
(2016) 05 CAL CK 0025

In the Calcutta High Court

Case No : GA 2288 of 2015 and CS 142 of 2009

M/s. Arun Sign Service

APPELLANT

Vs

Trade Wings Limited

RESPONDENT

Date of Decision : 19-05-2016

Acts Referred:

Citation : (2016) 164 AIC 539 : (2016) AIRCC 2285

Hon'ble Judges : Arijit Banerjee, J.

Bench : Single Bench

Advocate : Mr. Krishnaraj Thaker, Mr. Swarajit Dey, Mr. Lokenath Chatterjee, Mr. Indradeep Basu, and Mr. Parag Chaturvedi, Advocates, for the Appellant; Mr. Sakhya Sen, Mr. Biplab Majumder, and Mr. M. Dutta, Advocates, for the Respondent

Final Decision : Allowed

Judgement

Arijit Banerjee, J.—The instant application has been filed by one Arun Sign Service Private Ltd. for restoration of CS No. 142 of 2009 and for substitution of the applicant as the plaintiff in the place and stead of M/s. Arun Sign Service, a partnership firm, which had filed the suit as the original plaintiff. The material facts of the case are as follows.

2. The suit was filed on or about 19 May, 2009 by the plaintiff on record, being a partnership firm registered under the Indian Partnership Act, 1932, claiming a decree for Rs. 1,76,37,949/- against the defendant.

3. On or about 23 February, 2010 the applicant company being Arun Sign Pvt. Ltd. was incorporated and a certificate of incorporation dated 23 February, 2010 was issued by the Deputy Registrar of Companies, West Bengal under the Companies Act, 1956. It would appear from the Memorandum of Association of the applicant company that the main object of the company was to acquire and take over the partnership business of M/s. Arun Sign Service being the plaintiff on record as a going concern together with all its assets, properties, rights,

liabilities, obligations including all arrear taxes, duties, contributions, cess and other statutory liabilities with or without such modification as may be decided upon.

4. In October, 2010, the plaintiff on record applied for amendment of the plaint which was allowed by an order dated 19 November, 2010.

5. On 31 August, 2012 the suit was dismissed for default.

6. The present application was taken out on 16 July, 2015.

7. Although the application has been taken out almost two years and eleven months after the suit was dismissed for default, delay is not the ground on which the defendant opposes the application. Although I am not fully satisfied with the explanation given for the delay in filing the application, yet, since the application has been filed within three years and for the ends of justice I am inclined to condone the delay.

8. The ground on which the defendant resists the application is that, according to it, the applicant company has no locus standi to maintain the application. The defendant contends that only the original plaintiff has the locus standi to apply for restoration of the suit and only after restoration of the suit, if the same is allowed, the applicant company can seek leave of the Court to carry on the suit in its name. The defendant further contends that if the applicant took over the business of the original plaintiff as a going concern, the original plaintiff ceased to exist in the eye of law and hence the suit has abated. As such the question of restoration of the suit at this point of time, does not arise.

9. Ld. Counsel for the applicant has countered the contention of the Ld. Counsel for the defendant by drawing this Court's attention to Order 22, Rule 10 of the CPC, which provides as follows:-

"R. 10. Procedure in case of assignment before final order in suit.-

(1) In other cases of an assignment, creation or devolution of any interest during the pendency of a suit, the suit may, by leave of the Court, be continued by or against the person to or upon whom such interest has come or devolved.

(2) The attachment of a decree pending an appeal therefrom shall be deemed to be an interest entitling the person who procured such attachment to the benefit of sub-Rule (1)."

10. Ld. Counsel for the applicant also relied on a decision of the Hon'ble Supreme Court in the case of Dhurandhar Prasad Singhn v. Jai Prakash University, (2001) 6 SCC 534, and submitted that a person upon whom the interest of the plaintiff has devolved may apply for leave to continue with the suit in his name. He submitted that in the instant case, the applicant company has taken over the original plaintiff firm's business with all its assets and liabilities as a going concern and as such the interest of the plaintiff firm in the subject matter of the suit has devolved on the applicant company. Hence, the applicant

company is entitled to seek leave of the court under Order 22, Rule 10 of the CPC to continue with the suit in its name and for that purpose also has the locus standi to apply for restoration of the suit.

11. I have considered the rival contentions of the parties. There appears to be no dispute that the applicant company has taken over the business of the plaintiff firm as a going concern and to that extent has stepped into the shoes of the plaintiff firm. The allegation of the defendant that the plaintiff firm stood dissolved upon its business being taken over by the applicant company and accordingly the suit stood abated has been denied by the applicant company which states in the affidavit in reply that the plaintiff firm exists as a unit of the applicant company. However, whether or not the plaintiff firm stood dissolved becomes irrelevant in view of the decision of the Hon''ble Apex Court in the case of Dhurandhar Prasad Singh (supra). In that decision the Hon''ble Supreme Court has explained the clear distinction between the effects of Rules 3 and 4 of O. 22 of the CPC and Rule 10 thereof. In paragraph 6 of the judgment the Hon''ble Supreme Court observed as follows:-

"6. In order to appreciate the points involved, it would be necessary to refer to the provisions of Order 22 of the Code, Rules 3 and 4 whereof prescribe procedure in case of devolution of interest on the death of a party to a suit. Under these Rules, if a party dies and right to sue survives, the Court on an application made in that behalf is required to substitute legal representatives of the deceased party for proceeding with a suit but if such an application is not filed within the time prescribed by law, the suit shall abate so far as the deceased party is concerned. Rule 7 deals with the case of creation of an interest in a husband on marriage and Rule 8 deals with the case of assignment on the insolvency of a plaintiff. Rule 10 provides for cases of assignment, creation and devolution of interest during the pendency of a suit other than those referred to in the foregoing Rules and is based on the principle that the trial of a suit cannot be brought to an end merely because the interest of a party in the subject matter of suit is devolved upon another during its pendency but such a suit may be continued with the leave of the Court by or against the person upon whom such interest has devolved. But, if no such a step is taken, the suit may be continued with the original party and the person upon whom the interest has devolved will be bound by and can have the benefit of the decree, as the case may be, unless it is shown in a properly constituted proceeding that the original party being no longer interested in the proceeding did not vigorously prosecute or colluded with the adversary resulting in decision adverse to the party upon whom interest had devolved. The Legislature while enacting Rules 3, 4 and 10 has made clear-cut distinction. In cases covered by Rules 3 and 4, if right to sue survives and no application for bringing legal representatives of a deceased party is filed within the time prescribed, there is automatic abatement of the suit and procedure has been prescribed for setting aside abatement under Rule 9 on the grounds postulated therein. In cases covered by Rule 10, the Legislature has not prescribed any such procedure in the event of failure to apply for leave of the

court to continue the proceeding by or against the person upon whom interest has devolved during the pendency of a suit which shows that the Legislature was conscious of this eventuality and yet has not prescribed that failure would entail dismissal of the suit as it was intended that the proceeding would continue by or against the original party although he ceased to have any interest in the subject of dispute in the event of failure to apply for leave to continue by or against the person upon whom the interest has devolved for bringing him on the record."

12. The Hon^{ble} Apex Court further observed that when there has been devolution of interest during the pendency of a suit, the suit may, by leave of the court, be continued by or against the persons upon whom such interest has devolved and this entitles the person who has acquired an interest in the subject matter of the litigation by an assignment or creation or devolution of interest pendente lite or suitor or any other person interested, to apply to the court for leave to continue with the suit. However, it is not obligatory upon them to do so. If a party does not ask for leave, he takes the obvious risk that the suit may not be properly conducted by the plaintiff on record and yet he will be bound by the result of the litigation even though he is not represented at the hearing unless it is shown that the litigation was not properly conducted by the original party or that he colluded with the adversary.

13. On a meaningful reading of O. 22 of CPC it appears that abatement of a suit is contemplated only by Rules 3 and 4 of O. 22 and not by R. 10 thereof. Thus, where one of two or more plaintiffs dies and the right to sue does not survive to the surviving plaintiff or plaintiffs alone, or when a sole plaintiff or sole surviving plaintiff dies and the right to sue survives, the legal representative of the deceased plaintiff shall be brought on record on an application made by him and he shall be permitted to proceed with the suit. However, if no such application is made within the time specified, the suit shall abate so far as the deceased is concerned. Similar is the provision which governs the situation where one of two or more defendants dies and the right to sue does not survive against the surviving defendant or defendants alone. However, in the case of an assignment, creation or devolution of any interest pendente lite, the suit may, by leave of the court, be continued by the person upon whom such interest has devolved.

14. I am of the firm opinion that the present case is governed by R. 10 of O. 22 of the CPC and as such the question of abatement of the suit does not arise. It not being in dispute that the applicant company has taken over the business of the plaintiff firm as a going concern, the applicant company is entitled to seek leave of the court to continue with the suit in its name. If that be so, it would be preposterous to hold that the applicant company has no locus standi to apply for restoration of the suit which was dismissed for default. If the applicant company has locus standi to continue with the suit in its name, it surely has the standing to pray for restoration of the suit.

15. Accordingly, this application succeeds. There will be an order in terms of prayers (a), (b), (c), (d) and (e) of the petition. The department shall carry out

the amendment to the plaint within a period of fortnight from date. After the amendment is incorporated and the plaint is re-verified, a copy of the amended plaint shall be served by the substituted plaintiff on the defendant forthwith.

16. GA 2288 of 2015 is accordingly disposed of. There will be no order as to costs.

17. Urgent certified photocopy of this judgment and order, if applied for, be given to the parties upon compliance of necessary formalities.