(2005) 10 CAL CK 0016

Calcutta High Court

Case No: G.A. No''s. 36 of 2001 and 215 of 2003 and C.S. No. 287 of 2001

Smt. Prabha Agarwal		APPELLANT
	Vs	
Technofab Engineering Limited		RESPONDENT

Date of Decision: Oct. 7, 2005

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 12 Rule 6

Citation: (2006) 2 CALLT 11

Hon'ble Judges: Kalyan Jyoti Sengupta, J

Bench: Single Bench

Judgement

Kalyan Jyoti Sengupta, J.

In this suit both the plaintiff and the defendant have taken out two separate motions for two different reliefs as against them. First mentioned motion being G.A. No. 36 of 2002 has been taken out by the plaintiff for pronouncing final Judgment on admission under the provisions of Order 12, Rule 6 of the CPC against the defendant: while the second application being G.A. No. 215 of 2003 has been taken out by the defendant for taking the plaint off the file and/ or revocation of leave under Clause 12 of the Letters Patent. It is for the sake of recording and the recapitulation, it is noted that the plaintiffs application was once disposed of granting relief as prayed for ex parte. However, subsequently on the prayer of the defendant the said ex parte order was recalled.

2. Thereafter, the defendant has taken out the aforesaid application for the said relief. Both the applications are heard together. Learned Counsel Mr. Banerjee, senior advocate appearing for the defendant submits that the plaintiff concealing the fact that there has been an agreement between the parties selecting the Court for adjudication of the dispute involved between the parties, having obtained leave under Clause 12 of the Letters Patent has instituted the suit in this Court. Such forum selection agreement will be appearing in the clause mentioned in the purchase orders for supply of the insulating materials with the defendant. With the

acceptance of the purchase order containing forum selection clause both the parties have agreed that all disputes relating to the sale and supply shall be adjudicated and/or decided by the competent Court at Delhi. As such, this Court has no jurisdiction and the plaint should be taken off and the leave granted by this Court should be revoked.

3. Mr. Banerjee for the defendant submits further that the question of jurisdiction can be raised at any time even after filing of written statement. According to him, this High Court has Inherently lacked jurisdiction. The choice of either of the two Courts, which have jurisdiction ordinary, is lawful.

4. Mr. J.K. Mitra for the plaintiff In answering to this plea of jurisdiction, submits that there Is no written agreement between the parties as to choice of Court. In this case when several purchase orders were placed and in few purchase orders the aforesaid clause has been incorporated while in the other purchase orders no such clause is to be found. Moreover, in each and every bill raised by the plaintiff it has been specifically mentioned that all the disputes are to be resolved by the competent Court at Calcutta and these bills have been accepted. Therefore, it can be construed that earlier alleged agreement stood repudiated and, this Court has exclusive jurisdiction. It is submitted further that leave under Clause 12 has been obtained pleading part cause of action has arisen within the jurisdiction of this Court. At this stage, the Court will proceed on the basis of the statement and averment made in the plaint and not otherwise.

5. It cannot be a case of inherent lack of jurisdiction. The defendant has filed written statement and such plea of forum selection clause has not been averred anywhere. Thus, the plaintiff has submitted to the jurisdiction of this Hon''ble Court. In support of his contention relating to Jurisdiction, two decisions of Supreme Court reported in Chittaranjan Mukherji Vs. Barhoo Mahto, & AIR 2002 2402 (SC) are cited.

6. Mr. Mitra while pressing his client''s application for Judgment upon , admission submits that the defendant by a letter dated 15th July, 1998 with the enclosure annexed thereto has unequivocally and unconditionally admitted that a sum of Rs. 29,44,735.26p. is payable to the plaintiff. There cannot be any dispute about this admission and the Judgment shall be pronounced accordingly.

7. The learned Counsel for the defendants submits on merit that the written statement has already been filed and it has been specifically stated that the claim is barred by limitation. Moreover, it has been denied and disputed that there has been any part payment or this Court has jurisdiction. If the aforesaid letter of 15th July, 1998 is taken in its face value no admission of the claim will be reflected in the language of the letter. It is settled position of the law that unless there has been an unequivocal and unconditional admission of the claim no Judgment can be pronounced thereupon. The power of the Court under Order 12, Rule 6 is discretionary and it will be wholly inequitable if the Judgment is rendered on this

summary proceedings.

8. I have considered respective contentions of the learned Counsels and the material as well. While doing so, I find the question is whether there is any agreement regarding selection of the Court for trial and determination of the suit or not. Admittedly there has been no signed agreement between the parties. According to the defendant, agreement has to be inferred by necessary implication because of acceptance of the purchase orders containing forum selection clause as mentioned in the purchase order. The plaintiff, on the other hand, contends that forum selection clause is also mentioned in the bills which have been accepted. The defendant has not denied and disputed the acceptance of the bills containing forum selection clause. On the other hand, the plaintiff has said that in all the purchase orders involved in the suit no forum selection clause has been mentioned. In view of the statement, counter-statement, claim of different agreements choosing different Courts, I do not think that I should accept anyone''s version of agreement for forum selection clause. I am of the view that agreement for forum selection would be clear unambiguous and without any dispute.

9. A Supreme Court decision cited by the learned Counsel for the defendant reported in AIR 2002 2402 (SC) is of no help in this case, as in that case it was found that there has been a written lease agreement wherein forum clause could be found. Moreover, the aforesaid decision has laid down the law that parties can lawfully select one of two Courts by agreement having jurisdiction over the matter.

10. Going by the facts and circumstances of this case, I am of the view that there cannot be finding at this stage with certainty that Calcutta Court does not have jurisdiction. Whether any cause of action has arisen within the jurisdiction of the Calcutta Court or not has to be ascertained on evidence. Today, in the plaint, I find there are averments for granting leave under Clause 12. The statements and averments, while taking its face its value of the plaint, constitute part cause of action which has arisen within the jurisdiction of this Court. As such, on demurrer action leave cannot be revoked.

11. The decision cited by the learned Counsel for the plaintiff reported in Chittaranjan Mukherji Vs. Barhoo Mahto, on the facts circumstances of this case is applicable in this case as the defendant, having filed written statement, cannot take the plea of question of jurisdiction on the basis of forum selection clause. As rightly argued by the learned Counsel for the plaintiff that even in the written statement this plea of forum selection clause has not been taken, by not mentioning the same, such plea is deemed to have been waived and overruled.

12. Accordingly I hold that the plaint cannot be rejected or be taken off on the plea of agreement of jurisdiction. This application is, therefore, dismissed.

13. As far as the question of delivery of the Judgment and/or admission is concerned the law is well settled that unless and until the admission is unequivocal and

unconditional no Judgment can be rendered. In this connection three Judgments of three High Courts can be referred to viz. AIR 1918 Cal 467 AIR 1962 J&K 66 & State Bank of India Vs. Midland Industries and Others, .

14. Therefore, the language of the letter sought to be construed as admission is as follows :

Dear Sir,

As desired by you we are enclosing herewith supports of the payment made to you from 1991 to 1998 in annexure No. - I.

Kindly go through & correct your outstanding.

Thanking you.

Yours faithfully,

for Technofab Engineering Limited.

15. With the letter purporting to be admission a statement of account has been annexed. According to the learned Counsel for the plaintiff both the things constitute unconditional admission. I am unable to accept this submission as I do not find any unequivocal admission of the debt and dues, of defendant. The letter of the Technofab Engineering Limited suggests that during the period of 1991 to 1998 some payments have been made by the defendant to the plaintiff and the publication of the same are contained in the annexure being the enclosure of the letter. It appears further from the said letter that request is made for examining and correcting alleged outstanding. Nowhere in express terms or by necessary implication any admission has been made of the dues of the plaintiff as alleged.

16. It appears from the affidavit-in-opposition as well as the written statement filed in the suit that the defendant has taken plea of jurisdiction otherwise and also the plea of limitation. Apparently, going by the statement made in the plaint the suit would have been barred by limitation had there been no pleading of maintaining running current account and further part payment. This statement and averment of maintaining running current account and part payment have been denied and disputed in the written statement. Therefore, in the event case of maintaining continuous and current account and factum of part payment are not proved then the plaintiff will certainly be non-suited. In this summary application plea of limitation cannot be decided as it is mixed question of fact and law and the same needs witness action. It is wholly unsafe without deciding this plea to render final Judgment as prayed for on the basis of the aforesaid document. In the case decided by the Delhi High Court referred to above it has been in almost identical case the learned single Judge of that Court held in paragraph 8 as follows :

In the case in hand not only admission is not unequivocal but further also the defendants have raised certain preliminary pleas which must be decided before the

plaintiff can be held to be entitled to a decree. The preliminary objections raised b> the defendants in this case go to the very root of the suit and are likely to non-suit the plaintiff if these were found against the plaintiff. Keeping in view of all the facts, I do not think that a case has been made out under Order 12, Rule 6, CPC for passing a decree in favour of the plaintiff.

17. As such I do not think it is a fit case in which discretion should be exercised by passing Judgment on admission when written statement has already been filed.

18. However, I keep all these observations open for being decided at the time of the trial of the suit for which ''I expedite the matter.

19. Let there be cross order for discovery within fortnight from the date of receipt of this order.

Inspection forthwith thereafter.

Parties will be entitled to apply for early hearing of the suit.

No order as to costs.