(2016) 06 GAU CK 0026

GAUHATI HIGH COURT

Case No: CRP No.214 of 2016.

M/s. Midas Granites - Petitioner
@HASH Union of India - Opposite party — APPELLANT

Vs

RESPONDENT

Date of Decision: June 24, 2016

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 14 Rule 2, Order 7 Rule 11
- Constitution of India, 1950 - Article 227

Citation: (2016) 5 GauLJ 636 : (2016) 5 GauLR 537

Hon'ble Judges: N. Chaudhury, J.

Bench: Single Bench

Advocate: Mr. S. Kalita, Advocate, for the Petitioner; Mr. S.S. Roy, CGC, for the Opposite Party

Final Decision: Dismissed

Judgement

Mr. N. Chaudhury, J.(Oral) - By filing this revision petition under Article 227 of the Constitution of India petitioner, M/S Midas Granites, has challenged the order dated 25.02.2016 passed by learned Civil Judge No.1, Cachar at Silchar whereby the application filed by the present petitioner purportedly under Order 7, Rule 11 and Order 14, Rule 2 of the Code of Civil Procedure was rejected by the learned trial Court.

2. The present opposite party (Union of India, Ministry of Road Transport and Highways) as plaintiff instituted Money Suit No.34/2016 in the Court of learned Civil Judge No.1, Cachar at Silchar alleging that the present petitioner being the sole defendant therein was settled with a contract vide letter dated 19.01.2009 for construction of paved shoulder and strengthening of Katakhal Bye pass Road between KM 16.610 to KM 22.240 on Silchar Badarpur section of NH-53. The work

was delayed due to slow progress on the part of the defendant and so keeping in view the urgency to complete the prestigious SARDP work in scheduled time the subject contract was cancelled by the Accepting Officer on 20.08.2011 and the defendant was advised by contract in-charge for preparation of joint inventory of the complete/incomplete work. The same having been prepared a demand notice was raised on the defendant on 14.01.2012 for a sum of Rs.1,33,54,113.00. According to the plaintiff, as per averments made in paragraph 12 of the plaint, this cause of action for filing the suit arises on 27.08.2009 and on all subsequent dates corresponding to demand referred to in paragraph 4 of the plaint. A prayer was made for pass of a decree for Rs.1,33,54,113.00 along with interest pendent lite as well as further cost at the rate of 18% per annum. The suit appears to have been instituted on 08.09.2014.

3. On being summoned the sole defendant appeared and submitted written statement on 20.02.2015 taking objection both on maintainability as well as on merit. According to the defendant, the suit is barred by limitation, estoppels, waiver and acquiescence etc. and that no cause of action did arise in the case. In the written statement the defendant has specifically denied almost all the averments made in the plaint and made a prayer for dismissal of the suit with cost. In paragraph 2 of the written statement the defendant appears to have taken a plea that the suit is not maintainable in view of existence of an arbitration clause in the contract agreement which binds the parties. But at the time of filing the written statement the defendant does not appear to have filed any application under Section 8 of the Arbitration and Conciliation Act, 1996 asking for referring the matter to arbitration. Section 8 of the Arbitration and Conciliation Act, 1996 provides that if an action is brought before any judicial authority involving arbitration agreement and if a party so applies not later than submitting his first written statement on the substance of the dispute for referring the parties to arbitration, the Court shall refer the same. But such an application shall not be entertained unless it is accompanied by the original arbitration agreement or a duly certified copy thereof. The recital of Section 8 of the Arbitration and Conciliation Act, 1996, goes to show that it does not provide an absolute bar against institution of suit in regard to contract involving arbitration agreement. The Section has conferred a right on the defendant only to raise objection at the first instance before or at the time of filing written statement for making a prayer for referring the same to arbitration. Statutes also provide the manner in which such prayer has to be made. The prescribed manner is that an application has to be filed and it has to be accompanied by the original arbitration agreement or a duly certified copy thereof. It is established law that if statutes provide something to be done in a particular manner, in that event, it has to be done in that manner only and not otherwise. Under such circumstances there was no occasion on the part of the learned trial Court in the present case to refer the matter to arbitration although a mention was made by the defendant in paragraph 2 about possible existence of arbitration agreement. The arbitration agreement was

filed long thereafter at the stage of document and issues. The learned trial Court, therefore, proceeded to frame issues and thereafter permitted the parties to lead evidence on their respective behalf. The petitioner has not furnished the issues before this Court to show as to whether any of those issues can be decided only on the point of law and jurisdiction as referred to in Order 14, Rule 2 of the CPC. The defendant thereafter filed an application on 30.07.2015 when the suit reached evidence stage stating that the suit is not maintainable in view of existence of arbitration clause in the agreement and that ''the actual cause of action'' started from 30.07.2010 and so the suit having been instituted beyond three years from that date the suit is liable to be dismissed on the point of limitation alone. Be that as it may, without making any mention as to what should be the preliminary issue, a prayer was made by the defendant to dismiss the suit on the aforesaid preliminary issue of arbitration and limitation.

4. The plaintiff by filing written objection thereto contested the prayer and after hearing the learned counsel for the parties and on perusal of the application and the objection filed thereto the learned Civil Judge by order dated 25.02.2016 rejected the application filed by the petitioner. In so doing, the learned Court has considered the provision of Section 8 of the Arbitration and Conciliation Act, 1996 as well as the provision of Order 14, Rule 2 of the CPC. It is this order which has been brought under challenge in the present revision petition.

5. I have heard Mr. S. Kalita, learned counsel for the petitioner and Mr. S. S. Roy, learned Central Govt. Counsel, appearing for the opposite party. I have perused the plaint, the written statement, the purported application under Order 7, Rule 11 read with Order 14, Rule 2 of the CPC filed by the defendant and the objection filed thereto by the plaintiff.

6. Mr. S. Kalita, learned counsel for the petitioner, submits that since there is an arbitration clause in the contract agreement, it was the bounden duty of the learned Court to return the plaint for filing before appropriate forum, meaning thereby an arbitrator. The learned Court did not do so. Moreover, the contract site was not handed over to the defendant in time but for which there was delay in performance of the contract. But this aspect of the matter has not been considered by the learned trial Court. The suit is also barred by limitation as actual cause of action had arisen on 30.07.2010. Over and above, the Court does not have territorial jurisdiction. Mr. Kalita prays that the plaint is liable to be rejected on any of these points or some preliminary issue to be framed on the aforesaid points.

7. An application under Order 7, Rule 11 of the CPC is to be decided not on the basis of averments made in the written statement but presuming the averments made in the plaint to be correct. The Hon''ble Supreme Court has laid down the law in this regard in the case of **T. Arivandandam v. T.V. Satyapaul & another, reported in (1977) 4 SCC 467**. Law confers on every person an inherent right to bring a suit of civil nature of one''s own choice at ones peril however frivolous the claim may be

unless it is barred by statute. A suit does not require any provision of law for its maintainability but for rejecting the plaint or for holding it not maintainable a provision of law is necessary. In the case of T. Arivandandam (supra) the Hon''ble Supreme Court held that objection raised by the defendant by filing written statement cannot be the material for deciding an application under Order 7, Rule 11 of the CPC. A plaint can be rejected relying on the averments made in the plaint and the document annexed thereto. In the case in hand, the plaint did not disclose that there was an arbitration agreement or that cause of action had arisen on 30.07.2010 as alleged by Mr. Kalita. The plaint also does not show that the suit is barred by territorial jurisdiction or that the site was not handed over to the defendant in time. The plaint merely shows that there was an agreement between the plaintiff and the defendant for performing a work and the defendant failed to perform the work in time for which the contract was not only cancelled but also an inventory was made for the purpose of realising money from the unsuccessful contractor. The contract having provided that in case contractor failed to perform the contract the work would be done at his risk and cost, plaintiff made a prayer for realisation of cost from the defendant. Plaintiff may succeed to establish such allegations or may not succeed to establish the same and depending upon the quality of evidence to be adduced by the plaintiff the fate of the suit shall depend. If defendant wanted the matter to be referred to arbitration, in that event it would have been upon the defendant to file an application in appropriate manner as prescribed by Section 8 of the Arbitration and Conciliation Act, 1996. Mr. Kalita vehemently argued that when the defendant had pointed out the fact as to existence of contract agreement the plaint ought to have been returned to the plaintiff for presentation before appropriate forum. I am afraid, such exigency has not been contemplated by Order 7, Rule 10 of the CPC which is the appropriate provision for return of plaint. In the case in hand, the petitioner has raised the objection that the suit is barred by limitation because cause of action as shown in the plaint is not correct date of cause of action and one shown in the written statement is the correct one. The limitation is a mixed question of law and fact and it has to be decided on the basis of the materials brought on record by way of evidence. The defendant miserably failed to point out under what law the suit of the plaintiff was barred. The point of limitation raised by the defendant is also not borne on the body of the plaint. If on appraisal of the recital made in the plaint it appears that it is prima facie barred by limitation, in that event, a court in exercise of power and jurisdiction under Section 3(1) of the Limitation Act, 1963 can very well reject at the threshold although limitation is not taken as a defence by the defendant but that is not the case here. If the recital made in the plaint is taken at face value which is only subject to evidence to be adduced by the parties, the suit has been prima facie filed within a period of limitation. In that view of the matter the learned trial Court has not committed any error in rejecting the application filed by the sole defendant under Order 7, Rule 11 and/or Order 14, Rule 2 of the CPC.

8. Issues are of two types, viz., issues on fact and issues on law. If there are some issues on law which can be decided without recourse to evidence, in that event, in exercise of power under Order 14, Rule 2 CPC preliminary issues can be framed. The issue of limitation as referred to above and/or objection as to date regarding handing over of site does not come in any of the categories mentioned in Order 14, Rule 2 of the CPC. Taking entirety of circumstances into consideration and after giving anxious hearing to the submissions made by Mr. Kalita in course of hearing of the revision petition I do not feel that it is a fit case for admission and accordingly it stands dismissed. The purpose of filing the application appears only to delay a suit instituted by the Union of India for realisation of money. Keeping the entirety of circumstances in view the revision petition stands dismissed with a cost of Rs.1000/- (Rupees One Thousand). It is needless to say that defendant shall be at liberty to lead evidence on the objection raised by it and any observation made by this Court in the present order shall not influence the learned Court below while deciding the suit on merit.