

(2014) 12 CAL CK 0088
In the Calcutta High Court

Case No : G.A. Nos. 3345 and 3592 of 2013 and C.S. No. 319 of 2013

Raj Sekhar Agarwal

APPELLANT

Vs

Pragati 47 Development Ltd.

RESPONDENT

Date of Decision : 12-12-2014

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 23 Rule 1, Order 23 Rule 1(4), Order 32 Rule 1, Order 32 Rule 14
Companies Act, 1956 — Section 10F, 397, 398
Constitution of India, 1950 — Article 226, 32

Citation : (2014) 12 CAL CK 0088

Hon'ble Judges : Arijit Banerjee, J

Bench : Single Bench

Advocate : Ranjan Deb and Jishnu Saha, Sr. Advs., Madhu Priya, Sohail Haque and P.K. Jhunjhunwala, Advocate for the Appellant; Anubhav Singa, Anshuwala Bansal, Ratnanko Banerjee, Aniruddha Roy, Siddharta Banerjee and Victor Dutta, Advocate for the Respondent

Judgement

Arijit Banerjee, J.—This is an application taken out by the defendant Nos. 12, 13 and 14 for rejection of the plaint of CS No. 319 of 2013 as against the said defendants or alternatively for expunction of the names of the said defendants from the plaint of the said suit.

2. The plaintiffs have filed Company Petition No. 859 of 2010 before the Company Law Board, Eastern Bench, Calcutta, under Sections 397 and 398 of the Companies Act, 1956. In the said company petition the present defendant No. 12 was impleaded as respondent No. 16. The main reliefs sought in the said company petition included the following:-

"(n) The purported agreement dated 11th December, 2007, allegedly made between PSIDL the respondent No. 8 herein and Citystar the respondent No. 16 herein for issuance of Non Convertible Debentures in a forged and fabricated document and the said purported agreement be adjudged illegal, null and void and directed to be delivered up and cancelled;

(o) Declaration that the purported arbitration proceeding initiated by Citystar the respondent No. 16 herein against PSIDL the respondent No. 8 is a collusive proceeding and all records of the said proceeding including the purported awards made therein be adjudged illegal null and void and directed to be delivered up and cancelled.

(p) Declaration that the respondent No. 8 continues to be lawful owner of the said 2,22,49,999 equity shares of Rs. 10/- each all fully paid up in BAPL the respondent No. 12 company;

(q) Declaration that the respondent No. 16 has no right or interest whatsoever over the said 2,22,49,999 equity shares held by the respondent No. 8 in the respondent No. 12 company or any part or portion thereof;

(r) Perpetual injunction restraining the respondents from acting upon or giving any effect or further effect to the purported agreement dated 11th December, 2007 allegedly entered into by and between the respondent No. 8 and the respondent No. 12 referred to in paragraph 6.23 hereinabove;"

3. In the said company proceeding the interim reliefs prayed for included the following relief:-

"(k) Injunction restraining the respondents from acting upon or giving any effect or further effect to the purported agreement dated 11th December, 2007 allegedly entered into by and between the respondent No. 8 and the respondent No. 16 referred to in paragraph 6.23 hereinabove."

4. The petitioners in the said company proceeding being the plaintiffs in the present suit filed an application before the Company Law Board praying for withdrawal/abandonment of the main prayers (n) to (r) and interim prayer (k), which have been set out hereinabove. The petitioners further prayed for leave to institute a fresh suit in respect of the matters covered by the reliefs which were sought to be abandoned. The Company Law Board rejected the petitioner's prayer for abandoning the aforesaid reliefs with leave to institute fresh proceedings in respect of the matters covered by such reliefs.

5. Being aggrieved, the petitioners filed an appeal under Section 10F of the Companies Act, 1956 which was disposed of by this Court by an order dated 28th August, 2012 which is to the following effect:-

"The appellants are aggrieved by the Company Law Board rejecting the appellants' prayer for abandoning certain reliefs made in a petition under Sections 397 and 398 of the Companies Act, 1956. The appellants are also aggrieved by the Company Law Board declining to grant leave to the appellants to institute a fresh suit in respect of the matters covered by the reliefs which were to be abandoned.

It is not necessary to assess whether any legal issue of any importance arises under Section 10F of the Companies Act, 1956 since the respondents are

agreeable to have reliefs (n) to (r) in the bunch of main reliefs and relief (k) in the interim prayers to be deleted from the petition relating to C.P. No. 859 of 2010 filed before the Company Law Board.

Accordingly, APO No. 342 of 2012 and ACO No. 179 of 2012 stand disposed of by recording the deletion of reliefs (n) to (r) from the main reliefs made in the petition before the Company Law Board and deletion of prayer (k) from the interim reliefs sought in the main petition. The further prayer of the appellants cannot be acceded to since it does not appear that the Company Law Board had the jurisdiction to grant leave to the appellants to institute a fresh suit.

It is made clear that nothing in this order will prevent the appellants from filing a suit, but the maintainability of such suit on the ground of the pendency and partial abandonment of the Company Law Board proceedings may be gone into by the forum which receives the action."

6. In September, 2013, the petitioners before the Company Law Board filed the present suit being CS No. 319 of 2013 wherein Citystar Infrastructures Ltd. (which is the respondent No. 16 in the Company Law Board proceeding) has been impleaded as the defendant No. 12. The present application for rejection of the plaint has been taken out by the defendant Nos. 12, 13 and 14 primarily on the ground that the reliefs claimed in the suit against the defendant No. 12 are substantially the reliefs that had been claimed against it in the company law board proceeding but subsequently abandoned without obtaining leave to file a fresh proceeding in respect of the matters covered by such reliefs. It may be noted that the final reliefs (n) to (r) and the interim relief (k) that had been prayed for before the Company Law Board were against Citystar being the present defendant No. 12 which were subsequently abandoned.

Contention of the applicants (defendant Nos. 12 to 14)

7. Appearing on behalf of the applicants Mr. Ranjan Deb, Id. Senior Counsel, urged mainly three points.

8. Mr. Deb's first contention was that while this Court by its order dated 28th August, 2012 allowed deletion of reliefs (n) to (r) from the bunch of main reliefs prayed for in the petition before the Company Law Board and also allowed deletion of prayer (k) from the interim reliefs sought in the petition before the Company Law Board, this Court did not grant leave to the plaintiffs to institute a fresh suit in respect of the subject matter covered by the said reliefs. He submitted that although this Court recorded that nothing in that order would prevent the appellants (plaintiffs in this suit) from filing a suit, yet, the maintainability of such suit on the ground of pendency and partial abandonment of the Company Law Board proceedings may be gone into by the forum which receives the action.

9. In this connection, Mr. Deb relied on Order 23 Rule 1 of the Code of Civil Procedure which is set out hereunder:-

"1. Withdrawal of suit or abandonment of part of claim.-

(i) At any time after, the institution of a suit, the plaintiff may as against all or any of the defendants abandon his suit or abandon a part of his claim: Provided that where the plaintiff is a minor or other person to whom the provisions contained in rules 1 to 14 of Order XXXII extend, neither the suit nor any part of the claim shall be abandoned without the leave of the Court.

(ii) An application for leave under the proviso to sub-rule (1) shall be accompanied by an affidavit of the next friend and also, if the minor or such other person is represented by a pleader, by a certificate of the pleader to the effect that the abandonment proposed is, in his opinion, for the benefit of the minor or such other person.

(iii) Where the Court is satisfied,-

(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,

it may, on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit or such part of the claim with liberty to institute a fresh suit in respect of the subject-matter of such suit or such part of the claim.

(iv) Where the plaintiff-

(a) abandons any suit or part of claim under sub-rule (1), or

(b) withdraws from a suit or part of a claim without the permission referred to in sub-rule (3),

he shall be liable for such costs as the Court may award and shall be precluded from instituting any fresh suit in respect of such subject-matter or such part of the claim.

(v) Nothing in this rule shall be deemed to authorize the Court to permit one of several plaintiffs to abandon a suit or part of a claim under sub-rule (1), or to withdraw, under sub-rule (3), any suit or part of a claim, without the consent of the other plaintiffs."

10. Referring to sub-rules (1), (3) and (4) of Order 23 Rule 1, Mr. Deb submitted that since the petitioners in the company law board proceedings abandoned part of their claim without obtaining liberty to institute a fresh proceedings in respect of such claim, the present suit which is essentially in respect of such claim is barred by law. As regards the applicability of the provisions of the Code of Civil Procedure to proceedings under the Companies Act, Mr. Deb referred to Rule 6 of the Companies (Court) Rules, 1959 which is set out hereunder:-

"Rule 6. Save as provided by the Act or by these rules the practice and procedure of the Court and the provisions of the Code so far as applicable shall apply to all

proceedings under the Act and these Rules. The Registrar may decline to accept any document which is presented otherwise than in accordance with these rules or the practice and procedure of the Court."

11. Mr. Deb argued that by virtue of Rule 6, the provisions of the Code of Civil Procedure including Order 23 thereof would apply to company proceedings. In this connection, Mr. Deb relied on a decision of the Madras High Court in the Case of Jacob Cherain-vs.-K.N. Cherain reported in 43 Company Cases 235. Mr. Deb relied on in particular on paragraph 12 of the judgment which is set out hereunder:-

"12. Rule 6, inter alia, says that the provisions of the Code, so far as applicable, except as provided by the Companies Act and the Rules shall apply to all proceedings under the Act and the Rules. It cannot be denied that by virtue of this provision, Order 23, Rule 1, or the Code of Civil Procedure, can be applied to all proceedings under the Companies Act unless its application for any reason is to be held as unreasonable or impracticable or barred. The fact that specific provision is made in Sub-R.(2) of Rule 88 prohibiting the withdrawal of the petition under Sections 397 and 398 without the leave of the court does not necessarily mean that the petition so withdrawn without liberty to file a fresh petition on the same cause of action is not open to the defect arising out of the withdrawal without leave as required under Order 23. The leave contemplated in Sub-R. (2) of Rule 88 is only a leave to withdraw the petition. The framers of the Rules have presumably thought that inasmuch as the interest of the public is also involved, the leave of the court is necessary before withdrawal is made. But that provision cannot in any way affect the applicability of Order 23 of the Code of Civil Procedure. If a petitioner seeking the leave of the court for withdrawal for any reason whatsoever, had felt that an occasion arise for him to approach the court again with a similar petition on the same allegation, it is incumbent upon him to ask the court to grant him liberty to file a fresh petition on the same cause of action. Such a procedure is in no way inconsistent with the Companies Act or the rules framed thereunder. The expression "as far as applicable" occurring in Rule 6 is indeed very wide in its scope and it means "as far as reasonably applicable". It cannot be said that requiring a petitioner to obtain the leave of the court to file a fresh petition on the same cause of action would be unreasonable. To hold that the requirement is necessary if he should approach the court with a petition on the same cause of action, is in no way inconsistent with the rules. Such a view is necessary in the interest of the company and those who are in charge of the affairs of the company against whom relief can be claimed under Sections 397 and 398. It would be abuse of the process of the court to allow a person to drag to court the company and those in charge of the affairs of the company by filing a petition under Sections 397 and 398 after withdrawing a petition founded on the same allegations, without the express orders of the court granting leave to file a fresh petition, whatever be the reason for the withdrawal. The motive for the withdrawal is irrelevant in considering the maintainability of the subsequent petition. If a petition filed under Sections 397

and 398 is unconditionally withdrawn, the petitioner, in my view, is, by virtue of Order 23, Rule 1 precluded from instituting a fresh petition on the allegations upon which the earlier petition was founded. In this view, I uphold the preliminary objection in respect of the allegations upon which C.P. No. G8 of 1969 was founded. The petitioner is precluded from asking the court to investigate into the truth of those allegations. But he is, however, entitled to have an enquiry upon the other acts of mismanagement and oppression, which, according to him, occurred after the dismissal of C.P. No. 68 of 1969."

12. Mr. Deb also relied on a decision of the Hon"ble Supreme Court in the case of Sarguja Transport Service Vs. State Transport Appellate Tribunal, M.P., Gwalior and Others, , wherein at paragraph 9 of the judgment it was held that while the withdrawal of a writ petition filed in High Court without permission to file a fresh writ petition may not bar other remedies like a suit or a petition under Article 32 of the Constitution since such withdrawal does not amount to res judicata, the remedy under Article 226 of the Constitution should be deemed to have been abandoned by the petitioner in respect of the cause of action relied on in the writ petition when he withdraws it without such permission.

13. Mr. Deb also referred to Rule 88 of the Companies (Court) Rules, 1959 which provides that a petition under Section 397 or 398 shall not be withdrawn without leave of the court.

14. Finally, Mr. Deb argued that a proceeding before the Company Law Board with similar averments is pending. Certain other reliefs claimed by the petitioners are pending for adjudication by the Company Law Board. The present applicants have not been deleted from the array of respondents in the company petition pending before the Company Law Board. Under those circumstances it would be an abuse of process of law if the present suit is allowed to continue as against the applicants herein. Mr. Deb submitted that the plaint of the present suit be rejected or alternatively the names of the present applicants be expunged from the plaint.

Contention of the plaintiffs:-

15. Appearing on behalf of the plaintiffs Mr. Jishnu Saha, Ld. Senior Counsel submitted that this court by an order dated 28th August, 2012 granted leave to the plaintiffs to abandon some of the reliefs claimed before the Company Law Board and also granted liberty to file a suit. He submitted that the said order of this Court should not be interpreted in a manner that will leave the plaintiffs without a remedy against the applicants. He contended that the bar under Order 23 Rule 1(4) of the CPC does not apply since this Court expressly granted leave to the plaintiffs to file a fresh suit.

16. Mr. Saha placed various paragraphs of the company law board petition and submitted that the plaintiff's cause of action against the applicants is founded on fraud. The Company Law Board is not a suitable forum to go into such allegations of fraud and realizing the same the petitioners before the Company Law Board

have withdrawn some of the reliefs claimed in the company proceedings against the defendant No. 12 herein.

17. Mr. Saha relied on three decisions of the Hon''ble Supreme Court. The first one is in the case of Beniram and Others Vs. Gaiind and Others, wherein Hon''ble Supreme Court considered it just and proper in the interest of justice to permit the appellant-plaintiff to withdraw the suit with liberty to file a fresh suit. I have not been able to appreciate as to how this decision helps the plaintiffs.

18. The second decision is in the case of Vallabh Das Vs. Madan Lal and Others, wherein while discussing Order 23 Rule 1 of the Code of Civil Procedure the Hon''ble Supreme Court held that the expression "subject-matter" is not defined in the Civil Procedure Code. It does not mean property. That expression has a reference to a right in the property which the plaintiff seeks to enforce. That expression includes the cause of action and the reliefs claimed. Unless the cause of action and the relief claimed in the second suit are the same as in the first suit, it cannot be said that the subject matter of the second suit is the same as that in the previous suit. Mere identity of some of the issues in the two suits do not bring about an identity of the subject matter in the two suits. The expression "subject matter" in Order 23 Rule 1 of the CPC means the series of acts or transactions alleged to exist giving rise to the relief claimed. In other words, "subject-matter", means the bundle of facts which have to be proved in order to entitle the plaintiff to the relief claimed by him. Relying to this decision, Mr. Saha submitted that the subject-matter covered by the reliefs that were abandoned before the Company Law Board is not the same as the subject-matter of the present suit and, as such, the bar of Order 23(1)(4) of the Code of Civil Procedure is not attracted.

19. The third case relied upon by Mr. Saha is that of Kailash Paliwal Vs. Subhash Chandra Agrawal, wherein in the special facts of the case the Hon''ble Supreme Court permitted the appellant/plaintiff to withdraw the suit filed by him and file a fresh suit relating to same subject-matter. This case is also of no help to the plaintiffs.

20. In reply Mr. Deb submitted that no unconditional leave was granted by this Court to the plaintiffs to file a suit. The question of maintainability of such suit was left wide open. Order 23 of the Code of Civil Procedure enshrines public policy to prevent harassment to people. Moreover, the question of fraud can be well gone into by the Company Law Board and there is no bar in law in that regard.

Court's View:-

21. I have considered the rival contentions of the parties. On a meaningful reading of the plaint filed in the instant suit of the plaintiff it would appear that the reliefs claimed in the plaint against the applicants are substantially similar to the reliefs that the plaintiffs had claimed against the applicant in the Company Law Board proceeding. For whatever reason, the plaintiffs herein who are the

petitioners in the Company Law Board proceedings, applied to the Company Law Board for withdrawing such reliefs with leave to file fresh proceedings against the applicants herein. Such prayer was refused by the Company Law Board.

22. The petitioners in the Company Law Board proceeding appealed to this court against such refusal. This court permitted the petitioners to withdraw such reliefs but recorded that the further prayer of the appellants (petitioners in the Company Law Board proceedings) cannot be acceded to since the Company Law Board did not have jurisdiction to grant leave to the appellants to institute a fresh suit. However, this court recorded that nothing in the said order would prevent the appellants from filing a suit, but the maintainability of such suit on account of the pendency and partial abandonment of the Company Law Board proceedings may be gone into by the forum which receives the action.

23. The contention of the Ld. Senior Counsel appearing for the plaintiffs is that this Court having granted leave to file a suit, there is no merit in the present demurer application and the same must fail. On the contrary, Ld. Counsel for the applicants contends that no unconditional leave to file a fresh suit was granted by the order dated 28th August, 2012. By the said order this Court permitted the plaintiffs to file a suit but subject to the question of maintainability as aforestated. He contends that no unconditional leave having been granted, the suit must be rejected against the applicants in view of the bar prescribed in Order 23 Rule 1 of the Code of Civil Procedure.

24. I am inclined to accept the contention of the Ld. Counsel for the applicants. The plaintiffs having claimed and having subsequently abandoned certain reliefs against the applicants in the Company Law Board proceedings without being granted unconditional leave to file fresh proceedings for the self-same reliefs, in my opinion the plaintiffs' suit is barred against the applicants under Order 23 of the CPC. Further, exposing the applicants in the present suit substantially to the same claims which were withdrawn/abandoned against them in the Company Law Board proceedings, would, in my opinion, amount to abuse of process of law. The withdrawal and/or abandonment of the concerned reliefs against the applicants by the plaintiffs in the Company Law Board proceedings was voluntary and it would not be fair to expose the applicants to the same claims again in the present suit which would amount to putting the applicants in doubled jeopardy.

25. In view of the aforestated the present application succeeds. The plaint in CS No. 319 of 2013 is rejected as against the defendant Nos. 12, 13 and 14.

26. In the facts and circumstances of the case, however, there will be no order as to costs. The application, thus, stands disposed of.

27. Prayer for stay made on behalf of the plaintiffs is considered and refused.

28. Urgent certified photocopies of this order, if applied for, be supplied to the parties subject to compliance with all requisite formalities.