
(2014) 05 DEL CK 0346
In the Delhi High Court
Case No : FAO 261 and 281/2013

Syndicate Bank

APPELLANT

Vs

Hindalco Industries Ltd.

RESPONDENT

Date of Decision : 19-05-2014

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 10, Order 1 Rule 10(2), Order 22 Rule 10, Order 22 Rule 3, Order 22 Rule 4
Constitution of India, 1950 — Article 227
Limitation Act, 1963 — Section 22(1), 5

Citation : (2014) 144 DRJ 243

Hon'ble Judges : Valmiki J. Mehta, J

Bench : Single Bench

Advocate : Ajant Kumar, Advocate for the Appellant; R.R. Kumar, Advocate for the Respondent

Judgement

Valmiki J Mehta, J.

CM 18091/2013 in FAO 261/2013 (for restoration)

CM 18114/2013 in FAO 281/2013 (for restoration)

For the reasons stated in the applications, these applications are allowed and the appeals are restored to their original numbers.

CM 9560/2013 in FAO 261/2013 (delay)

CM 10374/2013 in FAO 281/2013 (delay)

It is stated that the delay in filing the appeal was due to filing of the petitions earlier wrongly under Article 227 of the Constitution of India. For the reasons stated in the applications, the same are allowed and delay in filing the appeals is condoned.

The applications stand disposed of.

1. Certain litigations show a mindset to indulge in unnecessary litigation. The present appeals are such unfortunate litigations, and which are all the more unfortunate because they are filed by a nationalized bank. Except technical aspects nothing has been argued with respect to challenge to the impugned orders.

2. This first appeal is filed by the appellant/defendant against the orders of the trial court dated 17.12.2012 which have allowed two applications filed by the respondent M/s. Hindalco Industries Ltd. under Order 22 Rule 10 read with Section 151 CPC and under Section 153 CPC and Order 6 Rule 17 read with Order 1 Rule 10 CPC. Both these applications were allowed by the court below and thereby M/s. Hindalco Industries Ltd. was substituted in place of the original plaintiff M/s. Indo Gulf Corporation Ltd.

3. The subject suits were suits filed by the plaintiff for recovery of Rs. 15/16 lakh under Order 37 CPC. Trial court had dismissed the leave to defend applications, but, a Division Bench of this Court in RFAs No.476/2006 and 477/2006 granted leave to defend to the appellant/defendant subject to deposit of the amounts claimed in the suits in court. The suit amounts have thus been deposited by the appellant/defendant. It is during the pendency of the suits thereafter that the subject applications were filed and which have been allowed by the impugned orders dated 17.12.2012.

4. The admitted facts are that the erstwhile plaintiff company M/s. Indo Gulf Corporation Ltd. had two business, one was of fertilizers and the second was of metals. The business of the fertilizer of the plaintiff M/s. Indo Gulf Corporation Ltd got merged with the company M/s. Indo Gulf Fertilizers Ltd and the metal business was got merged with the present respondent/present plaintiff M/s. Hindalco Industries Ltd. This has happened as a result of the orders of merger and amalgamation passed by the High Court of Bombay dated 31.10.2002 and the Lucknow Bench of Allahabad High Court dated 18.11.2002. The fact that the aforesaid orders of amalgamation and merger have been passed are not disputed on behalf of the appellant. The applications for substitution of M/s. Hindalco Industries Ltd. with the existing plaintiff M/s. Indo Gulf Corporation Ltd. was contested on behalf of the appellant basically on two grounds, one of delay in filing of the applications without filing of the applications seeking condonation of delay and second of the applications filed under Order 22 Rule 10 CPC were misconceived because actually applications should have been under Order 22 Rule 4 CPC because as per the appellant on merger and amalgamation taking place in terms of orders of High Courts of Bombay and Allahabad, the original plaintiff company M/s. Indo Gulf Corporation Ltd. ceased to exist i.e., died.

5. The court below has allowed the applications by placing reliance on the judgment of the Supreme Court in the case of Purushottam Umedbhai and Co. Vs. Manilal and Sons, by treating the applications as applications being for

correcting a mis-description in the name of the plaintiff from Indo Gulf Corporation Ltd to M/s. Hindalco Industries Ltd. The relevant paras of the impugned orders are paras 13 to 17 and which read as under :

"13. No doubt, in the original plaint filed by the original plaintiff in both the suits, the description of the plaintiff has been given as m/s. Birla Copper, a unit of Indo Gulf Corporation Ltd., where as the said description was not proper as M/s. Birla Copper, which was described as a unit of M/s. Indo Gulf Corporation Ltd. was not having any separate entity that is to say that it was only having any legal personality, not it is a legal entity capable of suing, as a unit or division of a company is only one of various extensions, faces of the company through which various business of the company are being run, in case of company involved in multifarious activities. Therefore the said description was not correct at the time of filing of suit. In any case, counsel for the plaintiff has relied upon a judgment AIR 61 Supreme Court 325, in which it was held as under :-

"The Madras High Court then concluded as follows:-

"If however imperfectly and incorrectly a party is designated in a plaint the correction of the error is not the addition or substitution of a party but merely clarifies and makes apparent what was previously shrouded in obscurity by reason of the error or mistake. The question in such a case is one of intention of the party and if the Court is able to discover the person or persons intended to sue or to be sued a mere misdescription of such a party can always be corrected provided the mistake was bona fide vide O.I, R. 10, C.P.C. Such an amendment does not involve the addition of a party so as to attract S. 22(1) , Limitation Act. Suits by or on behalf of dead persons stand in a different category. The principle that a misdescription could be corrected by amendment could not obviously be applied to such a case but this is far from saying that merely because the law does not recognise the firm as being a legal entity, the firm name could not indicate or designate the individuals composing the firm."

"To sum up, the situation is analogous to a case where an individual who has an alias or an abbreviated name by which he is sometimes called initially described himself in that name but subsequently applies to have it rectified so as to describe in the manner in which he is most generally known. There cannot be any doubt that by the correction in the name, a new plaintiff is not added so as to attract s. 22(1) , Limitation Act. A trade name either of a person or a group of individuals carrying on business in partnership is in true an alias for the person or the group."

"It is clear from this provision of the Act that the word "firm" or the "firm name" is merely a compendious description of all the partners collectively. It follows, therefore, that where a suit is filed in the name of a firm it is still a suit by all the partners of the firm unless it is proved that all the partners had not authorized the suit. A firm may not be a legal entity in the sense of a corporation or a company incorporated under the Indian Companies Act it is still an existing

concern where business is done by a number of persons in partnership. When a suit is filed in the name of a firm it is in reality a suit by all the partners of the firm. If O. XXX had not been introduced into the Code and a suit had been filed in the name of a firm it would not be a case of a suit filed by a nonexistent person. It would still be a suit by the partners of a firm, the defect being that they were described as a firm. In order to clarify matters a court would permit an amendment by striking out the name of the firm and replacing it with the name of the persons forming the partnership. It would be a case of misdescription. Even if the provisions of O. I, r. 10 and O.VI, r. 17 did not strictly apply the amendment could be permitted under s. 153 of the Civil Procedure Code because it was not a case of either adding parties or substituting parties. The High Court referred to a number of decisions to which no particular reference need be made but they do support the view taken by the High Court that in the present case the plaintiff described in the plaint as the firm of Manilal & Sons was mere misdescription capable of amendment and not case where a plaint had been filed by a non-existent person and therefore a nullity."

"If, however, under some misapprehension, persons doing business as partners outside India do file a plaint in the name of their firm they are misdescribing themselves, as the suit instituted is by them, they being known collectively as a firm. It seems, therefore, that a plaint filed in a court in India in the name of a firm doing business outside India is not by itself a nullity. It is a plaint by all the partners of the firm with a defective description of themselves for the purposes of the Code of Civil Procedure. In these circumstances, a civil court could permit, under the provisions of s. 153 of the Code (or possibly under O.VI, r. 17, about which we say nothing) , an amendment of the plaint to enable a proper description of the plaintiffs to appear in it in order to assist the court in determining the real question or issue between the parties. Strictly speaking O.I, r. 10(1) has no application to a case of this kind because the suit has not been instituted in the name of a wrong person, nor is it a case of there being a doubt whether it has been instituted in the name of the right plaintiff. The provisions of O.I, r. 10(2) also do not apply because it is not a case of any party having been improperly joined whose name has to be struck out or a case of adding a person or a party who ought to have been joined or whose presence before the court is necessary in order to enable the court effectually and completely to adjudicate upon settle all the questions involved in the suit. The suit has been from its very inception a suit by the partners of the firm and no question of adding or substituting any person arises, the partners collectively being described as a firm with a particular name."

14. The ration of law laid down in the said judgment is squarely applicable to the peculiar facts and circumstances of the present case. In my respectful view, the contrary judgments (supra) relied upon by Ld. Counsel for defendant are not applicable to the peculiar facts and circumstances of the present case, as the misdescription in the plaint of the plaintiff having been described as M/s. Birla Copper, a unit of Indo Gulf Corporation Ltd. was only a misdescription instead of

the plaintiff company being described as M/s. Indo Gulf Corporation Ltd., having one of its unit as M/s. Birla Copper, it was described in above manner, as admittedly it was only to M/s. Indo Gulf Corporation Ltd., which was a legal entity capable of suing and to be sued, therefore it was only an improper description of the name of the company and for which no prejudice has been caused to the defendant no. 1.

15. The original plaintiff company was amalgamated with M/s. Hindalco Industries Limited under the scheme of arrangement between m/s. Indo Gulf Corporation Limited, M/s. Indo Gulf Fertilizer Limited and M/s. Hindalco Industries Limited, which was duly sanctioned by High court of Bombay vide order dated 31.10.2012 and Lucknow bench of Allahabad High Court, vide order dated 18.11.2002, whereby the rights and liabilities of the M/s. Indo gulf corporation Limited have been taken over by M/s. Hindalco Industries Ltd. Therefore, this argument of Ld. Counsel for the defendant, that original company had been dissolved and wound up in the year 2002, therefore all the consequences mentioned in the order 22 rule 3 CPC would follow, is not a tenable argument, as said company technically speaking never died, but it only merged itself into another company M/s. Hindalco Industries Ltd., which took over its rights and liabilities. Therefore, the consequences of order 22 rule 3 would not follow in the present case.

16. Regarding the next argument of counsel for defendant no. 1 that said fact was concealed by the original plaintiff at the time of the filing of the suit, the said argument of counsel for the defendant no. 1 is also not tenable as the plaintiff would not have gained anything by concealing said fact from the court. It may be that the plaintiff being a large corporation may not have been aware about the pendency of the present case due to multifarious activities being carried out by the applicant company. No doubt, the said application should have been moved immediately after the year 2002, after the scheme of amalgamation was sanctioned by the High Court, yet no prejudice has been caused to the defendant by the said act of the plaintiff, who can always be compensated with cost.

17. Further it is the endeavour of law that all the matters, as far as possible, should be adjudicated on the merits, rather than on the technicalities. Consequently, the applications of the plaintiff / applicant M/s. Hindalco Industries Ltd., one u/o. 22 rule 10 r/w section 151 CPC and another u/s 153 CPC r/w Order 6 rule 17 r/w order 1 rule 10 CPC separately filed in both the above suits are allowed, subject to costs of Rs. 25,000/- in each case. The amended plaint is already on the record."

6. Supreme Court has now in a catena of judgments repeated ad nauseam that the heading of the applications cannot defeat the substance of the applications and that merely because a wrong provision of law is stated cannot mean that courts cannot treat the applications as having been filed under the correct provisions of law. Therefore, I do not agree with the counsel for the appellant that merely because applications which have been allowed were filed under

Order 22 Rule 10 CPC, under Order 1 Rule 10 CPC, under Order 6 Rule 17 CPC and Section 153 CPC, the applications cannot be taken as applications filed under Order 22 Rule 4 CPC read with Section 5 of the Limitation Act, 1963 for condoning the delay.

7. (i) In fact, to the applications under Order 1 Rule 10 CPC in a way period of limitation will not apply because on the "death" of the original plaintiff company M/s. Indo Gulf Corporation Ltd. its business undoubtedly got merged with the present respondent/ M/s. Hindalco Industries Ltd. and qua this business pursuant to the orders of amalgamation and merger, the present respondent company is entitled to be substituted by virtue of order of amalgamation and merger in place of original company M/s. Indo Gulf Corporation Ltd.

(ii) No doubt the judgment relied upon by the court below in the case of Purushottam Umedbhai & Co. (supra) may not strictly apply because it is not a case of mis-description but a case of substitution of a party on account of "death" of a party, however, the issue in the present case would stand covered in favour of the respondent by the judgment of the Supreme Court in the case Karuppaswamy and Others Vs. C. Ramamurthy, which provides that even if a suit is filed against a dead person, once there is no want of good faith, then the correct legal representatives can always be added under Order 1 Rule 10 CPC. In the present case, I do not find any lack of good faith on behalf of the present respondent/newly added plaintiff inasmuch as no benefit is derived or can be derived on account of delay in filing the application for bringing on record the present respondent/present plaintiff and counsel for the appellant could not argue before me as to how any benefit which the present respondent has derived on account of filing of the subject applications with delay before the court below, and which delay is because the orders of amalgamation and merger are of the year 2002 and the applications were filed in the year 2009. I may reminded at this stage of the observations made by the Supreme Court in the case of N. Balakrishnan Vs. M. Krishnamurthy, that once condonation of delay is sought, there is bound to be some negligence, but, if there is no want of good faith and there is no strategy to delay the case, courts can act liberally in condoning the delay, since in the present case there is no want of good faith on behalf of the respondent for seeking its substitution in place of the original plaintiff, I do not agree that the heading of the application should be a bar to the Court to apply the correct provisions of law including of Order 22 Rule 4 CPC or Order 1 Rule 10 CPC, especially taken with the ratio of the Supreme Court judgment in the case Karuppaswamy and Ors. (supra) .

8. I may note that the court below has rightly in para 17 of the impugned judgment observed that cases should be adjudicated on merits rather than on technicalities.

9. Obviously, the appellant is delaying the suits filed against it on account of technicalities although no prejudice is caused to the appellant/defendant by substitution of the present respondent/M/s. Hindalco Industries Ltd. in place of

the original plaintiff M/s. Indo Gulf Corporation Ltd., and which as stated above has been sought because of orders of merger and amalgamation passed by the High Courts of Bombay and Allahabad.

10. In view of the above, these appeals are wholly frivolous and are dismissed with costs of Rs. 50,000/- with respect to each of the appeals. Let a copy of this order be placed before the Board of Directors of the appellant Bank inasmuch as the Board of Directors of the appellant Bank/PSU Bank must know as to how unnecessary expenditure is caused by its legal managers in unnecessarily filing appeals on technical matters. This I am observing because when these appeals came up before this Court for the first time on 29.1.2014, after arguments were heard, it was thought desirable that appellant must not unnecessarily pursue these appeals which are based only on technicalities in delay by the present respondent to seek its substitution, but, counsel for the appellant subsequently on instructions on 15.4.2014 stated that appeals have to be argued on merits, and accordingly the appeals are listed today as per the request of the counsel for the appellant who was not well on 15.4.2014. Let the copy of the present judgment be placed before the Board of Directors of the appellant Bank positively within a period of six weeks from today and an affidavit to this effect that this judgment is placed before the Board of Directors be filed by the appellant bank within a period of eight weeks from today.