
(2015) 09 CAL CK 0032
In the Calcutta High Court
Case No : CO 1936 of 2014

Kwality Ice Cream India Ltd.

APPELLANT

Vs

Kalpana Sadhkhani and Others

RESPONDENT

Date of Decision : 23-09-2015

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 27, Order 6 Rule 17

Citation : (2016) 1 CALLT 200

Hon'ble Judges : Subrata Talukdar, J

Bench : Single Bench

Advocate : Saptangshu Basu, Ayan Banerjee, Debasree Dhamali and Ankita Basu Mallick, for the Appellant; Bidyut Banerjee, Rupen Mitra and Aniket Mitra, Advocates for the Respondent

Judgement

Subrata Talukdar, J.

1. In this application the petitioner challenges the Order No. 18 dated 29th May, 2014 passed by the Ld. 6th Additional District Court at Alipore in Ejectment Appeal No. 36 of 2012 arising out of Ejectment Suit No. 68 of 2006.

2. The petitioner is the defendant No. 2 in the suit. The opposite parties are the plaintiffs. The ejectment suit has been filed in respect of the properties of which ownership is being claimed by the plaintiffs-present OPs being Premises No. 2/1, Gariahat Road (now known as Leela Roy Sarani), P.S. Ballygunge under Ward No. 68 of Kolkata Municipal Corporation (hereinafter referred to for short as the suit premises).

3. The suit was instituted impleading the defendant Nos. 1 and 2 being M/s. Kwality Ice Cream (Pvt. Ltd.) and M/s. Kwality Ice Cream (India) Ltd. respectively on the ground that the predecessor-in-interest of the plaintiffs-present OPs had inducted the defendant No. 1 as a monthly tenant in the suit premises. That the defendant No. 1 is no more in enjoyment of the suit premises and it is further alleged by the plaintiffs that the defendant No. 2 is in possession

thereof without any formal attornment in favour of the plaintiffs.

4. The suit was also instituted on the ground that the defendant No. 1 as the recorded tenant did not tender any rent in favour of the landlord being the predecessor-in-interest of the present OPs. It was also, inter alia, pleaded in the plaint that the notice of ejectment sent to the registered address of the defendant No. 1 has come back unserved. In the meantime the plaintiffs-present OPs have also come to learn of the fact that the defendant No. 1 has wound up its business from the suit premises and is now merged with a company by a different name. Therefore, the defendant No. 1 is no more doing any business from the suit premises. However, to avoid all future complications the defendant No. 2 has been impleaded and the notice of ejectment has been received by the defendant No. 2, who is contesting the suit.

5. Therefore, on the grounds of both subletting and default a decree for eviction of the defendants from the suit premises was prayed for along with a decree for damages by way of mesne profits.

6. Sri Saptangshu Basu, Ld. Senior Counsel appearing for the present petitioner-defendant No. 2 draws the attention of this Court to the written statement filed on behalf of the defendant No. 2 in the suit. Paragraph 6 of the written statement reads as follows:--

"That with reference to the Paragraph 6 of the plaint the defendant states that the name of the company changed due to legal formalities, necessitated by turnover of the company under Section 43 (1-A) of the Companies (amendment) Act. By virtue of this word "profit" was deleted before the word (Limited) in the name of the company".

7. Sri Basu further submits that although the above facts were pleaded at Paragraph 6 of the written statement (supra) the change of the nomenclature of the defendant No. 1 to the defendant No. 2 could not be supported by documentary evidence at the stage of trial. It could not be therefore proved on the basis of documentary evidence before the Ld. Trial Court that in effect the defendant No. 2 is the same entity as the defendant No. 1 although there has been a conversion in the name and the pattern of its constitution.

8. Sri Basu further submits that after the suit was decreed in favour of the plaintiffs-present OPs on 18th September, 2012, sometime around 2014 at the appellate stage the petitioner-defendant No. 2 after a strenuous search could locate the necessary documentary evidence in support of the fact that the defendant No. 2 is an entity which has stepped into the shoes of the defendant No. 1 and, therefore could not be considered to be a distinct and/or separate entity thereby rendering the plaintiffs-present OPs ineligible to receive a decree on the ground of subletting or default.

9. The defendant No. 2 challenged the decree in the suit by filing Ejectment Appeal No. 36 of 2012 and, in order to bring the documentary evidence into the

written statement prayed for amendment of written statement and thereafter to proceed with the appeal. Sri Basu submits that the amendment sought for has its genesis in paragraph 6 of the written statement (supra) and therefore no fresh cause-of-action different from what has been already pleaded in the written statement was sought to be introduced by such amendment.

10. By the impugned Order No. 18 dated 29th May, 2014 the Ld. Appellate Court took up for consideration the application for amendment as filed by Sri Basu's client and was pleased to reject such application. The Ld. Appellate Court consequent to such rejection proceeded to hear the appeal along with the application of the petitioner-defendant No. 2-appellant for introducing additional evidence under Order 41 Rule 27 of the CPC.

11. On the strength of several decisions reported in 2004 (4) ICC 281 (at paras 12 and 14); 2008 (3) ICC 612 (at para 15); 2007 (1) ICC 337 (at para 20); and Kailash Vs. Nanhku and Others, AIR 2005 SC 2441 : (2005) 3 CTC 355 : (2005) 4 JT 204 : (2005) 141 PLR 558 : (2005) 4 SCC 480 : (2005) 3 SCR 289 , Sri Basu argues that a prayer for amendment can be made at any stage of the proceeding and the Court should be liberal in its approach to allow such amendment. Sri Basu stresses on the point that since the ground taken by the plaintiffs-present OPs is one of subletting, the defendants ought to be given an opportunity to prove that no subletting took place since, in effect, the defendant No. 2 is a continuation of the defendant No. 1 by a different name.

12. Sri Bidyut Kr. Banerjee, Ld. Senior Counsel appearing for the present OPs, assisted by Sri Aniket Mitra, Ld. Counsel submits that the present petitioner-defendant No. 2 plainly failed to exercise due diligence. Arguing that no amendment can be allowed at the appellate stage when such amendment has the consequence of calling for a fresh trial, Sri Banerjee takes this Court to the judgment and decree of the Ld. Trial Court.

13. Pointing to the issues framed by the Ld. Trial Court and particularly Issues No. 3 and 5, Sri Banerjee submits that on the basis of an exhaustive examination of evidence the Ld. Trial Court came to the finding that there is no relationship between the plaintiffs-landlord and the tenant-defendant No. 2.

14. Issues No. 3 and 5 respectively read as follows:--

"3. Is there any relationship between of landlord and tenant in between the parties?

5. Is the defendant guilty of subletting the suit premises without the permission of the plaintiffs?"

15. Issue No. 3 has been discussed by the Ld. Trial Court as follows:--

"This issue has not been really challenged by/or on behalf of the defendants. Nowhere, either in the written statement or in the affidavit-in-chief of DW1, it is pleaded that there is no relationship of landlord and tenant in between the

plaintiff and the defendant. Moreover, on perusal of Exhibit 1, i.e. the tenancy Agreement, it appears to this court that the agreement of tenancy/lease was made in between the predecessors-in-interest of the present plaintiff and the defendant No. 1. Therefore, there is relationship of landlord and tenant in between the plaintiff and defendant No. 1. However, there is no document to show that there is relationship of landlord and tenant in between the plaintiff and defendant No. 2 and actually there is no such relationship between them as it appears from the materials on record.

Therefore, the issue is decided in favour of the plaintiffs."

16. Issue No. 5 has been discussed as follows:--

"From the above discussions it is seen that there is no relationship of landlord and tenant in between the plaintiffs and defendant No. 2 and the relationship exist in between the plaintiff and defendant No. 1. Now, admittedly the defendant No. 2 is in physical possession of the suit premises through its men and agents, though there is no privity of contract in between the plaintiff and defendant No. 2 Exhibit 1 shows that the lease Agreement was made in between the predecessors-in-interest of the present plaintiff and the defendant No. 1. There is/was no agreement in between plaintiffs and defendant No. 2.

DW1 who deposes on behalf of the defendant No. 2 states that the name of the company has been changed in different material time. Initially, the name of the company was Gay Ice Cream (Cal) Pvt. Ltd. and then changed to Kwaliti Ice Cream (Cal) Pvt. Ltd. and then changed to Kwaliti Ice Cream Ltd. and then changed to Kwaliti Ice Cream (India) Ltd. and then to Kwaliti Ice Cream Pvt. Ltd. However, there is no evidence on record on behalf of the defendants to corroborate the same.

It is admitted by DW1 that the business of the defendant company has been transferred to M/s. Hindustan Lever Ltd. before February, 2007.

On careful perusal of Exhibit Nos. 5,6,7 and 8 it appears to this court that there is no company in existence at present in the name of Kwaliti Ice Cream Pvt. Ltd., i.e., the defendant No. 1 and the Kwaliti Ice Cream Pvt. Ltd. was dissolved and converted into LLP (Limited Liability Partnership) in terms of Special Resolution passed by the company in the A.G.M. (Annual General Meeting) held on 10th September, 2010 (Exhibit 6) and the designated name of the LLP as per the said special resolution is Kwaliti Ice Cream (India) LLP, i.e., the defendant No. 2. However, admittedly the defendant No. 1 did not attorn the said fact of resolution and conversion to the plaintiffs. Moreover, it further appears to this court that the Kwaliti Ice Cream Pvt. Ltd. admitted to have earlier transferred whole business of the company to M/s. Hindustan Lever Ltd. and Hon'ble Company Law Board vide its Order dtd. 25th September, 2008 (Exhibit 5) allow the petition of the company for shifting its Registered Office from West Bengal to National Capital Territory of Delhi and the same fact is admitted by DW1. Therefore, it is proved that defendant No. 1 is not in possession of the suit premises and has sublet the

suit premises to defendant No. 2 without the knowledge and consent of the plaintiffs."

17. Therefore, Sri Banerjee argues that upon an exhaustive consideration of the pleadings and the evidence on record the Ld. Trial Court came to the conclusion that there was no attornment of the possession of the defendant No. 2 by the defendant No. 1 in favour of the plaintiffs. The present amendment is clearly an afterthought and designed to frustrate the findings of the Ld. Trial Court.

18. Further arguing that the defendant Nos. 1 and 2 are actually separate entities Sri Banerjee takes this Court to the affidavit-in-opposition filed on behalf of the present OPs. Relying on data obtained from the Registrar of Companies (for short ROC), Sri Banerjee argues that the defendant No. 1 was never converted into the defendant No. 2 and by order of the Company Law Board (Kolkata Branch) the business of the defendant No. 1 was transferred to M/s. Hindustan Lever Ltd. in the year 2010. Therefore, assuming but not admitting the argument advanced on behalf of the petitioner that the defendant No. 2 stepped into the shoes of the defendant No. 1, since defendant No. 1 itself lost its existence in the year 2010, there can be no defendant No. 2 after that period.

19. In any view of the matter, Sri Banerjee argues that there can be no grant of a concurrent lease in favour of the defendant No. 2 and such prohibition is clearly settled by judicial authority as reported in Sambhunath Mitra and Others Vs. Khaitan Consultant Ltd. and Others, AIR 2005 Cal 281 : (2005) 2 CHN 519 : (2005) 1 ILR (Cal) 349 . Replying to Sri Basu's claim that there has been merely a delay in following up with the documentary evidence in support of the pleadings at paragraph 6 of the written statement, Sri Banerjee submits that delay and lack of diligence must be separately understood.

20. Having heard the parties and considering the materials on record this Court is first required to notice the impugned order of the Ld. Appellate Court dated 29th May, 2014 being Order No. 18. Before the examining the impugned order dated 29th May, 2014 this Court is also required to notice the previous order of the Ld. Appellate Court being Order No. 17 dated 5th May, 2014.

21. By Order No. 17 dated 5th May, 2014 the Ld. Trial Court, inter alia, recorded that the argument concluded on 27th March, 2014. On 5th March, 2014 the appeal was adjourned again on an application of the appellant when the appellant undertook to argue on 26th March, 2014 which was fixed as the last chance for hearing the appeal. Simultaneously, the application of the appellant dated 5th May, 2014 for amending the terms of the appeal was allowed on payment of costs and considering such fresh incorporation of grounds the appellant was permitted to make his final submissions on the next date fixed, which was 29th May, 2014.

22. On 29th May, 2014 the appellant-present petitioner-defendant No. 2 filed three applications. The first, for an adjournment. The second, for amendment under Order 6 Rule 17 CPC. And the third, for introducing additional evidence

under Order 41 Rule 27 CPC.

23. The adjournment application was opposed vociferously by the plaintiffs and rejected in view of the history of the proceedings.

24. The application for amendment was considered and the Ld. Trial Court noticed from the Lower Court Records that the Ejectment Suit No. 68 of 2006 was filed on 26th May, 2006. On 23rd March, 2007 the suit proceeded ex parte since none appeared for the defendants in spite of notice. On 28th February, 2008 the defendant No. 2-present petitioner filed the written statement. The amended plaint was filed on 23rd February, 2011.

25. The Ld. Appellate Court also noticed that PW1 filed affidavit-in-chief on 23rd February, 2011, was cross-examined and discharged. Evidence was placed on behalf of the defendant No. 2 by filing affidavit-in-chief of DW1 on 2nd May, 2012, who was also cross-examined and discharged. The decree followed on 18th September, 2012.

26. The Ld. Trial Court further observed as follows:--

"This appeal was filed on 17.12.2012. On 5.3.14 Id. advocate for the appellant undertook that he will conclude his hearing on 27.3.14 positively. On 5.5.14 the appellant filed an application for incorporation of fresh grounds and for recalling the order and giving fresh opportunity to argue the matter. These applications were allowed. Today the appellant has filed this application for amendment of the W.S. and leading additional evidence along with adjournment petition. By the amendment the scope of order-6 rule-17 has been restricted by the provision that no application for amendment shall be allowed after the trial has commenced, unless the Court comes to the conclusion that inspite of due diligence the party could not have raised the matter for the commencement of the trial. The above mentioned facts indicate that the appellant had sufficient opportunity at the time of filing its W.S. Nowhere it is contended that the facts were not within the knowledge of the appellant. The W.S. was filed on 28.2.08. Thereafter, more than five years have passed. The grounds of the appeal were amended. The appellant led its evidence before the Id. Trial Court. The appellant argued its case before this Court without seeking for amendment of W.S., till today. The appellant remained grossly and negligent and is not entitled for assistance of this Court. Conduct shows that appellant did not require the amendment right.

Moreover, no reason has been attributed for non-incorporating those contention in the W.S. has been given specially when the facts were within the knowledge of the answering defdt.

Hence, the petition is rejected on contest without cost. Fix 25/06/14 for hearing of the appeal as well as the application under order-41 rule-27 of C.P. Code."

27. Having regard to the crisp observations made by the Ld. Appellate Court regarding the conduct of the appellant-present petitioner this Court is persuaded

to hold that upon failure to exercise due diligence at the appropriate stage inspite of having sufficient opportunity to do so the appellant is adopting dilatory tactics.

28. This Court is further ad idem with Sri Banerjee that the attempt to put the clock back by the appellant at this stage when the trial was complete and the decree declared is an afterthought and impermissible.

29. This Court also finds that the documentary evidence claimed by the petitioner to have been searched out later in support of paragraph 6 of the written statement (supra) cannot be appreciated since such documents are eminently in the public domain and therefore readily accessible. It does not stand to reason that the officers of the defendant Nos. 1 and 2 would sit by idly and fail to access such document at the relevant time when the matter was proceeding before the Ld. Trial Court.

30. For the above reasons this Court is not satisfied with the pretext offered on behalf of the petitioner that the documents could be located only after a strenuous search. This Court also draws inspiration from the judgment of the Hon"ble Single Bench of this Court reported in Aktar Hossain Vs. Susama Rani Sahoo, (2001) 2 ILR (Cal) 101 in the matter of Aktar Hossain & Ors. v. Susama Rani Sahoo & Ors. wherein the Hon"ble Single Bench was pleased to hold that no amendment can be allowed which will mean a retrial of the whole case on a new footing at a late stage.

31. For the above reasons CO 1936 of 2014 fails. The order impugned No. 18 dated 29th May, 2015 in Ejectment Appeal No. 36 warrants no interference.

32. CO 1936 of 2014 stands accordingly dismissed.

33. There will be, however, no order as to costs.

34. Urgent Xerox certified photocopies of this judgment, if applied for, be given to the parties upon compliance of all requisite formalities.