

* IN THE HIGH COURT OF DELHI AT NEW DELHI

+ **CS(OS) 3273/2012**

Date of Decision: 14th February, 2013

IN THE MATTER OF
RAMESH SIPPY

..... Plaintiff

Through : Mr. S. Ganesh, Sr. Advocate with
Mr. Varun Singh, Advocate

versus

PEN INDIA PVT LTD & ANR

..... Defendants

Through : Ms. Pratibha M. Singh with
Mr. Sudeep Chatterjee and
Mr. Ashwin Kumar, Advocates

CORAM
HON'BLE MS.JUSTICE HIMA KOHLI

HIMA KOHLI, J. (Oral)

I.A.No.2371/2013 (by the plaintiff u/O XXIII R-1 r/w Section 151 CPC)

1. This application has been filed by the plaintiff under Order XXIII Rule 1 read with Section 151 CPC praying *inter alia* for permission to unconditionally withdraw the accompanying suit filed against the defendants. Before dealing with the present application, it is necessary to briefly advert to the sequence of events from the date of institution of the case.

2. The plaintiff has instituted the accompanying suit against the two defendants praying *inter alia* for the relief of perpetual injunction, for restraining them from proceeding further with the making of the 3D version of the cinematograph "Sholay" and if its making was complete, then the said version be not distributed, exhibited or exploited in any manner. The plaintiff has also sought the reliefs of delivery up, damages, etc., against the defendants.

3. The present suit was filed by the plaintiff on 5.10.2012, but was returned under objections on two occasions and the same finally came to be listed in Court for admission on 16.11.2012. On the aforesaid date, though there was no caveat, appearance was entered on behalf of the defendants by Ms. Pratibha M. Singh, Advocate and she had contested the suit on the ground that it is bad for *non-joinder* of necessary parties, i.e., a company by the name of Sholay Media and Entertainment Pvt. Ltd., who was stated to be the owner of the copyright in the film "Sholay" and had entered into an Agreement dated 20.7.2011 with the defendant No.1, permitting the latter to make a 3D version of the said film.

4. In response, learned counsel for the plaintiff had stated that he would obtain necessary instructions from his client and file an appropriate application for impleadment of Sholay Media and Entertainment Pvt. Ltd., if necessary. On the aforesaid date, the plaint was registered and summons in the suit were accepted by the learned counsel for the

defendants, who had sought time to file a written statement. While granting time to the defendants to file their written statement, the suit was directed to be listed before the Joint Registrar on 16.1.2013 for completion of pleadings and for admission/denial of documents and in Court on 30.4.2013, for framing of issues.

5. As regards the application filed by the plaintiff under Order II Rule 3 read with Section 151 CPC, registered as I.A.No.20627/2012, notice was issued on the said application and the parties were directed to complete pleadings therein before the next date fixed in the matter. With respect to the second application filed by the plaintiff under Order XXXIX Rules 1 & 2 read with Section 151 CPC for stay, registered as I.A.No.20626/2012, arguments were addressed by the counsels for the parties and after hearing their submissions, the Court had expressed its disinclination to grant any ad interim injunction in favour of the plaintiff and instead had directed that pleadings be completed in the application and it was adjourned to 29.1.2013.

6. On 16.1.2013, when the suit was listed before the Joint Registrar, an application filed by the defendants under Order VIII Rule 1 CPC, registered as I.A.No.734/2013, was taken up for consideration. Simultaneously, another application which was filed by the defendants under Order I Rule 10 CPC, registered as I.A.No.735/2013, seeking impleadment of the Sholay Media and Entertainment Pvt. Ltd was also

taken up for consideration. Notice was issued on the said application and it was re-listed on 11.4.2013.

7. Before 29.1.2013, the date fixed by this Court for arguments in I.A.No.20626/2012, the plaintiff approached the Bombay High Court and instituted a suit there against the defendants herein and seven other parties, including Sholay Media and Entertainment Pvt. Ltd. praying *inter alia* for a series of reliefs, including the reliefs of declaration, delivery up, mandatory and permanent injunction, etc. relating to the 3-D version of the film "Sholay". The aforesaid suit was listed before the Bombay High Court on 21.1.2013 and appearance was entered on behalf of the defendants No.1 to 6 therein. On the said date, the application filed by the plaintiff for interim relief was taken up for consideration and in view of the submission made by the learned Senior Advocate appearing for the defendants No.1 to 6 there that the 3D version of the film "Sholay" would not be completed before February, 2013, the Court did not grant any interim relief to the plaintiff and did not restrain the defendants from proceeding with the making of the 3D version of the said film and instead, it called upon the parties to complete pleadings in the suit, while adjourning the matter for 25.02.2013.

8. On 29.1.2013, when the interim application, filed by the plaintiff under Order XXXIX Rules 1 & 2 CPC, came up for hearing before this Court, instead of pointing out that the plaintiff had instituted a

subsequent suit against the defendants and some other parties in respect of the 3D version of the film "Sholay" in the Bombay High Court, time was sought on behalf of the plaintiff to file a rejoinder to the reply filed by the defendants. It was at that stage that counsel for the defendants had intervened and had stated that the plaintiff is indulging in forum shopping and she had brought to the notice of this Court the subsequent suit filed by him in the Bombay High Court. In response to the aforesaid submission, an adjournment was sought by the learned Senior Advocate appearing for the plaintiff to enable him to seek instructions and at his request, the suit was adjourned to 14.2.2012, i.e., today, for reporting instructions.

9. In the meantime, the present application came to be filed by the plaintiff under Order XXIII Rule 1 read with Section 151 CPC, seeking leave to withdraw the present suit. Notice was issued on the application on 12.2.2013 and a reply to the application in opposition has been filed by the defendants.

10. Learned Senior Advocate appearing for the plaintiff submits that the plaintiff being *dominus litis* is entitled in law to withdraw the suit at any stage and he has exercised the said right by filing the present application for unconditional leave to withdraw the accompanying suit.

11. Counsel for the defendants has vehemently opposed the present application and she submits that the same has been filed with *mala fide*

intention and the plaintiff is guilty of forum shopping. She has argued that if permission is granted to the plaintiff to simply withdraw the accompanying suit, the same would result in great injustice to the defendants, who shall have to *de novo* oppose the application for stay filed by the plaintiff before the Bombay High Court. She states that the plaintiff was under an obligation to have informed the Court at the very first occasion that he had approached the Bombay High Court by filing a subsequent suit in respect of the same film, which is the subject matter of the present suit and for other reliefs, which he has failed to do and instead, he proceeded to take his chance by filing an interim application for stay along with the aforesaid suit before the Bombay High Court, knowing very well that he had not succeeded in obtaining any ad interim order on the interim application for the same relief filed and pending in the present proceedings.

12. Further, counsel for the defendants submits that despite the fact that it was the plaintiff who was required to implead Sholay Media and Entertainment Pvt. Ltd. as a defendant in the present proceedings, he had failed to do so and instead, it was left to the defendants to file such an application and when the said application filed by the defendants under order I Rule 10 CPC was listed before the Joint Registrar, instead of conceding the relief sought therein, the same was opposed by the counsel for the plaintiff and a reply thereto was sought to be filed. She submits

that the aforesaid conduct of the plaintiff flies in the face of the stand that has been taken by him in the suit subsequently instituted in the Bombay High Court, where he has himself proceeded to array Sholay Media and Entertainment Pvt. Ltd. as defendant No.5. She contends that the plaintiff has also sought to mislead the Bombay High Court by making some averments in para 12 of the application, which are contrary to the correct facts and the records of this Court. In support of her submission that the present application is an abuse of the process of law and it ought to be dismissed with exemplary costs, she relies on the following decisions :-

- (i) K.S. Bhoopathy & Ors. vs. Kokila & Ors., **(2000) 5 SCC 458;**
- (ii) Vineeta Sharma vs. Rohit Sripat Singh, **2000 (56) DRJ (Suppl.) 481**, and
- (iii) Udyami Evam Khadi Gramodyog Welfare Sanstha & Anr. vs. State of Uttar Pradesh & Ors., **(2008) 1 SCC 560.**

13. The aforesaid submissions made by the counsel for the defendants are rebutted by Mr. S. Ganesh, Senior Advocate appearing for the plaintiff. He states that the plaintiff did not have any such intention to mislead the Court as argued by the other side and the only fault attributable to him is that he was not prompt enough to have apprised the Court of the institution of the subsequent suit before the Bombay High Court well in time. He disputes the submission of the other side that the plaintiff did not reveal the relevant details of the present suit to the

Bombay High Court and submits that the plaintiff has extensively alluded to the present suit in the averments made in the subsequent suit instituted by him in the Bombay High Court, which fact is borne out from a perusal of the said plaint, copy whereof has been placed on record by the defendants. He also relies on the provisions of sub-rule (1) of Order XXIII Rule 1 CPC to urge that the plaintiff is well entitled to abandon his suit or abandon a part of his claim against all or any of the defendants at any time after the institution of the suit and no permission is required from any quarter, including the court for the said relief.

14. Per contra, counsel for the defendants relies on sub-rule (4) of Order XXIII Rule 1 CPC to argue that if the plaintiff is abandoning the present suit then he is liable to pay costs as the court may award and he should be barred from instituting any fresh suit in respect of the same subject matter or such part of the claim, as has been done by him by instituting a subsequent suit in the Bombay High Court.

15. The Court has heard the counsels for the parties and has carefully considered their submissions. A narration of the sequence of events in present proceedings has been made only to set out the manner in which the suit has progressed in this Court from day one. As noted above, the defendants had entered appearance in the present suit on the very first date, i.e., on 16.11.2012, and counsel for the defendants had opposed the interim relief, prayed for by the plaintiff in I.A. No.20626/2012. At

that stage, having heard the counsels for the parties for some time, the Court was not persuaded to grant any ad interim relief to the plaintiff and the matter was adjourned to 29.11.2013 for consideration, after pleadings were directed to be completed in the aforesaid application. It cannot be argued by learned counsel for the plaintiff that even one day before 17.01.2013, the date fixed before the Joint Registrar, the plaintiff was unaware of the fact that he had decided to institute a suit in the Bombay High Court more so when the same was at an advance stage of preparation by then.

16. It is also relevant to note from a copy of the plaint of the aforesaid suit filed by the plaintiff in the Bombay High Court that it runs into forty nine pages and it was verified on 15.1.2013, i.e., one day prior to the date when the present suit was listed before the Joint Registrar. Thus, had he so wanted, the plaintiff could have easily instructed his counsel in Delhi to have brought to the notice of the court the fact that he was proposing to file a suit in the Bombay High Court. Rather than revealing the said information to the Court, counsel for the plaintiff had opposed the application filed by the defendants under Order I Rule 10 CPC for impleadment of Sholay Media and Entertainment Pvt. Ltd. and instead, sought time to file a reply to the said application.

17. Further, even on 29.1.2013, the date fixed before this Court, the plaintiff was not candid enough to have apprised the Court at the very

outset about the institution of the subsequent suit in the Bombay High Court or the proceedings that took place therein on 21.1.2013, which was just a week prior thereto. Instead, it was left for the defendants to bring to the notice of this Court the factum of institution of the aforesaid suit and the proceedings conducted therein. Further, the defendants had been vigilant in protecting their interest and in the absence of a caveat, they had entered appearance in the present suit on their own upon seeing it listed in the cause list. Their counsel had appeared and vehemently contested the application filed by the plaintiff for ad interim relief. This only fortifies the submission of the learned counsel for the defendants that if the plaintiff is granted unconditional leave to withdraw the present suit, it would result in dislodging the defendants from the advantage gained by them in the present proceedings.

18. It is also relevant to note that on 29.1.2013, when the factum of filing of the subsequent suit by the plaintiff in the Bombay High Court was pointed out by the counsel for the defendants, instead of conceding to the said position, learned Senior Advocate appearing for the plaintiff had sought an adjournment to obtain instructions from his client and it was at his request that the suit was adjourned for today. This is also a reflection on the plaintiff, who had apparently failed to brief his counsel in Delhi of the subsequent events that had transpired at Mumbai in the interregnum.

19. In such circumstances, the Court is inclined to concur with the submissions made by learned counsel for the defendants that if the present application filed by the plaintiff for withdrawal of the suit is allowed, then costs ought to be imposed on him. At the same time, this Court is not inclined to accept the submissions made by the counsel for the defendants that the present suit should not be permitted to be disposed of as withdrawn but ought to be dismissed for the reason that the provisions of Order XXIII Rule 1 CPC leave no manner of doubt that the plaintiff being *dominus litis* is well entitled to unconditionally withdraw the suit at any time after its institution, against any or all the defendants and the court cannot refuse permission to withdraw the suit in such circumstances and nor can the court compel the plaintiff to proceed with it.[Refer: Hulas Rai Baij Nath Vs. Firm K.B.Bass & Co., **AIR 1968 SC 111**, Surakshit Exports Pvt.Ltd. & Ors. Vs. M/s GCG Transglobal Housing Project Pvt. Ltd., **2012 (188) DLT 243**.

20. A perusal of the plaint filed by the plaintiff in the Bombay High Court, fortifies the submission made by the counsel for the plaintiff that he had not kept away the factum of institution of the present suit in this Court from the Bombay High Court. Rather, the plaintiff had not only made extensive reference to the present suit in the body of the plaint filed in the Bombay High Court, he had also placed on record, a copy of the order dated 16.11.2012 passed by this Court.

21. In view of the aforesaid facts and circumstances, it is deemed appropriate to allow the present application, but with costs of ₹50,000/- to be paid to the defendants, through counsel, within one week from today. While disposing of the present application, the right of the defendants to invoke the provisions of Order XXIII Rule 4 CPC and Section 11 of the CPC against the plaintiff before the Bombay High Court, in accordance with law, is preserved. It is also clarified that the observations made hereinabove shall not be treated as an expression on the merits of the suit instituted by the plaintiff in this Court or the Bombay High Court.

22. The application is disposed of.

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In view of the order passed herein above in I.A.No.2371/2013, the suit is dismissed as withdrawn, along with the pending applications.

FEBRUARY 14, 2013
sk/rkb/mk

(HIMA KOHLI)
JUDGE