

(2009) 12 DEL CK 0003
In the Delhi High Court
Case No : CM (M) No. 807 of 2008

Ansal Properties and Infrastructure Ltd. and Another	APPELLANT
Vs	
Col. Y.L. Sud	RESPONDENT

Date of Decision : 01-12-2009

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 11 Rule 21, Order 22 Rule 10, Order 4 Rule 1(1), Order 4 Rule 1(2), Order 4 Rule 1(3)
Companies Act, 1956 — Section 21
Constitution of India, 1950 — Article 227
Limitation Act, 1963 — Section 5

Citation : (2010) 6 RCR(Civil) 645

Hon'ble Judges : Rajiv Sahai Endlaw, J

Bench : Single Bench

Advocate : Prem Kumar and Sharad C. Jha, for the Appellant; K.K. Bhuchar, Pushkar Sood and Kanchan Bala, for the Respondent

Judgement

Rajiv Sahai Endlaw, J.—This petition under Article 227 of the Constitution of India has been preferred by the plaintiff in a suit before the trial court and with respect to the order dated 27th May, 2008 non-suiting the plaintiff and consigning the file to the record room. The petitioner/plaintiff has been non-suited on an application of the respondent/defendant in the suit, under Order 4 Rule 1(3) of the CPC.

2. The petitioner instituted the suit from which this petition arises for the relief of injunction restraining the respondent from interfering with the possession and use of the petitioner of an immovable property.

3. The Counsel for the respondent at the outset took a preliminary objection as to the very maintainability of this petition. He contended that the suit before the trial court had been preferred by M/s Ansal Properties & Industries Ltd; however the petition before this Court is preferred by M/s Ansal Properties & Infrastructure Ltd. He contends that the petitioner herein is not a party to the suit from which the petition arises and there is no explanation therefore in the

body of the petition. The attention of the Counsel has been invited to the memo of parties, where it has been stated that the said M/s Ansal Properties & Infrastructure Ltd. was formerly known as Ansal Properties & Industries Ltd. The Counsel however contends that inspite of the change of name having been alleged to be effected long back and during the pendency of the suit before the trial court, no application was moved in the trial court for such change/substitution.

4. Change of name of a corporate entity in terms of Section 21 of the Companies Act is not a case of substitution within the meaning of Order 22 Rule 10 of the CPC inasmuch as there is no assignment or transfer or succession and no change of the entity. The petitioners have before this Court filed the certificate of change of name issued by the Registrar of Companies which shows that the name of M/s Ansal Properties & Industries Ltd. stands changed to Ansal Properties & Infrastructure Ltd. The Counsel for the petitioner has also drawn attention to the order dated 22nd February, 2007 in FAO (OS) 454/2006 of this Court arising from another legal proceeding between the parties relating to the same property. A perusal of the said order shows that a similar plea was taken by the respondent herein before the Division Bench of this Court also and was negated. In the circumstances, the preliminary objection of the Counsel for the respondent is vexatious and has no force.

5. The Counsel for the respondent contends that on the original plaint, there is an endorsement of the reader of the trial court, pursuant to the order for the office to check, that the original documents relied upon by the plaintiff had not been brought to the court. He further contends that the respondent on 23rd February, 2005 filed an application before the trial court averring that the photocopies of the documents filed by the petitioner in support of its claim of title and possession of the suit property do not inspire confidence and for direction to the petitioner to file the original agreement to sell, sale deed, power of attorney on the basis of which sale deed was executed and on the basis whereof the petitioner so claimed title and possession of the property; the petitioner on 25th October, 2005 filed a reply to the said application contesting the same. The respondent thereafter filed an application under Order 4 Rule 1(3) of the CPC for non-suiting the plaintiff for having not filed the original documents before the court.

6. Both the aforesaid two applications were taken up for consideration on 7th May, 2008 when the court noted the contention of the Counsel for the petitioner that there was no necessity of filing the original documents on the record. The court however observed that the petitioner inspite of repeated opportunity had not filed any reply to the application of the respondent under Order 4 Rule 1(3) of the CPC and further ordered that in view of the fact that the petitioner is relying on various sale deeds, agreement to sell, GPA etc which are mentioned in the list of documents of which photocopies have been filed on record, one last opportunity was granted to the petitioner to file the originals on record and it

was further ordered that failing which the plaint shall be deemed to be non instituted in accordance with Order 4 Rule 1(3) of the CPC.

7. It is further the contention of the Counsel for the respondent that the petitioner inspite of the order aforesaid did not file the documents and on the contrary filed an application for review of the said order. The trial court on 27th May, 2008 i.e. in the order impugned in this petition noted that-

- i. It is not the case of the petitioner that he may be allowed to give secondary evidence;
- ii. that the Counsel for the petitioner had stated that the originals are with some financial institution but the name of the financial institution was not informed;
- iii. that last opportunity had been granted to the petitioner; that the petitioner had alongwith his application for review filed certified copies of the documents;
- iv. having held so, the trial court held that the petitioner has been unable to satisfy the court as to where the originals were and had given an evasive response.

The trial court dismissed the application of the petitioner for review and allowed the application of the respondent under Order 4 Rule 1(3) of the CPC and further observed "in view of the above the suit is deemed to be non instituted".

8. The Counsel for the petitioner has contended that the petitioner had under cover of list of documents dated 8th August, 2005 filed the original documents and had otherwise filed the photocopies of the documents and as noted by the trial court also had, filed certified copies of the sale deed relied upon by the petitioner.

9. However, before entering into the aforesaid factual matrix, since the order of non suiting the petitioner under Order 4 Rule 1(3) of the CPC is found by this Court to be novel, first the legality of the said order shall be tested on the premise that the petitioner had not filed the original documents.

10. I have inquired from the Counsel for the respondent whether there is any precedent of such non suiting of a plaintiff under Order 4 Rule 1(3) of the CPC. He candidly states that he has not been able to find any. Since the said provision of law is not one which is often invoked or dealt with by the court, it is deemed expedient to set out the same herein below.

1. Suit to be commenced by plaint.- (1) Every suit be instituted by presenting a plaint in duplicate to the court or such officer as it appoints in this behalf.

(2) Every plaint shall comply with the rules contained in Orders VI and VII, so far as they are applicable.

(3) The plaint shall not be deemed to be duly instituted unless it complies with the requirements specified in Sub-rules (1) and (2).

Sub-rule (3) of aforesaid has been inserted vide Amendment Act 1999, w.e.f. 2002.

11. A reading of the aforesaid provision would immediately show that Sub-rule (3) under which the trial court has acted does not empower the court to non-suit the plaintiff or dismiss the suit or reject the plaint.

In my view, the aforesaid provision does not give any power to the court to dismiss the suit as has inter alia been done by the trial court, though termed as "non-suited"

Wherever the legislature desired to empower the courts to dismiss the suit or reject the plaint, it has been expressly so provided. Reference can be made to Order 7 Rule 11, Order 8 Rule 10, Order 9, Order 11 Rule 21 etc. of the CPC. The language of Sub-rule (3) aforesaid is distinct. It does not say that the court shall dismiss the suit or that the court shall reject the plaint. All that it states is that the plaint shall not be deemed to be duly instituted unless compliance with the requirement mentioned therein. In my view, the only impact of Order 4 Rule 1(3) can be qua the date of institution of the suit. If the defendant is able to show to the court that the plaint as instituted did not comply with the Rules contained in Orders 6 and 7 of the CPC as far as applicable as mentioned in Order 4 Rule 1(2), it is open to the defendant to contend that the plaint shall be deemed to be instituted only after the said defects had been complied with. The notes on Clauses of the CPC (Amendment) Bill, 1999 also provide that with a view to dispel the doubts when a suit is regarded to have been instituted, Clause 14 inserts a new Sub-rule (3) to provide that the plaint shall not be deemed to be duly instituted unless it complies with the requirements specified in Sub-rules (1) & (2).

12. Instances are plenty where the non-compliance with the various requirements of Orders 6 and 7 have been held to be a mere irregularity capable of being cured and not fatal to the institution of the suit. The courts have repeatedly held that if there is any defect in the institution of the suit, an opportunity has to be given to the plaintiff to cure the said defect and only when the plaintiff, inspite of opportunity, fails to cure the defect would the court be empowered to reject the plaint. This court has held in *Rajeshwarhwa Vs. Sushma Govil*, that even where the suit is found to have been instituted and the plaint signed and verified by a person not duly authorized by the plaintiff, it is open to the plaintiff to subsequently ratify the said action. Thus to my mind there is no power in the court to dismiss the suit or reject the plaint under the aforesaid provision.

13. Order 4 aforesaid also does not provide any consequences. Wherever else in CPC, a provision is made for dismissal of the suit, rejection of the plaint or withdrawal of the suit or the like, a consequential provision is found for the right of the plaintiff to sue or being not entitled to sue on the same cause of action. There is no such provision in Order 4. The only logical conclusion is that Order 4

is not actionable per se and is only a provision affecting the date on which the suit shall be deemed to have been instituted i.e., for the purposes of limitation only.

14. Though the suit in the present case was instituted in the court of the Senior Civil Judge, Delhi but I may noticed that the Original Side Rules of the High Court of Delhi provide for scrutiny of the plaint and for grant of time to the plaintiff to remove the defects/objections, if any, in institution. There are a number of judgments which have held that delays in re-filing of the suit are not to be governed by the provisions of the Limitation Act and power of the court to condone the delay in re-filing is much wider and more liberal than the power otherwise to condone the delay u/s 5 or under any other provisions of the Limitation Act. Reference in this regard can be made to Indian Statistical Institute Vs. Associated Builders and Others,

The practice directions issued by the High Court for Civil Courts in Delhi contain a para materia provision in direction No. 9.

15. The Counsel for the respondent/defendant has next drawn attention to the Order 7 Rule 14 of the CPC. He contends that under Sub-rule (1) thereof, the plaintiff is required to only file copies of the documents but is required to produce the original documents for inspection of the court. He has contended that the plaintiff in the present case failed to do so inspite of express objection of the reader of the court. However, the fact remains that notwithstanding the said objection, the court nevertheless proceeded to admit the plaint and also to issue notice thereof to the defendant. This circumstance would lead to the inference that the court waived the requirement even, if any, of production of original documents.

16. I have recently in Aktiebolaget Volvo and Others Vs. R. Venkatachalam and Another, held with reference to the various provisions of the CPC and the Indian Evidence Act that there is no requirement whatsoever for the parties to file the original documents in the court and the only requirement is for production i.e., giving inspection of the originals to the opposite party, if so required and that too at the stage of admission/denial of documents.

17. Order 7 Rule 14, Sub-rule (3) is as under:

(3) A document which ought to be produced in Court by the plaintiff when the plaint is presented, or to be entered in the list to be added or annexed to the plaint but is not produced or entered accordingly, shall not, without the leave of the Court, be received in evidence on his behalf at the hearing of the suit.

The aforesaid provision provides the consequences of non-production/non filing of documents. The only consequence provided is that the plaintiff is barred from proving the documents save with the leave of the court. I have repeatedly put to the Counsel for the respondent/defendant that if, according to him, on non production of the original documents, the suit is to be dismissed under Order 4

as has been done in the present case, the occasion for applicability of Sub-rule (3) aforesaid would not arise. Though, the Counsel could not give any reply but subsequently contended that per contra if it is to be held that notwithstanding non production of the original documents, the suit is to proceed and the court has the power to subsequently also permit the plaintiff to produce the documents, the same would be in negation of Order 4. The said contention of the Counsel for the respondent/defendant is not tenable in view of the interpretation of Order 4 given hereinabove i.e. with the only effect thereof is on the date of the institution and not on the factum of institution or on the maintainability of the suit.

18. The Counsel for the respondent/defendant has also contended that though the Supreme Court has held various provisions of the CPC couched even in mandatory form to be directory for the reason of the consequence of default having been provided but there is no consequence provided in Order 4. This is again erroneous. As aforesaid the consequences of not filing of the documents is provided in Order 7 Rule 14(3) and the only other consequence can be as to the date of institution.

19. The Counsel for the petitioner/plaintiff has also drawn attention to Vidyawati Gupta and Others Vs. Bhakti Hari Nayak and Others, . In that case also the Division Bench of the High Court relying on Order 4 Rule 1(3) had held the suit to have been not validly instituted for the reason of the plaint being not accompanied with an affidavit in support of the contents thereof and had vacated the interim order in the suit on that ground with liberty to the plaintiff to apply afresh after the irregularities in institution of the suit had been cured. The Supreme court held that the requirements of Orders 6 and 7 of the CPC are procedural in nature and any omission in respect thereof will not render the plaint invalid and that such defect or omission will not only be curable but will also date back to the presentation of the plaint. The Counsel for the petitioner/plaintiff has correctly contended that the said judgment applies on all fours to the facts of the present case and in view thereof the effect of Order 4 Rule 1(3) is not res integra.

20. The observations of the trial court as to the petitioner/plaintiff having not applied for secondary evidence are also found to be erroneous. I have recently in Shri Prem Chandra Jain (Deceased) represented by LR's Shri Bharat Bhushan Jain, Advocate and Others Vs. Shri Sri Ram (Deceased) and Others, deprecated the practice of filing applications for permission to lead secondary evidence. There is no basis in law for the said practice. The documents are permitted to be proved by primary or by secondary evidence. If a party is desirous of proving the document by secondary evidence, it will have to, during the course of its evidence, lead evidence not only for laying foundation for reception of secondary evidence but also prove the document by secondary evidence as prescribed. The court merely on an application is not competent to decide whether to allow secondary evidence or not. Moreover, the issues had not been framed in the suit

and the question of the plaintiff seeking permission to lead secondary evidence did not arise.

21. I have also perused the trial court file summoned to this Court and find therein at least some of the original documents on the basis whereof the plaintiff claims title and possession of the property. I have found agreements to sell and possession receipts in original to have been filed by the plaintiff. The Division Bench of this Court has in *Asha M. Jain Vs. The Canara Bank and Others*, held that the courts have to take judicial notice of the practice prevalent in Delhi of transfer of properties on the basis of agreement to sell, power of attorney, Will etc and thus merely because the plaintiff had not filed any sale deed in its favour was not a ground for the trial court to dismiss the suit inasmuch as it was open to the plaintiff to prove through such agreement to sell, power of attorney, possession letter etc. that the title in the property stood transferred to the plaintiff. I also find the plaintiff to have filed on record certified copies of the two sale deeds with respect to the share in the property in favour of the plaintiff. It is not incumbent upon the plaintiff to file the original sale deeds in the court. Once the certified copy of a registered document has been filed, it is open to the plaintiff to prove the same even by summoning the copy with original signatures in the records of the concerned Registrar.

22. In the circumstances aforesaid, the petition is entitled to succeed. The order impugned in the petition is set aside and the suit is restored to its original position.

23. The question of costs remain. I find the action of the defendant of taking the plea under Order 4 of the CPC for dismissal of the suit to be farfetched and vexatious in view of settled legal position after the judgment in *Vidyawati Gupta (Supra)*. The defendant has thereby delayed the proceedings in the suit by over two years. Not only so, inspite of this Court at the commencement of the hearing itself expressing concerns to the Counsel with respect to the order impugned in the petition, the Counsel continued to urge the same without any success and without being able to meet the specific queries of the court as to the effect of Order 7 Rule 14(3) of the CPC. In the circumstances, I also impose costs of Rs. 5,000/- on the respondent/defendant and payable to the Counsel for the petitioner/plaintiff before the trial court.