

(2006) 07 PAT CK 0093

In the Patna High Court

Case No : Civil Revision No. 1353 of 2005

Ashok Kumar Choudhary

APPELLANT

Vs

Hindustan Petroleum Corporation Limited and Others

RESPONDENT

Date of Decision : 25-07-2006

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 10, Order 23 Rule 1, Order 23 Rule 1A, Order 33 Rule 1A, 107

Citation : (2006) 4 PLJR 49

Hon'ble Judges : Navaniti Pd. Singh, J

Bench : Single Bench

Advocate : Pushkar Narain Shahi, Ritesh Kumar No. 1 and Sanjeet Kumar Singh, for the Appellant; Rajeev Prakash, Binmita Sinha for Opp. Party Nos. 1 and 2, M/s Shashi Shekhar Dwivedi and Pramod Manbansh for Opp. Party No. 3, for the Respondent

Final Decision : Allowed

Judgement

Navaniti Pd. Singh, J.—This is an application by the plaintiff against an order by which the trial court has permitted the defendant No. 3 (Opposite party No. 3) to be transposed as plaintiff while rejecting the plaintiff's prayer for withdrawal of the suit, the impugned order being passed with reference to Order XXIII, Rule 1A and Order XXIII, Rule 1 CPC respectively. Mr. Shashi Shekhar Dwivedi, learned senior counsel has appeared on behalf of defendant No. 3-opposite party No. 3 before this Court. Mr. Pushkar Narain Shahi has appeared on behalf of plaintiff-petitioner and Mr. Rajeev Prakash has appeared for defendant Nos. 1 and 2, the oil company, being opposite party Nos. 1 and 2 before this Court.

2. It appears that the plaintiff-petitioner was appointed as an agent and dealer by defendant Nos. 1 and 2-Hindustan Petroleum Corporation Limited, pursuant to an agreement entered into between the plaintiff and defendant Nos. 1 and 2. The plaintiff was noticed regarding cancellation of his dealership on the ground that he had entered into the partnership agreement with defendant No. 3 in respect

of the dealership contrary to the agreement and in violation thereof. The petitioner contended that the so-called partnership was not his handiwork but fraudulently his signature was obtained by opposite party No. 3 (defendant No. 3).

3. The petitioner challenged this action of cancellation of dealership before this court in a writ petition which was withdrawn in order to file a suit. The present suit is the consequence thereof. The petitioner made defendant No. 3 a party, who claims to have entered into a partnership agreement with the plaintiff which the plaintiff had denied. The relief claimed in the suit was for setting aside the order of cancellation of dealership, restraining oil company from taking over the dealership and/or interfering with the working of the dealership and also for awarding cost for illegal interference and stoppage of dealership work as against the oil company. No relief whatsoever was sought as against defendant No. 3.

4. While the matter was pending, the plaintiff-petitioner wanted the matter the dispute as between him and the oil company to be referred for arbitration. It was referred for arbitration to defendant No. 1. Defendant No. 1 being represented through its Managing Director had difficulty in dealing with the arbitration and, as such, a request was made by defendant No. 1 to authorise the Managing Director to appoint a delegate to act on his behalf. This was rejected but subsequently allowed by this Court in a civil revision.

5. While the matter was pending, it appears that the oil company withdrew the order of cancellation of dealership of plaintiff-petitioner. An application was thus filed in the court below by the plaintiff to abandon the suit in view of the aforesaid fact. This was not opposed by defendant Nos. 1 and 2 the oil company and it was pointed out that on the basis of agreement reached between the parties if the plaintiff-petitioner wanted to withdraw the suit without reserving right to re-file, they would have had no objection. Defendant No. 3 objected to it and prayed for transposing him as a plaintiff in terms of Order 23, Rule 1(A) of the Code of Civil Procedure. By the impugned order the trial court has rejected the prayer of the plaintiff for withdrawal from the suit and has permitted the defendant No. 3 to be transposed as plaintiff.

6. On behalf of the petitioner it is submitted that the relief which was prayed for in the suit, by the plaintiff having been granted, no further relief was required to be granted. The suit had thus become infructuous for all practical purposes. In such a situation, transposing the defendant No. 3 as plaintiff would serve no purpose because if the defendant No. 3 was to prosecute the suit he would have to pray for a different distinct and new reliefs having no similarity to the relief that was originally prayed in the suit. In fact, it would virtually amount to a new suit altogether. By making defendant No. 3, a party to the suit, no right had accrued to defendant No. 3. There was no dispute inter se the defendants. Accordingly, refusal of permission to withdraw from the suit and simultaneous order for transposing defendant No. 3 as plaintiff was bad and unsustainable.

7. On the other hand Mr. Dwivedi learned senior counsel appearing for defendant No. 3, has submitted that the court has rightly permitted defendant No. 3 to be transposed as plaintiff, as this right was conferred on the court under Order XXIII, Rule 1A CPC and the court below has rightly exercised its power.

8. Coming to one other objection which was raised by Mr. Dwivedi appearing for defendant No. 3 that the order impugned though is a composite order there were two issues-one withdrawal from the suit and second transposition of party as such the petitioner cannot challenge the two orders in one revision application. In my view, it is not necessary to decide this issue for the simple reason that on consideration of facts I feel that the two issues are inter-linked and inter-dependent for the simple reason that Order XXIII, Rule 1A CPC permitting transposition comes into play only consequent to order for withdrawal from suit under Order XXIII, Rule 1.

9. The question of transposition of defendant would only come if the suit is abandoned by the plaintiff otherwise there is no question of transposing defendant No. 3 as plaintiff. If the plaintiff continues with the suit it would result in an anomaly for the simple reason that as consequent of agreement between the plaintiff and defendant Nos. 1 and 2 no relief is required to be granted as against defendant Nos. 1 and 2. If defendant No. 3 is transposed as plaintiff then it will be a suit where there will be two plaintiffs and no defendant. Therefore it must follow that a composite order of this nature has to be judged as a whole.

10. Mr. Dwivedi has placed reliance in the case of Basudeb Narayan Singh and Others Vs. Shesh Narayan Singh and Others, . This is a case which deals with both issues i.e. withdrawal from suit and transposition. No doubt withdrawal is a right of a litigant but in certain circumstances exceptions have been carved out where withdrawal cannot be permitted for simple reason where a party has taken advantage during the pendency of suit or by virtue of the suit pending, he cannot then be permitted to abandon the suit. But coming to the present case the situation is totally different. Here all reliefs which the petitioner wanted he has got. He has no further relief to seek. In the case of Sarguja Transport Service Vs. State Transport Appellate Tribunal, M.P., Gwalior and Others, while dealing Order 23, Rule 1 and the power of a person to withdraw the suit the Apex Court has held "that the law confers upon a man no rights or benefits which he does not desire." The plaintiff does not desire to proceed with the suit which had become infructuous by reason of relief having been granted by the concerned defendant itself. The law cannot force him to proceed with the suit. The plaintiff is the master of the suit.

11. Now coming to the question of transposition that question is relevant only if withdrawal is permitted. As indicated above, in the present case there is no valid and legal ground for refusing permission to withdraw from the suit. If withdrawal is not permitted there will be anomalous situation, as indicated above, and in the suit virtually there would be two plaintiffs and no defendant. Apart from that, a defendant on being transposed as a plaintiff, can only agitate the matter within

the parameter of the suit as originally instituted. He cannot make out absolutely a new case with new relief based on new cause of action. Moreover the defendants inter se have no dispute. The last is a condition precedent for exercise of power under Order XXIII, Rule 1A CPC.

12. Dealing with the similar question a Division Bench of this Court in the case of Parbati Charan Das and Others Vs. Jagdamba Prasad Sinha and Others, has held that transposition of party in appeal could be permitted by virtue of Order 1, Rule 10 CPC read with Section 107 CPC if it was necessary for the ends of justice and it would not affect scope of appeal.

13. In Ram Prasad Choudhary and Others Vs. Mst. Fulia and Others, , it has been held that transposition cannot be allowed where the scope or character of the suit will be altered. Similar is the view taken with regard to Order 23, Rule 1A CPC by the Madras High Court in Govinda Iyer Vs. Kumar and Others, , which dealt with a situation similar to that of Bhubenshwar Prasad Narain Singh Vs. Sidheswar Mukherjee and Others, . It has noticed 1949 Patna and followed it. In the case of Jethiben Vs. Maniben and Another, their Lordships have discussed as to what was the aim and object for introducing Order XXIII, Rule 1A CPC and why it was thought necessary to make such a provision notwithstanding there being Order 1, Rule 10 CPC already. Their Lordships then relying on 1964 Patna 508 have held that transposition cannot be permitted if the nature of suit is altered because the defendant has to remain within the parameter of suit as instituted.

14. Shri Dwivedi, then relied on the case of Md. Muzahid Vs. John Wilson Zedak and Another, and submitted that this court had not accepted the law as laid down by the Gujarat High Court (supra). Whatever may be the position, even in this case (Md. Muzahid) this court has held that now by virtue of Order XXIII, Rule 1A the Court shall take into consideration whether there is substantial question to be decided between the defendants inter se. In the present case, there was no dispute between defendant Nos. 1, 2 and 3 which was required to be decided. Thus there was no dispute between defendants inter se and as such this case does not help the cause of defendant No. 3, rather is against her.

15. Considering the aforesaid decision and the law laid down therein if the same is applied to the present case it would be seen that if the defendant is allowed to be transposed as plaintiff, what relief would the defendant get and/or what relief the defendant is entitled to. The relief that was claimed was as against the oil company and for setting aside the letter of cancellation of dealership. Defendant No. 3 was not the dealer. He had no agreement with the oil company. Oil company never recognised him. There was no privity of contract between defendant No. 3 and defendant Nos. 1 and 2. He was thus not entitled to any such relief. Moreover, as noticed above, relief, if any, claimed was already granted. No other relief would survive in the suit. No relief in the suit was claimed as against defendant No. 3. There was no dispute inter se between defendants i.e. defendant Nos. 1, 2 and 3. The only consequence of such a

transposition would be that defendant No. 3 would now set up some new case altogether which is not permissible, in the present suit by virtue of Order XXXIII, Rule 1A CPC. If the defendant wishes she may file a suit for any other relief in accordance with law and subject to law of limitation. In view of the above, this revision application is allowed and the impugned order dated 13.4.2005 passed by Munsif II, Begusarai in Title Suit No. 144/89 is set aside. The plaintiff-petitioner is entitled to withdraw from the suit and/or abandon the suit and the defendant No. 3 (opposite party No. 3) is not entitled to be transposed as a plaintiff in the suit.