

**TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL
NEW DELHI**

DATED 23 NOVEMBER, 2010

**Petition No. 5(C) of 2010
(With MA No.149 of 2010)**

Link Vision

...Petitioner

Vs.

Win Cable Entertainment Pvt. Ltd. & Ors

...Respondents

BEFORE:

**HON'BLE MR. JUSTICE S.B.SINHA, CHAIRPERSON
HON'BLE MR. G. D. GAIHA, MEMBER**

For Petitioner : Mr. Tejveer Singh Bhatia, Advocate

For Respondent No.1 : Mr.Navin Chawla, Advocate

For Respondent No.2 : Mr.J.K.Mehta, Advocate

For Respondent No.3 : None

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J U D G E M E N T

S. B. Sinha

Whether 'limitation' and 'forum shopping' can be grounds for rejection of a petition within the meaning of Order VII Rule 11 of the Code of Civil Procedure, 1908 and/or the principles analogous thereto is the question which arises for consideration in this petition.

The petitioner is a service provider. The respondent No. 1 is the Managing Director of the respondent No. 2 which is a multi service operator. The respondent No. 3 is also a service provider.

The grievance of the petitioner is that the respondent No. 3 in collusion and conspiracy with the respondent No. 1 had sold its network to the respondent No. 2.

The petitioner admittedly filed a suit before the City Civil Court against the respondents herein being Suit No. 5407 of 2006 praying inter alia for the following reliefs :-

- “(a) This Hon’ble Court be pleased to grant leave under Order –II Rule – 2 of C.P.C., 1908 to file a substantive Suit.
- (b) This Hon’ble Court be pleased to declare that the alleged purported Agreement and other documents, if any, executed between the Defendant No.1 and the Defendant No.2 in respect of the business of M/s. Link Vision, as null, void, illegal, bad in law and not binding upon being the plaintiff being the Sole Proprietor of M/s. Link Vision.
- (c) This Hon’ble Court further be pleased to declare that the Circulars dated 2nd October, 2006 and 13th October, 2006, issued by the Defendant Nos.1 and 2 are illegal, bad in law and not binding upon the plaintiff being the sole proprietor of M/s. Link Vision.
- (d) This Hon’ble Court be pleased to pass a permanent order and injunction, directing the Defendant Nos. 1 and 2 to handover all the documents pertaining to the alleged purchase of the business of M/s. Link Vision by the Defendant No. 2 from the Defendant No. 1.
- (e) This Hon’ble Court be pleased to pass permanent order and injunction, directing the Defendant No. 3 to not provide the signals through the Defendant No. 2 being its Distributor, but to provide the signals through its other Distributors or directly to the Plaintiff.

(f) This Hon'ble Court be pleased to grant a permanent order and injunction restraining the Defendants, their servants, agents, employees, officers, representatives, or any person or persons claiming through or under them."

The said suit was dismissed. Indisputably, the petitioner and the respondent No. 3 had entered into a Memorandum of Understanding whereby and whereunder the parties had become shareholders to the extent of 50-50 in the firm in question.

Allegedly, the respondent No. 3 has sold the network in question on 2.10.2006 to the respondent No. 2. According to the petitioner, the respondent No. 3 did so without any authority, which is however, denied and disputed by it.

A first appeal against the decree passed in the said suit was filed before the High Court of Bombay which was marked as First Appeal No. 1076 of 2007.

In the said suit, an application for injunction was filed pursuant whereto an interim order was passed. The respondent filed an application for vacating the said order of interim injunction.

Roshan Dalvi J. by an order dated 16th June 2007 disposed of two notices of the motion filed by the parties thereto, directing :-

“Upon the correct analysis, interpretation of the law and the documents and marshalling of the facts, the learned Judge has dismissed the Suit as not being maintainable. Consequently, the learned Judge has dismissed the Notice of Motion as well as the Suit. It is seen that the Suit is not maintainable as having been barred under Section 69 of the Partnership Act. The Court had no pecuniary jurisdiction. The Notice of Motion deserved to be dismissed on merits upon the suppression of material facts by the plaintiff.

On merits, the injunction, which prevails since 20.10.2006 and which continues until today, deserves to be vacated but only upon the payment of 50% share of the Plaintiff in the consideration shown under the Agreement and Deed of Sale dated 2.10.2006 by the Applicant to the Plaintiff and further upon paying the requisite stamp duty thereon.”

The petitioner preferred an appeal thereagainst before the Supreme Court of India. By a judgement and order dated 13th December 2007 the said appeal was disposed of, directing:-

“The short question which arises for determination in this case is whether the MoU constituted a partnership deed. In our view, the said question is a mixed question of law and fact. The said question should not have been disposed off finally in a notice of motion.

Having heard learned counsel on both sides, however, we are of the view that it will be open to all parties to raise all issues and contentions in the suit including objections with regard to the maintainability of the suit, being barred under Section 69 of the Partnership Act, under valuation of the suit etc. We are conscious of the fact that the Bombay City Civil Court is flooded with matters. Therefore, we direct that it will be open to the parties herein to move the trial court for interim arrangement regarding business to be conducted during the pendency of the suit and maintenance of accounts and also to provide a monthly list of customers before the court, including appointment of Receiver. We give liberty to the first defendant to move a fresh notice of motion for appropriate relief within a period of four weeks from today. We request the Bombay City Civil Court to hear and dispose of the said notice of motion, if so filed, within a period of three months."

The petitioner herein before us inter alia questions a public notice dated 2.10.2006 issued by the respondent No. 2 hereto. The said notice was addressed to all Link Vision Cable TV Subscribers.

This petition was filed on 8.1.2010.

The petitioner in this petition has prayed for a large number of prayers. The prayers A to E and H relate to orders for payment of compensation. Prayers F, I, J, K and L relate to orders of injunction; whereas prayer G relates to revocation of Cable TV and Internet distributorship rights of and from Win Cable Entertainment Pvt. Ltd. being a distributor of Win Cable Data Com Pvt. Ltd. and other companies.

Mr. Bhatia, the learned counsel appearing on behalf of the petitioner would contend that the question of limitation being a mixed question of fact and law should not be considered to be a ground for rejection of petition. It was furthermore submitted only because the petitioner has filed a suit which is still pending by itself cannot be a ground for rejecting the petition.

On a query made by this Tribunal as to how the petitioner had filed a suit before the City Civil Court, the learned counsel would contend that the same was maintainable as the question as to whether the deed of sale/agreement of sale could be executed by the respondent No. 3 without any authority was not a matter which would come within the purview of the exclusive jurisdiction of this Tribunal as contained in Section 14 and 14A of the Telecom Regulatory Authority of India Act, 1997 (The Act).

We, however, fail to understand as to how on the same premise namely the lack of authority on the part of respondent No. 3 to sell the network in question to the respondent No. 2, can be a subject matter of the petition before us, as award of compensation on various heads as prayed for by the petitioner would be entertainable subject to declaration(s) that the action on the part of the said respondents, being wholly illegal is void ab initio.

Mr. Bhatia, however, would urge that the Memorandum of Understanding and/or the Agreement/Deed of Sale dated 2nd October, 2006 having been found to be not sufficiently stamped had been impounded and in that view of the matter, the respondents are debarred from relying on the said documents for any purpose whatsoever under the provision of Bombay Stamp Act, 1958 in the case, where a party to a lis intends to prove the authority to transfer

the network. We would however assume that such a case had been made out, but our attention had been drawn to the fact that the respondents had deposited the deficit stamp duties before the Collector under the Bombay Stamp Act.

In this behalf our attention has been drawn to the following endorsement of the Collector of Stamp dated 24.7.2007.

C.V. 8000006

Certificate u/s. 41 of the Bombay Stamp Act, 1958.

No. Adj. A. 2502/2007

Office of the Collector of Stamps

Dated 24/7/2007

5285

Received from Shri ~~Smt.~~ Shehraz Sani

resident of Twenty four thousand only

Insufficient Stamp duty of Rs. (24,000/-) vide challan No. S....., dated 23.7.2007

chargeable under article 25(a) 37..

of schedule I of Bombay Stamp Act, 1958

Certified under Section 41 of the Bombay Stamp Act, 1958 that the proper duty of

Rs. (24,000/-) Twenty four thousand only.

and penalty Rs. (4,800/-) Four thousand eight hundred only

under article 25(a) 37 of schedule I have

been paid in respect of this Instrument.

This certificate is subject to the provisions

of section 53-A of the Bombay Stamp Act, 1958.

Place: Andheri

Date: 24-7-07

Collector of Stamps Andheri

Subject to the Provision of Section-53-A of the Bombay Stamp Act-1958.



The submission of Mr. Bhatia, therefore, is of no substance.

In terms of the provisions contained in Section 35 of the Indian Stamp Act and/or similar provision contained in the Bombay Stamp Act, reliance, thus, can be placed by the respondent on the said document, the deficit stamp

duty having been paid.

As the suit has been filed on the same cause of action as in this petition, we are of the opinion that this petition would not be maintainable.

Mr. Bhatia, however, has relied upon a decision of the Division Bench of Orissa High Court, in Manabrani Hazra and Ors. Vs. Mohinder Singh Jaggi and Anr. in AIR 1968 Orissa 418, wherein a suit was filed for payment of compensation for damages arising out of damage caused to the tenanted premises before a Civil Court as also an 'Application for Eviction' before the Rent Controller.

A question arose in the 'Eviction Petition' that the landlord having obtained a decree for damages, an application for eviction would not be maintainable on the same cause of action.

The Orissa High Court rejected the said contention opining that as the Civil Court had no jurisdiction to pass a decree of eviction and the Rent Controller had no jurisdiction to pass a decree for damages, two separate actions before two separate forums were maintainable. Such is not the case here.

This Tribunal also for the purpose of grant of any relief to the petitioner will have to arrive at a finding of fact that the said purported Deed of Sale was illegal for one reason or the other as a result whereof the petitioner became entitled to a judgement/decree for grant of damages on various heads as also decrees for permanent injunction(s) as also a decree for revocation.

If the suit was maintainable, in our considered view, the prayers made before us could also be made therein. Only because a prayer has been made before the City Civil Court for grant of leave under Order II Rule 2 of the Code of Civil Procedure, 1908, the same by itself is not and cannot be held to be sufficient for not entertaining this petition. There is nothing on record to show at the hearing of the suit and/or at the time of filing of the same, any leave under Order II Rule 2 of the code was granted.

Even otherwise this petition is apparently barred by limitation as the petitioner herein questions the validity of the aforementioned public notice dated 02.10.2006 which action should have been brought before this Tribunal only within a period of 3 years from the said date.

It is true that in a given situation 'limitation' may be held to be a mixed question of law and fact and in such a case it would be appropriate for a court of law not to reject the plaint on that ground alone. However, in terms of Section 3 of Limitation Act 1963, the question of limitation is a jurisdictional question. If on the face of the petition, without referring to any other document, it is possible to arrive at the conclusion that the suit is barred by limitation, the question of considering the question of limitation along with other issues does not and cannot arise.

In this regard, we may notice the decision of the Apex Court in C. Natrajan v. Ashim Bai,(2007) 14 SCC 183, wherein it was held as under:

“10. The question which was raised before the learned trial Judge was different from the question raised before the High Court. Before the learned trial Judge, as noticed hereinbefore, the provisions of the

Limitation Act were brought in with reference to the identification of the property. It was not contended that the suit was barred by limitation in terms of Article 58 of the Limitation Act, 1963. The High Court, therefore, in our opinion, ex facie committed an error in arriving on the aforementioned finding. The scope of applicability of the Limitation Act vis-à-vis Order 7 Rule 11 of the Code of Civil Procedure has been considered in some recent decisions of this Court to which we may advert to.

11. In *Popat and Kotecha Property v. SBI Staff Assn.* this Court, inter alia, opined: (SCC p. 517, para 23)

23. Rule 11 of Order 7 lays down an independent remedy made available to the defendant to challenge the maintainability of the suit itself, irrespective of his right to contest the same on merits. The law ostensibly does not contemplate at any stage when the objections can be raised, and also does not say in express terms about the filing of a written statement. Instead, the word 'shall' is used clearly implying thereby that it casts a duty on the court to perform its obligations in rejecting the plaint when the same is hit by any of the infirmities provided in the four clauses of Rule 11, even without intervention of the defendant. In any event, rejection of the plaint under Rule 11 does not preclude the plaintiffs from presenting a fresh plaint in terms of Rule 13.

It was further opined: (SCC p. 517, para 25)

25. When the averments in the plaint are considered in the background of the principles set out in *Sopan Sukhdeo* case the inevitable conclusion is that the Division Bench was not right in holding that Order 7 Rule 11 CPC was applicable to the facts of the case. Diverse claims were made and the Division Bench was wrong in proceeding with the assumption that only the non-execution of lease deed was the basic

issue. Even if it is accepted that the other claims were relatable to it they have independent existence. Whether the collection of amounts by the respondent was for a period beyond 51 years needs evidence to be adduced. It is not a case where the suit from statement in the plaint can be said to be barred by law. The statement in the plaint without addition or subtraction must show that it is barred by any law to attract application of Order 7 Rule 11. This is not so in the present case.

12. However, we may notice that another Division Bench of this Court, in Balasaria Construction (P) Ltd. v. Hanuman Seva Trust stated the law thus: (SCC p. 661, para 8)

8. After hearing counsel for the parties, going through the plaint, application under Order 7 Rule 11(d) CPC and the judgments of the trial court and the High Court, we are of the opinion that the present suit could not be dismissed as barred by limitation without proper pleadings, framing of an issue of limitation and taking of evidence. Question of limitation is a mixed question of law and fact. Ex facie in the present case on the reading of the plaint it cannot be held that the suit is barred by time. The findings recorded by the High Court touching upon the merits of the dispute are set aside but the conclusion arrived at by the High Court is affirmed. We agree with the view taken by the trial court that a plaint cannot be rejected under Order 7 Rule 11(d) of the Code of Civil Procedure.

13. In the said decision, it may be placed on record, on the question as to whether Order 7 Rule 11(d) can be applied when a suit was filed on the premise that a suit is barred by limitation, this Court noticed: (Balasaria Construction case, SCC pp. 660-61, para 4)

4. This case was argued at length on 30-8-2005. Counsel appearing for the appellant had relied upon a judgment of this Court in N.V. Srinivasa Murthy v. Mariamma for the proposition that a plaint could be rejected if the suit is ex facie barred by limitation. As against this, counsel for the respondents relied upon a later judgment of this Court in Popat and Kotecha Property v. SBI Staff Assn. in respect of the proposition that Order 7 Rule 11(d) was not applicable in a case where a question has to be decided on the basis of fact that the suit was barred by limitation. The point as to whether the words 'barred by law' occurring in Order 7 Rule 11(d) CPC would include the suit being 'barred by limitation' was not specifically dealt with in either of these two judgments, cited above. But this point has been specifically dealt with by the different High Courts in Mohan Lal Sukhadia University v. Priya Soloman, Khaja Quthubullah v. Govt. of A.P., Vedapalli Suryanarayana v. Poosarla Venkata Sanker Suryanarayana, Arjan Singh v. Union of India wherein it has been held that the plaint under Order 7 Rule 11(d) cannot be rejected on the ground that it is barred by limitation. According to these judgments the suit has to be barred by a provision of law to come within the meaning of Order 7 Rule 11 CPC. A contrary view has been taken in Jugolinija Rajia Jugoslavija v. Fab Leathers Ltd., National Insurance Co. Ltd. v. Navrom Constantza, J. Patel & Co. v. National Federation of Industrial Coop. Ltd. and SBI Staff Assn. v. Popat & Kotecha Property. The last judgment was the subject-matter of challenge in Popat and Kotecha Property v. SBI Staff Assn. This Court set aside the judgment and held in para 25 as under: (SCC p. 517)

'25. When the averments in the plaint are considered in the background of the principles set out in Sopan Sukhdeo case the inevitable conclusion is that the Division Bench was not right in holding that Order 7 Rule 11 CPC was applicable to the facts of the case. Diverse claims were made and the Division Bench was wrong in proceeding with the assumption that only the non-execution of lease deed was the basic issue. Even if it is accepted that the other claims were relatable to it they have independent existence. Whether the collection of amounts by the respondent was for a period beyond 51 years needs evidence to be adduced. It is not a case where the suit from statement in the plaint can be said to be barred by law. The statement in the plaint without addition or subtraction must show that it is barred by any law to attract application of Order 7 Rule 11. This is not so in the present case.'

14. If the plaintiff is to be granted a relief of recovery of possession, the suit could be filed within a period of 12 years. It is one thing to say that whether such a relief can be granted or not after the evidence is led by the parties but it is another thing to say that the plaint is to be rejected on the ground that the same is barred by any law. In the suit which has been filed for possession, as a consequence of declaration of the plaintiff's title, Article 58 will have no application.

Also in Narne Rama Murthy V. R. Somasundaram, (2005) 6 SCC 614:

5. We also see no substance in the contention that the suit was barred by limitation and that the courts below should have decided the question of limitation. When limitation is the pure question of law and from the pleadings itself it becomes apparent that a suit is barred by limitation, then, of course, it is the

duty of the court to decide limitation at the outset even in the absence of a plea. However, in cases where the question of limitation is a mixed question of fact and law and the suit does not appear to be barred by limitation on the face of it, then the facts necessary to prove limitation must be pleaded, an issue raised and then proved.”

For the reasons aforementioned, the application filed by the respondent (M.A. No. 149 of 2010) is allowed and the petition is rejected.

In the facts and the circumstances of the case however, there shall be no order as to costs.

.....J
(S.B. Sinha)
Chairperson

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(G.D. Gaiha)
Member

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