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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Date of decision: 20.08.2018*

+ CS(COMM) 280/2017

M/S. FAITH MERCANTILE PVT. LTD. Plaintiff
Through Mr. Rishabh Gulati, Adv.

versus

M/S SIMBHAOLI SUGARS LTD. & ORS Defendants
Through Ms.Suneha Jain, Adv.

CORAM:
HON'BLE MR. JUSTICE JAYANT NATH

JAYANT NATH, J.(ORAL)

OA No. 166/2017

1. This appeal is filed on behalf of defendants No. 2 and 3 for setting aside the order dated 16.11.2017 passed by the Joint Registrar dismissing the application of defendants No. 2 and 3/appellants under Order 1 Rule 10 CPC.
2. The plaintiff has filed the present suit for recovery of Rs.5,96,83,224/-. It has been pointed out in the plaint that purchase orders were issued by the defendants and a High Sea Sales Agreement was executed between the parties in 2012. The plaintiff had supplied the goods and issued bills/invoices. Part payment on account of this has been received by the plaintiff. C Forms have been issued by the defendants confirming the receipt of goods. Balance payment remains payable. Hence, the present suit.
3. The plaintiff in the plaint also impleaded defendants No.2 and 3, the

Director and the Managing Director of defendant No.1. Hence, defendants No.2 and 3 filed the present application under Order 1 Rule 10 CPC seeking to delete them from the array of the parties. By the impugned order the Joint Registrar has dismissed the said application of defendants No.2 and 3.

4. A perusal of the impugned order dated 16.11.2017 would show that the learned Joint Registrar noted that the suit is against defendant No.1 Company and its Director and Managing Director who have been impleaded as defendants No. 2 and 3. The impugned order notes the averments made in the plaint that defendants No. 2 and 3 and their representatives on behalf of defendant No. 1 used to approach the plaintiff from time to time at its Delhi Office. The plaintiff has also averred that on the assurance of defendants No.2 and 3, the plaintiff had been dealing with defendant No.1 for the last 10 years. There are specific and categorical assertions/averments in the plaint against defendants No. 2 and 3. It is also stated that defendants No. 2 and 3 are responsible for managing the day to day affairs of the company and thus, they cannot escape from their liability of making the payment to the plaintiff for the goods supplied to defendant No. 1 on their instructions. The High Sea Sales agreement Dated 05.06.2012 is also said to have been signed by defendant No. 2 on behalf of defendant No. 1. Hence, the application filed by defendants No. 2 and 3/the appellants under Order 1 Rule 10 CPC was dismissed.

5. I have heard learned counsel for the parties.

6. Learned counsel appearing for the plaintiff/respondent has reiterated his pleas that there are averments against defendants No. 2 and 3 in the plaint and hence the impugned order has to be sustained.

7. Both sides have relied upon the judgment of this court in *Tristar*

Consultants vs. M/s. Vcustomer Services India P. Ltd. & Anr., MANU/DE/4031/2013, decided on 05.03.2007 in CRP No. 365/2006. This court had held as follows:-

“19. It is settled law that a company is a juristic person. Therefore, a company has to act through a living human being. Collectively, decisions on behalf of the company, are taken by the board of directors of a company. An individual director has no power to act on behalf of a company of which he is a director, unless there is a specific resolution of the board of directors of the company giving specific power to him/her, or, where the articles of company confer such a power.

20. Directors of companies have been described as agents, trustees or representatives of the company because of the fact vis-a-vis the company they act in a fiduciary capacity. They perform acts and duties for the benefit of the company. Thus, directors are agents of the company to the extent they have been authorized to perform certain acts on behalf of the company.

21. But directors of a company owe no fiduciary or contractual duties or any duty of care to third parties who deal with the company.

22. This distinction has been ignored by learned counsel for the petitioner.

23. Directors of a company are referred to as agents of the company in the context of their fiduciary duty to the company and therefore if they derive any personal benefit while purporting to act on behalf of the company, they will be liable to the company and its shareholders. But the directors cannot be treated as acting as agents of the company, in the conventional sense of an agent, vis-a-vis third parties.

24. As conventionally understood, a person acts as an agent for a principal and represents the principal before third parties. Such contracts which are concluded by the agent on behalf of his

principal with third parties would bind the principal to the third party.

25. Section 230 of the Indian Contract Act 1872 reads as under:-

“230. Agent cannot personally enforce, nor be bound by, contracts on behalf of principal:- 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.

Presumption of contract to contrary.- Such a 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.”

26. A perusal of Section 230 of the Indian Contract Act 1872 shows that unless an agent personally binds himself, an agent is not personally liable for contracts entered into by him on behalf of his principal.

27. I may note an exception. The exception is that where an agent has contracted on behalf of a principal who is unnamed and undisclosed, on properly constituted pleadings and on so establishing, such an agent who acts on behalf of a undisclosed principal may be personally liable for a contract entered into by him.

28. To interpret the law as is sought to be projected by the petitioner would mean negation of the concept of a company being limited by its liability as per the memorandum and articles of association of the company. Other than where directors have made themselves personally liable i.e. by way of guarantee, indemnity etc. liabilities of directors of a company, under common law, are confined to cases of malfiescence and

misfeasance i.e. where they have been guilty of tort towards those to whom they owe a duty of care i.e. discharge fiduciary obligations. Additionally, qua third parties, where directors have committed tort. To the third party, they may be personally liable.

29. For example by making false representations about a director induces a third party to advance a loan to the company. On proof of fraudulent misrepresentation, a director may be personally liable to the third party.

30. But this liability would not flow from a contract but would flow in an action at tort. The tort being of misrepresentation of inducement and causing injury to the third party having induced the third party to part with money.”

8. In *Mukesh Hans & Anr. v. Smt.Uma Bhasin & Ors.*, RFA 14/2010, decided on 16.08.2010, this court held as follows:

“11. It is equally well settled that a Director of a Company though he owes a fiduciary duty to the Company, he owes no contractual duty qua third parties. There are, however, two exceptions to this rule. The first is where the Director or Directors make themselves personally liable, i.e., by execution of personal guarantees, indemnities, etc. The second is where a Director induces a third party to act to his detriment by advancing a loan or money to the Company. On the third party proving such fraudulent misrepresentation, a Director may be held personally liable to the said third party. It is, however, well settled that this liability would not flow from a contract, but would flow in an action at tort, the tort being of misrepresentation and of inducing the third party to act to his detriment and to part with money.”

9. Hence, the directors of the company are agents, trustees or representatives of the Company. Under Section 230 of the Indian Contract Act, unless an agent personally binds himself, an agent is not personally

liable for the contracts entered by him on behalf of his principal. Similarly, personal liability of a director would only arise where he makes a false averment regarding the company and induces a third party to advance a loan/money to the company. It is only on proof of fraudulent misrepresentation that a director may be personally liable to a third party. In that case, there would not be a liability under the contract but it would be an action in tort.

10. A perusal of the plaint here would show that there is no such allegation being made against defendants No. 2 and 3. The plaint merely narrates facts and events which the said defendants No. 2 and 3 have undertaken as agent/directors of the defendant Company.

11. In my opinion, defendants No. 2 and 3 are neither necessary nor proper parties for adjudication of the disputes.

12. According I set aside the impugned order and allow the present application.

13. Defendants No. 2 and 3 are deleted from the array of parties.

14. The appeal stands disposed of.

IA No. 13544/2017

In view of the above order, the present application is infructuous.

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List for framing of issues on 29.11.2018.

JAYANT NATH, J

AUGUST 20, 2018

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