single Judge had allowed the Application under Order VII Rule 11 of the Code of Civil Procedure, 1908 (CPC for short) filed by the Defendant/Respondent and consequently had rejected the Plaint. It is apparent to us that the learned Single Judge was unshakably influenced by a document purporting to be a „Settlement between the parties which had been relied upon by the Plaintiff/Appellant and denied by the Defendant. The view of the learned Single Judge was that this

document constituted an illegal contract inasmuch as the Plaintiff and his sister had agreed to give evidence favourable to the Defendant so that proceedings against the latter under the erstwhile Foreign Exchange Regulation Act (FERA), 1973 could be brought to an end. The learned Single Judge has pressed Sections 23 and 28 of the Indian Contract Act, 1872 to arrive at the conclusion that such a Settlement or "contract cannot form the basis of a legitimate claim by the plaintiff against the Defendant". Support has been taken for this conclusion from Sudhindra Kumar Rai Chaudhuri -vs- Ganesh Chandra Ganguli, AIR 1938 Calcutta 840 and Sita Ram - vs- Radha Bai, AIR 1968 SC 534.

2. There can be no gainsaying that an application under Order VII Rule 11 of the CPC for rejection of the plaint has to be decided entirely on a perusal of the plaint and documents filed along with it. If authorities are required for this proposition, we need not travel beyond the latest exposition of the law contained in Liverpool & London S.P.& I Association Ltd. -vs- M.V. Sea Success I, (2004) 9 SCC 512. More recently, in Mayar (H.K.) Ltd. v. Owners & Parties, Vessel M.V. Fortune Express, (2006) 3 SCC 100 it has yet again been clarified that the Court cannot reject a plaint under Order VII Rule 11 of the CPC on the basis of the allegations made in the Written Statement. In other words, the defence to the Suit is not relevant for the purposes of Order VII Rule 11 of the CPC. The summation of the law is available in the following paragraph thereof:

> 12. From the aforesaid, it is apparent that the plaint cannot be rejected on the basis of the allegations made by the defendant in his written statement or in an application for rejection of the plaint. The court has to read the entire plaint as a whole to find out whether it discloses a cause of action and if it does, then the plaint cannot be rejected by the court exercising the powers under Order 7 Rule 11 of the Code. Essentially, whether the plaint discloses a cause of action, is a question of fact which has to be gathered on the basis of the averments made in the plaint in its entirety taking those averments to be correct. A cause of action is a bundle of facts which are required to be proved for obtaining relief and for the said purpose, the material facts are required to be stated but not the evidence except in certain cases where the pleadings relied on are in regard to misrepresentation, fraud, wilful default, undue

influence or of the same nature. So long as the plaint discloses some cause of action which requires determination by the court, the mere fact that in the opinion of the Judge the plaintiff may not succeed cannot be a ground for rejection of the plaint. In the present case, the averments made in the plaint, as has been noticed by us, do disclose the cause of action and, therefore, the High Court has rightly said that the powers under Order 7 Rule 11 of the Code cannot be exercised for rejection of the suit filed by the plaintiff- appellants.

3. To similar effect is the pronouncement in Hardesh Ores Pvt. Ltd. -vs- M/s. Hede and Company, (2007) 5 SCC 614 where the suit had been rejected in response to the plea of the Defendant that the Suit was barred by limitation. The Honble Supreme Court reversed the concurrent findings of the Trial Court as well as the High Court by observing that the language of Order VII Rule 11 of the CPC is quite clear and unambiguous; the plaint can be rejected on the ground of limitation only where a reading of the plaint unambiguously shows this to be so. The decision can be discerned from the following paragraph:-

25. The language of Order 7 Rule 11 CPC is quite clear and unambiguous. The plaint can be rejected on the ground of limitation only where the suit appears from the statement in the plaint to be barred by any law. Mr Nariman did not dispute that "law" within the meaning of clause (d) of Order 7 Rule 11 must include the law of limitation as well. It is well settled that whether a plaint discloses a cause of action is essentially a question of fact, but whether it does or does not must be found out from reading the plaint itself. For the said purpose the averments made in the plaint in their entirety must be held to be correct. The test is whether the averments made in the plaint, if taken to be correct in their entirety, a decree would be passed. The averments made in the plaint as a whole have to be seen to find out whether clause (d) of Rule 11 of Order 7 is applicable. It is not permissible to cull out a sentence or a passage and to read it out of the context in isolation. Although it is the substance and not merely the form that has to be looked into, the pleading has to be construed as it stands without addition or subtraction of words or change of its apparent grammatical sense. As observed earlier, the language of clause (d) is quite clear but if any authority is required, one may usefully refer to the

judgments of this Court in Liverpool & London S.P. & I Assn. Ltd. v. M.V. Sea Success I, 2004(9) SCC 512 and Popat and Kotecha Property v. State Bank of India Staff Assn, (2005) 7 SCC 510.

4. Mr. Narula, learned Senior Counsel for the Appellant, relies on decisions of Division Bench of this Court in Steel Authority of India Ltd. -vs- Rameshwar Dass Bishan Dayal, 60(1995) DLT 271 (DB), Inspiration Clothes & U -vs- Colby International Limited, 88(2000) DLT 769(DB) and on Rajiv Kumar -vs- Kewal Cargo Carriers (P) Ltd., AIR 2007 Delhi 27. Our attention has also been drawn by Mr. Narula to Vishnu Dutt Sharma -vs- Daya Sapra (Smt.), (2009) 13 SCC 729 where the Court reiterated the established principle that every person has a right to have access to courts of justice, which right has been enshrined in Section 9 of the CPC. This very proposition has also been recognised by their Lordships in Abdul Gafur -vs- State of Uttarakhand, (2008) 10 SCC 97 where a writ petition was filed by one Tek Chand challenging the acquisition of land which came to be dismissed consequent upon the clarification by the Government that the road in question was not going to be used exclusively by the Hospital. This apparently did not assuage the fears of Tek Chand who thereafter filed two suits against the Hospital in which judgment was reserved. Undaunted, Tek Chand filed yet another writ petition in the course of hearing of which the High Court summoned the two pending suits to the file of the High Court. These two suits were thereupon dismissed by the High Court. It was in those circumstances that the Supreme Court observed that Section 9 bestowed on civil courts inherent jurisdiction, which could be whittled or watered down only by specific statue and, therefore, a suit could not be dismissed on the ground of it being frivolous. Their Lordships were, in no manner, desirous of diluting earlier observations made by the Supreme Court calculated to bring an expeditious and early conclusion of litigation, including civil suits. This is obvious from a reading of paragraph 20 of the Judgment which is reproduced below:-

20. Having considered the matter in the light of the aforestated legal position, we are of the opinion that the impugned order cannot be sustained. It is true that under Section 24 of the Code, the High Court has jurisdiction to suo motu withdraw a suit or appeal, pending in any court subordinate to it, to its file and

adjudicate itself on the issues involved therein and dispose of the same. Unless the High Court decides to transfer the suit or the appeal, as the case may be, to some other court or the same court, it is obliged to try, adjudicate and dispose of the same. It needs little emphasis that the High Court is competent to dispose of the suit on preliminary issues, as contemplated in Order 14 Rules 1 and 2 of the Code, which may include the issues with regard to maintainability of the suit. If the High Court is convinced that the plaint read as a whole does not disclose any cause of action, it may reject the plaint in terms of Order 7 Rule 11 of the Code. As a matter of fact, as observed by V.R. Krishna Iyer, J. in T. Arivandandam -vs- T.V. Satyapal, (1977) 4 SCC 467, if on a meaningful -not formal- reading of the plaint, it is manifestly vexatious, and meritless, in the sense of not disclosing a clear right to sue, the court should exercise its power under the said provision. And if clever drafting has created an illusion of a cause of action, it should be nipped in the bud at the first hearing by examining the party searchingly under Order 10 CPC. Nonetheless, the fact remains that the suit has to be disposed of either by the High Court or by the courts subordinate to it in a meaningful manner as per the procedure prescribed in the Code and not on ones own whims.

5. After this analysis of the law relating to the circumstances in which the plaint can be rejected, a reading thereof manifests that the Appellant/Plaintiffs grievance was that the Defendant had initially agreed to pay to the former a commission of ` 15/- per kilogram of tea, which amounted to ` 1,76,26,500/-. The Plaint narrates that a sum of ` 13,00,000/- was paid by the Defendant to the Plaintiff leaving outstanding a sum of ` 1,63,26,500/-. According to the Plaint, in liquidation of this commission, a post- dated cheque for ` 1.15 crore had been made over by the Defendant to the Plaintiff.

6. It transpires that the proceedings under FERA were started against the Defendant. Contemporaneously, the Defendant claimed that the cheque for ` 1.15 crore was unauthorizedly encashed by the Plaintiff in conspiracy with his sister which compelled the Defendant to file a First Information Report resulting in the incarceration of the Plaintiff for twenty-two days. The Plaintiffs sister was unsuccessful in obtaining Anticipatory Bail. The Plaintiffs case is that the Settlement, referred to above, came to be arrived at between the parties acting

through the Plaintiffs father. Needless to state, this version would have to be substantiated by the Defendant by leading requisite evidence.

7. Mr. Narula has relied on the Division Bench verdict in Life Insurance Corporation of India, Madras -vs- Devendrappa Bujjappa, AIR 1987 Karnataka 129 which clarifies that Section 23 of the Indian Contract Act does not prohibit enforcement of valid portion of the transfer of property or debt if it is severable from the invalid portion. On the other hand, Mr.C. Mukund, learned counsel for the Respondent, has relied heavily on Sudhindra Kumar, V. Narasimharaju -vs- V. Gurumurthy Raju, AIR 1963 SC 107 and Sita Ram -vs- Radha Bai, AIR 1968 SC 534. We think that it is not necessary to rely on these Judgments.

8. We say this for the reason that on a perusal of the Plaint, it is uncontrovertedly clear to us that the Plaintiff does not rely solely on the „Settlement which the learned Single Judge has viewed as being illegal and consequently hit by Section 23 of the Indian Contract Act. Had there been no commercial or other dealings between the parties, nonetheless a compact had been arrived at between them for payment by the Defendant to the Plaintiff of a sum of money in return for the Plaintiff and/or his sister making favourable statements to ensure the closure of FERA proceedings against the Defendant, such a contract would indubitably have been hit by Section 23. As we see it, the Plaintiff may succeed in proving his claim for the sum of ` 1,00,17,972/- by leading evidence of the transactions which allegedly earned and entitled the Plaintiff to commission at the rate of ` 15/- per kilogram, thereafter reduced to ` 9/- per kilogram. The learned Single Judge has found no illegality in these transactions between the parties. It is for this reason that Section 23 of the Indian Contract Act is of little relevance. We also find it impossible not to conclude that the learned Single Judge has erred in going threadbare into the defences to the claim proffered by the Defendant. What has to be considered in the context of Order VII Rule 11 of the CPC, we may reiterate, as has been spelt out time and again in several judgments, is to understand and digest the cause of action that has been narrated in the Plaint. Proving or disproving that cause of action can only be considered after the parties have gone to Trial and have completed their evidence.

9. It is in these circumstances that the Appeal is accepted. The impugned Order is set aside. The application under Order VII Rule 11 of the CPC is dismissed. The Suit is restored to its original number. There shall be no order as to costs.

10. Parties to appear before the learned Single Judge on 5.5.2011.

**SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com**