IN THE HIGH COURT OF DELHI AT NEW DELHI

SUBJECT : SUIT FOR RECOVERY

IA No. 10995/2006 IN CS (OS) No. 485/2004

Reserved on : March 1, 2007

Pronounced on : July 06, 2007

M/s Metso Minerals (New Delhi) Pvt. Ltd. ....Plaintiff

through: Mr. J.N. Patel, Advocate
Mr. Dinesh, Advocate
Ms. Tripta, Advocate

VERSUS

M/s Satyam Shankaranarayan JV .....Defendant

through: Mr. S.S. Naganand, Sr. Advocate
Mr. R.S. Srivatsa, Advocate

A.K. SIKRI, J.

1.The plaintiff has filed suit for recovery of Rs. 49,91,483.16/- along with interest @24% per annum. The defendant is contesting the suit. It has filed the written statement in which one of the preliminary objections is that the defendant had already filed suit for recovery in Bangalore against M/s. Mesto Minerals Inc., which is the supplier company. The said suit is for recovery of Rs. 2,09,98,880/- along with cost and interest which according to the defendant was filed prior in point of time and the subject matter of the two suits is substantially the same between the same parties. On this ground the defendant does not want the present suit of the plaintiff to proceed and, therefore, instant application is filed under Section 10 of the CPC for stay of the proceedings. The plaintiff has opposed this application and filed the reply. Learned counsel for both the parties made extensive submissions in support of their respective pleas.

2.In order to determine the controversy raised in this application, we will have to go into the nature of the present suit filed by the plaintiff as well as the suit filed by the defendant in Bangalore.

3.As per averments in the suit OS No. 7577/2003 filed by the defendant against the Metso Minerals Inc. (hereinafter referred to as the supplier company) incorporated under the laws of US, the defendant had placed a purchase order dated 30.5.2000 for purchase of two boom jumbo drills MK-65 HE (hereinafter referred to as the equipment) with man-basket adjustment and soft starter. The price of this equipment was US $3,93,400/- and the supplier company was to supply this equipment within six weeks and ex-works from the date of receipt of the purchase order. Without going into the details of the execution of the said order, as mentioned by the defendant in the suit filed by it, suffice is to point out that after supply of equipment, that too belatedly, which the defendant received on site on 22.10.2000, the service engineers of the supplier were unable to commission the equipment till 31.10.2000. The said service engineers were ill equipped and inexperienced to commission the equipment. Because of late arrival of the equipment and non-commissioning in time, the defendant allegedly suffered losses including needless idle charges etc. and its

production targets were severely hampered. Even after this equipment was commissioned, the defendant noticed innumerable shortcomings and lapses in the performance and running of the equipment. Several parts of the equipment were either malfunctioning, not supplied or damaged. The equipment frequently broke down as it was not serviced in time by the service 'engineers' of the supplier. The defendant was constantly reminding the supplier about the need to take immediate action to rectify the defective equipment supplied. However, the equipment continued to malfunction and in May, 2001 it stopped functioning. It was found that one of the injector's nozzle element had failed. The equipment remained in brake down condition for quite some time. The engine had totally lost its power. Even after replacing the engine with a new nozzle element, the loss of engine power continued. In this manner, the defendant incessantly faced problems in the equipment supplied by the supplier because of which the defendant was unable to honour its commitment and schedule in the progress of work at the Larji Hydro Electric Project site for which the equipment was imported. On the basis of these allegations, in the aforesaid suit filed by the defendant, it has made the following claims:

(a) the amount paid to the supplier under LC through Canara Bank of Rs. 1,67,16,925/-;

(b) Customs duty paid Rs. 41,48,097/-;

(c) damages including demurrage of Rs. 1,33,858; totaling to Rs. 2,09,98,880/- i in the suit.

Needless to mention that in the suit filed, the only defendant is the supplier i.e. parent company of the plaintiff herein.

4.Let me now revert to the plaint in the present suit. It is predicated on the averments that it is engaged in the business of supply in India and has been rendering various services to various companies in the form of supply and services of spare parts since the year 1999. There is a long standing business relationship between the plaintiff and the defendant as the defendant has been purchasing spare parts from the plaintiff's through verbal and written purchase orders. It is alleged that the plaintiff and the defendant had been recording their agreement in lieu of the remuneration payable to the plaintiff. At no point of time the plaintiff agreed to render services gratuitously to the defendant. It was the plaintiff's practice to raise invoices for each supply ordered by the defendant. The rates of each spare part were fixed on the basis of cost of each spare part. It is also alleged that the defendant was consistently irregular in making payments to the plaintiff and on various occasions made payments after repeated requests from the plaintiff. In order to expedite the outstanding payments, the plaintiff met the defendant on 1.12.2000 and discussed the issue of recurring delays. The defendant agreed to clear all outstanding amounts and further agreed to make payments against future supplies on or before 15th of subsequent month of presentation of invoices by way of demand draft payable at Delhi. These minutes were duly recorded in the subsequent meeting held between the parties on 5.12.2000. It is further alleged that the plaintiff has been keeping a running account in the name of the defendant and as per that running account, a sum of Rs. 49,91,482.16 paise is due and payable to the plaintiff against the supplies made. It is clear from the above that whereas the defendant has filed the suit for recovery of the amount paid against the equipment purchased from the supplier namely the parent company of the plaintiff on the ground that it was a faulty equipment, the plaintiff has filed the suit for recovery of money from the defendant against the supplies of spare parts. The two transactions, therefore, ostensibly, appear to be different and even the parties are different, though the defendant is a common party in both the suits. However, the case of the defendant is that little deeper scrutiny into the contractual transactions would reveal that they are inextricably mixed and it was one composite transaction involving supply of

equipments by the supplier and after the sales service, timely supply of genuine parts by the plaintiff, associate company of the supplier. For this purpose, the defendant referred to the written statement filed by the supplier itself in the suit filed by the defendant in Bangalore wherein the supplier has inter alia stated:

"(vii) It was known to the plaintiff at the time of placing purchase order upon defendant that equipment is of such a nature that would requires replacement of repairs from time to time. Therefore, it was intended in purchase order that defendant would supply spares at mutually acceptable terms. However, no such terms and conditions were ever agreed upon or finalized between the plaintiff and defendant. Further, in terms of the purchase order, the defendant warranted that equipment would not use spare parts used within a duration of 20 months or 7,500 hours whichever is earlier, for more than an amount of US$ 80,000. However, the plaintiff has failed to even allege that the value of spares utilized by him exceeded US$ 80,000 within the warranty period. The defendants' other group company in Delhi namely M/s Metso Minerals (New Delhi) Pvt. Limited supplied spares to plaintiff from time to time upon the order placed by the plaintiff. Plaintiff had also made payments regarding such supplies to M/s Metso Mineral (New Delhi) Pvt. Limited. Defendant had never dealt with plaintiff in relation to spares. Accordingly, plaintiff had by conduct waived its right to allege any breach on this account as against defendant. In this regard, the plaintiff corresponded with the M/s Metso Mineral (New Delhil) Pvt. Limited in Delhi directly. The plaintiff is already involved in a separate suit on issue relating to spares in the High Court of Delhi under Sui No. C.S. (OS) 485 of 2004. Plaintiff had appeared and had submitted its written statement to the said suit."

Again, in para (xii), M/s Metso Minerals Inc. has stated as follows:

"(xii) Plaintiff owes to M/s Metso Mineral (New Delhi) Private Limited, a hefty sum of money. M/s Metso Mineral (New Delhi) Private Limited was pressing plaintiff to make payments towards the material supplied. However, only to arm twist the defendant by way of this present suit. The defendant has neither breached any contract for sale or any other terms and condition of the purchase order and, therefore, plaintiff is not entitled to any relief."

Further, in para 10 it is stated as follows:

"10. It was known to the plaintiff at the time of placing purchase order that equipment is of such a nature that it requires replacement of repairs from time to time and therefore, it was intended to purchase order that defendant would supply spares at mutually acceptable terms. However instead of defendant, M/s Metso Mineral (New Delhi) Private Limited supplied spares to plaintiff from time to time. Defendant had never dealt with plaintiff in relation to the spares. In this regard, plaintiff had corresponded with M/s Metso Mineral (New Delhi) Private Limited directly. Plaintiff is already involved in a separate suit on issue relating to spares in High Court of Delhi under the suit No. CS(OS) 485 of 2004. Plaintiff had appeared and had submitted its written statement to the said suit. The plaintiff rely upon and reiterates the contents of paragraph No. (vii) of the preliminary submissions."

5.It is, thus, sought to argue that the following significant features emerged from the written statement of the supplier:

"a) The Plaintiff (M/s Metso Minerals (New Delhi) Pvt. Limited) supplied the spare parts instead of M/s Metso Minerals Inc.

b) The Plaintiff (M/s Metso Minerals (New Delhi) Pvt. Limited) is a sister concern of M/s Metso Minerals Inc.

c) The transaction of the defendant with the plaintiff and the M/s Metso Minerals Inc. was a composite one, which was served partly by M/s Metso Minerals Inc. and partly by its sister concern M/s Metso Minerals (New Delhi) Pvt. Limited (the plaintiff herein).

d) In respect of the supply of spare parts which formed part of the composite transaction which is the subject matter of the suit in Bangalore, the Plaintiff has filed a suit against the Defendant in this Hon'ble Court."

6.Learned Senior Counsel appearing for the defendant/applicant submitted that once holistic view of the matter is taken, it would show that ingredients of Section 10 of the CPC were satisfied as the subject matter of the two cases was substantially the same and it was also substantially between the same parties. He also referred to the following judgments on the basis of which he contended that the proceedings in the present suit be stayed till the decision of the suit filed by the defendant against the supplier in Bangalore Court:
1.Arun General Industries Ltd. v. Rishabh Manufacturers Private Ltd and others - AIR 1972 Calcutta 123.
2.Shorab Merwanji Modi and another v. Mansata Film Distributors and another - AIR 1957 Calcutta 727
3.Jai Hind Iron Mart v. Tulsiram Bhagwandas - AIR 1953 Bombay 117.

7.The plaintiff has resisted this application by submitting that the two transactions are totally independent of each other which are on the basis of the separate contracts. Contract with the supplier was for supply of equipment which was governed by the terms and conditions contained in the specific purchase order. On the other hand, the contract entered with the plaintiff company was for supply of spare parts which was supplied against oral as well as written purchase orders. It was also submitted that against the supply of these spare parts the plaintiff company raised specific and separate invoices. It was also submitted that a running account was maintained by the plaintiff as per which supplies made were debited in the account of the defendant and the money received from time to time was credited. The suit filed by the plaintiff against the defendant was therefore on a different cause of action; plaintiff has nothing to do with the suit filed by the defendant against the supplier in which the plaintiff was not even a party; likewise the supplier was not a party in the instant suit filed by the plaintiff against the defendant. Therefore, neither the cause of action was same nor the subject matter was same nor there was any identity of the parties in the two suits. Therefore, ingredients of Section 10 of the CPC were not satisfied and application of the defendant is required to be dismissed with cost. Learned counsel for the plaintiff referred to the following judgments in support of his submission:
1.C.L. Tandon, G.S. v. Prem Pal Singh Rawat and others - AIR 1978 Delhi 221.
2.M/s Freewheels (India) Ltd. v. Dr. Veda Mitra and another - AIR 1969 Delhi 258.
3.N. Dutta v. M/s. Jardin Victor Limited - AIR 1984 Patna 7.
4.Bijedra Kumar and others v. Basant Kumar AIR 1994 Allahabad 81.

8.I have considered the submissions of both the parties. In order to succeed in application under Section 10 CPC, the applicant is required to satisfy the Court with the following four essential conditions:
(1)that the matter in issue in the second suit is also directly and substantially is issue in the first suit;
(2)that the parties in the second suit are the same or parties under whom they or any of them claim litigating under the same title;
(3)that the court in which the first suit is instituted is competent to grant the relief claimed in the subsequent suit;
(4)that the previously instituted suit is pending (a) in the same court in which the subsequent suit is brought or (b) in any court in India, or (c) in any court beyond the limits of India established or continued by the Central Govt. or (d) before the Supreme Court.

9.The focal point for consideration would be as to whether the scope of inquiry in the two proceedings is the same, in order to find out as to whether the subject matter of the controversy is substantially the same in the two suits. "Matter in issue" does not mean any matter in issue in the suit but has reference to the entire subject matter in controversy. In order to find out as to whether the scope of inquiry or the matter in issue is same, the test is as to whether the decision in one suit would non suit the other suit. Other test of applicability is as to whether final decision in the previous suit would operate as res judicata in the subsequent suit. Likewise, the expression "same parties" occurring in Section 10 has been interpreted to mean "the parties as between whom the matter substantially in issue has arisen and has to be decided". It is not necessary that all the parties on either side should be the same in both the suits; it is enough if there is a substantial identity of the parties.

10.In Arun General Industries Ltd. (supra), the Court opined that the matter for determination in the case of an application for stay under Section 10 is not what the basis of the claim in the two suits is but what is the "matter in issue" in the two suits. The two different bases of claim namely, one based on a contract and the other on a tort would not make the matters in issue in the two suits different merely on that ground. If a claim based on a contract in one suit, is sought to be avoided and repelled on the ground of fraudulent misrepresentation and a subsequent suit is filed claiming damages on the basis of a fraudulent misrepresentation with regard to the same contract, the issues nevertheless in the two suits would be substantially the same, even though the bases of the claim in the two suits are altogether different. Commenting upon the expression "same parties" the Court held that existence of additional party in the suit subsequently filed does not by itself make Section 10 inapplicable. There should be substantial identities of the parties.

11.To the same effect is the judgment of Calcutta High Court in Shorab Merwanji Modi and another (supra), wherein the Court clarified that the expression "cause of action" is not used in Section 10 but the words "matter directly and substantially in issue". Two persons quarrelling over the same transaction and bringing separate suits with respect to it against each other, cannot be said to have the same cause of action. However, the matter in issue in the two suits would substantially be the same though different reliefs may have been claimed by the plaintiffs.

12.In Jai Hind Iron Mart (supra), Bombay High Court held that though there must be an identity of the subject matter and the field of controversy between the parties in the two suits must also be the same, but the identity contemplated and the field of controversy contemplated should not be identical and the same in every particular, but the identity and the field of controversy must be substantially the same. In that case, previously instituted suit was filed in Calcutta and on the basis of which subsequently instituted suit in Bombay was sought to be stayed. The Calcutta suit was filed by the appellants on a contract dated 4.11.1951, and their case was that the contract was for a sale by them of 1,898 tyres to the respondents. Their further contention was that these tyres were according to certain specifications and they contended that the plaintiffs in the present suit failed to take delivery of these tyres and therefore they filed a suit for damages for non-acceptance. In the Bombay suit the respondents sued on the same contract of 4.11.1951, but their contention was that under this contract they had contracted to purchase only 1,600 tyres and not 1,898 tyres. Further the contention was that these 1,600 tyres were not according to specifications but they were according to certain contract quality, and their grievance in the Bombay suit was that the tyres that were delivered

were not according to contract quality. They, therefore, filed a suit for refund of a certain amount in respect of the price they had paid for tyres which were not according to contract quality and also for damages for non-delivery. Held that whatever reliefs the appellants might seek in the Calcutta suit and whatever may be the reliefs which the respondents might seek in the Bombay suit, these reliefs were incidental to the decision which the Court must come to the decision as to what was the contract between the parties. Therefore, if the Calcutta High Court in the previously instituted suit were to decide that the contract was either as the appellants pleaded or as the respondents pleaded, that decision must operate as res judicata in the Bombay suit. The Bombay suit should be stayed under S. 10 until the hearing and final disposal of the Calcutta suit.

13.In C.L. Tandon, G.S. v. Prem Pal Singh Rawat and others (supra), this Court held that where on a comparative study of the plaints in the Delhi suit and the Patna suit the issues involved in the two suits were found not substantially the same, the mere fact that one of the major issues is common to both the suits will not by itself serve the applicant's purpose. One valuable touchstone for determining whether the matters in issue are directly and substantially the same is whether the decision in the prior suit will bring the principle of res judicata into the operation in the subsequent suit. The Court found that the issues of utmost importance involved in the Delhi suit were alien to the Patna suit and, therefore, the suit in Delhi could not be stayed.

14.In N. Dutta v. M/s. Jardin Victor Limited, the factual position was that a party had entered into independent contracts with two different limited companies to render services to them on remuneration payable under respective contract entered into with each of the companies. The said party filed suit against the company B for realisation of commission in which case the appeal was pending. The party also filed suit for realisation for commission from company A. The Court held that the suit against the company A could not be stayed under Section 151 because Section 10 was not attracted on the ground that the appeal was pending in the money suit which was filed by him for realisation of commission from company B. What is important for us is that it was also held that in such a case it was of no consequence that the company A was subsidiary of company B. Further, the fact that the date of the contracts and termination letters were of same date was wholly irrelevant, as the appointment and termination by each Company were distinct from each other being issued by two different companies.

15.In Bijedra Kumar and others v. Basant Kumar (supra), prior suit was filed for injunction restraining from taking the possession of the suit property. Subsequent suit for partition of the suit property and other immovable property was filed. The Court held that the subject matter of two suits was different and Section 10 had no application.

16.Keeping in mind the principles laid down in the aforesaid judgments, let me discuss the present case. No doubt, the two contracts are somewhat related to each other. Contract of supply of equipment between the defendant and the supplier was for main equipment, whereas the contract between the plaintiff and the defendant was for supply of spare parts needed for the main equipment and services in respect of main equipment supplied. The plaintiff is also a subsidiary company of the supplier. Nevertheless, two contracts are of different nature. One was for the supply of equipment. After the supply of the equipment for running the said machine, certain spare parts were required from time to time and, therefore, another independent contract was entered into between the plaintiff and the defendant for supply of those spares and service

of the spares, if needed. Contract between the supplier and the defendant worked out after the supply. Of course dispute raised by the defendant is on account of defective supply. On the other hand, the plaintiff supplied spares from time to time, whereas the defendant has made claim against the supply of defective equipment. Claim of the plaintiff against the defendant is for supply of spares. It is nowhere the case of the defendant, in the suit filed by the defendant against the Supplier, that because of alleged defective equipment supplied to the defendant it is not to make any payment for the spares also to the plaintiff. The defendant has simply demanded the refund of price paid against the equipment, plus other charges like custom duty and demurrage etc. from the supplier. For this reason or otherwise, the defendant has not even impleaded the plaintiff in the suit filed by him.

17.The issue decided in the suit filed by the defendant namely whether the machinery supplied was defective or not may have some bearing on the suit filed by the plaintiff against the defendant. However, that decision in no way would operate as res judicata as the subject matter of the two suits is entirely different. In this scenario, merely because the supplier, in the written statement filed by it in Bangalore suit, has mentioned about the contract between the plaintiff and the defendant would not mean that the subject matter of the two suits would be substantially the same. Even the parties in the suits are totally different. Supplier company may be the parent company of the plaintiff herein, however, supplier company is incorporated under the laws of US, whereas the plaintiff company is an Indian company incorporated under the Indian Companies Act. They are having distinct entities. It is not a case where corporate veil can be lifted and identity of the two companies can be established as one nor any such attempt is made by the defendant/applicant. {See M/s Freewheels (India) Ltd. v. Dr. Veda Mitra and another (supra)}

18.I do not, therefore, find any force in this application which is hereby dismissed with cost.

Sd/-
(A.K. SIKRI)
JUDGE