

(2006) 06 CAL CK 0040
In the Calcutta High Court

Case No : G.A. No. 1729 of 2005 and C.S. No. 318 of 2004

Ashok Kumar Yadav

APPELLANT

Vs

Noble Designs Pvt. Ltd.

RESPONDENT

Date of Decision : 14-06-2006

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 10

Citation : AIR 2006 Cal 237

Hon'ble Judges : Jayanta Kumar Biswas, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Jayanta Kumar Biswas, J.—The sole defendant in CS No. 318 of 2004 has taken out this application (GA 1729 of 2005) u/s 10 of the Code of Civil Procedure, 1908 for an order staying all further proceedings in the suit.

2. The plaintiff and the defendant, in CS No. 318 of 2004, entered into an agreement for sale dated September 14, 2001. The agreement was with respect to certain land located in Patna. In terms of Clause 17 of that agreement the plaintiff was to execute and give an irrevocable general power of attorney to the defendant, and that power was to be governed by the provisions of that agreement. The terms and conditions of the agreement were to prevail in case of conflict between the power and the agreement.

3. Alleging that the members of the Hindu undivided family of which the plaintiff was the Karta, failed and neglected to carry out their obligations in terms of the agreement for sale, the defendant, as plaintiff, filed title suit No. 271 of 2004 in the Court of the first subordinate Judge in Patna; it filed that suit on July 24, 2004. It impleaded one Manvendra Singh as the second set defendant in that suit. It prayed for a decree for specific performance of contract for sale of the land. The first set defendant in that suit filed their written statement on April 25, 2005. That suit is pending decision.

4. On December 8, 2004 CS No. 318 of 2004 was filed in this Court by the first defendant in the Patna suit; the Calcutta suit was filed by him in the capacity of the Karta of the Hindu undivided family. He alleged that since the defendant failed and neglected to discharge its obligation in terms of the agreement, the agreement for sale stood determined, and as a result the power of attorney executed in terms of Clause 17 of the agreement stood cancelled. He also alleged that for non-registration the power of attorney concerned was invalid and void. He prayed for a decree declaring the power of attorney as void and cancelled. On June 6, 2005 the defendant took out the present application u/s 10.

5. Counsel for the parties have debated on the question whether the matter in issue in the Calcutta suit is directly and substantially in issue in the Patna suit. According to counsel for the defendant, the matter in issue in the Calcutta suit is whether the agreement for sale had stood determined, and hence it is directly and wholly in issue in the Patna suit where his client prayed for a decree for specific performance of the contract arising out of that agreement. According to counsel for the plaintiff though the issue whether the agreement for sale stood determined is directly in issue in both the suits, it cannot be said that the matter in issue, meaning thereby the whole subject-matter of the Calcutta suit, is directly and substantially in issue in the Patna suit,

6. For this he places strong reliance on the Apex Court decision in National Institute of Mental Health and Neuro Sciences Vs. C. Parameshwara, . His contention is that unless there is absolute identity of the whole subject-matter, it cannot be said that the matter in issue in the Calcutta suit is directly and substantially in issue in the Patna suit, in support of his contention he has also relied on the decisions in Vallabh Das Vs. Madan Lal and Others, , Shaw Wallace and Co. Ltd. Vs. Bholanath Mandanlal Sherawala and Others, , Adhish Chandra Sinha Vs. Hindusthan Gas and Industries Ltd. and Another, , Pukhraj D. Jain and Others Vs. G. Gopalakrishna, and Heinz Italia Sr L and Another Vs. Dabur India Ltd. and Others, .

7. Counsel for the defendant has relied on the decisions in Shorab Merwanji Modi and Another Vs. Mansata Film Distributors and Another, , Mathura Prasad Bajoo Jaiswal and Others Vs. Dossibai N.B. Jeejeebhoy, , Arun General Industries Ltd. Vs. Rishabh Manufacturers Private Ltd. and Others, , and Challapalli Sugars Ltd. Vs. Swadeshi Sugar Supply Pvt. Ltd., . He has also relied on the same Apex Court decision in National Institute of Mental Health and Neuro Sciences Vs. C. Parameshwara, that has been strongly relied on by counsel for the plaintiff.

8. The contentions that parties in both the suits are not absolutely same and that the defendant has taken out the Section 10 application before filing its written statement in the suit have not been very seriously pressed by counsel for the plaintiff. On the strength of the authorities (noted before) counsel for the defendant has argued that in a Section 10 application the test is not whether parties in the suits are identical in every respect. His argument is that in the subsequent suit the plaintiff who is a party in the previously instituted suit may

choose to jettison a person who is a party in the previously instituted suit. He says that the plaintiff in the subsequently instituted suit may also add a person in his suit, though such person is not a party in the previously instituted suit,

9. I fully agree with him that for determining whether the matter in issue in the subsequently instituted suit is directly and substantially in issue in the previously instituted suit absolute identity of the parties in both the suits is not a consideration. By this I say that if the parties in the previously instituted suit are parties in the subsequently instituted suit, then any aggrieved party can take out an application u/s 10 seeking stay of trial of the subsequently instituted suit on the ground that the matter in issue in it is directly and substantially in issue in the previously instituted suit.

10. I also agree with him that for maintaining an application u/s 10 the defendant in the suit concerned need not first file his written statement; the Section 10 application can be taken out, as has been done in the present case, even before filing the written statement. It is to be noted here that in its Section 10 application the defendant has asserted that case made out in its plaint in the Patna suit would be its case in the written statement in the Calcutta suit. Hence in any view of the matter the aspect of filing written statement loses significance.

11. The hotly debated point is whether the matter in issue in the Calcutta suit is directly and substantially in issue in the Patna suit. In my view, for answering the question in the present case, it will not be necessary to discuss the authorities cited to me in detail. There is no dispute regarding the proposition that the expression "matter in issue" shall mean (as said by the Apex Court in Mathura Prasad) Mathura Prasad Bajoo Jaiswal and Others Vs. Dossibai N.B. Jeejeebhoy, . "The right litigated between the parties, i.e., the facts on which the right is claimed or denied and the law applicable to the determination of that issue." In other words, the expression means the whole subject-matter; that is to say, the entire controversy between the parties. In my view, if the present case is tested by applying this proposition, it cannot be held that the matter in issue in the Calcutta suit (the subsequently instituted suit) is directly and sub-stantially in issue in the Patna suit (the previously instituted suit).

12. The subject-matter of the Patna suit is the agreement for sale on the basis whereof the defendant in the Calcutta suit, as plaintiff there, prayed for a decree for specific performance of contract. The power of attorney originated from that agreement. In the absence of the agreement the power of attorney simply becomes non-est: it will not have any independent existence. That is to say, unless the agreement exists, the power of attorney cannot survive. So the question of validity of the agreement is the whole controversy between the parties in the Patna suit. I have no hesitation in saying that the same controversy is the whole subject-matter of the Calcutta suit. The decree for declaration that the power of attorney stood cancelled has been sought on the ground that the sale agreement stood cancelled. The power of attorney was not an instrument capable of existence once severed from the agreement for sale, it

was born out of Clause 17 of the agreement.

13. The whole controversy in the Calcutta suit is whether it stood cancelled consequent upon determination of the agreement, as claimed by the plaintiff. Thus it cannot be said that the whole subject-matter of the Calcutta suit is not identical with the subject-matter of the Patna suit. The controversy between the parties being one and the same, I am unable to hold that the matter in issue in the Calcutta suit is not directly and substantially in issue in the Patna suit. In my opinion, the decision in the Patna suit will make the Calcutta suit absolutely useless and academic. Nothing of any substance will remain for decision in the Calcutta suit.

14. For these reasons I hold that the trial of Calcutta suit should remain stayed, and that the Section 10 application should be allowed. I accordingly allow the application, and order that till the disposal of the Patna suit trial of the Calcutta suit shall remain stayed.

15. There shall be no order for costs in the application.

16. All parties shall act on a signed xerox copy of this dictated order and also on an urgent certified xerox copy thereof, both to be supplied on the usual undertakings.