
(2014) 08 CAL CK 0087
In the Calcutta High Court
Case No : C.O. No. 699 of 2014

Toghral Kamal

APPELLANT

Vs

Kiran Shankar Paul

RESPONDENT

Date of Decision : 08-08-2014

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11, 9
Civil Procedure Code, 1908 (CPC) — Order 47 Rule 1, 11, 114, 151
Constitution of India, 1950 — Article 227

Citation : (2014) 4 CALLT 253

Hon'ble Judges : Debabrata Mookerjee, J

Bench : Single Bench

Advocate : Saptangsu Basu, Sr. Advocate, Ayan Banerjee, Advocate and Krishnendu Bhattacharjee, Advocate for the Appellant; S.P. Roy Chowdhury, Sr. Advocate and Soumya Kanti Chatterjee, Advocate for the Respondent

Final Decision : Allowed

Judgement

Debangsu Basak, J.—The petitioner entered into a development agreement with the opposite parties. The petitioner was appointed as the power of attorney of the opposite parties. The opposite parties, however, cancelled the development agreement and the power of attorney. The petitioner alleging that such cancellation of the development agreement and the power of attorney was bad and illegal filed a suit being Title Suit No. 18 of 2013 and sought reliefs relying thereto. In such suit the petitioner applied for withdrawal of the same without leave to file a fresh suit on the self-same cause of action. The petitioner adduced evidence in support of his application for withdrawal. The learned Judge by an Order dated April 1, 2013 allowed the petitioner to withdraw Title Suit No. 18 of 2013. No leave to file a fresh suit on the selfsame cause of action was granted by such order.

2. The petitioner, thereafter, filed an application u/s 9 of the Arbitration and Conciliation Act, 1993 and obtained an ex parte order of status quo therein. The

opposite party applied for vacating of the ad interim order of status quo on the ground of suppression of caveat. The opposite party moved this Hon''ble Court under Article 227 of the Constitution of India being C.O. No. 3736 of 2013 impugning the action of the Court in not giving precedence to the vacating application. Such revisional application is pending.

3. The petitioner, thereafter, filed an application u/s 11 of the Arbitration and Conciliation Act, 1996. Such application was opposed by the opposite parties on the ground that, the suit was withdrawn by the petitioner unconditionally and without obtaining leave to file a fresh proceeding on the selfsame cause of action. The petitioner, thereafter, filed an application u/s 114 read with Section 151 of the Code of Civil Procedure, 1908 in Title Suit No. 18 of 2013 seeking review/recall of the Order dated April 1, 2013.

4. The application u/s 11 of the Arbitration and Conciliation Act, 1996 filed by the petitioner was dismissed by default. The petitioner filed an application for restoration. The restoration application was dismissed. The Trial Court, thereafter, rejected the petition u/s 114 read with Section 151 of the Code of Civil Procedure, 1908 filed by the petitioner by the impugned Order dated February 14, 2014.

5. Mr. Saptangsu Basu learned Senior Advocate for the petitioner submits that, due to the mistake of the learned Lawyer of the petitioner Title Suit No. 18 of 2013 was withdrawn without obtaining leave to file a fresh proceeding on the selfsame cause of action. In the application for review/recall the petitioner has explained that, the petitioner discovered the arbitration clause in the development agreement. The disputes between the petitioner and the opposite parties arising out of the development agreement are covered by the arbitration clause in the development agreement. Consequently, the petitioner instructed his Advocate to withdraw the suit so that the petitioner is able to take appropriate steps for the purpose of initiating arbitration in terms of the arbitration clause contained in the development agreement. The learned Lawyer, however, by mistake did not seek leave to withdraw the suit conditionally. The rights of the petitioner are, therefore, irreparably affected in the event the Order dated April 1, 2013 is not recalled and the petitioner is not granted leave to file a suit and/or proceeding on the selfsame cause of action as that of Title Suit No. 18 of 2013.

6. In support of his contention that an application seeking withdrawal of the suit can be withdrawn reliance is placed on Rameswar Sarkar Vs. State of West Bengal and Others, It is submitted on behalf of the petitioner that, mistake of a Lawyer comes within the purview of review u/s 114 of the Code of Civil Procedure, 1908 and reliance is placed on Board of Control for Cricket, India and Another Vs. Netaji Cricket Club and Others, in this regard. In support of the contention that, the High Court's powers of superintendence under Article 227 of the Constitution of India are wide enough to prevent abuse of process of Court and that such power is not limited by technical rules reliance is placed on 2004 Volume 1 Calcutta High Court Notes page 261(Mira Banik & Anr. v. Samita

Bhattacharyya & Ors.). Reliance is also placed on Jet Ply Wood Private Ltd. and Another Vs. Madhukar Nowlakha and Others, for the proposition that, when there is no specific provision in the Code of Civil Procedure, 1908 providing for filing application for recalling order permitting withdrawal of suit then provisions of Section 151 can be resorted to in the interest of justice.

7. Mr. S.P. Roy Chowdhury learned Senior Advocate for the opposite parties contends that, the review/recall application is not on the basis of an innocent mistake of a learned Advocate as sought to be made out. He relies upon the list of dates and the events leading up to the application for review/recall of the Order dated April 1, 2013. He submits that, the petitioner was made over cheques for Rs. 37,50,000/- which the petitioner returned in order to avail of a better bargain. The petitioner, thereafter, applied for review/recall of the Order dated April 1, 2013. Such application is not bona fide. Consequently, such application should not be allowed.

8. He submits that, the petitioner withdrew Title Suit No. 18 of 2013 unconditionally. In the application for withdrawal of Title Suit No. 18 of 2013 the petitioner stated that, there was change in circumstances between the date of filing of the suit and the date of the application for withdrawal. According to the opposite parties, the change in the circumstances is the offer of the cheques for Rs. 37,50,000/- and the refusal of the petitioner to accept the same for a better bargain. He also emphasizes the fact that, the petitioner went to the witness box and deposed before the Court of seisin in Title Suit No. 18 of 2013 that the petitioner was withdrawing the suit unconditionally. After such categorical statement in his application for withdrawal and his evidence before Court of seisin in Title Suit No. 18 of 2013 the petitioner should not be allowed to withdraw his recalling application and seek leave to file a proceeding on the self-same cause of action afresh. With regard to Rameswar Sarkar (supra), Mr. Roy Chowdhury refers to paragraph 10 of such judgment and submits that when an application under Order 47 Rule 1 is filed the suit cannot be restored by invoking Section 151 of the Code of Civil Procedure, 1908.

9. In course of submissions of the parties I wanted to look into the written objection filed by the opposite parties to the application of the petitioner giving rise to the order impugned. A copy of the written objection was submitted. In addition to the written objection, the opposite parties wanted to rely upon the affidavit-in-opposition used by them in the proceedings u/s ARBIT of the Arbitration and Conciliation Act, 1996.

10. I have considered the rival contentions of the parties and the materials on record.

11. A suit for declaration and injunction relating to a development agreement dated February 4, 2011 and three supplemental agreements dated February 11, 2011 as well as a registered power of attorney dated February 11, 2011 was filed by the petitioner and was registered as Title Suit No. 18 of 2013.

12. The petitioner applied for withdrawal of Title Suit No. 18 of 2013. The application for withdrawal stated that, due to the change in the circumstances the present position and as new development had taken place the petitioner did not want to proceed any further with the suit and desired to withdraw the suit. By the Order dated April 1, 2013 the learned Court after taking evidence of such application for withdrawal where the petitioner reiterated his stand as in the withdrawal application allowed the petitioner herein to withdraw Title Suit No. 18 of 2013 unconditionally.

13. As the subsequent developments of the proceeding between the parties would demonstrate the petitioner applied u/s 9 of the Arbitration and Conciliation Act, 1996 on May 2013 and obtained an ex parte interim order thereon. The opposite parties have applied vacating of the same. The ex parte ad interim injunction is still continuing. The petitioner filed an application u/s 11 of the Arbitration and Conciliation Act, 1996 on May 2013 to have the same ultimately dismissed for default and the restoration application dismissed on January 9, 2014.

14. The petitioner, thereafter, applied for review/recall of the Order dated April 1, 2013. In such review/recall application the petitioner claimed that he instructed his Lawyer for withdrawal of the suit on the ground of the arbitration agreement contained in the development agreement dated February 4, 2011. The petitioner set out the arbitration clause in the application. The petition went on to say that, due to the inadvertence of the learned Advocate the application for withdrawal was made without praying for leave to file the claim of the petitioner before the arbitral Tribunal.

15. The opposite parties herein filed a written objection to such review/recall application. In its written objection the opposite parties did not take the point that, the changed circumstances stated by the petitioner in his withdrawal application was actually the offer of the sum of Rs. 37,50,000/- by the opposite parties to the petitioner which the petitioner wrongfully rejected on the ground of striking better bargain later on and not the alleged mistake of the learned Advocate. The opposite parties had taken the point of tender of sum of Rs. 37,50,00/- by them to the petitioner in the affidavit-in-opposition to the application u/s 11 of the Arbitration and Conciliation Act, 1996 filed much prior to the review/recall application. Therefore, there was no ground for the opposite parties not to take the same point in their written objection in the review/recall application.

16. I remind myself that, for considering an application under Article 227 of the Constitution of India directed against a particular order impugned, I must confine myself to the materials available to the learned Trial Court in adjudicating the application giving rise to the order impugned and not to look at any other materials.

17. The affidavit-in-opposition to the Section 11 of the Code of Civil Procedure,

1908 application was not before the Court below and while considering the review/recall application.

18. Before me the opposite parties contend that, the application for review/recall is not bona fide since the change in circumstances stated in the withdrawal application was essentially a change in the factual circumstance of the offer of the sum of Rs. 37,50,000/- and the return of such cheques of the opposite parties and not the so-called bona fide mistake of the learned Advocate for the petitioner in allegedly misunderstanding the instructions of the petitioner. However, this allegation of the opposite parties made before me is not substantiated from the records before the Trial court which gave rise to the order impugned. The fact that the review/recall application was not bona fide due to the reasons claimed by the opposite parties before me was not placed by the opposite parties before the Court below.

19. Even assuming that, the allegations of the opposite parties with regard to the tender of sum of Rs. 37,50,000/- and its refusal by the petitioner is concerned are correct, there are subsisting disputes between the parties to the development agreement. It would be harsh, unjust and improper to non-suit the petitioner in view of the subsisting disputes between the parties. It is one thing to say that the petitioner is entitled to ventilate his grievances and the other to succeed the grievances ventilated. To shut out the petitioner for the facts and circumstances of the instant case from ventilating grievances would be harsh, unjust and improper. More particularly when the opposite parties did not take the point of the facts now sought to be canvassed (changed circumstances) prompting the petitioner to withdraw the Title Suit No. 18 of 2013 unconditionally.

20. Rameswar Sarkar (supra) allowed the plaintiff therein to withdraw the application for withdrawal of the suit itself. This view of the Court to allow the plaintiff to withdraw an application for withdrawal itself is approved by the Supreme Court in Jet Ply Wood Pvt. Ltd. (supra). Jet Ply Wood Pvt. Ltd. (supra) says that Section 151 of the Code of Civil Procedure, 1908 can be invoked in order to render justice to a party since there is no specific provision under the Code of Civil Procedure, 1908 providing for filing an application for recalling an order permitting withdrawal of the suit.

21. Mira Banik & Anr. (supra) speaks power of a Court under Article 227 of the Constitution of India. It lays down that,

"Article 227 is an essential weapon, provided to the High Court through wisdom of the founding fathers of the Constitution, to be used whenever it is needed according to the need of the hour. It can be used and utilized to defend as a shield or offend as a sword. If situation warrants, in order to keep Court within its bounds, in order to prevent abuse of process, in order to preserve sanctity, restore the dignity, maintain the faith and inspire confidence of people in it, the High Court may even quash the plaint or the proceeding in appropriate case."

22. In Board of Control for Cricket in India & Anr. (supra) the Supreme Court

recognized that, mistake of a Lawyer can be a ground for a review. The petitioner herein as the plaintiff has grievances against the opposite parties with regard to the development agreement, supplemental agreements and the registered power of attorney. The obligations inter se between the parties to the documents referred to above have not been worked out even taking the stand of the opposite parties to be correct to the extent that, the opposite parties tendered cheques for Rs. 37,50,000/-, the cheques were returned albeit wrongfully as contended by the opposite parties. Therefore, even taking the version of the opposite parties to be correct, the opposite parties have with them sums belonging to the petitioner. At the barest minimum level, the disputes between the parties emanating from the documents referred to above are not settled. The development agreement contains an arbitration clause. Disputes between the parties, therefore, require adjudication at an appropriate forum. Therefore, the petitioner should be afforded a forum to have the disputes between the parties settled. In such context the changed circumstances can mean the discovery of the arbitration clause by the petitioner subsequent to the filing of his suits. The petitioner, therefore, has made out a case for recall of the Order dated April 1, 2013 in view of the mistake of the learned Advocate. An application u/s 151 for the purpose of recalling an order permitting withdrawal of the suit is maintainable. The petitioner has shown appropriate cause why it is wanting recall of the Order dated April 1, 2013. In fact, the petitioner is categorical in its submission that he does not want the Order dated April 1, 2013 to be recalled in its entirety in view of the arbitration clause in the development agreement. He wants that the Order dated April 1, 2013 should be suitably modified to permit him to file appropriate proceedings in an appropriate forum in respect of the subject matter of Title Suit No. 18 of 2013.

23. By the order impugned the learned Judge rejected the application for review/recall on the ground that the Court passing the Order dated April 1, 2013 took a view taking into account the facts discernible from the record and that the Order dated April 1, 2013 can neither be recalled nor called for review. Rameswar Sarkar (supra) and Jet Ply Wood Pvt. Ltd. (supra) are of the view that, an application for withdrawing the withdrawal application is maintainable and that provisions of Section 151 of the Code of Civil Procedure, 1908 can be resorted to allow a party to withdraw the application for withdrawal of the suit in absence of a specific provision in the Code of Civil Procedure, 1908 providing for filing application for recalling order permitting withdrawal of the suit. In such circumstances the learned Judge acted with material irregularity in holding that the Order dated April 1, 2013 cannot be recalled. Board of Control for Cricket in India & Anr. (supra) is of the view that, a mistake by a Lawyer is a ground for review. Again the learned Judge acted with material irregularity in returning a finding that the Order dated April 1, 2013 cannot be reviewed when the application for review/recall speaks the mistake of a Lawyer in allowing the Order dated April 1, 2013 to be passed. In such circumstances, an application u/s 151 of the Code of Civil Procedure, 1908 is maintainable to have an order permitting

withdrawal of the suit to be recalled. As held in Rameswar Sarkar (supra) a plaintiff can apply for withdrawing the application for withdrawal itself.

24. In such circumstances the petition for review/recall of the petitioner is allowed. The order impugned before me is set aside. The Order dated April 1, 2013 is modified to permit the petitioner to institute appropriate legal proceedings at an appropriate forum in respect of the selfsame cause of action as of Title Suit No. 18 of 2013.

25. Since, I am of the view that, non-suiting the petitioner in facts and circumstances of the instant case would be harsh, unjust and improper, I will permit the petitioner to have a conditional withdrawal of Title Suit No. 18 of 2013. The petitioner will be entitled to withdraw Title Suit No. 18 of 2013 and will also be entitled to initiate appropriate proceedings in respect of the self-same cause of action in accordance with law.

26. C.O. No. 699 of 2014 is allowed. No order as to costs.