

(2018) 01 DEL CK 0434

In the Delhi High Court

Case No : First Appeal From Order (OS) (COMM) No. 9, 10 Of 2018

M/S Amrit Lal Bajaj & Co & Anr

APPELLANT

Vs

M/ Vysya Leasing And Finance Ltd

RESPONDENT

Date of Decision : 19-01-2018

Acts Referred:

Code Of Civil Procedure, 1908 — Section 30, 50, 52, 151, Order 22 Rule 10, Order 11 Rule 12, Order 11 Rule 14, Order 16 Rule 14, Order 6 Rule 17, Order 43 Rule 1
Commercial Courts Act, 2015 — Section 13
Code Of Criminal Procedure, 1973 — Section 340
Companies Act, 1956 — Section 21, 23, 23(1), 23(3)
Companies Act, 2013 — Section 18
Evidence Act, 1872 — Section 74

Citation : (2018) 01 DEL CK 0434

Hon'ble Judges : G.S.Sistani, J; Sangita Dhingra Sehgal, J

Bench : Division Bench

Advocate : Urvashi Singh, Radhika Arora, Vidit Gupta

Final Decision : Dismissed

Judgement

G.S.Sistani, J

CM.APPL 2379/2018(Exemption) in FAO(OS) (COMM) 9/2018 CM.APPL 2380/2018(Exemption) in FAO(OS) (COMM) 10/2018

1. Exemption allowed, subject to all just exceptions.

2. The applications stand disposed of.

FAO(OS) (COMM) 9/2018

FAO(OS) (COMM)10/2018

3. Both the appeals arise out of a common order passed by the learned Single Judge of this Court dated 28.11.2017. The present appeals have been instituted under Order XLIII Rule 1 of the Code of Civil Procedure (hereinafter referred to

as "CPC") read with Section 13 of the Commercial Courts Act, 2015. Since common arguments have been addressed by counsel for the parties, both the appeals are being disposed of by a common judgment.

4. The following applications were filed by the appellants in the two suits where the parties are common:

"(I) I.A. No.15039/2016 (under Order VI Rule 17 CPC) filed by legal heir no.1 of deceased defendant no.2/appellant in CS(COMM) No.421/2016 I.A. No.15037/2016 (under Order VI Rule 17 CPC) filed by legal heir no.1 of deceased defendant no.2/appellant in CS(COMM) No.424/2016

(II) I.A. Nos.12315/2016 & 10097/2017 (under Order XI Rule 12 and 14 CPC read with Section 151 CPC) filed by legal heir of deceased defendant no.2/appellant in CS(COMM) No.421/2016 I.A. Nos.12435/2016 & 10093/2017 (under Order XI Rule 12 and 14 CPC read with Section 151 CPC) filed by legal heir of deceased defendant no.2/appellant in CS(COMM) No.424/2016

(III) I.A. No.10098/2017 (under Section 30 CPC read with Order XVI Rule 14 CPC) by legal heir no.1 of deceased defendant no.2/appellant in CS(COMM) No.421/2016 I.A. No.10094/2017 (under Section 30 CPC read with Order 16 Rule 14 CPC) by legal heir no.1 of deceased defendant no.2/appellant in CS(COMM) No.424/2016

(IV) I.A. No.2371/2017 (under Section 151 CPC) by plaintiff /respondent in CS(COMM) No.421/2016 I.A. No.2373/2017 (under Section 151 CPC) by plaintiff/respondent in CS(COMM) No.424/2016"

5. Some necessary facts to be noticed for the disposal of the appeals are that the appellants are the legal heirs of the original defendant no.2, late Sh. Rajesh Bajaj, in both the suits. Defendant no.1, being the sole proprietorship concern of Late Sh. Rajesh Bajaj. Upon the demise of Sh. Rajesh Bajaj, his legal heirs were substituted as defendants and are the appellants herein. Counsel contends that the applications have been filed by Mrs. Sapna Bajaj, wife of Late Sh. Rajesh Bajaj. Out of the two suits, one suit is for recovery of Rs.14.0 lakhs along with the interest being CS (COMM).421/2016, while the second suit being CS (COMM).424/2016, is a suit for recovery of Rs.1.52 crores along with the interest. The first suit was filed in the year 2007 being CS (OS).549/2007 and the second suit was registered as CS (OS).2010/1997. Both the suits pertain to recovery of amounts sought on account of the shares having been sold to the original defendant no.2. For the sale price, cheques were issued and the same were dishonoured, which led to the filing of the suits in the year 1997. Both the suits stand consolidated and are pending before this Court. Fresh suits numbers have been given while registering them as commercial suits under the Commercial Courts Act, 2015. In the suit being CS(COMM).424/2016, a cheque for a sum of Rs.1.10 crores dated 01.09.1994 was issued and, in the suit being CS(COMM).421/2016, a cheque for a sum of Rs.10.0 lakhs dated 23.09.1994, were issued. In both the suits, applications have been filed for amendment to the

written statement as also for production of documents and for preserving of documents. As noticed by the learned Single Judge, the evidence of both the parties stand completed and the suits were fixed in the category of "Finals" for final arguments.

6. Counsel for the appellants submits that the learned Single Judge has failed to appreciate that at the time of seeking amendment, the merits of the amendment are not to be considered. It is further submitted that the appellants do not intend to set up a new case and, on the contrary, the respondents were duty bound to disclose all the correct facts, but did not do so. Counsel contends that the learned Single Judge has failed to appreciate that the appellants had been diligently defending the suits and never delayed the trial at any point of time. It is further contended that the learned Single Judge has failed to appreciate that as per the settled law, the Courts must encourage filing of interlocutories to cut short the litigation and thus, the reliefs so prayed by the applicants in the applications filed under Order XI Rule 12 should have been allowed. It is also contended that the learned Single Judge has erred in dismissing the applications under Section 30 of CPC, which was filed only to preserve the record of the Government Department, which was also essential for disposal of the application pending under Section 340 Cr.P.C. Counsel further submits that the learned Single Judge failed to appreciate that there was no delay in filing the application as it was the defendant/appellant no.2 Late Shri Rajesh Bajaj who was the sole proprietor of the appellant company expired on 12.03.2003 and it is only post his death that the legal heirs of the deceased learnt about the pendency of the present cases and was impleaded as a party to the suit vide order dated 24.08.2005. Therefore, such an application could not have been filed earlier or in the year 2008, when the written statement were filed.

7. Learned counsel for the appellant submits that in all, the appellants had sought three amendments. Firstly, the cheques issued are a fraud upon the appellants. The said cheques could not have been issued in the name of the respondent herein (Plaintiff Company) because the respondent company did not exist in September, 1994. The appellant relied upon the incorporation certificate of the respondent company, which was issued in year 1996, and other documents like bank account entries. Secondly, the respondent company changed its name from M/s Vysya Leasing and Finance Ltd to M/s KMG Leasing and Advances Ltd without bringing the same to the notice of the court, the suit should have been dismissed on the ground of concealment. Thirdly, the legal heirs have not inherited any assets from the deceased Sh. Rajesh Bajaj and are therefore not liable.

8. We have heard learned counsel for the parties, perused the impugned order passed by the learned Single Judge and also gone through the documents placed on record.

9. It may be noticed that the learned Single Judge while passing the impugned order has carefully considered the amendment sought and by a reasoned order,

while rejecting the application, rightly held that the defence sought to be raised was available to the defendant no.2 deceased Rajesh Bajaj, who had issued the cheques under his signatures, but he did not raise this defence and since deceased Rajesh Bajaj had not raised the defence, his legal heirs, including the present appellant herein, cannot be allowed to raise the objection that the respondent herein was not in existence in September, 1994. The second reason for rejecting the amendment is that for the change in the name of the respondent company from M/s Vysya Leasing Ltd to M/s Vysya Leasing and Finance Ltd, the respondent relied upon a letter dated 01.12.1988 issued by the Government of India, Department of Company Affairs. According to the letter, the name of M/s Vysya Leasing Ltd. was very similar to another company already registered by the name of M/s Vysya Bank Leasing Ltd. and, thus, the respondent company must adopt for the change in name. According to the stand taken by the respondent pursuant to the letter dated 01.12.1988, the respondent company passed a Resolution dated 01.12.1990 to change its name from M/s Vysya Leasing Ltd to M/s Vysya Leasing and Finance Ltd, which was acknowledged by the Department of Company Affairs vide its letter dated 30.10.1996. On the ground of the Resolution dated 01.12.1990 passed by the respondent company for change of name, the procedural request was forwarded to the concerned statutory authorities and the respondent company, in the meanwhile, in its record changed its name. Pursuant thereto, the name of the bank account was also changed and the balance sheets post the year 1991 and other documents were also drawn in the name of the respondent. The learned Single Judge considered the fact that although as on 1994, a formal change of name by issuance of a fresh incorporation certificate was not available to the respondent company, which only became available in the year 1996, but since the respondent had already changed its name by a Resolution of 1990 for all practical purposes, therefore, defendant no.2 Rajesh Bajaj had issued the cheques in the name of the respondent company.

10. It is in the above backdrop, the learned Single Judge observed that ordinarily, the Court would not go into the merits of the amendment sought but the rule is not a absolute rule, as in some cases in order to decide whether the application for amendment is bonafide or malafide, and taking into consideration the peculiar facts and circumstances of these two present suits, one of which is pending for the past 20 years, the Court examined the amendments which were sought, more so when the amendment sought, if allowed would have the effect of delaying the suit pending since 1997, and that too for a plea, which was not taken up by the deceased. The learned Single Judge also noted that it was not incorrect to say that neither the deceased nor the appellants denied the signature of the deceased on the cheques. The change in name of the respondent company is only a technical ground and was also factually incorrect. The amendments sought by appellant at the final stage of arguments cannot be allowed as such amendments are malafide in nature and are only sought to delay the present suit as the best person to raise such defence was the deceased

himself , who did not take up such defence.

11. Sections 21 and 23 of Companies Act 1956, read as under:-

"21. Change of name by company:-A company may, by special resolution and with the approval of the Central Government signified in writing, change its name: Provided that no such approval shall be required where the only change in the name of a company is the addition thereto or, as the case may be, the deletion therefrom, of the word" Private", consequent on the conversion in accordance with the provisions of this Act of a public company into a private company or of a private company into a public company.]"

"23. Registration of change of name and effect thereof-

(1) Where a company changes its name in pursuance of section 21 or 22, the Registrar shall enter the new name on the Register in the place of the former name, and shall issue a fresh certificate of incorporation with the necessary alterations embodied therein; and the change of name shall be complete and effective only on the issue of such a certificate.

(2) The Registrar shall also make the necessary alteration in the memorandum of association of the company.

(3) The change of name shall not affect any rights or obligations of the company, or render defective any legal proceedings by or against it; and any legal proceedings which might have been continued or commenced by or against the company by its former name may be continued by or against the company by its new name."

12. A mere reading of the above mentioned provisions makes it clear that a company is free to change its name through a special resolution by the Board and with the approval of the Central Government in writing. The respondent company relied upon a letter dated 01.12.1988 issued by the appropriate government, which specifically stated that the name of the respondent company is similar to the another entity, and the same name should be changed to M/s Vysya Leasing and Finance Ltd. Pursuant to the written instruction by the Department of Company Affairs and a Board Resolution dated 01.12.1990, the respondent company amended its name.

13. Furthermore, Section 18 of the Companies Act 2013 makes it clear that an already registered company may convert itself under the Companies Act by altering its Memorandum and Articles of Associations in accordance with the provisions of the act. However, such registration shall not affect its debts, liabilities, obligations and contracts incurred or entered into, by or on behalf of the company before conversions and such debts, liabilities, obligations and contracts may be enforced in the manner as if such registration had not been done. Therefore, mere conversion of the company would not negate the fact that it deemed to exist prior to 1996.

14. In the case of Surendra Nath Shukla vs Indian Airlines Corporation, AIR 1966 Cal 272, the Court held as under:-

"If it is a change of name and nothing else then of course under the present Section 23(3) of the Companies Act, such change of name shall not affect any rights or obligations of the company and any legal proceedings which might have been continued or commenced by or against the company by its former name may be continued by or against the company by its new name."

15. In the case of Pioneer Protective Glass Fibre P. Ltd vs. Fibre Glass Pilkington Ltd., (1986) 60 Comp Cas 707, the Calcutta High Court in its paragraph 10 , 17, 18 and 19 held as under:-

"10.It was contended that the Companies Act, 1956, provided that a change of the name of an existing company was to be registered afresh and a new certificate of incorporation was to be issued by the Registrar, from the date of which, the change of name would be effective. It followed that from the date of the change of its name, a new company under a new name had come into existence. The rights and liabilities of the old company vested in the new company under the statute which further provided that any proceeding which had been commenced or continued by the company in its old name could be continued by the company in such name even after the change of name. No right, however, was conferred on the company to commence a new proceeding in its old name.

17. On a consideration of the relevant sections of the Companies Act, 1956, relating to change of name of existing companies, noted earlier, it does not appear to us that a change of the name of the company results in its dissolution and incorporation of a new company under a new name. Section 21 of the statute permits a company to change its name in the manner as prescribed and nothing else. Ex facie, the section indicates that the company continues in a new name.

18. Section 23 of the Act appears mainly to be a ministerial section and lays down the procedure for recording of the change of name. A fresh certificate of incorporation is no doubt issued, but the same is only for the purpose of recording the alteration in the name. The effect of the issue of the new certificate as provided in Sub-section (1) of Section 23 is to render the change of name complete and effective and nothing more. The section does not provide or imply that on the issue of the new certificate, the company as it existed will stand dissolved and a new company will come into existence.

19. Sub-section (3) of Section 23 provides that change of name will not affect any right or obligation of the company and that legal proceedings in the old name will not be rendered defective but will be continued by or against the company in its new name. The expression used in the section is "the company" and not "old company", or "new company", or "dissolved company". There are further indications that in spite of a change of name, the entity continues."

16. In the case of M/S Satpuda Infracon Private Ltd vs M/S Satpura Infrcon Private Ltd, WP. No.6972/2017, the Madhya Pradesh High Court held as under:-

"(iii) The direction to change the name of petitioner company by impugned order should not, in any way, effect the assets, rights, business, etc. of petitioner company. In other words, it is submitted that rights of the petitioner accrued prior to the direction of change of name of the company may be directed to remain intact. Reliance is placed on Section 23 of the Companies Act, 1956 (old Act)."

17. Another amendment sought is that it has now come on record that the name of the plaintiff has now changed from M/s Vysya Leasing and Finance Ltd. to M/s KMG Leasing and Advances Ltd and since this fact was not brought to the notice of the Court by the plaintiff itself. Therefore, for concealing this information, the suit was liable to be dismissed.

18. As noticed by the learned Single Judge, the plaintiff filed two applications without bringing on record the factum of change of name, which was opposed by the learned counsel for the appellants herein on the ground that the provision of Order XXII Rule 10 CPC would apply. The argument was rightly rejected by the learned Single Judge on the ground that Order XXII Rule 10 CPC would apply where a party to the suit transfers its interest in the subject matter of the suit to another party and the other party thereafter, would come on record under Order XXII Rule 10 CPC.

19. The appellant is unable to show as to how the provision of Order XXII Rule 10 CPC would apply in a case where there is a mere change of name of a "party to a suit and which would not have the effect of transferring of interest from one entity to another". The learned Single Judge has rightly taken note of the fact that the certificate of incorporation of M/s KMG Leasing and Advances Ltd being a public document as per Section 74 of the Indian Evidence Act, 1872 could be placed on record and allowed both the applications in the suit for change of name being IAs.2373/2017 and 2371/2017. Identical arguments have been raised before us today while placing reliance on Section 50 and 52 CPC that the appellants being legal heirs have not inherited any assets from the deceased and, thus, are not liable for the liability. Such an argument is misplaced for the present, for the reason that a decree is yet to be passed. Needless to say that such a ground can be raised by the legal heirs at the stage of execution of the decree if and when it is passed.

20. Having regard to the facts of this case, the law laid down by various courts in the catena of judgments and the decision rendered by the learned Single Judge, we find no infirmity in the view taken by the learned Single Judge, although we may hasten to add that generally at the time of deciding an application seeking amendment, the Courts must not go into the merits of the amendments. But, in the present case, having regard to the explanation rendered and the fact that one of the suits was pending for more than 20 years, the application for

amendment was not made at the earliest opportunity available. The evidence stands completed and the matter is ripe for final argument. In case, amendments in such circumstances are allowed, mechanically it would certainly lead to delay and the learned Single Judge has rightly, after examining the merits of the matter, rejected the amendment, especially when there is delay in making such an application. There is no explanation for the delay, especially in commercial suits where the timelines are to be adhered to strictly and the objective is speedy justice.

21. No other ground has been urged. In view of above, we find no infirmity in the order passed by the learned Single Judge. The appeals are without any merit and the same are dismissed accordingly.