(2006) 11 CAL CK 0052

Calcutta High Court

Case No: G.A. No. 2626 of 2004 and C.S. No. 243 of 2003

Basudeo Khaitan and Others		APPELLANT
	Vs	
Madan Lal Periwal and Others		RESPONDENT

Date of Decision: Nov. 21, 2006

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 1 Rule 1, Order 1 Rule 3, Order 2 Rule 3, Order 7 Rule 11

Citation: (2007) 1 CHN 392

Hon'ble Judges: Aniruddha Bose, J

Bench: Single Bench

Advocate: P.K. Das and Dhrubo Ghosh, for the Appellant;Pratap Chatterjee, Ashis Chakraborty and A.P. Agarwala, for the Respondent

Final Decision: Dismissed

Judgement

Aniruddha Bose, J.

The instant interlocutory motion has been taken out by the petitioner under Rule 11(d) of Order 7 of the CPC ("Code" in short) for dismissal of the suit on the grounds of multifariousness, misjoinder of plaintiffs and misjoinder of causes of action. The suit out of which present proceeding arises was instituted by the plaintiffs, being six individuals and an incorporated company claiming decree for a sum of Rs. 56,12,250/-. The first defendant is an individual, whereas the second defendant, being the petitioner herein is a partnership firm, of which the second, third, fourth, fifth and the sixth defendants have been described as partners. Fifteen other individuals have also been impleaded in the suit as proforma defendants. The plaintiff Nos. 1 to 6 and the proforma defendants appear to be members of different branches of the same family, and had equity holding in two limited companies.

2. The case of the plaintiffs is that there was a dispute among the family members and the first defendant was entrusted with the duty to mediate and settle the

dispute. The decision of the disputing groups was expressed in a memorandum of understanding signed by almost all the plaintiffs and proforma defendants and this instrument is dated 16th May, 2004, a copy of which has been made Annexure "B" to the plaint. The plaintiff Nos. 1 to 6 had deposited the aforesaid sum of money with the second defendant at the instance of the first defendant, on the latter''s representation that the partnership firm was under his management and control. In pursuance of such mediation process, the plaintiffs and the proforma defendants had sold their respective holdings in two companies, being Selimbong Tea Co. Ltd. and Seeyok Tea Co. Ltd. and deposited the sale proceeds with the second defendant. This deposit as has been pleaded in the plaint was made with the understanding that on conclusion of the mediation, and in the event the mediation process failed, the money so deposited would be refunded with a specified rate of interest. In the memorandum of understanding, the plaintiff Nos. 1, 2, 3, 4 and 6 as also majority of the proforma defendants were signatories.

3. Mr. Das, learned Senior Counsel appearing for the petitioner submitted that the plaintiffs had deposited diverse amounts with the defendant No. 2 and the claim of each plaintiff is also in respect of the sum of money they had deposited individually. The memorandum of understanding dated 16th May, 1994 does not refer to any deposits having been made by the parties with the second defendant. Moreover, the fifth and the seventh plaintiffs (Vimal Securities Limited) were not parties or signatories to the memorandum of understanding and the seventh plaintiff could not be said to be a part of the Khaitan family either. Mr. Das argued that each individual plaintiff was seeking to enforce his individual claim against the second defendant in respect of independent transactions and such claim could not be made in a single suit. The right to relief of the plaintiff were not in respect of, nor the same did arise out of the same set or set of acts and transactions. The case of the petitioner is also of misjoinder of causes of action, as the plaintiffs and the defendants are separate in this case, and the claim of the plaintiffs are based on separate transactions.

4. Mr. Das relied on the following authorities in support of his submissions:

1. An unreported judgement of this Court in the case of Margo Trading & Six Ors. v. Own Credit Private Ltd., delivered on 30th October, 1995 in Suit No. 242 of 1995.

2. A decision of an Hon''ble Division Bench of this Court in the case of Chandi Prasad Sikaria v. Premlata Nahata reported in 2005 (4) CHN 664.

5. Alternative submission of Mr. Das is that even if the suit could be maintained by the plaintiff Nos. 1 to 6, the seventh plaintiff ought to be struck out from array of the plaintiffs as the said plaintiff is an incorporated company and no connection of the Khaitan family with the seventh plaintiff has been disclosed or pleaded in the plaint.

6. Mr. Chatterjee, learned Senior Advocate appearing for the plaintiff/ respondent has opposed the prayer of the petitioner and submitted that the suit relates to the

same sets of transaction, having its root in the understanding of the members of the Khaitan family reduced in writing in the memorandum of understanding. In this respect, he has referred to an affidavit affirmed by the first defendant in an application filed by the plaintiffs under Chapter XIIIA of the Original Side Rules of this Court for summary judgement against the defendants. In this affidavit, the first defendant has stated:

I say that the said amounts were disbursed with the consent and concurrence of all the members of the Khaitan family and being a person who was holding amounts in escrow I could not have parted with any amount unless consent was received from all the members of the Khaitan family.

7. Submission of Mr. Chatterjee is that this amounts to admission of the commonality of the transactions between the plaintiff and the defendants, and if separate trial is directed in respect of each instance of deposit by the individual plaintiffs that would give rise to common questions of law and fact. The plaint discloses only one agreement and the individual plaintiffs deposited the money in pursuance of this agreement only. This was a composite transaction. His further submission was that the instant application was misconceived and intended to delay the hearing of the application filed by the plaintiffs under Chapter XIIIA of the Original Side Rules of this Court, to which I have referred to earlier.

8. For proper appreciation of arguments of the learned Counsel for the parties, certain provisions of the CPC is relevant and in fact have been relied upon by the learned Counsels appearing for both the parties. These are reproduced below:

Order 1 Rule 1. Who may be joined as plaintiffs.-All persons may be joined in one suit as plaintiffs where-

(a) any right to relief in respect of, or arising out of, the same act or transaction or series of acts or transactions is alleged to exist in such persons, whether jointly, severally or in the alternative; and

(b) if such persons brought separate suits, any common question of law or fact would arise.

Order 2 Rule 3. Joinder of causes of action.-(1) Save as otherwise provided, a plaintiff may unite in the same suit several causes of action against the same defendant, or the same defendants jointly; and any plaintiffs having causes of action in which they are jointly interested against the same defendant or the same defendants jointly may unite such causes of action in the same suit.

(2) Where the causes of action are united, the jurisdiction of the Court as regards the suit depend on the amount or value of the aggregate subject-matters at the date of instituting the suit.

9. I shall address first the issue of misjoinder of plaintiffs. Law permits joining more than one person as plaintiffs in a single suit if their claim for relief arise out of or in respect of the same or series of acts or transactions and if these persons were to bring separate suits, common questions of law or facts would have arisen. On this point the argument of Mr. Das is that in the present suit, the identity of each of the plaintiff as shareholders are distinct, and deposits made upon sale of their holdings also are not interlinked and forms separate transactions. The second defendant maintained separate accounts in respect of each of the plaintiffs. In the plaint it is also found that the maintenance of the accounts or admission of the liability of the second defendant to each of the plaintiffs were by way of individual communication. On the basis of these facts Mr. Das has relied on the decision of Margo Trading (supra), in which this Court held:

On a scrutiny of the plaint there can be no doubt that such of the plaintiffs have distinct and separate cause of action against the defendant. The agreements of which specific performance are sought are separate. Each transaction is independent of the other. The reliefs claimed are different. The breach of one agreement is independent of the other. Each plaintiff will have to prove its right to relief separately such as its readiness and willingness to perform its obligations under its agreement. The cause of action of such plaintiff does not derive from a common root. There is no interdependence or nexus in the sense that the same act is the foundation of the right to relief for all the plaintiffs. For example in Ramendra Nath Ray (supra) there were several defendants. The right against each of the defendants was the alleged fraud of the defendant No. 1. If the plaintiff failed to prove such fraud the case would fail against all the defendants. It was held that therefore the causes of action against the defendants arose out of the same transaction and there was no misjoinder.

10. He also placed reliance on the decision of an Hon''ble Division Bench of this Court in the case of Chandi Prasad Sikaria (supra). In particular, he drew my attention to the following passage from this judgment:

After perusing the plaint, it appears to us that the causes of action of the plaintiff No. 1 and plaintiff No. 2 are separate and on the basis of their individual dealings with the defendant. The claim is arising out of two different agreements. Each of the transaction is an independent transaction. The reliefs claimed are different as it would be evident from the prayers in the plaint and further it appears to us that a prayer has been made in the plaint for an enquiry into the loss and damages suffered by the plaintiffs and decree may be passed in favour of the plaintiffs for such amounts as may be found upon such enquiry. In our opinion, the said prayer is nothing but an eyewash or an effort tried to bypass the provisions of law and we do not find that the causes of action of the plaintiff No. 1 and the plaintiff No. 2 cannot be treated as one. Each of the plaintiffs will have to prove their claim separately. The claim of the plaintiffs is not based on one agreement. Therefore, in our opinion, the

suit is bad not only for misjoinder of parties but also for misjoinder of causes of action.

11. I am of the opinion, however, that the facts involved in the present case are different from the facts on the basis of which the decision was rendered by this Court in the cases of Margo Trading (supra) and Chandi Prasad Sikaria (supra). In both these cases, the plaintiffs sought to enforce in a single suit their rights arising out of different agreements. In the case of Margo Trading (supra) the plaintiffs were independent companies who had entered into separate agreements for purchase of separate areas on certain portion of a building and the suit was for specific performance of the agreements. In the case of Chandi Prasad Sikaria (supra) also independent loan transactions were involved. There was no common event or arrangement from which the agreements originated. The transactions in the instant case, however, has its root in a single instrument, being the memorandum of understanding dated 16th May, 1994.

12. At this stage, while considering the application for dismissal of the plaint on the grounds of misjoinder of parties and causes of action, I am to look at the allegations as made in the plaint and on that basis test as to whether the same suffers from any disqualification under the law. There is no scope for entertaining any pleading or argument to the effect that the allegations made in the plaint are incorrect while adjudicating an application under Order 7 Rule 11(d) of the Code. In the perspective, examination of the plaintiffs'' case as made out in the plaint is necessary. The substance of the plaintiffs'' case appears from paragraphs 3, 4, 5, 6 and 7 of the plaint, which are reproduced below:

3. In order to facilitate the mediation process, a memorandum of settlement was signed by or on behalf of the plaintiffs and the proforma defendant Nos. 7 to 19, copy of the said document in writing is Annexure ''B'' hereto.

4. As a part or process of the said mediation proceedings, all the groups sold their shares in the said two companies namely Selimbong Tea Co. Ltd. and Seeyok Tea Co. Ltd. and deposited the sale proceeds thereof with the defendant No. 2 which, defendant No. 1 stated, was under his control and management. The said deposit was made by all concerned on the basis that the same would be refunded and/or paid upon conclusion of the mediation and/or in case the mediation did not prove fruitful. It was also agreed that in the meantime interest @ 15 per cent per annum would be paid, on the amount deposited with the defendant No. 2. The defendant Nos. 3 to 6 are partners of the defendant No. 2.

5. Pursuant to the aforesaid the following sums of money were deposited by the plaintiffs:

Name	Amount deposited
Basudeo Khaitan (Plaintiff No. 1)	Rs. 17,50,000.00
Usha Khaitan (Plaintiff No. 2)	Rs. 20,00,000.00

Nirmal Kumar Khaitan (Plaintiff No. 3)	Rs. 15,00,000.00
Veena Khaitan (Plaintiff No. 4)	Rs. 14,00,000.00
Vishal Khaitan (Plaintiff No. 5)	Rs. 5,50,000.00
Niharika Khaitan (Plaintiff No. 6)	Rs. 50,00,000.00

6. So far as the plaintiffs are aware, the defendant Nos. 7 to 19 have also deposited on aggregate sum of Rs. 2,25,00,000/- on similar terms.

7. From time to time the defendants repaid certain amounts deposited by the plaintiff Nos. 1 to 6 and the plaintiff No. 7 deposited a sum of Rs. 10,00,000/- on 22nd May, 1998 with the defendant No. 2 to replenish the amounts repaid to the plaintiff Nos. 1 to 6.

13. While testing as to whether more than one plaintiff can be joined in a single suit, as per the provisions of Order 1 Rule 1 of the Code is to ascertain as to whether any right to relief to the plaintiffs arises out of or in respect of the same act or transactions or a series of acts or transactions. Such sets or series of transactions, however, must have a common root, as it has been observed by Her Lordship in the case of Margo Tradng (supra). In a subsequent unreported decision, in the case of Innovative Capital Strategies Pvt. Ltd. v. Tushar G. Shah and Ors. being G.A. No. 1832 of 1997 arising out of C.S. No. 47 of 1997, the expression "in respect of has been construed to mean the act or transaction must be relevant to the relief and need not form part of the basis of the relief. In this case, the provision of law which the Court considered was with regard to joinder of defendants under Order 1 Rule 3 of the Code. But expressions used therein are similar to that used in Order 1 Rule 1 of the Code, and so far as construction of the expression "in respect of is concerned, I am of the view that same construction should be imputed to the identical expression as used in Order 1 Rule 3 of the Code.

14. What is the position here ? There is a memorandum of understanding in which certain amount has been deposited with the defendant No. 2 in view of an understanding among five of the plaintiffs and the proforma defendants. To give effect to this memorandum of understanding, the plaintiffs and the proforma defendants had deposited certain sums of money with the second defendants at the instance of the first defendant. This is what has been pleaded in the plaint. This memorandum forms the basis of the deposits made by the plaintiffs as per the pleading. The existence of the memorandum of understanding is vital to the transactions made by the plaintiffs with the second defendant. This factor, in my opinion, brings the case of the plaintiffs within the first part of Order 1 Rule 1 of the Code. Once the condition stipulated in the first part of the said provision of the Code is satisfied, the question arises as to whether any common question of fact or law would have arisen if the parties brought any separate suit. The expression "common" in this provision does not mean identical, and from a plain reading of the plaint it is apparent that the individual transactions, if are to be enforced, then this memorandum of understanding would be vital for adjudication of the case of each

of the plaintiffs. In the case of Margo Trading (supra) there were different agreements for purchase of immovable property and in the case of Chandi Prasad Sikaria (supra) there were independent agreements. In both these cases there was no common link between the transactions, which is not so in the present case.

15. The next question which calls for determination is as to whether the plaint shall be rejected on the ground of misjoinder of causes of action. The petitioner''s case here is that the obligation of the first defendant, if any, towards the plaintiffs arises out of independent transactions, and each transaction forms an independent cause of action. The plaintiffs'' case as made out in the plaint, however, is that such deposits were made to give effect to a common understanding amongst the parties. On the point of joinder of parties. I have already held that the plaintiffs can jointly maintain this suit since their transactions with the second defendant has a common root. Having held that, I am of the view that the attack on the maintainability of the suit on the ground of misjoinder of causes of action ought to fall automatically in the facts of the present case. The cause of action of the plaintiffs here is failure on the part of the defendants to refund the amount deposited with the second defendant. If the claim of each plaintiff was found to be distinct, then the petitioner could have succeeded on the point of misjoinder of causes of action. But for the reasons discussed in the preceding paragraphs, on the basis of pleadings, I have found these transaction arise out of a single source. If these transactions arise out of a single source or have a common root, then that common root becomes the basic cause of action of the suit, and the subsequent sets of acts or transactions having link or connection to that common root could be united in a single suit. There is no bar, in my opinion, in joinder of such causes of action.

16. Mr. Das, had made an alternative prayer of striking out the plaintiff No. 7 from the array of the plaintiffs, as it was not a member of the family of Khaitans but an independent corporate entity and was absolute stranger to the memorandum of understanding as well. But as pleaded, in paragraph 7 of the plaint, the deposit made by the plaintiff No. 7 was to replenish the amounts which was repaid to the plaintiff Nos. 1 to 6. Thus there was a direct link between transaction made by the plaintiff No. 7 and the transactions of the other plaintiffs which forms basis of the present suit. Order 1 Rule 1 postulates joinder of plaintiffs if any right to relief in respect of any act or transaction is alleged to exist in such persons. In the present case, the right to relief is claimed from the transactions entered into in pursuance of the memorandum of understanding. Even if the plaintiff No. 7 is not a party to the memorandum of understanding, the link of the seventh plaintiff to the transactions of the other plaintiffs has been clearly pleaded.

17. Under these circumstances, the instant petition is dismissed. There shall, however, be no order as to costs.

Later:

18. Mr. Das learned Senior Counsel, appearing for the petitioner prays for stay of operation of this order. However, having regard to the fact that this was an application for rejection of the plaint and at no point of time there was any stay on hearing of the main suit, the prayer for stay is refused.