(2001) 05 CAL CK 0003

Calcutta High Court

Case No: G.A. No. 1406 of 2001 and C.S. No. 481 of 2000

Jaytee Exports		APPELLANT
	Vs	
Natvar Parekh Industries Ltd.		RESPONDENT

Date of Decision: May 14, 2001

Acts Referred:

- Carriage of Goods by Sea Act, 1925 - Article 3, 2
- Civil Procedure Code, 1908 (CPC) - Order 39 Rule 1
- Contract Act, 1872 - Section 230

Citation: AIR 2001 Cal 150 : (2001) 3 ARBLR 519

Hon'ble Judges: D.K. Seth, J

Bench: Single Bench

Judgement

@JUDGMENTTAG-ORDER

D.K. Seth, J.

An interim order was granted on 18-4-2001. Under the said interim order the bank account of the defendant/respondent No. 1 was attached to the extent of a sum of Rs. 37,89,000/-. On behalf of the respondent No. 1 this interim order is sought to be vacated. The learned counsel wanted to make his submissions on the question of law. He did not want to use any affidavit. He sought to proceed on the basis of the materials on record. He submitted that on the face of the pleadings the interim order could not be maintained as against respondent No. 1. According to him, respondent No. 1 is only an agent of a known principal, being the Respondent No. 4. The real claim of the plaintiff is as against the principal. From the materials produced he had pointed out that the name of the principal, respondent No. 4 herein, is apparent and is known. As such no claim could be maintained as against the agent, in view of Section 230 of the Contract Act. He further contended that a bill of Lading is governed by a limitation of one year. The alleged transaction took place in January, 1998. Therefore, the suit presented sometimes in April, 2001, on the face

of it, is barred by limitation. He then contends that Order 38 Rule 5 of the CPC does not speak of any debt or a determined amount. In the present case, the amount is quantified and there is nothing to be determined. As such there cannot be any question of attachment before judgment. He further contends that no part of the cause of action arose within the jurisdiction of this Court. The goods were shipped at Cochin and delivered at Dubai. Leave granted under Clause 12 should, therefore, be revoked.

2. On the other hand the learned Counsel for the petitioner pointed out that by reason of Section 230 of the Contract Act the agent is equally liable. He then contended that Order 38 Rule 5 CPC does not make any distinction with regard to debt or ascertained sum. It is only when the conditions laid down under the Order 38 Rule 5 are satisfied an order of attachment can be issued. He also relied on Sections 23 & 28 of the Contract Act and contended that by reason thereof the suit is very much maintainable before this Court.

3. I have heard both the learned counsel at length.

4. The reference to Sections 23 and 28 of the Contract Act, as pointed out on behalf of the petitioner, has no manner of application in the facts and circumstances of the present case. Section 23 deals with the consideration or object of an agreement for the purpose of ascertaining its lawfulness. Section 28 deals with the Contract for reference to arbitration. Relying on the decision in the case of A.B.C. Laminart Pvt. Ltd. and Another Vs. A.P. Agencies, Salem, a the learned counsel for the petitioner submits that this case is not hit by the principal of either of Section 23 or of Section 28 of the Contract Act.

5. Relying on the decision in the case of Smt. Smriti Jaiswal and Another Vs. Romi Jaiswal and Another, the petitioner contends that under Clause 12 of the letters patent when a part of the cause of action arise within the jurisdiction of this Court then the suit is maintainable before this Court. In the present case the forwarding of the documents through Allahabad Bank and its return through the same bank at Calcutta is also one of the part of the cause of action due to which the suit is maintainable under Clause 12.

6. But this question may not be relevant for our present purpose, since now the Court is not called upon to decide the question of revocation of leave granted under Clause 12. Once leave is granted under Clause 12 until revoked the same cannot be a consideration for the purpose of determining the continuation of interim order. Therefore, the citation of the decision in Smt. Smriti Jaiswal (supra) is not relevant for the present purpose.

7. Admittedly, the defendant No. 1 is the agent of the defendant No. 4 as is pleaded in this petition. But it is alleged that the defendant Nos. 1 and 4 are one and the same. The directors and shareholders are common. Therefore, both of them are jointly and severally liable. It is contended further that by reason of express

instruction of the respondents the goods were delivered without the Bill of Lading for which the goods have been lost to the petitioner.

8. In the present case it is not necessary to go into the question relating to Section 23 and 28 of the Contract Act. An action for Bill of Lading is limited by one year but the same does not prevent an action in tort for which the limitation is three years. The question of limitation is not free from doubt. Be that as it may the question of jurisdiction is not relevant at this stage. Any decision on this ground would be pre-judging the issues. The question of limitation is also not necessary to be gone into except to the extent of finding out a prima facie case as against the respondent No. 1.

9. To grant or continue an interim order, it is necessary to consider the question of prima facie case and the question of balance of convenience and inconvenience. Before we refer to the question of convenience and inconvenience we may find out the question of prima facie case. Now let us examine as to whether the plaintiff has been able to make out a prima facie case.

10. In order to contend that no prima facie case has since been made out Mr. Saha had relied upon two contentions. First is that the carriers liability is for a period of 12 months from the time when the goods were delivered or ought to have been delivered. The transaction took place in 1998 and the goods were supposed to be delivered in early part of 1998. The one year had expired in early part of 1999. This suit was filed in 2001 which is almost three years. It is not necessary to go into this question of limitation at this stage except for the limited purpose, as observed earlier.

11. The other question that was raised by Mr. Saha is based on Section 230 of the Contract Act. It is an admitted position that the account that was sought to be attached, though was not particularly mentioned either in the pleading or in the prayer, belongs to the respondent No. 1. It is also admitted in the pleading in Paragraph 5 that the respondent No. 1 is an agent of the respondent No. 4.

Section 230 of the Contract Act provides as follows :

"230. In the absence of any contract to that effect, an agent cannot personally enforce contracts entered into by him on behalf of his principal, nor is he personally bound by them.

Such contract shall be presumed to exist in the following cases :

(1) Where the contract is made by an agent for the sale or purchase of goods for a merchant resident abroad;

(2) Where the agent does not disclose the name of his principal;

(3) Where the principal, though disclosed, cannot be sued."

12. A plain reading of the said section reveals so far as the present facts are concerned that an agent is not personally bound by the contract between his principal and the principal''s customer. But this rule has three exceptions as enumerated in Clause 1, 2 and 3 of the second part of the section. But the present case is not pleaded to fall within any of these exceptions. Neither the principal of the respondent No. 1, being the respondent No, 4, is a resident abroad. Nor the name of the principal was undisclosed nor the respondent No. 4, though disclosed, is a person who cannot be sued. Therefore, the present facts does not come within the exceptions as referred to above in order to rope in the respondent No. 1. Unless the contract comes within the exception provided in Section 230, an agent cannot be personally bound by the contract between its principal and its customer though entered through the agent, in the absence of any contract to that effect.

13. From the Bill of Lading it is apparent that the said document was issued by the defendant No. 1 as an agent of the respondent No. 4, who is named in the document itself. There is no contract to the effect that the agent would be bound by the contract. Thus unless it is shown that there is a contract to that effect to bind the agent by the contract entered into by it on behalf of its named principal, the agent cannot be bound by it.

14. Though an attempt has been made to plead that the respondent No. 1 as agent is coupled with interest, but, in fact, the same has not been properly spelt out in the petition. Admittedly, the respondent Nos. 1 and 2 are two different legal entities. Even if the directors are common or some of the shareholders are common, still then the two legal entities cannot be treated to be one and the same. Neither the dual capacity could be obliterated altogether. The said conditions as pleaded does not make out or spell out a case of agency coupled with interest. There is nothing in the petition to show that this principle could be attracted or that the respondent No. 1 had any interest in the goods or any lien in the property. Inasmuch as it is pleaded in the plaint itself that freight was paid.

15. The respondent No. 1 might be working as an agent may be on commission but the receipt of such commission cannot be treated to be an agency coupled with interest. In the case of Bramwell v. Spiller (1870) 21 LT 672, it was held that the mere fact that an agent is acting under a del credere commission does not give him the right personally to enforce a contract which he was not otherwise entitled to enforce. The test for deciding agency with interest is as to whether the agent has an interest or lien in the goods or the property as has been held in the case of Seth Loon Karan Sethiya Vs. Ivan E. John and Others, . The other test is that the agent must have an interest in the contract as has been held in Hardayal v. Kishen Gopal AIR 1938 Lah 673 : 178 1C 939; Subodh Gopal Bose Vs. Province of Bihar and Others, . Same view was taken in Agacio v. Forbes (1861) 14 MOO PC 160.

16. The rule relating to undisclosed principal is now a settled principle followed in Indian Courts. In case the name of the principle is disclosed the agent can no more

be liable. Even if the name is not disclosed but it is known to the parties contracting, still then the principle is attracted, in a case where the other party had knowledge that the contract was entered into by the person as an agent. In Mackinnon v. Lang (1881) ILR 5 Bom 584, knowledge in such cases were held to be equivalent to disclosure. The presumption, however, is rebuttable and such rebuttability is based, where the contract is in writing, on the examination of the contract, as was held in Soopromonian Setty v. Heilgers (1879) ILR 5 Cal 71, and in Mackinnon v. Lang (supra). Upon examination of the document in the present case there is nothing to rebut the presumption that the respondent No. 1 is an agent of the respondent No. 4. Having regard to the pleading the same does not call for any determination. The plaintiff had never sought to plead anything to rebut the same. In Patiram v. Kankinarra Company (1915) ILR 42 Cal 1050, 1065-66 : (AIR 1916 Cal 548), Jivraj v. Chain Karan AIR 1944 Nagpur 279, it was held that a broker is an agent to find a contracting party. He is not engaged to contract a purchase or sell with the party but if he contracts on behalf of the principal then Section 230 will apply. But when the contract was on behalf of a disclosed principal then he is not personally liable. In the present case the contract appears to be clear and unambiguous and it is also not so pleaded in the petition. On the other hand the ground on which the plaintiff sought the respondent No. 1 to rope in, is on the ground that the directors of both the agent and the principal are common. It was also not pleaded that there are no other directors either of respondent No. 1 or of the respondent No. 4. Thus the contention raised by Mr. Saha appears to be prima facie substantiated.

17. Therefore, in the facts and circumstances of the case it clearly appears, at least, prima facie. That the defendant No. 1 is an agent of a known or disclosed principal the respondent No. 4. The mere allegation that some of the directors are common does not affect the said rule of disclosed principal. Therefore, on this ground alone the attachment of the bank account of the respondent No. 1 an agent of respondent No. 4 cannot be continued.

18. Now let us examine as to whether the petitioner is able to bring the case within the scope and ambit of the rules prescribed in Article III of the schedule referred to in Section 2 of the Indian Carriage of Goods by Sea Act, 1925 to fix the liability on the respondent No. 1. Under the said Act the rules set down in the schedule becomes applicable in connection with the carriage of goods by sea in ships carrying goods from any port in India to any other port whether in or outside India. Section 4 thereof provides that every Bill of Lading or similar document of title issued in India, which contains or is evidence of any contract to which the rules are applicable, shall contain express statement with regard to the effect and subject to the provisions of the rules as applied under the said Act. Rule 3 of Article III of the schedule to the said Act provides the responsibilities and liabilities. A reading of different rules contained in Article III shows that those are responsibilities and liabilities of the carrier. It does not bind the agent. Rule 6 of Article III of the schedule provides that the carrier or the ship shall be discharged from all liability in respect of loss or

damage unless suit is brought within one year after delivery of goods or from the date when the goods should have been delivered. This condition is also printed overleaf the Bill of Lading. In the present case admittedly this suit is brought beyond the said period of 12 months or one year. As such prima facie the suit appears to be not maintainable against the carrier. Whether it is maintainable in an action for tort against the carrier or not, this question, as observed earlier need not be gone into at this stage. However, this fact may be one of the consideration for arriving at a prima facie case while dealing with the liability of the respondent No. 1, though it may not be a consideration as against the respondent No. 4, being the principal of the respondent No. 1.

19. The principle of one year limitation was laid down in the case of The East and West Steamship Company, George Town, Madras Vs. S.K. Ramalingam Chettiar, . In the said decision the Apex Court had held that unless the claim is lodged within one year from the date when the goods were delivered or when the goods should have been delivered the suit brought beyond the said period is not maintainable. This decision deals with the question of the carriers liability under the said 1925 Act. In that case the Apex Court had no occasion to deal with the question of action in tort. Whether it is available or not, might be examined later. It would not be relevant for our present purpose. But prima facie it appears that the respondent No. 1 as agent cannot be dropped in with regard to the carriers liability when the carrier was a disclosed principal of the agent respondent No. 1 and not a resident abroad.

20. The reference to the decision in the case of Premraj Mundra Vs. Md. Maneck Gazi and Others, related to Order 38 Rule 5. It is no more necessary to go into the said question after the above observations are made. Similarly the reference to the decision in the case of Union of India (UOI) Vs. Raman Iron Foundry, is also not required to be gone into in view of the observation made above, since it would be wholly unnecessary at the present moment.

21. For all these reasons the interim order cannot be continued and is hereby vacated and or discharged, so far as it relates to the bank accounts of the respondent No. 1. This order will not prevent the petitioner from seeking appropriate direction or relief against the respondent No. 4, as he may be advised.

22. The observations made above will not affect or prejudice any of the issues between the parties, which are kept open to be tried at the time of trial.

23. The application for injunction as against the respondent No. 1 is thus disposed of.

The concerned Bank and all parties are to act on a signed copy of the dictated order.