
(2016) 09 CAL CK 0001

In the Calcutta High Court

Case No : G.A. No. 3760 of 2015 in 269 of 2009

Ghanshyam Sarda

APPELLANT

Vs

Sri Govind Kumar Sarda

RESPONDENT

Date of Decision : 15-09-2016

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 23 Rule 1 (3)

Citation : (2017) 172 AIC 335

Hon'ble Judges : Arijit Banerjee, J.

Bench : Single Bench

Advocate : Mr. Ranjan Deb, Sr. Adv., Mr. S. Sarkar, Mr. Rohitendra Deb, Mr. Aditya Kamodia and Mr. Debasish Das, Advocates, for the Plaintiff/Petitioner; Mr. Reetobroto Mitra, Mr. Soumava Ghosh and Mr. N. Beklia, Advocates, for the Defendants/Respondents

Final Decision : Dismissed

Judgement

Arijit Banerjee, J.—By an order dated 8 October, 2015, this Court had permitted the plaintiff to withdraw the suit with liberty to file a fresh suit on the self-same cause of action. In the present application, the defendant no. 14 ("the defendant") prays that the said order be recalled and its application being GA No. 2707 of 2009, inter alia, for revocation of leave under Clause 12 of the Letters Patent or alternatively for return of the plaint for being filed before the appropriate forum, be disposed of expeditiously.

2. Learned Counsel for the petitioner submitted that no notice was served on the petitioner before the plaintiff mentioned the suit before this Court for withdrawal with liberty to file afresh. He submitted that without hearing the petitioner, the plaintiff's prayer should not have been allowed. He referred to pages 25-27 of the plaintiff's affidavit in opposition and submitted that the same was only a purported proof of dispatch of notice and was not evidence of receipt of the notice by the petitioner.

3. Learned Counsel then submitted that under Order 23 R. 1 (3) of the Code of

Civil Procedure, before granting the plaintiff permission to withdraw the suit with liberty to institute a fresh suit in respect of the self-same subject matter, the Court must record its satisfaction that the suit must fail by reason of some formal defect or that there are sufficient grounds for granting such permission. The said provision is extracted hereunder:-

"R. 1(3). Where the Court is satisfied,-

(a) That a suit must fail by reason of some formal defect, or

(b) That there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject matter of a suit or part of a claim, it may, on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit or such part of the claim with liberty to institute a fresh suit in respect of the subject matter of such suit or such part of the claim."

4. Learned Counsel relied on a decision of the Bombay High Court in the case of *The Asian Assurance Co. Ltd. v. Madholal Sindhu*, AIR 1950 Bombay 378. In that case the Court held that no order under O. XXIII R. 1(2) should be made without hearing the other side. The court has to be dissatisfied that there is some formal defect by reason of which the suit would fail and in order to decide that point, the court is obliged to hear what the other side has got to say on the contention put forward by the plaintiff.

Learned Counsel then referred to another decision of the Bombay High Court in the case of *Ramrao Bhagwantrao Inamdar v. Babu Appanna Samage*, AIR 1940 Bombay 121. In that case the Bombay High Court held that where the defect is not one of form but one of substance, leave under O. XXIII R. 1(3) of the CPC ought not to be granted.

Mr. Mitra then placed before this Court a decision of the Andhra Pradesh High Court in the case of *Bangaru Pattabhirmayya v. Bangaru Gopalakrishnayya*, AIR 1986 Andhra Pradesh 270, wherein the court held that the lower court acted without jurisdiction in granting permission to the plaintiff to withdraw the suit without giving notice to all the defendants.

Finally, Learned Counsel relied on a decision of the Apex Court in the case of *K.S. Bhoopathy v. Kokila*, (2000) 5 SCC 458, wherein the Hon'ble Apex Court observed that the grant of leave envisaged in sub Rule (3) of R. 1 of O. XXIII is at the discretion of the court but such discretion is to be exercised with caution and circumspection.

5. Mr. Ranjan Deb, Learned Sr. Counsel, appearing on behalf of the plaintiff took a preliminary point of the application being not maintainable by reason of lack of proper verification of the averments made therein. He drew this court's attention to Order 3, Rule 2 of the Code of Civil Procedure which indicates the recognised agents of a party through whom the party can make applications before this Court. He submitted that the person verifying the averments in the petition cannot be treated as a recognised agent of the petitioner. He also referred to O.

29 of the CPC and submitted that an "authorised representative" is not permitted to sign or verify pleadings on behalf of a corporation.

6. Mr. Deb then submitted that the petitioner/defendant has not entered appearance in the suit in spite of service of writ of summons. Such a defendant is not entitled to notice at the time of final disposal of the suit, in whatever manner. He drew this court's attention to page 22 of the affidavit-in-opposition which is a service report dated 6 October, 2015 signed by the Dy. Sheriff of Kolkata wherefrom it appears that the petitioner/defendant refused to accept service of writ of summons.

7. Mr. Deb then produced a tracking record issued by India Post where from it appears that notice was delivered to the petitioner on 8 October, 2015 at 3.54 p.m. He submitted that the petitioner has represented before this court that it was not served at all, which is untrue. The petitioner has not approached this court with clean hands and is thus, not entitled to any order.

8. Learned Counsel then submitted that admittedly the Learned Advocate of the defendant no. 1 was served with the notice of mentioning. The defendant no. 1 is a Director of the petitioner/defendant. A limited company acts through its Directors. Knowledge of the Directors must be deemed to be the knowledge of the company.

9. Mr. Deb then pointed out that the statements in paragraphs 1-13 of the petition have been verified as true to the knowledge of the deponent, namely, Abhinav Dadich. He produced a copy of an extract from the minutes of the meeting of the Board of Directors of the petitioner company held on 23 November, 2015 whereby the said Abhinav Dadich was authorised to institute or defend legal proceedings for and on behalf of the petitioner company. Learned Counsel submitted that the said agent having been so authorised only on 23 November, 2015, he could not have any personal knowledge of incidents that occurred on 8 October, 2015. In any event, an authorised representative or a power of attorney holder cannot verify the pleadings as "true to knowledge". In this connection he relied on a decision of the Apex Court in the case of Janki Vashdeo Bhojwani v. Indusind Bank Ltd., (2005) 2 SCC 217, wherein at paragraph 13 of the judgment the Hon"ble Court observed that O. 3 Rules 1 and 2 of the CPC empower the holder of power of attorney to "act" on behalf of the principal. However, the word "act" is confined only to "acts" done by the power of attorney holder in exercise of power granted by the instrument. The term "acts" would not include deposing in place and stead of the principal. If the power of attorney holder has done some "acts" in pursuance of the power of attorney, he may depose for the principal in respect of such acts, but he cannot depose for the principal for the acts done by the principal and not by him. Similarly, he cannot depose for the principal in respect of a matter of which only the principal can have personal knowledge and in respect of which the principal is entitled to be cross-examined.

10. In reply, Mr. Mitra, Learned Counsel for the petitioner submitted that if the petitioner was not required to be served notice, it is strange that the plaintiff, in fact, served notice on the petitioner although such service was effected belatedly and after the order was passed on 8 October, 2015.

11. Further, all other parties were served through their learned Advocates who are stationed in Calcutta. However, the petitioner was not served through its Advocate but was served at its registered office at Delhi. This was a deliberate act on the part of the plaintiff to prevent the petitioner from being present before this Court on 8 October, 2015.

12. I have considered the rival contentions of the parties.

13. While deciding this application I have to keep in mind that the application is one for recalling of an order which was passed in the absence of the petitioner. In this application I ought not to consider whether or not the order dated 8 October, 2015 was correctly passed. In my opinion, the merit of an order is not to be gone into on an application for recalling of the order on the ground that it was passed ex-parte. What I need to consider is whether or not the petitioner was entitled to notice and if the answer is in the affirmative, whether absence of timely notice has caused any prejudice to the petitioner. If the order dated 8 October, 2015 is wrong on merits, the remedy of the petitioner is by way of appeal and not by filing a recalling application.

14. The petitioner did not dispute that it refused to accept service of the writ of summons in the suit. The petitioner did not even attempt to assail the service report issued by the Dy. Sheriff. It is settled law that refusal to accept service is deemed to be good service. Hence, I must proceed on the basis that the petitioner was served with the writ of summons.

15. However, the petitioner did not enter appearance in the suit. The plaintiff has placed on record at page 23 of the affidavit-in-opposition a certificate issued by the Dy. Registrar (Ct. & J.) to the effect that till 6 October, 2015 several defendants including the defendant no. 14/petitioner had not entered appearance in the suit. This fact is also otherwise not disputed. That being the position, was it obligatory upon the plaintiff to serve notice of mentioning on the petitioner before making a prayer before this Court for withdrawal of the suit with liberty to file afresh" In my opinion, the answer must be in the negative. The petitioner never showed any intention of participating in the suit. In view of the petitioner's failure to enter appearance in the suit, under the Rules of this Court, the plaintiff could have brought the suit for hearing as an "undefended suit" against the petitioner. In that event, the plaintiff would not have been required to serve notice on the petitioner. The plaintiff could have obtained an undefended decree as against the petitioner and the same would have been a perfectly lawful and valid decree. If that be so, it does not stand to reason to contend that the plaintiff was under a legal obligation to put the petitioner on notice before approaching this court for withdrawal of the suit with liberty to file a fresh suit

regarding the same subject matter. Thus, I am of the considered view that the petitioner had no right or entitlement in law to receive any notice of the plaintiff's proposal to approach this court for withdrawing the suit with liberty to file afresh. The fact that the plaintiff actually served notice on the petitioner, albeit belatedly, would not change the position and in my view such notice was superfluous and unnecessary.

16. Further, it is not in dispute that the defendant no. 1 was served with notice through his Advocate. Undisputedly, the defendant no. 1 is a Director of the petitioner company. Being an inanimate legal entity the petitioner operates and functions through its Directors. The knowledge of a Director of the petitioner company can surely, at least in certain circumstances, be imputed to the petitioner. Order 29, Rule 2 of the CPC provides, inter alia, that subject to any statutory provision regulating service of process, in a suit against a corporation, summons may be served on the Secretary or any Director or other principal officer of the corporation. Learned Counsel for the petitioner contended that knowledge of a Director in his individual capacity cannot be deemed to be the knowledge of the company. Whether or not such contention is correct, it appears from the list of Directors of the petitioner company appearing at page 21 of the affidavit-in-opposition that the petitioner is managed and controlled entirely by the defendant no. 1 and his family members. In such a situation, it would be illogical and unrealistic to hold that the petitioner did not have sufficient notice of the proposed mentioning of the matter before this Court on 8 October, 2015. Still further, there is not a whisper in the petition as to how the petitioner has suffered prejudice by reason of the order dated 8 October, 2015. If a plaintiff intends to withdraw his suit unconditionally, no leave of the Court is required. The Court cannot prevent a plaintiff from abandoning his suit although in certain circumstances the court may impose costs on the plaintiff. However, if the plaintiff seeks to reserve liberty to file a fresh suit on the same cause of action after withdrawal of a suit, he requires court's permission. The court has a discretion whether or not to grant such permission. The discretion no doubt has to be exercised judiciously. If the court is of the view that permitting the plaintiff to withdraw the suit with liberty to file afresh would prejudice the defendants in any way or will deprive the defendants of the benefit of any finding already arrived at in the course of the suit or appeal arising out of the decree or any interlocutory order, the court may refuse to grant liberty to file afresh.

17. Further, in my view, it is definitely not mandatory to hear the defendants in a suit before granting leave to a plaintiff under O. XXIII R. 1 (3) of the CPC. To that extent I am in respectful disagreement with the observation of the Bombay High Court in the case of Asian Assurance Co. Ltd. (supra). In the case of Ramrao Bhagwantrao Inamdar (supra), in the facts of the case the Bombay High Court held that there was no formal defect in the suit but the defect was one of substance arising out of the inability of the plaintiffs to prove their title on which they had based their claim. The plaintiffs allowed the suit to be fully tried and to end in a decree which went against them. It was only when they found that the

trial court did not uphold their title as claimed by them that they sought to withdraw the suit in order to start the litigation afresh and ask for the same relief on a different basis. The said case, in my opinion, has no relevance to the facts of the present case.

In *Bangaru Pattabhirmayya (supra)*, the Andhra Pradesh High Court was dealing with a partition suit. It is well-known that in a partition suit all the parties are in the position of plaintiffs. The court held that if the defendants had been given notice, they would have in all probability, subject to the law of limitation, transposed themselves as plaintiffs and continued the suit making the plaintiff a defendant, if necessary. They would have thus saved and safeguarded their lawful interest. By permitting the plaintiff to withdraw his suit even without notice to the contesting defendants the lower court had denied the defendants their lawful right. The said case also has no manner of application to the facts of the present case.

In *K.S. Bhoopathy (supra)*, the Hon'ble Supreme Court held that while exercising discretion under O. XXIII R. 1, the Court has to consider all relevant aspects of the matter including the desirability of permitting the party to start a fresh round of litigation on the same cause of action. This becomes all the more important in a case where the plaintiff seeks to withdraw the suit at the stage of appeal. Grant of leave in such a case would result in the unsuccessful plaintiff to avoid the decree against him and seek a fresh adjudication of the controversy on a clean slate. It may also result in the contesting defendant losing the advantage of adjudication of the dispute by the court or courts below. Grant of permission for withdrawal of a suit with leave to file a fresh suit may also result in annulment of a right vested in the defendant or even a third party. In my respectful view, none of these considerations are relevant in the present case.

18. Finally, I also find substance in Mr. Deb's contention that the averments in the application before me have not been verified in accordance with law. Neither Order 3, Rule 2 nor Order 29, Rule 1 or R. 21 of the Company Court Rules contemplate or permit verification of pleadings on behalf of a limited company by an "authorised representative". Only the Secretary or a Director or a principal officer of a limited company is competent to verify the pleadings on its behalf. Even though a power of attorney holder is a recognised agent under Order 3, Rule 2 of the CPC, even such a person has serious limitations and cannot verify as true to knowledge facts which are within the exclusive knowledge of his principal as held by the Apex Court in the case of *Janki Vashdeo Bhojwani (supra)*. Hence, although my decision is based on what have been stated herein above, I also have serious doubts as regards the maintainability of the present application.

19. For the reasons aforesaid, this application is dismissed without, however any order as to costs.