
M/s. M and B Footwear Pvt. Ltd. Vs M/s. Madhuvesh Distributors and Others

CS (OS) 258 of 2009

Court: Delhi High Court

Date of Decision: Aug. 22, 2013

Acts Referred:

Civil Procedure Code, 1908 (CPC) – Order 37 Rule 3, Order 7 Rule 11, 20, 20(c) #Negotiable Instruments Act, 1881 (NI) – Section 138

Citation: (2013) 137 DRJ 597

Hon'ble Judges: Mukta Gupta, J

Bench: Single Bench

Advocate: Nishant Datta, Ms. Ruchita Datta and Ms. Garima Hooda, for the Appellant; K.K. Kishore, Advocate for Defendant Nos. 3 and 4, for the Respondent

Judgement

Mukta Gupta, J.

I.A. 2084/2012 (leave to defend by Defendant Nos. 3 and 4 u/Order XXXVII Rule 3 CPC)

1. By this application under Order XXXVII Rule 3 CPC the Defendant Nos. 3 and 4 seek leave to defend in the suit filed by the Plaintiff under

Order XXXVII for recovery of Rs. 55,51,232/-. Learned counsel for the Applicants/Defendant Nos. 3 and 4 states that this Court has no

territorial jurisdiction to entertain the suit and in view thereof besides the leave to defend being granted, the suit is liable to be dismissed on this

count itself even in the absence of an application under Order VII Rule 11 CPC filed by the Defendants. To make good his point he states that the

Defendants are residents of Bangalore and are gainfully working at Bangalore. All the invoices, on the basis of which the Plaintiff seeks recovery of

the amount, are of Bangalore between ESSVEE Commercials and the Defendant No. 1. Thus goods were sold and delivered at Bangalore. All the

dishonoured cheques were admittedly issued on the bank account maintained with "Jayanagar Branch" of Axis Bank Ltd. in Bangalore City. Thus

in view of the intra city sales within the territorial limits of Bangalore City, this Court has no territorial jurisdiction to entertain and try the present

suit. Reliance is placed on Arinits Sales Pvt. Ltd. Vs. Rockwell Plastic Pvt. Ltd. and Others, and Gujarat Insecticides Ltd. Vs. Jainsons Minerals

and Another, The case of the Plaintiff is that the Distribution Agreement between the Plaintiff and Defendant No. 1 was executed at Delhi however,

the present suit does not contest the terms of contract and the Distribution ship Agreement does not give any cause of action to the Plaintiff to sue

the defendants in Delhi. Reference is made to Union of India and Others Vs. Adani Exports Ltd. and Another, Not only the suit is liable to be

dismissed, the Defendants/applicants should be paid damages in view of the hardship and expenses incurred by the Defendants due to wrongful

institution of the suit. The Defendant Nos. 3 and 4 have placed on record their affidavit along with the hotel bills and travel expenses and an

affidavit of Defendant No. 4 has been filed in this regard. An affidavit has also been placed regarding the litigation and travel expenses incurred on

the lawyer. Thus the suit be dismissed and costs of the same be awarded to the Defendant Nos. 3 and 4.

2. Learned counsel for the Plaintiff on the other hand contends that leave to defend has been sought only by Defendant Nos. 3 and 4 and as no

application has been filed by the Defendant No. 1 and 2 the judgment qua them is required to be passed. The Distribution Agreement dated 15th

May, 2005 was entered into between the Plaintiff and Defendant No. 1 at Delhi and ESSVEE Commercials was only carrying and selling agent of

the Plaintiff even as per the invoice. As a matter of fact the firm ESSVEE Commercials is run by the mother of Defendant No. 3 and thus this was

an in house arrangement of the Defendant No. 1 and ESSVEE Commercials. In the leave to defend application neither the averments made in the

plaint nor the invoices are disputed. In view thereof this Court is required to pass a judgment straightway under Order XXXVII CPC. It is further

contended that at this stage at best this Court can grant leave to defend to the applicant in case triable issues are made out and in the absence of

any application under Order VII Rule 11 CPC, the suit cannot be dismissed. Reliance is placed on Ramesh Lal Vs. Municipal Corporation of

Delhi, and Boston Scientific International B.V. vs. Metro Hospital, I.A. No. 193/2005 in CS (OS) No. 819/2002 decided on 3rd January, 2007.

Relying upon A.B.C. Laminart Pvt. Ltd. and Another Vs. A.P. Agencies, Salem, it is contended that a suit of contract can be filed at the place

where the contract is made. Hence this Court has territorial jurisdiction to entertain the suit and thus the application be dismissed.

3. I have heard learned counsel for the parties.

4. Before filing the present application, the Defendant Nos. 3 and 4 had filed I.A. No. 4387/2011 u/s 20 CPC for dismissal of the present

summary suit filed by the Plaintiff against the Defendants under Provisions of Order XXXVII CPC on the ground that this Court is not vested with

the territorial jurisdiction to try and adjudicate the same. However, in the meantime, since this application was filed and lack of territorial

jurisdiction was also pleaded, the applicants/Defendants were granted liberty to raise objections while addressing arguments in the present

application. The Plaintiff seeks to base its case for vesting territorial jurisdiction on this Court on the ground that the 12 cheques were issued to the

Plaintiff by Defendants at New Delhi, the said cheques were also presented for payment by the Plaintiff to its bankers at New Delhi and were

returned as dishonoured to the Plaintiff by its bankers at New Delhi. It is finally contended that the Distribution Agreement dated 15th May, 2005

was also executed at New Delhi which also confers jurisdiction to try and adjudicate the present criminal complaint at Delhi which appears to be

an error in the plaint probably because it appears to have been copied from the Criminal Complaint filed u/s 138 of Negotiable Instruments Act.

5. Heard learned counsels for the parties.

6. There is no dispute that the Distribution Agreement dated 15th May, 2005 between the Plaintiff and Defendant No. 1 was executed at Delhi.

Vide Clause 19 of the Agreement it was agreed to between the parties that in case any disputes or differences arise in respect of the agreement the

same shall be subject to the jurisdiction of the Courts at New Delhi or Noida to the exclusion of all other courts. It is well settled position of law

that a Court cannot derive jurisdiction in respect of a matter for which otherwise the said Court does not have jurisdiction merely because the

parties have agreed to vest jurisdiction in the said Court however the parties can agree to submit to the jurisdiction of one of the courts which has

jurisdiction to try the suit. Reference is made to Harshad Chiman Lal Modi Vs. D.L.F. Universal Limited and Another, and Archie Comic

Publications Inc. Vs. Purple Creations Pvt. Ltd., Nagji Kheraj Vira, Pankaj Nagji Vira and Dipak Nagji Vira, Directors, Purple Creations Pvt.

Ltd.,

7. Since the contract between the parties was entered into at Delhi this Court is certainly one of the courts which has jurisdiction to try the suit. In

A.B.C. Laminart Pvt. Ltd. and another (supra) their Lordships while discussing the cause of action held:

11. The jurisdiction of the Court in matter of a contract will depend on the situs of the contract and the cause of action arising through connecting

factors.

12. A cause of action means every fact, which, if traversed, it would be necessary for the plaintiff to prove in order to support his right to a

judgment of the Court. In other words, it is a bundle of facts which taken with the law applicable to them gives the plaintiff a right to relief against

the defendant. It must include some act done by the defendant since in the absence of such an act no cause of action can possibly accrue. It is not

limited to the actual infringement of the right sued on but includes all the material facts on which it is founded. It does not comprise evidence

necessary to prove such facts, but every fact necessary for the plaintiff to prove to enable him to obtain a decree. Everything which if not proved

would give the defendant a right to immediate judgment must be part of the cause of action. But it has no relation whatever to the defence which

may be set up by the defendant nor does it depend upon the character of the relief prayed for by the plaintiff.

13. u/s 20(c) of the CPC subject to the limitation stated theretofore, every suit shall be instituted in a court within the local limits of whose

jurisdiction the cause of action, wholly or in part arises. It may be remembered that earlier Section 7 of Act 7 of 1888 added Explanation III as

under:

Explanation III. In suits arising out of contract the cause of action arises within the meaning of this section at any of the following places, namely:

1. the place where the contract was made;
2. the place where the contract was to be performed or performance thereof completed;
3. the place where in performance of the contract any money to which the suit relates was expressly or impliedly payable.
14. The above Explanation III has now been omitted but nevertheless it may serve a guide. There must be a connecting factor.
15. In the matter of a contract there may arise causes of action of various kinds. In a suit for damages for breach of contract the cause of action

consists of the making of the contract, and of its breach, so that the suit may be filed either at the place where the contract was made or at the

place where it should have been performed and the breach occurred. The making of the contract is part of the cause of action. A suit on a

contract, therefore, can be filed at the place where it was made. The determination of the place where the contract was made is part of the law of

contract. But making of an offer on a particular place does not form cause of action in a suit for damages for breach of contract. Ordinarily,

acceptance of an offer and its intimation result in a contract and hence a suit can be filed in a court within whose jurisdiction the acceptance was

communicated. The performance of a contract is part of cause of action and a suit in respect of the breach can always be filed at the place where

the contract should have performed or its performance completed. If the contract is to be performed at the place where it is made, the suit on the

contract is to be filed there and nowhere else In suits for agency actions the cause of action arises at the place where the contract of agency was

made or the place where actions are to be rendered and payment is to be made by the agent. Part of cause of action arises where money is

expressly or impliedly payable under a contract. In cases of repudiation of a contract, the place where repudiation is received is the place where

the suit would lie. If a contract is pleaded as part of the cause of action giving jurisdiction to the Court where the suit is filed and that contract is

found to be invalid, such part of cause of the action disappears. The above are some of the connecting factors.

16. So long as the parties to a contract do not oust the jurisdiction of all the Courts which would otherwise have jurisdiction to decide the cause of

action under the law it cannot be said that the parties have by their contract ousted the jurisdiction of the Court. If under the law several Courts

would have jurisdiction and the parties have agreed to submit to one of these jurisdictions and not to other or others of them it cannot be said that

there is total ouster of jurisdiction. In other words, where the parties to a contract agreed to submit the disputes arising from it to a particular

jurisdiction which would otherwise also be a proper jurisdiction under the law their agreement to the extent they agreed not to submit to other

jurisdictions cannot be said to be void as against public policy. If on the other hand the jurisdiction they agreed to submit to would not otherwise be

proper jurisdiction to decide disputes arising out of the contract it must be declared void being against public policy. Would this be the position in

the instant case?

8. It would be thus seen that the cause of action arises also in Delhi as the Dealership Agreement was entered into at Delhi. Vide the dealership

agreement, parties agreed to submit to the jurisdiction of the Courts at Delhi. The contract cannot be said to be void as it did not deliberately oust

the jurisdiction of all the Courts to try the suit which had jurisdiction to try them. The contract only conferred the jurisdiction at one of the places

where cause of action also arises. Thus prima facie I find no merit in the contention of learned counsel for the Defendant Nos. 3 and 4 that the suit

of the Plaintiff be dismissed/returned for want of territorial jurisdiction though in the leave to defend application this Court is only required to look

into whether the triable issue is made out or not which the Defendant Nos. 3 and 4 have made out. This Court has formed a prima facie opinion on

the issue of territorial jurisdiction for the reason that vide order dated 6th February, 2013 in I.A. No. 4387/2011 of the Defendant Nos. 3 and 4

u/s 20 CPC was disposed of by this Court permitting the Defendant Nos. 3 and 4 to raise this issue in the present application.

9. Besides the issue of territorial jurisdiction the defendant Nos. 3 and 4 have raised other issues like the suit being bad for non-joinder of

necessary parties i.e. M/s. Essvee Commercials which was the seller of the goods and has not been made a party to the suit, though the right to sue

is based on invoices between M/s. Essvee Commercials and defendant No. 1. As the defendants No. 3 and 4 have raised triable issues, leave to

defend is granted. I.A. 2084/2012 filed by Defendant Nos. 3 and 4 under Order XXXVII Rule 3 CPC is disposed of.

CS (OS) 258/2009

Written statement be filed by the Defendant Nos. 3 and 4 within eight weeks. Replication be filed within four weeks thereafter.

List before the learned Joint Registrar on 9th December, 2013 for completion of pleadings and admission/denial of documents.

The matter be listed thereafter before this Court for framing of issues by the learned Joint Registrar.