

(2009) 07 CAL CK 0109

In the Calcutta High Court

Case No : G.A. No. 119 of 2007 and C.S. No. 311 of 2006

Amrita Bazar Patrika Ltd. and Others

APPELLANT

Vs

Jayanta Sengupta and Others

RESPONDENT

Date of Decision : 29-07-2009

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 10

Citation : (2009) 07 CAL CK 0109

Hon'ble Judges : Indira Banerjee, J

Bench : Single Bench

Advocate : Pratap Chatterjee, Mr. Surojit Nath Mitra, Mr. Ashis Chakravarty and Mr. Amitava Ghosh, for the Appellant; S.N. Mookerjee and Mr. Ratnanko Banerjee for the Plaintiff/Respondents, Mr. Ranjan Deb and Mr. Arijit Banerjee for the Defendant No. 5, for the Respondent

Final Decision : Allowed

Judgement

Indira Banerjee, J.—This application u/s 10 of the Code of Civil Procedure, 1908 is for stay of the suit being C.S. No.311 of 2006.

2. The petitioners, being the defendants in the suit claim to have been appointed Directors of the plaintiff No.1, Amrita Bazar Patrika Pvt. Ltd. at an extraordinary general meeting of the plaintiff No.1 held on 3rd November, 2006. It is alleged that the erstwhile Directors of the plaintiff No.1, that is, plaintiff Nos.2 to 4 were removed in that extra ordinary general meeting.

3. By a letter dated 4th November, 2006, purported to be written on behalf of the plaintiff No. 1, the plaintiff Nos. 2 to 4 were informed of their alleged removal from the Board of Directors of the plaintiff No.1, requested to make over all the records/documents of the plaintiff No.1 to its present Board of Directors and further requested not to act on behalf of and/or in the name of the plaintiff No.1.

4. On the allegation that, in spite of receipt of the said letter, the plaintiff Nos.2 to 4 wrongfully and illegally continued to hold themselves out to be the Directors

of the plaintiff No.1, the plaintiff No.1 along with its single largest shareholder Amrita Media Pvt. Ltd. filed a suit being C. S. No.302 of 2006 in this Court impleading inter alia the plaintiff Nos.2 to 4 as defendants and praying for the following reliefs:

- "a) Decree declaring that the plaintiff No.1 is entitled to be represented through its present Board of Directors mentioned in paragraph 21 above;
- b) Perpetual injunction restraining the defendants and each one of them from in any manner representing and/or acting and/or holding out themselves to be the directors of the plaintiff No.1 company in any manner whatsoever;
- c) Perpetual injunction restraining the defendants and each one of them either by themselves or through their respective servants, agents and/or assigns from in any way dealing with and/or transferring and/or alienating and/or encumbering any of the properties belonging to the plaintiff No.1 including the said premises being premises No.41A, Acharya Jagadish Chandra Bose Road, Kolkata - 700 017;
- d) Mandatory injunction commanding the defendants and each one of them to forthwith hand over to the present Board of Directors of the plaintiff No.1 as mentioned in paragraph 21 above all the records including statutory records and other documents, bank statements, cheque books, bank accounts and the common seal of the company and/or any other documents to assets of the company lying with them;
- e) Receiver;
- f) Temporary injunction;
- g) Attachment;
- h) Costs;
- i) Further and/or other reliefs."

5. The said suit was filed by the plaintiff No. 1 through the Directors allegedly appointed on 3rd November, 2006 and Amrita Media Private Ltd. on 23rd November, 2006 on their own behalf and in their representative capacity on behalf inter alia of all shareholders of the plaintiff No.1 and the legal heirs and representatives of deceased shareholders of the plaintiff No.1, with leave under Order 1 Rule 8 of the Code of Civil Procedure, 1908. An interlocutory application being - G. A. No.3591 of 2006 was also filed in the said suit, in which diverse interim orders were, from time to time, passed.

6. According to the petitioners as a counterblast to the said suit instituted by the plaintiff No.1 and its single largest shareholder, the plaintiffs filed the suit being C.S. No.311 of 2006, praying for the following reliefs:

- "a) Declaration that the public notification dated 13th November, 2006 published in the "Business Standard" on 13th November, 2006 is illegal and void;

- b) Decree for declaration that the alleged extraordinary general meeting held on 3rd November, 2006 and resolutions passed thereat are illegal, null and void;
- c) Decree for perpetual injunction restraining the defendants and their servants and agents from acting on the basis of the purported extra ordinary general meeting;
- d) Decree for delivery up and cancellation of the letter dated 4th November, 2006 issued by one of the defendants as directors of the plaintiff No.1 being annexure "L" herein;
- e) Decree for perpetual injunction restraining the defendant Nos. 1 to 4 from themselves out as Directors of plaintiff No.1 and/or representing themselves as directors of the plaintiff No.1;
- f) Decree for perpetual injunction restraining the defendant Nos.1 to 4 and their servants or agents from acting or taking any steps for or on behalf of the plaintiff No.1;
- g) Decree for delivery up and cancellation of the notice dated 1st September, 2006, 3rd October, 2006 after being adjudged void;
- h) Decree for delivery up and cancellation of any minutes or resolutions of the alleged Extraordinary General Meeting held on 3rd November, 2006 after the same is adjudged void;
- i) Decree for declaration that the alleged Board Meeting and resolutions passed thereat on 4th November, 2006 are illegal, null and void;
- j) Decree for delivery up and cancellation of minutes of alleged Board Meeting of 4th November, 2006 so that the same may be cancelled, adjudged and void;
- k) Perpetual injunction restraining the defendants, their men, agents and assigns from relying on the alleged extra ordinary general meeting allegedly held on 3rd November, 2006 at Kalakunj or 4B, Shakespeare Sarani, Kolkata;
- l) Receiver;
- m) Injunction;
- n) Costs;
- o) Such further or other reliefs or reliefs."

7. An interlocutory application has also been filed in the said suit. According to the petitioners, granting of the interim reliefs that have been sought, would amount to granting of the final reliefs in the suit. For the purpose of this application, it is not relevant whether the interlocutory reliefs claimed by the plaintiffs should be granted or not.

8. The question is whether the issues in the suit, being C.S.No.302 of 2006 are directly and substantially in issue in the later suit being C.S. No-311 of 2006 of

which stay has been sought.

9. Mr. Surojit Nath Mitra, appearing on behalf of the petitioners, submitted that a perusal of the respective plaints in the earlier suit being C. S. No. C. S. 302 of 2006 and C.S. No.311 of 2006 would show that the issues in the two suits were really the same.

10. In the suit being C.S. No.302 of 2006, it is claimed that the plaintiff Nos.2 to 4 have been removed at the extraordinary general meeting of the plaintiff No.1 held on 3rd November, 2006 and orders have been sought restraining the said plaintiff Nos.2 to 4 from representing themselves as and/or holding themselves out to be the Directors of the plaintiff No.1.

11. In this suit, the plaintiffs have alleged that no extraordinary general meeting of the plaintiff No.1 was held on 3rd November, 2006 and as such no resolution, as alleged by the petitioners, could have been adopted on that day.

12. The plaintiffs have contended that the resolutions, which could never have been passed, since no meeting actually took place, are illegal, null and void and of no effect.

13. The main issue in both the suits is whether any extraordinary general meeting of the plaintiff No.1 was held on 3rd November, 2006 and if so whether any valid resolution was adopted at the aforesaid meeting. Once the aforesaid issue is decided, the decision would operate as res judicata in the subsequent suit.

14. In support of his submissions, Mr. Mitra cited the following decisions:

Manohar Lal Chopra Vs. Rai Bahadur Rao Raja Seth Hiralal, .

Challapalli Sugars Ltd. Vs. Swadeshi Sugar Supply Pvt. Ltd.,

Arun General Industries Ltd. Vs. Rishabh Manufacturers Private Ltd. and Others,

Shorab Merwanji Modi and Another Vs. Mansata Film Distributors and Another,

15. In Manohar Lal (supra) the Supreme Court held that the provisions of section 10 of the CPC were clear, definite and mandatory. The Court in which a subsequent suit had been filed was prohibited from proceeding with the trial of that suit in certain specified circumstances. The Supreme Court further held that where there was a special provision in the CPC for dealing with the contingency of two such suits being instituted recourse to the inherent powers of Court u/s 151 of the CPC would not be justified.

16. As held in Manohar Lal (supra) the provisions of section 10 do not become inapplicable even if the Court finds that the previously instituted suit is a vexatious suit or has been instituted in violation of the terms of a contract. The proposition that a Court in which a subsequent suit has been filed, is prohibited from proceeding with the trial of that suit in certain specified circumstances, is unexceptionable. The question is whether those special circumstances exist

warranting stay of C.S. No. 311 of 2006.

17. In Challapalli Sugars Ltd. (supra) a Division Bench of this Court held that when the subject matter in controversy in the two suits was the same, trial of the later suit was liable to be stayed u/s 10 of the Code of Civil Procedure, even though the reliefs may be based on different causes of action.

18. In A.G. Industries Ltd. v. Risabh Manufacturers (supra) a Division Bench of this Court held that the words "same parties" in section 10 of the CPC meant parties between whom the matter substantially in issue had arisen and had to be decided. For the purpose of the said section complete identity of parties was not necessary and it was enough if there was substantial identity of parties:

19. In Shorab Merwanji Modi (supra) too, a Division Bench of this Court held that for the purpose of section 10 of the CPC complete identity of either the subject matter or the parties was not required.

20. Mr. S.N. Mookerjee appearing on behalf of the plaintiffs submitted that the test u/s 10 of the CPC for stay of trial of a subsequent suit was, whether the whole of the subject matter in both the proceedings were identical.

21. Mr. Mookerjee submitted that the cause of action in the two suits being C.S.302 of 2006 and C.S. 311 of 2006 are entirely different and as such the subsequent suit could not be stayed.

22. Relying on the judgment of the Supreme Court in National Institute of Mental Health and Neuro Sciences Vs. C. Parameshwara, Mr. Mookerjee submitted that the object of section 10 was to prevent exercise of concurrent jurisdiction to simultaneously trying two parallel suits between the same parties in respect of the same matter in issue.

23. Mr. Mookerjee submitted that both the suits were before this Court and the same could be conveniently tried together. There could thus be no question of conflict of judicial decisions.

24. Mr. Mookerjee cited the judgment of the Supreme Court in British Indian Corporation Ltd. Vs. Rashtraco Freight Carriers, where the Supreme Court held that when an earlier suit had been filed for recovery of dues said to be payable for arrears of transportation charges, the subsequent suit for recovery of the very same goods detained by the other party could not be stayed u/s 10 of the Code of Civil Procedure.

25. In British Indian Corporation v. Rashtraco Freight Carriers (supra) the Supreme Court reiterated the proposition that section 10 of the CPC envisaged that no Court was to proceed with the trial of a suit, where the matter in issue was directly and substantially in issue in a previously instituted suit between the same parties." The Supreme Court, however, found on facts that there was direct and substantial common issue in the two suits in question.

26. Mr. Mookerjee next cited Hanspal Singh Bhinder v. University of Delhi,

reported in AIR 1997 Del. 232 where the Delhi High Court held that a subsequent suit u/s 120 of the Trade and Merchandise Marks Act for injunction against an action for infringement of trade mark could not be stayed by reason of an earlier suit complaining of infringement of trade mark instituted by a registered proprietor as there was no substantial identity of the matters in issue.

27. In the aforesaid case, the Court found as follows:

"A suit filed u/s 120 of the CPC". (sic section 120 of the Trade and Merchandise Marks Act) would be liable to be dismissed the minute the defendant has been able to satisfy the Court that his trade mark was registered and the act of the plaintiff (occasioning the threat) amounts to infringement of such trade mark. There may be several other relevant pleas and defences legally permissible in a trade mark action but they will be beyond the scope of inquiry in a suit u/s 120. Once the Court is satisfied that the threats were neither irresponsible nor unjustified they cease to be "injury" so far as section 120 is concerned and the person threatened cannot be said to be a person aggrieved. The action u/s 120 would be liable to be dropped. The parties shall be left free to seek adjudication of their rights in an otherwise duly constituted suit.

Section 10 of the CPC contemplates substantial identity of matter in issue in the two suits. It is not the identity of main issue or all issues but the identity of matter in issue which is the determining test. The decision in one suit must non-suit the other suit - this must be the phraseology of answer, to win the question whether the matter in issue in the two suits is directly and substantially the same. A suit u/s 120 does not so answer the said question as to dictate stay of a suit complaining of infringement of trade mark instituted by a registered proprietor or registered user."

28. Mr. Mookerjee next submitted that the parties to the suit were different. The case of the plaintiffs in C.S. No.311 of 2006 was of collusion and conspiracy between the defendants in the said suit. If the case of collusion and conspiracy were to succeed, the persons alleged to have colluded, that is, the defendant Nos.1 to 6 would have to be parties. The defendant Nos. 1 to 4 are, however, not parties to the earlier suit being C.S. No.302 of 2006 and the decision in the said suit would not non-suit the plaintiffs.

29. In reply, Mr. Mitra reiterated that the parties to the two suits need not be identical. Mr. Mitra further submitted that the first suit being C.S. No.302 of 2006 having been instituted after obtaining leave under Order 1 Rule 8 of the Code of Civil Procedure, 1908, and necessary advertisements having been published, the decision if any, in the suit would be binding on all its shareholders including the plaintiff No.5.

30. Mr. Mitra rightly submitted that even though the defendant Nos. 1 to 4 were not directly parties to the first suit being C.S. No.302 of 2006, yet any decision in the first suit on the validity of the extraordinary general meeting held on 3rd November, 2006 and there appointment therein would be binding on them.

Moreover, the allegation in the suit of collusion and conspiracy of the defendant Nos.5 and 6, would also have to be decided for adjudicating the validity of the extraordinary general meeting held on 3rd November, 2006, which is in issue in the first suit.

31. The object underlying section 10 of the CPC is to prevent Courts of concurrent jurisdiction from simultaneously trying two parallel suits in respect of the same matter in issue, to avoid conflicting findings.

32. As held by the Supreme Court in *National Institute of Mental Health & Neuro Sciences v. C. Parameshwara* (supra) the fundamental test to attract section 10 is whether the final decision in the previous suit would operate as *res judicata* in the subsequent suit. Section 10 would apply if the decision in the previous suit would non-suit the subsequent suit.

33. For attracting the bar of section 10, it is not necessary that the reliefs prayed for in both the suits should be identical. Nor is it necessary that the causes of action should be identical. Even if the reliefs are based on different causes of action, the later suit should be stayed if the subject matter in controversy is the same as held in *Shorab Merwanji Modi* (supra) and in *Challapalli Sugar Ltd. v. Swadeshi Sugar Supply Pvt. Ltd.* (supra). The subject matter of the subsequent suit must be covered by the previously instituted suit.

34. For the purpose of operation of section 10 it is also not necessary that all the parties on either side should be the same in both the suits. It is enough if there is substantial identity of the parties as held in *Shorab Merwanji Modi v. Mansata Film Distributors* (supra), cited by Mr. Mitra. The view has been reaffirmed in *A.G. Industries Ltd. v. Risabh Manufacturers* (supra).

35. In *Shorab Merwanji Modi v. Mansata Film Distributors* (supra), a Division Bench of this Court held as follows:

"The fact that one is a suit under the agreements and the other is a suit *de hors* the agreements does not make a substantial identity of the subject-matter *per se* impossible. The basis of the defence in the Bombay suit and the basis of the claim in the Calcutta suit appear to be both fraudulent misrepresentation and if the defence succeeds in Bombay, nothing will be left of that suit and, similarly, if succeeds in Calcutta, this suit will be practically decided, the only, enquiry remaining being an enquiry as to the damages claimed in addition to a refund of the money paid. Similarly, again, if the defence falls in the Bombay suit, the basis of the Calcutta suit will be wholly destroyed. In my view, the principal matter in issue in the Calcutta suit is directly and substantially in issue in the Bombay suit, which is a suit previously instituted and that an unnecessary duplication of proceedings with the possibility of conflicting decisions being rendered will occur, if the Calcutta suit is not stayed.

It remains to refer to one other matter. The learned Judge has also given it as a reason for refusing to stay the suit before him u/s 10 that there is an additional

party in that suit. That, by itself, does not make section 10 inapplicable. It is true that the section speaks of "same parties", but it has been held that the "same parties" mean "the parties as between whom the matter substantially in issue has arisen and has to be decided." Complete identity of either the subject-matter or the parties is not required."

36. A perusal of the complaints filed in the two suits clearly reveals that the matters directly and substantially in issue in both the suits are, whether any extraordinary general meeting was at all held on 3rd November, 2006, if so, whether the meeting was in accordance with law, whether any resolutions were taken at the meeting and whether the decisions, if any, taken were legally valid.

37. In deciding the earlier suit being C.S. No.302 of 2006 the Court would be required to adjudicate whether any extraordinary general meeting was held on 3rd November, 2006 and if the Court found that such a meeting had been held, it would be required to adjudicate whether the meeting was in accordance with law, whether any valid resolution could have been adopted at the meeting and whether any resolution had in fact been adopted at the meeting removing the plaintiff Nos.2 to 4 and appointing new Directors in their place.

38. The plaintiffs are right in pointing out that the causes of action for the two suits were different. The cause of action of the plaintiffs in C.S. 302 of 2006 was the alleged wrongful failure of the plaintiff Nos.2 to 4 in this suit, being defendants in the said suit to make over documents and records to the present Board of Directors and to step down from the management of the plaintiff No.1.

39. The alleged cause of action of the plaintiff's for the suit being C.S. No.311 of 2006 is based on the alleged wrongful acts of the defendants therein in holding out that an extraordinary general meeting had been held and that resolutions had been taken for their removal from the Board of Directors.

40. It, however, makes no difference that the cause of action in the suits is different. The main issue in the two suits is substantially and directly the same. It is reiterated, at the cost of repetition that the issue is whether any meeting was held and whether any resolution was validly adopted at the meeting. If the aforesaid issues are decided in favour of the plaintiffs in the earlier suit, the subsequent suit would necessarily fail.

41. It is also not really material that the defendant Nos. 1,2,3 and 4 of the subsequent suit are not parties to the earlier suit. There may be allegations of collusion in the subsequent suit. However, the reliefs claimed are squarely based on issues which are also the main issues in the earlier suit and any decision thereon would non-suit the plaintiffs in the subsequent suit.

42. The application is thus allowed. The trial of the suit being C.S. No.311 of 2006 is stayed.

Urgent certified copy of this order, if applied for, be supplied to the parties subject to compliance with all requisite formalities.