
(2005) 04 CAL CK 0012

In the Calcutta High Court

Case No : A.P.O.T. No. 657 of 2004, G.A. No's. 2569 and 4033 of 2004 and C.S. No. 105 of 2004

Lyons Corporate Market Ltd. and Others

APPELLANT

Vs

Uma Gupta and Others

RESPONDENT

Date of Decision : 21-04-2005

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 10, Order 1 Rule 5(3), Order 1 Rule 8, Order 1 Rule 8(3), Order 1 Rule 8(5)

Citation : (2005) 3 CALLT 212

Hon'ble Judges : Soumitra Pal, J; Dilip Kumar Seth, J

Bench : Division Bench

Advocate : S.B. Mookherjee, A.K. Chatterjee and S. Ganguly, for the Appellant; Pratap Chatterjee and Sakya Sen for Respondent Nos. 13 and 14, Abhrajit Mitra and Jishnu Chowdhury for Respondent No. 1 and S.N. Mookherjee and A.K. Gandhi for Respondent Nos. 2 and 15 to 30, for the Respondent

Final Decision : Dismissed

Judgement

Dilip Kumar Seth, J.—The appellants made an application under Order 1 Rule 8 sub-rule (3) of the CPC (CPC) for being added as party to the suit on the ground that they are parties interested. The Notice of Motion indicated that they have wanted to be parties as defendants whereas in the application the prayer is only for being added as party to this suit. The affidavit in respect of the application does not disclose in what capacity the appellants intended to intervene.

1.1. Admittedly, leave under Order 1 Rule 8 was granted and the notice was published on 30th April, 2004 and 4th May, 2004. The application was affirmed on 9th July, 2004 and was filed on 13th July, 2004 namely, after the expiry of the period mentioned in the notice under Order 1 Rule 8 so published.

1.2. The learned single Judge in its order dated 27th September, 2004 referred to the decisions in the case of Vassonji Tricumji v. Esmailbhai Shivji and Ors. ILR 34 Bom 420; T.G. Jog v. Muir Mills Limited ILR (1953) Cal 171; Batokristo Nandy

v. Ranadeb Chowdhury ILR (1972) Cal 480 and Balaram Palai and Others Vs. Collector, Puri and Others, which in turn relied on the decision in the case of Chairman, The Chairman, Tamil Nadu Housing Board, Madras Vs. T.N. Ganapathy, and observed that the scope of the application for being added as party in a suit where leave under Order 1 Rule 8 was granted after the expiry of the period of notice was limited and that one could be added as a party only when it was established that his interest was not being properly represented in the, suit and that it would be prejudicially affected by the conduct of the suit by the parties thereto and that it is discretionary on the part of the Court to add a person applying for addition under Order 1 Rule 8 of the Code of Civil Procedure. It is to be dealt with due care and circumspection and it is never a matter of course.

1.3. The learned single Judge found that no reason was assigned as to why the applicants could not come within the time indicated in the notice. The only allegation was that the applicants were the owners and the occupiers of the building and, as such, they were vitally interested in the subject matter of the suit and the reliefs claimed therein. They had not stated that the conduct of the suit was not in proper hands or that their interests were prejudicially affected. It was suggested in course of hearing that near relations of some of the applicants were already on record as parties to the suit. In these circumstances, the application was rejected with the clarification that the said order of rejection would not prevent the petitioners to apply for their addition in future if they can show good grounds that their interests are being injured in any way.

1.4. Against this order the present appeal is preferred.

The appellant's contention :

2. Mr. S.B. Mookherjee, the learned senior counsel, relied on the decision in the case of Razia Begum Vs. Sahebzadi Anwar Begum and Others, and contended that direct interest in the property is sufficient to enable a person to be added as a party to a suit. He further relied on the decision in the case of Saila Bala Dassi Vs. Sm. Nirmala Sundari Dassi and Another, and contended that if a party becomes bound by a decree in respect of a property in which he is vitally interested he is entitled to be added. He relied on the decision in the case of Chairman, The Chairman, Tamil Nadu Housing Board, Madras Vs. T.N. Ganapathy, in support of his contention that a person should be added as a party to avoid multiplicity of the litigation if the parties have same interest or common grievance and it is not necessary that the cause of action should be the same. Relying upon the decision in the case of Batokristo Nandy v. Ranadeb Chowdhury ILR (1972) Cal 480 (para 25), Mr. Mookherjee contended that the added defendant may file Written Statement or adopt the Written Statement or raise new plea or if one is added as plaintiff he has to adopt the plaint or ask for amendment if he wants to raise new plea in order to impress upon the Court that by reason of the interest of the appellant, it was necessary to add them parties for the purpose of protecting their interests, which are in dispute. He relied on a decision in the case of T.G. Jog v. Muir Mills Limited ILR (1953) Cal 171 and

contended that a co-plaintiff seeking enlargement of the scope of the suit cannot be added but the said principle will not preclude a person from protecting his own interest since the decree passed would bind him. Mr. Mookherjee also distinguished the decision in the case of Balaram Palai and Others Vs. Collector, Puri and Others, . According to him, the scope of Order 1 Rule 8 cannot be put into straight jacket formula on the principle that the parties are acting prejudicially to the interest of the party. The discretion has to be exercised judicially. He submits that the principle of prejudice is one of the factors but not the only factor. Therefore, the learned single Judge confined his attention only to a particular factor leaving aside other factors when no straight jacket formula has been laid down and it is left at the discretion of the Court, which is required to exercise its discretion judicially. The delay would not be a matter, which can stand in between, if the case of interest is made out.

2.1. Mr. A.K. Gandhi, the learned counsel appearing on behalf of the respondent Nos. 2. 15 to 30, supports Mr. Mookherjee and adopts his submission.

The Respondent's contention :

3. Mr. Pratap Chatterjee, the learned senior counsel, opposed this prayer on the ground of maintainability of the appeal. According to him, the appeal is not maintainable under Clause 15 of the Letters Patent since it is not a Judgment within the meaning thereof, inasmuch as, no right has since been finally determined. According to him, right to apply to add as a party in future has been kept open. He relied on the decision in the case of Bibijan Bibi v. Abdul Jabbar Daftary AIR 1917 Cal 627 where in a case arising out of an order passed by the learned District Judge on an application under Order 1 Rule 10, the Court held that no right was determined. Mr. Chatterjee points out that the parties are related to some or the other of the respondents or the defendants. He pointed out with reference to page 55 that the applicant No. 1 in the serial is a company. The applicant No. 3 is the wife of defendant No. 1; the applicant No. 4 is the brother of the defendant No. 1; the applicant No. 5 is a company of respondent No. 2; the applicant No. 8, a company is controlled by respondent No. 20; the applicant No. 9 is the son of defendant No. 15. Therefore, it cannot be said that their interests are being prejudicially affected and would not be looked after by their relations or other related persons. He pointed out that applications were coming in dribblets one after the other for being added as a party which was initially allowed by consent, but ultimately the proceedings of the suit was being delayed by reason of filing of such application in waves. According to him, there is distinction between the scope of being added as party under Order 1 Rule 8 and under Order 1 Rule 10. In a case where leave under Order 1 Rule 8 is granted, one cannot be added as party as of right until it is established that the suit is not in safe hands without which he cannot ask for being added. He refers to the decisions relied upon by the learned single Judge and contends that the law is well settled.

Appellant's reply :

4. On the question of maintainability, Mr. Mookherjee submits that the order is a Judgment within the meaning of Clause 15 of the Letters Patent. To support his contention, he relied on the decisions in the cases of *Shah Babulal Khinji v. Jayaben D. Kania and Ors.* 1981 SC 1786 ; *State Bank of India Stall Association v. Popat & Kotech Property* 2000 (2) CLJ 62; *P&J Services Pvt. Ltd. v. Board of Trustees for the Port of Calcutta and Ors.* 2003 (2) CHN 283; *Liverpool and London S.P. and I Asson. Ltd. Vs. M.V. Sea Success I and Another*, ; *Iridium India Telecom Ltd. Vs. Motorola Inc.*, , and also in *Great Eastern Shipping Co. Ltd. Vs. Board of Trustees for the Port of Calcutta*, . He also distinguished the decisions relied upon by Mr. Chatterjee.

4.1. Relying upon paragraph ,13 of *Balaram Palai (supra)*, he had distinguished that one has to be brought on record in order to protect his interest and the power under sub-rule (3) is discretionary which can be exercised under circumstances in which such discretionary power can be exercised without putting the same in a straight-jacket formula. Relying on the decision in *E & I Services Pvt. Ltd. v. Board of Trustees* 2003 (2) CHN 283, Mr. Mookherjee contends that in the said decision an order under Order 1 Rule 10 was held to be appealable. Relying on the decision in *Suprokash Das Vs. The Indian Tea Licensing Committee* he contended that though rejection of an application under Order 1 Rule 10 does not decide the right of the appellant but he would be kept out of the suit in a case where no cause of action has been made out against him and no relief has also been sought for against him. Referring to the present fact, he submits that in this case the present appellants have a cause of action and are entitled to the relief or reliefs sought for by the plaintiff. He relied on paragraphs 12 and 14 of the said Judgment to support his contentions.

Order 1 Rule 8 : Scope : The principle :

5. In this background, we are now to consider the scope of Order 1 Rule 8 sub-rule (3) read with sub-rule (5) of the CPC. The provisions of Order 1 Rule 8 has been provided to enable one person to sue or defend on behalf of all with the same interest. This representative capacity has been enacted with a view to create a convenience in the matter of procedure. It is not as open as that is contemplated under Order 1 Rule 10 in which having an interest directly is sufficient to be added as a party. The Courts have taken a consistent view with regard to which there is little to be distinguished or differed from and has since been affirmed by the Apex Court as has been dealt with by the learned single Judge particularly in *Vossorji Tricumji (supra)* by the Bombay High Court, *T.G. Jog (supra)* and *Batokristo Nandy (supra)* by the Calcutta High Court, *Balaram Palai (supra)* by the Orissa High Court and *Chairman, T.N. Housing Board v. T.N. Ganapathy (supra)* by the Apex Court. These were sought to be contrasted with the provision laid down in sub-rule (3) or Rule 5 of Order 1 Rule 8. In fact, sub-rule (3) does not prescribe any qualification for being added as a party to a proceeding in which leave under Order 1 Rule 8 was granted, as was rightly pointed out by Mr. Mookherjee, whereas sub-rule (5) apply in a case where the

party suing or defending does not proceed with due diligence in the suit or defence, the Court may substitute any party in his place. Therefore, this would not be sufficient to interpret the provisions, except as has been sought to be laid down in these decisions by the different High Courts as cited. On the other hand, the decision in Abdul Jabbar Daftary (supra) was a decision on an order passed by the District Court against which no appeal lay under Order 43 of the CPC and as such it could not be brought within the purview of Clause 15 of the Letters Patent and as such this decision does not help the respondents.

5.1. Though the provisions have been couched in such simple manner, yet they cannot be read without the context in which they are provided for under Order 1 Rule 8, a procedure provided for the sake of convenience circumscribing the scope and ambit making it different from the procedure provided under Order 1 Rule 10. Under sub-rule (3) any person on whose behalf or for whose benefit the suit is instituted or defended under sub-rule (1) may apply to the Court to be made a party to such suit. This does not give right to a person to be added as a party. It only confers a right to apply leaving the relief to be granted by the Court at its discretion. In case it is construed as a right, in that event, the very purpose of engrafting the provisions of Order 1 Rule 8 would be frustrated, as has been rightly held by the decisions referred to in the Judgment appealed against and with which the Apex Court has not differed. It cannot be presumed that applications made under sub-rule (3) are to be allowed without due exercise of the discretion.

5.2. Admittedly, the discretion might have several facets. The question of prejudice may be one of the factors but not all. But even then there must be something to indicate that the right of the applicant is not being protected in the representative suit by the plaintiff if he wants to be added as plaintiff or the defendant if he wants to defend the suit. The scope under sub-rule (5) is not confined only to the parties to the proceeding. In case it appears that a person suing or defending any such suit does not proceed with due diligence in the suit or defence, the Court may substitute in his place any other person having the same interest in the suit. The word "person" used therein does not seem to be confined only to the parties thereto. It may include such persons who are not added as parties or who might apply for being so added. Sub-rule (3) and sub-rule (5) cannot be read out of context. The entire purpose has to be read from the reconciled meaning of the scheme of Order 1 Rule 8. Thus, the legislature had intended that there should be some restriction in the matter of addition of party without entitling a person to be added as a party as of right but at the discretion of the Court and such discretion must be exercised in a situation which might give rise to an apprehension either to the party or to the Court that the interest of the party applying is not being protected. We do not think that there could be any other interpretation of those provisions.

The present case : The principle applied :

6. In the facts and circumstances of this case, it appears from the application

that the applicants had not indicated in its application as to in which category the applicants wanted to be added as party. It has not spelt out as to what kind of prejudice to their interest is apprehended particularly when it is not denied that they had some relation with some of the parties already on record. The application does not spell out that the suit is not in safe hands either as plaintiff or defendant or how their right is going to suffer. At the same time, in the order itself the learned single Judge had clarified that the said order would not prevent the appellants in future from being added as parties to the application on good grounds that their interests are being injured in any way. Thus, we see that the right of the appellant was not determined finally and it was still kept open, if they are so advised for still making out sufficient ground for being added as party within the scope and ambit of sub-rule (3) and sub-rule (5).

6.1. Thus, by reason of such situation, it cannot be said that the order could be treated as a Judgment within the meaning of Clause 15 of the Letters Patent determining the particular right of the appellant finally. In any event we need not go into the question of maintainability at this stage since on merit we have held that there was no infirmity in the order of the learned single Judge having regard to the facts and circumstances of the case and the law is settled on this question.

6.2. So far as the decision in Razia Begum (supra) is concerned, there is no doubt about the proposition laid down therein; but it has to be interpreted in the facts and circumstances and in consonance with the legal principles as enunciated above. As such the said decision does not help Mr. Mookherjee. Similarly the decision in Smt. Saila Bala Dassi (supra) also does not help him since the interest of the applicant is adequately protected under Order 1 Rule 8 and they can protect their interest upon making out sufficient grounds if there is any case of apprehended injury. A person is entitled to be added as a party if the party is bound by a decree and is virtually interested therein. This proposition is well settled but in the peculiar facts and circumstance of this case it would not come in aid of Mr. Mookherjee. The decision in T.N. Ganapathy (supra) on the other hand supports Mr. Chatterjee's client more than the appellant and does not seem to help Mr. Mookherjee. Similarly the decision in Batokristo Nandy (supra) as dealt with by the learned single Judge appears to be the correct reading and as such would not help Mr. Mookherjee in the present case. Similarly the decision in Muir Mills Ltd. (supra) also does not help having regard to the discussion made above. We are in full agreement with the view taken in Balaram Palai (supra) and do not harbour any other view, with regard to what has been taken under the two decisions of our High Court in T.G. Jog (supra) and Batokristo Nandy (supra) and are fully in agreement with the decision in Vassonji Tricumji (supra) of the Bombay High Court.

Order :

In the result, the appeal fails and is hereby dismissed. The order appealed against is hereby affirmed. There will, however, be no order as to costs.

Let it be recorded that we have not entered into the merits of the case and all points are kept open.

Xerox certified copy of this Judgment be made available to the parties, if applied for, on usual terms.

Soumitra Pal, J.

7. I agree.