
(1991) 10 GAU CK 0009
In the Gauhati High Court
Case No : Civil Revision No. 84 of 1990

Canara Bank

APPELLANT

Vs

Joboka Woods Private Limited

RESPONDENT

Date of Decision : 10-10-1991

Acts Referred:

Civil Procedure Code, 1908 — Order 1 Rule 10

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 10

Citation : (1991) 2 GLJ 374

Hon'ble Judges : S.N.Phukan, J

Bench : Single Bench

Advocate : A.K.Maheswari, V.K.Dewan, J.N.Sharma, D.N.Barua, G.Gopal,
Advocates appearing for Parties

Judgement

1. This revision petition is directed against the order dated 25.11.89 passed by the learned Assistant District Judge, Tinsukia in Money Suit Na. 105 of 1986.
2. The opposite party as plaintiff filed a suit against the present petitioner, namely, Canara Bank and the Branch Manager of the said Bank at Tinsukia Branch for recovery of a sum of Rs. 2,64,450/ with interest.
3. According to the plaintiff, a cash credit account with the Tinsukia Branch of the Bank was opened and it was operated by the plaintiff which is a company through one of its Directors who was duly authorised from time to time. On or about 2.2.85 plaintiff detected that a cheque bearing No. CRH 767185 was missing and accordingly on the same day the bank was informed with a request to stop payment of the above cheque when presented. Subsequently, on reconciliation of the statement of account sent by the Bank, it was found that a sum of Rs. 2,15,000/ in favour of Shri P. K. Sen drawn on the above cheque was debited against the account of the plaintiff company. Plaintiff immediately informed the defendant Bank that the cheque was never issued by the company and the signature was forged. On these facts, the present suit was laid mainly on the ground that though it was the duty of the defendant bank to verify signature

in the cheque with the specimen signature to prevent fraud, the defendants, their employees and/or agents did not follow the procedure of such verification which amounted to misconduct, negligence and carelessness for which the payment was made. It was also averred that Sri P. K. Sen in whose favour the cheque was alleged to have been issued by the plaintiff company was not known to the plaintiff. Police was also informed and it has been stated in the plaint that the name of Sri P. K. Sen was a fictitious one.

4. In written statement, it is not disputed about the letter sent by the plaintiff company regarding missing of the cheque and requesting to stop payment. According to defendants on 22.8.84 defendant No. 1 received the cheque in question from the Punjab National Bank through clearing house and after due and proper verification of the cheque including the signature, the cheque was passed for payment and the amount debited to the account of the plaintiff. Statement of account, was sent to the plaintiff in due course in the month of November reflecting the above payment. It has been denied that the signature was a forged one. It has also been denied that defendants, their employees and/or agents did not follow the procedure and stated that the payment was made in due course of business in good faith or without negligence. According to the defendants payee of the cheque Sri P. K. Sen had an account with the Punjab National Bank and said bank certified that the account will be credited to the account of the payee, namely, Sri P. K. Sen. According to the defendants the payment was made to the Punjab National Bank and not to any individual.

5. The suit was laid in the year 1986 and on 25.11.89 a petition under Order 1 Rule 10 read with section 151 CPC was filed on behalf of the defendants stating that the cheque in question was presented by the Punjab National Bank, Tinsukia through clearing house and with the said Bank Sri P. K. Sen has an account. It was further stated that in view of the above fact the Punjab National Bank as well as Sri P.K. Sen are necessary party to enable the Court to effectively and completely adjudicate the matter involved in the suit. This petition was rejected by the impugned order on the grounds inter alia, that defendants filed this petition after lapse of 2\ years when the suit was posted for hearing and that no relief was prayed for by the plaintiff against the Punjab National Bank and Sri P. K. Sen. Therefore, the Court held that there was no cause of action for invoking Order 1 Rule 10(2) CPC. The Court further observed that Sri P. K. Sen was a fictitious person and that the very fact that the defendants filed this petition at the time of examination of witnesses for the plaintiff, gave the impression that the defendants want to prolong the trial of the suit. On this ground the petition was rejected.

6. I have heard Mr. J. N. Sarma, learned counsel for the petitioner and Mr. A. K. Maheswari, learned counsel for the opposite parties.

7. Subrule (2) of Rule 10 of Order 1 CPC inter alia, provides that the Court may at any stage of the proceedings, either upon or without the application of either

party, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the Court may be necessary in order to enable the Court to effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added. Subrule (5) provides that subject to the provisions of the Indian Limitation Act, 1877, the proceedings as against any person added as defendant shall be deemed to have begun only on the service of the summons.

8. Mr. Sarma, learned counsel for the petitioner has urged that in view of the above Rule 10 of Order 1 CPC the addition of the Punjab National Bank and Sri P.K. Sen as defendants is very much necessary to effectually and completely adjudicate upon the present dispute. In this connection Mr. Sarma has drawn my attention to the observation of the learned trial Court in the impugned order that Court has held that Sri P.K. Sen is fictitious person and such a decision cannot be given without making Sri P. K. Sen as a party. Mr Sarma has further urged that for the purpose of adding any person as a defendant in a suit even the defendant can make a prayer. In reply Mr. Maheswari, learned counsel has urged that in the present suit the plaintiff claimed relief in the plaint only against the present defendants not against Punjab National Bank and Sri P. K. Sen and further the plaintiff cannot be forced to add any other person as defendant. According to Mr. Maheswari as a specific plea has been taken in the written statement on this point and an issue has also been framed, if the suit fails on this ground, it is entirely upon the plaintiff to take the risk. That apart according to Mr. Maheswari, at late stage if the above two parties are added as defendants, the suit will fail on the ground of limitation in view of above subrule (5) of Rule 10 of Order 1 CPC

9. In *Amin Lal vs. Hunna Mai*, AIR 1965 SC 1243 Order 1 Rule 10 CPC was considered in respect of an election petition wherein the Apex Court held that a party can avail himself of the provisions of Order 1 Rule 10 CPC subject to the law of limitation and as the application in that case was made more than 8 months after the election of the returned candidate there was an inordinate delay and, therefore, the prayer of the election petitioner was refused. Applying the same ratio even if the defendants have a right to apply for adding other persons as defendants, the present petition filed by the defendants has to be dismissed on the ground of delay.

10. It is settled law that suit may fail for want of impleading a necessary party, but not for want of impleading a proper party (See *M/s Premraj Gobindram vs. Promode Kumar Dey*, AIR 1964 Assam 85). Attention of this Court has been drawn to the decision of the Madras High Court in *Vanjiappa Goundan vs. NPVLR Annamalai Chettiar*, AIR 1940 Madras 69 wherein it was held that the expression "questions involved in the suit" referred to in Order 1 Rule 10 (2) means not merely the questions which are involved in the suit as originally framed between the parties to the suit and that the object of the provision is that where several disputes arise out of one subjectmatter, all the parties interested in such disputes

should be brought before the Court and all questions in controversy between them should be completely settled in the action. In the case in hand the limited question is whether the payment in question was made due to failure on the part of the employees of the defendant bank to follow the procedure and nonverification of the signatures on the cheque in question with the specimen signature. There is no other dispute between the parties and no relief has also been claimed against Punjab National Bank and Sri P. K. Sen and as such the above ratio laid down by the Madras High Court is not applicable in the case in hand.

11. The attention of this Court has been drawn to a decision of the Orissa High Court in *Megharaj Agi'rwa!a vs. Kariheshyam Agarwala*, AIR 1977 Orissa 138. From the facts of the case, it appears that in that case a suit was filed against 2 defendants for a mandatory injunction directing the defendants to remove the unauthorised constructions. Two other persons applied to be added as defendants which was allowed and consequently plaintiff prayed for amendment of the plaint. The Court considered the provisions of subrule (4) of Rule 10 of Order 1 CPC and held that after the addition of two persons as defendants, it was necessary to amend the plaint and accordingly allowed the amendment. This decision has been cited in support of the contention that even the defendant can apply for impleading other persons as defendants. But in my opinion, this ratio is not applicable in the case in hand as no third party has come forward with a prayer for joining as defendant.

12. In *G.D.F. Luis v?. Inacio Piedade Hildeberte Fernandes*, AIR 1977 Goa, Daman & Diu 4, it was held that the principles governing the power of the Court under Order 1 Rule 10 CPC are that as a rule the Court should not add a person as a defendant in a suit when the plaintiff is opposed to such addition. Reason being that the plaintiff is the "dominus litis" and he cannot be compelled to fight against a person against whom he does not wish to fight and against whom he does not claim any relief. It was also held that in exercising discretion in subrule (2) of Rule 10 of Order 1 CPC, the Court will invariably take into account the wishes of the plaintiff before adding a third person as a defendant to his suit. I am in respectful agreement with the ratio laid down by the learned Judicial Commissioner.

13. Situated thus, I hold that in a civil suit, it is for the plaintiff to decide who should be made as defendant and it will depend on the relief claimed by the plaintiff. Plaintiff cannot be compelled to fight against a person against whom he does not wish to fight and no relief is claimed. While considering a petition under Order 1 Rule 10 CPC for addition of necessary parties, the Court has to keep in mind the above proposition of law. I may add here that discretion under Order 1 Rule 10 can be exercised by the Court only when the Court is satisfied that a person ought to have been joined as a party when he is a necessary party or when without his presence the question in the suit cannot be completely decided. A person need not be joined as a party in the suit merely because he may be

affected by the ultimate verdict given by the Court. The Court has to bear in mind that if a person who is not a necessary party is added as a party, it may cause considerable prejudice to him. The Court is only concerned regarding the real controversy between the parties and all issues arising therein more particularly to avoid multiplicity of suit while considering a petition for addition or deletion of a party in a suit.

14. Coming to the case in hand as stated above the only grievance of the present petitioner is that the employee of the defendant bank did not follow the procedure in verifying the signature in the cheque with the specimen signature and payment was made due to misconduct, negligence and carelessness on the part of the employees of the defendant bank. I fail to understand how Punjab National Bank or Sri P. K. Sen are to be added as parties as there is no allegation against them and on the top of that no relief is claimed against them. I may also add as held earlier that it may cause prejudice to the plaintiff if at this late stage the above bank and the person is added as parties in view of the provisions of the Limitation Act. There is already an issue as stated above regarding nonjoinder of the parties and if this issue is decided against the plaintiff the suit may fail and the plaintiff being aware of this fact has not taken steps for impleading the above bank and the person as defendants and the present defendant cannot force the plaintiff to do so.

15. Mr. Sarma has drawn my attention to the observation of the learned Court to the impugned order that "socalled Mr. P. K. Sen a fictitious person" and has urged that this finding is not only irrelevant for the present parties, but is not based on any evidence. I find considerable force in the submission of the learned counsel and direct that the above portion of the observation shall be deleted from the impugned order.

With the modification of the impugned order, the present petition is dismissed. No costs.