

(2015) 02 CAL CK 0029

In the Calcutta High Court

Case No : A.P.O.T. No. 11 of 2015, G.A. 76 of 2015 and CS 319 of 2013

Raj Shekhar Agarwal and Others

APPELLANT

Vs

Citystar Infrastructures Ltd. and Others

RESPONDENT

Date of Decision : 13-02-2015

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 23 Rule 23, Order 23 Rule 3
Companies Act, 1956 — Section 397, 398, 399

Citation : (2015) 2 CHN 230 : (2015) 3 WBLR 684

Hon'ble Judges : Manjula Chellur, C.J.;Joymalya Bagchi, J.

Bench : Division Bench

Advocate : Jishnu Saha, P.K. Jhunjhunwala, Sohail Haque, S. Panda and Alpana Chowdhury, for the Appellant; Ranjan Deb, Madhu Priya and Sorbopriyo Mukherjee, Advocates for the Respondent

Final Decision : Allowed

Judgement

Dr. Manjula Chellur, C.J.—The appellants are the plaintiffs before the learned Single Judge and the respondents herein are the defendants. CS 319 of 2013 was filed by the appellants seeking following reliefs as against the defendant Nos. 12, 13 and 14:

"(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 up 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;"

2. During pendency of the suit, defendant Nos. 12, 13 and 14 filed an application for rejection of plaint against those respondents or alternatively expunge the names of said defendants from the plaint. The said application came to be allowed; consequently, the suit also came to be rejected against defendant Nos. 12, 13 and 14.

3. In order to understand the controversy in issue, in brief, the facts leading to the filing of the present appeal are mentioned herein. A Company Petition No. 859 of 2010 was filed by the appellants under Sections 397 and 398 of the Companies Act of 1956 before the Company Law Board, Eastern Bench, Kolkata. Defendant No. 12 was impleaded as the respondent No. 16 in the said petition. In the said company petition, following reliefs were sought against the respondents:-

"(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 up 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;"

4. In the said company proceedings interim relief was sought which reads as under:-

"(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 an between the respondent No. 8 and the respondent No. 16 referred to in paragraph 6.23 hereinabove." 5. During pendency of the said proceedings in the Company Law Board, an application came to be filed by appellants praying for abandonment of the main prayers (n) to (r) and interim prayer (k) which are mentioned above. It is not in dispute, they also prayed for institution of a fresh suit in respect of matter covered by the reliefs which were sought to be abandoned.

6. Apparently, the Company Law Board refused to allow the prayer of appellant/petitioner for abandonment of the aforesaid reliefs and for institution of fresh proceedings in respect of the matters covered by such reliefs.

7. Aggrieved by the same, an appeal came to be filed being A.P.O. 342 of 2012 along with A.C.O. 179 of 2012. Learned Judge of this Court disposed of the appeals by order as under:-

"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."

8. Subsequently, the present suit being C.S. No. 319 of 2013 was filed. The defendant No. 12 who was respondent in Company Law Board petition along with defendant Nos. 13 and 14 have sought for rejection of the plaint contending that the reliefs claimed in the suit were substantially the reliefs sought against the respondents in the Company Law Board proceedings. Therefore, having abandoned the reliefs and especially in the light of no leave being obtained to file a fresh proceeding in respect of the reliefs based on the subject matter cannot be proceeded with in this suit.

9. Learned Single Judge referring to the contentions of both the parties opined that the reliefs claimed in the suit against the defendants are substantially similar reliefs as sought in the Company Law Board proceedings. Having applied to the Company Law Board for abandonment of such reliefs, without leave to file

fresh proceedings against the applicant herein plaintiff cannot proceed with the suit was the stand of the applicants. It was further contended that the suit stands barred against the applicants/defendant Nos. 12, 13 and 14 under Rule 3 of Order 23 of C.P.C. According to learned Single Judge exposing the defendant Nos. 12, 13 and 14 to the same claims which were abandoned against them in the Company Law Board proceedings is nothing but abuse of process of law hence proceeded to reject the plaint in C.S. 319 of 2013 as against defendant No. 12, 13 and 14.

10. Learned Senior Counsel, Mr. Jishnu Saha arguing for appellants, contends that Company Law Board could not have granted the reliefs which were withdrawn as it has limited power of a Civil Court. At best can exercise powers relating to discovery and inspection of documents etc. only. He further contends that scope and effect of order dated 28.8.2012 by this Court in the appeal against the orders of the Company Law Board is not appreciated in the right perspective by learned Trial Judge. According to him, provisions of Order 23 Rule 3 has no application to the proceedings, therefore, consequently no leave of the Company Law Board could have been granted. He further contends that even otherwise by way of abundant caution, appellants had made an application before Company Law Board seeking leave to abandon reliefs (n) to (r) and interim relief (k) with a liberty to institute a fresh suit before the Civil Court for similar reliefs.

11. Mr. Jaydip Kar, learned Senior Counsel arguing for one of the respondents who is sailing with the appellants, reliefs on Sub-Rule (2) of Rule 88 of the Companies (Court) Rules of 1959 which reads as under:-

"88. Petition under section 397 or 398.-(1) xxxxxx

(2) A petition under section 397 or 398 shall not be withdrawn without leave of the Court, and where the petition has been presented by a member or members authorised by the Central Government under sub-section (4) of section 399, notice of the application for leave to withdraw shall be given to the Central Government."

12. The application filed by the appellants before the Company Law Board has to be read in the right perspective in order to understand what exactly was the intention of the appellants seeking leave of the Court is his stand.

13. As against these arguments Mr. Ranjan Deb, learned Counsel arguing for the respondents/defendants contends that the subject matter of proceedings before Company Law Board and the subject matter of the suit in question were similar. He also brought to our notice Rule 6 of the Companies (Court) Rules to contend that provisions of Code of Civil Procedure Court would apply so far as proceedings under the Companies Act.

14. According to learned Senior Counsel Mr. Deb, reading of Rule 6 of the Companies (Court) Rules along with Order 23 of C.P.C. would clearly indicate that

having abandoned the reliefs before the Company Law Board and in the absence of any leave to file fresh suit on the same reliefs, the present suit was not maintainable. He further contends that no unconditional leave was granted by this Court in the appeal to file a fresh suit since the question of maintainability of such suit was left open. Learned Senior Counsel, Mr. Deb also contends that Rule 3 of Order 23 of the C.P.C. is meant to prevent the harassment to people. He also contends that the Company Law Board can also go into the question of fraud alleged and there is no legal bar.

15. With these arguments at our command, now we proceed to appreciate what exactly was the application before the Company Law Board. From paragraph 6 onwards, they have narrated the various proceedings and other factual situation pertaining to the management of the Company in question. They also submit that though they had some knowledge of fraud committed by the party respondents at the time of filing the main C.P. 859 of 2010, but did not have documents relating thereto, therefore, they were not able to bring on record the full particulars of fraud, pleaded by the applicants in the petition. Some of the parties were also not impleaded. Certain main reliefs claimed by the applicants were on the basis of such fraud and those reliefs are (n) to (r) and the interim relief (k) of the petition. According to them, it has become necessary for the applicants to claim various other reliefs arising out of such fraud in the light of disclosures made by the respondent Nos. 2 and 3 before the Company Law Board. Applicants have to necessarily challenge such massive fraud before a Civil Court by giving better particulars of such fraud is the stand. Mentioning these reasons they sought for leave in the main petition C.P. 859 of 2010 to abandon the main reliefs contains in prayers (n) to (r) and the interim reliefs contain prayer (k) but with liberty to file a fresh action or suit on the same subject matter before any Civil Court. Admittedly, this Company Application No. 230 of 2011 was dismissed. In other words, the reliefs sought by appellants for abandoning the aforesaid reliefs and leave to institute fresh proceedings was rejected.

16. Prayer column in the application, if read, definitely indicate the prayer was for abandoning the reliefs (n) to (r) and interim relief (k). As mentioned above reasons for filing such application was not just to abandon absolutely those reliefs (n) to (r) and interim relief (k) but they sought leave to institute fresh proceedings. This is very clear, therefore, intention of the appellants could be gathered not only from the prayer column in the application but also from the averments in the application that they were of the opinion that in civil suit they could rather properly prosecute and pursue their allegations of fraud against the defendants. Using of word "abandon" cannot be read in isolation. The averments of application in its entirety and especially the leave to institute fresh proceedings in the prayer column have to be read together in order to understand the purport of the application indicating the intention of the applicants before Company Law Board. It is well-settled that action of Court cannot prejudice rights of the party.

17. The appellants did not stop at this stage. He further took the matter before this Court by filing an appeal and this Court further observed as under:-

"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."

(emphasis supplied)

18. Learned Judge did not stop at this. He further opined that nothing in that order would prevent appellant to file a suit. But 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.

19. In the light of Company Law Board rejecting the application granting the prayer of abandoning the reliefs with leave to institute fresh proceedings, there was no particular abandonment. In the appeal, learned Judge of the Company Court opined that Company Law Board does not appear to have the jurisdiction to grant leave to appellants to institute a fresh suit. This opinion takes support from Sub-Rule (2) of Rule 88 of Companies (Court) Rules. In other words, it is clear that without the leave of the Company Law Board a petition filed under Sections 397 and 398 could not have been withdrawn. The rule further does not indicate that leave could be granted by Company Law Board or the Courts as the case may be to institute fresh suit. In that context, the learned Judge in his order dated 28.8.2012 must have opined as stated above.

20. Orders of the Company Law Board rejecting the application and the opinion of this Court in the appeal as stated above would clearly indicate appellants were allowed to file a suit wherein maintainability of such suit on the ground of pendency and partially abandonment of Company Law Board proceedings could be gone into.

21. Accordingly, suit was filed and the present impugned order is passed as stated above. The appellants had sought permission of the Company Law Board to abandon. Here mentioning of the word "abandon" cannot be taken in its true meaning. It has to be understood in what context said word is used and the intention behind filing such application. It is well-settled that nomenclature cannot be taken into consideration in order to understand either a document or an application. The entirety of the application indicating the intention of the parties has to be taken into consideration. Though the word "abandon" is used, virtually the appellants intended it as withdrawal.

22. As the petition was rejected by Company Law Board which came to be challenged in the appeal ending with the order dated 28.8.2012, the plaintiffs are allowed to file the present suit. So far as the question of abuse of process of law, the reliefs sought in the present civil suit need not be pressed by the appellants before the Company Law Board. In that situation, there will not be abuse of process of law.

23. In the light of the above discussion and reasoning, we are of the opinion the learned Single Judge was not justified in rejecting the plaint.

24. Accordingly, the appeal is allowed.

Joymalya Bagchi, J.

25. I agree.