
(2006) 03 CAL CK 0013

In the Calcutta High Court

Case No : G.A. No. 3884 of 2005 and C.S. 199 of 2001

Numazar Dorab Mehta and Others

APPELLANT

Vs

The Assam Company Ltd.

RESPONDENT

Date of Decision : 20-03-2006

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 23 Rule 1, Order 23 Rule 3

Citation : AIR 2006 Cal 204

Hon'ble Judges : Sengupta, J

Bench : Single Bench

Judgement

Sengupta, J.—The plaintiffs have taken out this application to withdraw the instant suit. In prayer (a) leave is sought for to withdraw the suit simplicitor on such terms as the Hon''ble Court may deem fit and proper.

2. Mr. Mitra, learned Senior Advocate appearing for the applicants upon instruction submits: that his clients are pressing for the relief in terms of prayer (c), namely, leave be given under Order 23, Rule 1 of the CPC to withdraw the instant suit with liberty to institute a fresh suit in respect of the subject matter of the instant suit, therefore, the issue in this application shall be confined to the provision of Order 23, Rule 1 of the Code of Civil Procedure. Mr. Mitra on merits submits that on the advice of the legal expert the present suit cannot be maintained in its form. The instant suit has been filed for eviction of the defendant on the ground of the expiry of lease in respect of the premises in question by efflux of time. An application for summary judgment was taken out and in that application a defence was taken that the suit filed by the plaintiffs cannot be governed by the Transfer of Property Act and the defendant enjoys the protection under the West Bengal Premises Tenancy Act, 1956. On the aforesaid ground in the summary application the Court granted unconditional leave to defend.

3. Now the plaintiffs have accepted the defendant to be a monthly tenant and whatever protection available under the West Bengal Premises Tenancy Act now

available can be made applicable to them. Based on the provision of the aforesaid statute his clients want to file a fresh suit. According to Mr. Mitra the aforesaid facts and circumstances constitute sufficient cause, if not a formal defect, in order to enable this Court to grant permission to file a fresh suit. The other technical objection raised by the defendant is that the application has not been verified by the appropriate person, namely, the constituted Attorney who did not have any authority to verify. In answer to the aforesaid plea the original Powers of Attorney have been produced before this Court, one executed by three trustees jointly and another by fourth trustees. The documents are of dated 5th August, 2003 and 19th August, 2003 respectively.

4. Mr. Tilak Bose, learned Advocate led by Mr. Pratap Chatterjee, learned Senior Advocate contends that the Power of Attorney of Rushi Ardeshir Jeejeebhoy dated 19th August, 2003 cannot be relied on in this application, as on the date of execution of the same he was not a party to the suit. So power given by him on the strength of the aforesaid document to the deponent is invalid. Naturally the application must fail.

5. He further contends that the relief under Order 23, Rule 1 of the CPC can be granted only upon satisfaction of the two conditions, namely, "(a) that a suit must fail by reason of some formal defect, or (b) that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject matter of a suit or part of a claim". According to him this power given to the Court is absolutely discretionary one and it should be exercised cautiously and taking into consideration of the rights already accrued in favour of the defendant particularly. He says that his client has already filed written statement and is contesting the proceeding and a valuable right has been accrued in favour of his client.

6. The words "sufficient ground" should be read as analogous to the formal defect as it has been ruled by a Full Bench decision of the Bombay High Court reported in AIR 1940 Bombay 121. He has also cited a Supreme Court decision reported in K.S. Bhoopathy and Others Vs. Kokila and Others, for the proposition as to when the Court will exercise its discretion and in which manner. He has also cited two decisions reported in AIR 1977 SC 131 and Trimbak Purshottam Patil Vs. Yashodabai, I think the later two decisions are of no relevance in this case.

7. Having heard the respective contentions of the learned Counsels for the parties and the objection raised relating to the operation of the Power of Attorney of Mr. Jeejeebhoy I am of the view that it is true at I the relevant point of time Mr. Jeejeebhoy was not a party to the suit but there is no provision of law under which one cannot in anticipation execute a Power of Attorney in favour of some other persons. I have read the language of the Power of Attorney. It expressly empowers the present deponent to verify on his behalf. On the date of execution of the Power of Attorney he was a very much trustee. However, the attorney did not bring him formally as a plaintiff and subsequently it was done. Therefore, the objection raised by Mr. Bose regarding verification by Power of Attorney holder

without having any power is baseless and the same is rejected accordingly.

8. Now coming to the provision of the Order 23, Rule 1 of the CPC I have noted caution given by the Hon"ble Apex Court reported in K.S. Bhoopathy and Others Vs. Kokila and Others, particularly in Paragraph 13. I follow respectfully the guidelines and caution in this case and I hold there exists sufficient cause which according to me, has been held by the Full Bench decision of the Bombay High Court as quoted above, that sufficient grounds should be analogous to the formal defect. In the Code the "formal defect" has not been illustrated. It depends upon each and every individual case and sufficient cause must co-relate to the formal defect and formal defect has got many facets. I find considerable force in the argument of Mr. Mitra that formal defect does not merely relate to form of pleading, it includes essential averment and statement in the plaint. It may be various kinds and it may develop later on even after filing of the suit because of change in law with retrospective operation. I am of the view that at the time of the filing, the suit may not be formally defective but because of change of law it may be rendered formally defective, which cannot be maintainable.

9. In this case the plaintiffs filed a suit saying that the suit is governed by the Transfer of Property Act as the right of the defendant being the lessee, stood determined by efflux of time, so the suit should have been decreed under the provision of Transfer of Property Act. An application was taken out for pronouncing a final judgment and the plea of monthly tenancy was taken by the defendant and it was contended that the provision of the tenancy law, namely, West Bengal Premises Tenancy Act was applicable and Transfer of Property Act had no application. On the aforesaid plea being taken the Court granted leave unconditionally to contest the suit. Thereafter this judgment has been accepted finally by the plaintiffs and have accepted the plea of monthly tenancy.

10. There is no law under which a suitor can be compelled to maintain a suit, rather he can be allowed to withdraw his suit but the question is whether leave should be granted to file a fresh suit or not. Order 23, Rule 1 clearly provides for withdrawal of the suit without leave. If such leave is not granted subsequently the plaintiff may be debarred from filing a fresh suit in relation to the same subject matter. But Order 23, Rule 3 has protected the suitor in the event he wishes to proceed further in relation to the same subject matter.

11. According to me one of illustration of sufficient cause is, in the event the suitor establishes that he has a cause or right to take future action as against the adversary under the law and existing lis has become infructuous by operation of law or by virtue of the judgment and order of Court and particularly before trial commences. In such circumstances he should be allowed to withdraw the suit and to file a fresh suit in proper manner. Factually in this case only written statement has been filed and in fact the plea taken in the written statement has been accepted by the plaintiffs and based on this plea the plaintiffs want to bring a fresh suit. Therefore, the defendant will not be prejudiced or suffered in any manner if this suit is allowed to be withdrawn with liberty to file a fresh suit. One

of the criteria while exercising discretion of this Court under the aforesaid provision is to see whether there is any valuable right having been accrued by lapse of time or not. If there is no such right being accrued nor affected, the Court as a matter of course has a power to allow the plaintiffs to withdraw the suit. As I have already observed there is no affectation of right of the defendant at present if the suit is allowed to be withdrawn. I allow this prayer for withdrawal with liberty to file fresh.

12. But this relief cannot be granted unconditionally and certain terms have to be put into since the defendant contested the application for final judgment and also the amendment application and other proceeding as well. The defendant has filed written statement and thereafter the plaintiffs have chosen to withdraw the suit when good sense prevailed in them that the instant suit cannot be proceeded with going by the factual and legal position. As such the plaintiffs are allowed to withdraw the suit with liberty to file a fresh suit upon payment of costs assessed at Rs. 10,000/- to be paid by the plaintiffs. Such costs is to be paid within a period of fortnight from the date of receipt of the signed copy of the minutes of this order. The aforesaid amount I feel, is reasonable having regard to the number of proceedings contested by the defendant and also having regard to the number of steps taken in this matter and it was a suit of 2001. Thus the application is disposed of accordingly.

13. All parties concerned are to act on a xerox signed copy of this dictated order on the usual undertaking.