

(2012) 12 CAL CK 0069

In the Calcutta High Court

Case No : G.A. No. 219 of 2012 with G.A. No. 1175 of 2010; G.S. No. 1241 of 2010; CSOS No. 355 of 1987

Harsh Vardhan Lodha

APPELLANT

Vs

Nawal Kishore Kejriwal

RESPONDENT

Date of Decision : 13-12-2012

Acts Referred:

Charitable and Religious Trusts Act, 1920 — Section 7
Civil Procedure Code, 1908 (CPC) — Order 1 Rule 10, Order 1 Rule 10(2), 92

Citation : (2013) 1 CALLT 361 : (2013) 2 CHN 62

Hon'ble Judges : Aniruddha Bose, J

Bench : Single Bench

Advocate : Sudipio Sarkar, P.S. Sengupta, Mousami Bhattacharya and R. Kapoor, for the Appellant; Anindya Kumar Mitra, Pratap Chatterjee, Malay Kumar Ghosh, Abhrajit Mitra, Debanjan Mandal, Sanjiv Kumar Trivedi, Jishnu Chowdhury, Sarvapriya Mukherjee and Arif Ali, for the Respondent

Judgement

Aniruddha Bose, J.—This application has been taken out in connection with the affairs of a Trust, being "Seva Nidhi Trust" and the applicants before me are Kumar Mangalam Birla and his wife, Neerja Birla. Their prayer is for permitting them to intervene or get impleaded in the main Application, being G.A. No. 1175 of 2010. In that Application, i.e. G.A. 1175 of 2010, the main prayer is for adjudging a decree passed in an Originating Summons, registered as Suit No. 355 of 1987 as null and void and of no effect. The Applicant in G.A. No. 1175 of 2010 is Harsh Vardhan Lodha (HVL). This decree was passed on 8 April 1988. All these proceedings, including Suit No. 355 of 1987 deal with the management and administration of the said trust, which has under its administration and control, inter alia, a medical institution in the city of Kolkata, known as Belle Vue Clinic. Seva Nidhi Trust (the Trust) was created for undertaking diverse philanthropic works in the year 1950 by Madhav Prasad Birla (since deceased) and Priyambada Devi Birla (since deceased). The reason for taking out the said Originating Summons, would appear from paragraphs 4, 5, 6 and 7 of the

affidavit filed in support of the Originating Summons, a copy of which has been made annexure "D" to G.A. No. 1175 of 2010. It is stated therein:--

4. Subsequent to the creation of the said trust new trustees were appointed from time to time and the old trustees also resigned from time to time subject however to the condition that the maximum number of trustees never exceeded 7 and 2 members of the family of Sri Madhav Prasad Birla continued to remain trustees all along. The present trustees of the said trust are as under. 1. Sri Nawal Kishore Kejriwal, 2. Sri Madhav Prasad Birla, 3. Smt. Priyamvada Birla, 4. Sri Kashinath Tapuria, 5. Smt. Nandini Nopany, 6. Smt. Jyotsna Poddar and 7. Smt. Shobhana Bhartia. 5. The family of Sri Madhav Prasad Birla consists of only two persons i.e. himself and his wife Smt. Priyamvada Birla as they have no children. Sri Madhav Prasad Birla is aged about 69 years and his wife is aged about 60 years. Both of them are suffering from various ailments and it can be reasonably presumed that they would not have any children in the future. After the death of either Sri. Madhav Prasad Birla or his wife, Clause 20 of the trust Deed would become unworkable in as much as it stipulated that at least two members of the family of Madhav Prasad Birla should be trustees of the said Trust. Shri L.N. Birla, Shri B. K. Birla and Sri G. P. Birla are the first cousins of Shri Madhav Prasad Birla and are his nearest male relatives. 6. Hence the trustees in a meeting of the trustees held on 22nd January, 1987 have unanimously decided that clause 20 of the said Trust deed should be suitably modified as follows: "The number of trustees shall at no time be less than four and more than seven provided always that so long Sri Madhav Prasad Birla or Smt. Priyamvada Devi Birla, both or either of them are alive, they/he/she shall continue to be the Trustees/Trustee during the tenure of their respective natural lives and in the vacancy of either or both of them the Trustee(s) in the respective places(s) and the successor(s) of such Trustee(s) shall be appointed by the Trustees for the time being from amongst the male descendants in the male line of Shri L.N. Birla, Shri B.K. Birla or Shri G.P. Birla or the wives of such male descendants having attained the age of 18 years in all cases."

7. The Trustees have authorized the deponent to apply to this Hon'ble Court for confirmation of the aforesaid change in clause 20 since it is a question affecting the management and/or administration of the said Trust.

Clause 20 of the Deed of Trust, a copy of which is Annexure "A" to G.A. No. 1175 of 2010 originally stood as:--

The number of Trustees shall at no time be less than four and more than seven provided always that at least two of the Trustees shall be members of the family of Madhav Prasad Birla.

2. It is submitted on behalf of the applicants that the Originating Summons was taken out by one of the trustees, primarily for ensuring that the line of succession of the trustees of the said trust had among them members of the family of Birlas, who are a leading industrial family of this country. Both Madhav

Prasad Birla and Priyamvada Devi Birla, whom I shall refer to in the later part of this judgment as MPB and PDB were defendants in the O.S. Suit No. 355 of 1987, along with the other trustees of the same trust. O.S. Suit No. 355 of 1987 was decreed on 8 April 1988 in the following terms:--

It is declared in answer to the question raised in the said originating Summons that the number of Trustees of Sevanidhi Trust shall at no time be less than four and more than seven provided always that so long Shri Madhav Prasad Birla or Smt. Priyamvada Devi Birla, both or either of them are alive, they/he/she shall continue to be the trustees/trustee during the tenure of their respective natural lives and in the vacancy of either or both of them the Trustee(s) in the respective place(s) and the successor(s) of such Trustee(s) shall be appointed by the Trustees for the time being from amongst the male descendants in the male line of Shri L.N. Birla, Shri B.K. Birla or Shri G.P. Birla or the wives of such male descendants having attained the age of eighteen years in all cases mentioned in paragraph 6 of the affidavit of Nawal Kishore Kejriwal affirmed on the twenty seventh day of April one thousand nine hundred and eighty seven.

3. MPB passed away on 30 July 1990, and his widow PDB passed away on 3 July 2004. It appears that during the lifetime of PDB, R.S. Lodha (since deceased), father of HVL was appointed as a trustee of Seva Nidhi trust. After death of MPB, composition of the Board of Trustees underwent certain changes, and it appears that on 15 June 2004, HVL was also appointed as a trustee of the trust. The foundation of the claim of the applicants in this proceeding is the decree passed in the Originating Summons, and their ultimate aim is to enforce the modified clause 20 of the trust deed by getting themselves appointed as trustees of the said Trust. On behalf of HVL, however, it has been submitted that modification in terms of the decree in Suit No. 355 of 1987 was never effected and validity of the decree has also been questioned. That is his case in G.A. No. 1175 of 2010.

4. There is an ongoing controversy over legacy of the estate of PDB, which has generated several litigations, and legality of the will of PDB is in question in a proceeding pending in this Court. The genesis of the two proceedings, i.e. GA No. 1175 of 2010, and the present one, being G.A. No. 219 of 2012 largely lies in a suit instituted by the applicants herein, Kumar Mangalam Birla and his wife, Neerja Birla, former being the grandson of B.K. Birla. This suit registered as C.S. No. 94 of 2010 has been filed u/s 92 of Code of Civil Procedure, in which the plaintiffs have claimed decree of declaration to the effect that they were appointed as the trustees of Seva Nidhi Trust on and from 10 October 2009. The plaint of the said suit was referred to before me in course of hearing of the instant proceeding. It has been pleaded in that plaint that all other male descendants of the three branches of the Birla family referred to in the said clause 20, which formed the subject-matter of the Suit No. 355 of 1987 had accorded their consent for appointing the applicants as trustees of the said trust. On the strength of the same, the applicants on that date, i.e. 10 October 2009 had written to all the trustees for their appointment as trustees thereof in

respect of the vacancies arising from death of MPB and PDB, The other reliefs claimed in the said suit include removal of all the other existing trustees from their office.

5. In G.A. No. 1175 of 2010, in connection with which this Application has been taken out, prayer of HVL is for adjudging the decree in Suit No. 355 of 1987 as null and void and of no effect. Main grounds on which such prayer is made are that the Court in the Originating Summons did not have jurisdiction to alter any of the terms of the Trust Deed. Legality of the claim of the applicants to be appointed as trustees on the strength of being descendants of B.K. Birla has also been questioned, on the ground that B.K. Birla is still alive. It has also been contended that the modified clause 20 of the Trust Deed had never been acted upon. I am not describing in detail the basis of the applicants' case in C.S. No. 94 of 2010 or HVL's case in G.A. No. 1175 of 2010. For adjudication of the present petition, such dealing in detail the points raised in those proceedings are not necessary.

6. Before me, on behalf of the applicants judgments have been relied upon primarily on two propositions of law. One set of judgments has been cited by Mr. Sudipto Sarkar, learned Senior Counsel for the applicants in support of his submission that in an Originating Summons, the Court can exercise powers conferred upon it u/s 7 of the Charitable and Religious Trusts Act, 1920. These decisions are Rameshwar Das Birla and Ors. vs. Advocate General of West Bengal [(1957) 99 CLJ 161], P.C. Alexander and Others Vs. Government of India, . Rama Aziz Parpia and Others Vs. Balkrishna K. Mehta and Others, , Sukhlal Chandanmull Karnani Trust and Another Vs. Shew Kumar Karnani and Others, , and an unreported judgment of this Court delivered on 5 December 1952 in Originating Summons (Suit No. 26 of 1951) in the case of Maharaja Bahadur Probirendra M. Tagore vs. Sri Sri Thakur Brahma Gopal Jew & Ors. An English authority, in Re: Burnham National Schools reported in XVII Law Reports 241 has also been relied on by Mr. Sarkar. Argument has been advanced on maintainability of G.A. 1175 of 2010. It has been submitted by Mr. Sarkar that a decree cannot be set aside by way of an application taken out in the same proceeding. The judgment of the Supreme Court in the case of Official Trustee, West Bengal and Others Vs. Sachindra Nath Chatterjee and Another, and a judgment of this Court in the case of Nanalal M. Varma and Co. (Gunnies) P. Ltd. Vs. Gordhandas Jerambhai and Others, has been referred to on this point. Mr. Sarkar's submission is that the applicants have sufficient interest in the subject-matter of the proceeding, being G.A. 1175 of 2010, as members of one of the three branches of the family of Birlas referred to in the modified clause of the trust. He has also drawn my attention to paragraph 27 of the petition filed in G.A. No. 1175 of 2010, in which it has been pleaded:--

27. The cause of action of this application arose when the application dated 10 October 2009 was made by Kumar Mangalam Birla and Neerja Birla as made descendant in the line of B.K. Birla and wife of such male descendant was

received by the Honorary Secretary of the said Trust and circulated for consideration of the Trustees.

7. Main case of HVL, being the respondent in this proceeding, i.e. G.A. No. 219 of 2012, is that the applicants have no interest which would entitle them to be joined in the proceeding initiated by G.A. 1175 of 2010. On this point submission of Mr. Anindya Kumar Mitra, learned Advocate General appearing for the respondent is that the applicants have no legal interest to defend in G.A. No. 1175 of 2010. He has argued, referring to a judgment in the case of *Sydall vs. Castings Ltd.* reported in (1966(3) ALL ER 770)] that Kumar Mangalam Birla cannot represent himself to be a descendant of the B.K. Birla branch of the family as B.K Birla himself is alive. The part of the judgment on which the reliance is placed, lays down:

"Descendant" is but one of a number of nouns which have been used in countless legal documents for a century or more to identify persons between whom and the deceased a particular family relationship existed.

8. Resisting the contention of the applicants, Mr. Mitra has submitted that a declaratory decree is not an executable decree. In support of this submission, he has cited the case of *State of M.P. Vs. Mangilal Sharma*, and a judgment of this Court in the case of *Jai Krishna Arora Vs. Maulvi Abdur Rab Firoze Ahmed and Co.,* . On the strength of these authorities, case of the respondent HVL as advanced is that since the applicants cannot get appointed as trustees in terms of the Trust Deed, it would be impermissible to give them an entry in the proceeding by which HVL has applied for declaring the decree passed in the Originating Summons as null and void. Further contention of Mr. Mitra is that his client is not getting a walkover in GA No. 1175 of 2010, without anyone contesting in that proceeding on behalf of the Birla family. The said application, he submitted, is being resisted by Nandini Nopany, who is a party to the said proceeding. Nandini Nopany is the daughter of K.K. Birla (since deceased). Three decisions have been cited by Mr. Mitra resisting entry of the applicants in G.A. No. 1175 of 2010. These are *Kasturi Vs. Iyyamperumal and Others*, *Jivanlal Damodardas Wani Vs. Narayan Ukha Sali*, . He has submitted that no relief has been prayed for against the applicants in G.A. No. 1175 of 2010, and as such they are not necessary or proper parties to this proceeding. It has been argued on behalf of HVL that he cannot be compelled to add as parties to a proceeding any person against whom no relief has been prayed for. Further submission on his part is that the scope of the proceeding (G.A. No. 1175 of 2010) would be expanded if this Application is allowed, and it is impermissible in law to have collateral issues adjudicated in a proceeding through impleading strangers.

9. In the Application, it has been pleaded that the applicants ought to be allowed to intervene in G.A. 1175 of 2010 for assisting this Court and the applicants' interest in the subject proceeding i.e. G.A. No. 1175 of 2010 has been referred to in paragraphs 6 and 12 of the Application, in which it has been stated:

6. Without prejudice to the rights of the Applicants and with a view to provide assistance to this Hon''ble Court and for the just and proper adjudication of the application filed by the Petitioner, which adversely affects the interest of the Applicants (in the manner so explained in Civil Suit No. 94 of 2010), the Applicants should be allowed to intervene in the application being G.A. No. 1175 of 2010 filed by the Petitioner.

12. The Applicants submit that their intervention in the application being G.A. No. 1175 of 2010 is proper and necessary and no effective order can be passed in the application being G.A. No. 1175 of 2010 without hearing/intervention of the Applicants herein. The Applicants submit that their presence is necessary in order to enable this Hon''ble Court to effectually and completely adjudicate and settle all disputes involved in the application being G.A. No. 1175 of 2010.

This petition thus is essentially founded on the case of the applicants made out in C.S. No. 94 of 2010. I have already discussed in brief the scope of that suit and reliefs claimed therein in the earlier part of this judgment.

10. The principle which ought to guide the question of addition of party has been laid down in the decision of Rasiklal (supra) in which it has been held:

2. Now the provisions relating to adding of parties are to be found in sub-rule (2) of Rule 10 of Order 1 of the Civil Procedure Code, which provide that the Court may at any stage of the proceedings either upon or without the application of either party, and on such terms as may appear to the Court to be just, 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 effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added. Under these provisions a person may be added as a party to the suit in two cases only, namely, (1) when he ought to have been joined and is not joined that is whenever he is a necessary party and (2) when without his presence the suit cannot be completely adjudicated. There is no jurisdiction to add a party in any other case merely because that would save a third person, the expense and botheration of a separate suit for seeking adjudication of a collateral matter, which was not directly and substantively in issue in the suit into which he seeks inclusion. The general rule is that the plaintiff is the master of his suit. He is dominus litis. 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 is discretionary to grant a relief under Order 1, Rule 10(2) of the Civil Procedure Code. In exercising the discretion the Court will invariably take into account the wishes of the plaintiff before adding a third person as a defendant to his suit. Only in exceptional cases, where the Court finds that the addition of the new defendant is absolutely necessary to enable it to adjudicate effectively and completely the matter in controversy between the parties, will it add a person as a defendant without the consent of the plaintiff. Vide Banarsi Dass Durga Prashad

Vs. Panna Lal Ram Richhpal Oswal and Others, Jivanlal Damodardas Wani Vs. Narayan Ukha Sali, and the decision of my brother J.M. Sheth J. in Civil Revn. Appln. No. 514 of 1972 decided on 9-4-1974 (Guj.).

11. In the case of Jivanlal (supra) the proceeding arose out of a dispute arising out of termination of tenancy. The defendant tenant in that proceeding had alleged that the plaintiff had no title of the property in question and he referred to another person as the owner thereof. The defendant had made an application for adding as a party defendant the person who he claimed was the actual owner of the property and this was allowed by the Trial Court on the ground that the said person sought to be impleaded as a party defendant had some interest in the suit property. The plaintiff challenged the said order in a Revisional Application before the Bombay High Court and the High Court set aside the order directing addition of party holding, inter alia that:

The Court would add a person as a party-defendant to a suit without the concurrence of the plaintiff to that suit only where the party sought to be added is a necessary party is distinguished from a mere proper party. This is the view which a single Judge of the Punjab High Court has taken in the case of Banarsi Dass Durga Prashad Vs. Panna Lal Ram Richhpal Oswal and Others, cited above, after considering the various authorities, on the point, and it is a view with which I am in agreement, since a person can be joined as a party-defendant to a suit without the concurrence of the plaintiff only in exceptional cases, the only line that the Court can draw to distinguish the ordinary rule from an exceptional case would be to distinguish between a "proper party" and a "necessary party". This distinction has been recognized in Order 1, Rule 10, Civil P.C. itself it has been held by a single judge of this Court that a real owner is not a necessary party to a suit by the benamidar, but is only a proper party (1970-72 Bom LR 827).

12. The judgment of the Supreme Court in the case of Kasturi (supra) also defines the scope of a proceeding for addition of party by a stranger to the suit. This judgment arose out of a suit for specific performance and it was held that the Court cannot allow addition of parties on collateral matters so as to convert suit for specific for contract for sale into a complicated suit for title. In that case, it was held rejecting the prayer for addition of party on the ground that such prayer, if allowed could lead to a complicated litigation and matters outside the scope of the suit would have to be gone into. The argument of Mr. Mitra resisting the applicant's prayer for being added as a party was primarily founded on these three authorities. To establish that the applicants could not have any connection or interest with the subject matter of the proceeding, he had referred to the English authority in Sydall vs. Castings Ltd. and the other decisions in which it has been held that the declaratory decree was not an executable decree. The underlying argument of the respondent on the issue was that since the applicants could not be held to be connected with the subject-matter of the proceeding being G.A. No. 1175 of 2010 and in any way, in the said proceeding he would be a total stranger.

13. In this judgment, I am not dealing in detail the strength of the case of the parties on merit of the main matter, that is whether clause 20 of the Trust Deed in terms of the decree dated 8th April 1988 could be enforced or not and whether applicants would be entitled to seek enforcement of the provisions contained in the modified clause. I am also not dealing with the question as to whether the decree passed in the Originating Summons is valid or not. In this proceeding, I am concerned with the question as to whether the applicants could contest the prayer of the petitioner, HVL in GA 1175 of 2010. As I have already observed, though it is not spelt out in detail, the applicants' case in the present proceeding is primarily founded on CS No. 94 of 2010. In G.A. No. 1175, it has been pleaded that the cause of action of HVL therein accrued from the letter of the applicants. In that suit, prayer of the plaintiffs is for being appointed as trustees in terms of the modified clause 20. In GA 1175 of 2010, HVL has asked in substance for invalidation of the decree in the Originating Summons. As the case of the applicants is founded on the claim made in C.S. No. 94 of 2010, in my opinion they have sufficient interest in the subject matter of this application. The question as to whether the applicants at all have locus to maintain the C.S. No. 94 of 2010 u/s 92 of the Code or not would have to be adjudicated upon and in this judgment I am not making any comment on that aspect of the matter. But the fact remains that the said suit has been instituted and there is no material before me that the dismissal of the said suit has been applied for by the defendants on any preliminary point. It is admitted position that the letter of the applicants dated 10 October 2009 had triggered G.A. No. 1175 of 2010. The subject of the said suit of 2010 and this proceeding are interlinked and the applicants' claim in this proceeding is also founded on the decree which is sought to be adjudged as null and void.

14. The three authorities in which it has been held that the plaintiff cannot be compelled to implead any stranger as defendant in a proceeding would not strictly apply in the facts of the present case. I do not think the points raised in this proceeding by the applicants would enlarge the scope of G.A. No. 1175 of 2010. Main issue in G.A. No. 1175 of 2010 is as to whether the decree passed in the Originating Summons is valid and enforceable or not. The applicants' contention is merely because Nandini Nopany is contesting the said application ought not to preclude the applicants from defending the decree. The applicants have an interest in the decree which is sought to be adjudged as null and void in G.A. No. 1175 of 2010. Till the suit u/s 92 of the Code is pending, the applicants continue to have interest in the subject trust. The Court's jurisdiction to add an outsider as a party and allow him to intervene in a proceeding is discretionary. In this case the applicants have demonstrated sufficient interest in the subject controversy. In the event they are permitted to intervene and participate in the said proceeding, as I have already observed, I do not think the scope of the proceeding would be unnecessarily widened. It would assist the Court on the other hand in making proper and effective adjudication of the said proceeding.

15. The applicants thus are permitted to intervene in G.A. No. 1175 of 2010. The

application is allowed in the above terms. Appropriate steps may be taken in that regard in accordance with law.

16. There shall be no order as to costs. Urgent Photostat certified copy of this judgment be given, to the learned Advocates for the parties, if applied for, with necessary formalities as expeditiously as possible.