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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Date of decision:* 11.01.2017

\+ C.R.P. 5/2017 and CM Nos. 1087-89/2017

INFONOX SOFTWARE PVT. LTD. AND ORS. ..... Petitioners

Through Mr.Akhil Sibhal, Mr.Ajoy Roy, Mr.Aman Avinav, Ms.Nadita Chauhan and Ms.Tanvi Misra, Advocates.

versus

RAJ KUMAR DUBEY AND ANR. ..... Respondents

Through Mr.Subhash Mishra and Mr.Pulkit Jindal, Advocates.

CORAM:
HON'BLE MR. JUSTICE JAYANT NATH

<u>JAYANT NATH, J. (ORAL)</u>

1. The present revision petition is filed under Section 115 CPC seeking to challenge the order dated 24.11.2016 passed by the Trial Court dismissing the application of the petitioners under Order 7 Rule 10 & 11 CPC for dismissal of the suit.

2. Respondent No.1 has filed the present suit for declaration, permanent and perpetual injunction and damages. Petitioner No. 1-Company was incorporated on 23.05.2000 under the Companies Act, 1956. The respondents were the first directors of the Company who were said to have the entire share capital at the time of incorporation. It is stated that on 16.10.2009 respondent No.1 received a notice convening a meeting of the Board of Directors of petitioner No.1 which was proposed to be held on

18.10.2009 at Arizona, USA. As per the Resolution of the Board of Directors which was forwarded to respondent No.1, respondent No.1/plaintiff was sought to be ousted from the Board of Directors. Hence respondent No. 1 filed a suit seeking the following reliefs:-

> "A. Pass a decree of declaration declaring that the resolution passed in the purported meeting of the Board of Directors of the Defendant No.1 Company on 18.10.2009 are illegal, null, void and non-est in the eyes of law;
> B. Pass a decree of perpetual injunction restraining the defendants from giving effect to the resolution passed in the Board Meeting dated 18.10.2009;
> C. Pass a decree of mandatory injunction restraining the defendants from holding the Extra Ordinary General meeting proposed to be held on 27.10.2009 and further to give effect to the resolutions passed therein;
> D. Pass a decree of declaration declaring that the plaintiff continues as Director on the Board of Defendant No.1 till the conclusion of enquiry already initiated by defendant No.3 and till the conclusion of enquiry on the issue mentioned in his letter dated August 5th, 2009 to the Board."

3. On 03.08.2011, when the suit came up for hearing, respondent No.1 sought leave to withdraw the suit with liberty to take recourse to such remedies which may be available to him in accordance with law. Granting leave, the suit was dismissed as withdrawn with liberty as prayed for.

4. Thereafter, respondent No. 1 has filed the present suit. In the present suit, the additional facts urged are that on 27.10.2009, when the Extra Ordinary General Meeting of petitioner No. 1 was to be held, respondent No. 1 claims to have reached the venue along with one junior advocate but was prevented from entering the premises. A resolution was passed by the EGM

that respondent No.1 be removed as a director of petitioner No. 1 Company. In the present suit the following reliefs are sought:-

> "i) Declaring that Resolution pertaining to removal of the plaintiff as a Director, as passed by defendant No.1 Company in its Extra Ordinary General Meeting held on 27th October 2009 is illegal, null and void;
> ii) Declaring that the removal of the plaintiff as Director of defendant No.1 Company is illegal, null and void; or mala fide or arbitrary or wrongful and that the plaintiff shall be deemed to continue as its Director.
> iii) Issuing a consequential mandatory injunction to defendant No.1 Company, directing it to take the plaintiff as one of its directors in accordance with law;
> iv) Granting damages and compensation of Rs. 25,00,000/- (Rupees Twenty Five lakhs only) payable to the plaintiff;"

5. After the present suit was filed, the petitioners have filed the present application under Order 7 Rule 11 CPC where various grounds have been raised as to why the suit is not maintainable. The trial court however dismissed the application of the petitioners.

6. I have heard the learned counsel for the parties. I may place on record that at the outset, I have informed the learned counsel for the parties that as a senior advocate about four years ago, I have been engaged in two- three matters by the law firm of which respondent No.1 is proprietor/managing partner. The learned counsel for the petitioners, however submits that they have no objection if the present court adjudicates the present petition.

7. Learned counsel for the petitioners has urged that the present suit is barred on account of the prohibition contained under Order 23 Rule 1 CPC. He submits that having filed the suit seeking to challenge his ouster as a member of the Board of Directors, he has withdrawn the suit without seeking

permission of the court to file a fresh suit. Hence, the present suit would be barred under the said provision. He relies upon the judgment of this court in the case of ***Deepa Dua vs. Tejinder Kumar Muteneja, 2013 (137) DRJ 653*** and the judgment of the Supreme Court in the case of ***K.S.Bhoopathy & Ors. vs. Kokila & Ors. (2000) 5 SCC 458*** to submit that in the absence of a specific permission granted to file a fresh suit for one of the reasons as stated under Order 23 Rule 1 CPC, no fresh suit would be maintainable. He also relies upon the judgment of the Allahabad High Court in ***Lallu v. The Board of Revenue, U.P., Allahabad & Ors., AIR 1973 All. 195*** and the judgment of the Supreme Court in the case of ***Bakhtawar Singh & Anr. v. Sada Kaur & Anr., (1996) 11 SCC 167*** to contend that unless a specific order is passed granting liberty to institute a fresh suit, it is not permissible to infer such an order based on 'constructive interpretation'.

8. I may first note that the trial court on the above submissions had noted that the said objection taken by the petitioners is not tenable as this court where the first suit was pending on 03.08.2011 had granted liberty to respondent No. 1 to withdraw the suit with liberty to take recourse to such remedies which may be available to the said respondent No.1 in accordance with law. Hence, the filing of the present suit is in order.

9. I may first see the order of this court by which the first suit was dismissed as withdrawn. The said order dated 03.08.2011 reads as follows:-

> "After some arguments plaintiff who appears in person, seeks leave to withdraw the present suit with liberty to take recourse to such remedies which may be available to him in accordance with law. Leave is granted and the suit is dismissed as withdrawn with liberty as prayed for."

10. Order 23 Rule 1 (3) and (4) CPC read as follows:-

> "**1. Withdrawal of suit or abandonment of part of claim.-**
> (1) ……..
> (2) …….
> (3) Where the court is satisfied,—
> a) that a suit must fail by reason of some formal defect, or
> (b) that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject matter of a suit or part of a claim,
> it may, on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit or such part of the claim with liberty to institute a fresh suit in respect of the subject matter of such suit or such part of the claim.
> (4) Where the plaintiff,—
> (a) abandons any suit or part of claim under sub-rule (1), or
> (b) withdraws from a suit or part of a claim without the permission referred to in sub-rule
> (3),
> he shall be liable for such costs as the court may award and shall be precluded from instituting any fresh suit in respect of such subject matter or such part of the claim.
> (5) ….."

11. Hence when a suit is likely to fail on account of a formal defect or there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject matter of the suit, the court may grant permission to withdraw such suit with liberty to institute a fresh suit. Where the plaintiff withdraws a suit without permission as referred to in Sub Rule 3, he is precluded from instituting a fresh suit in respect of such subject matter.

12. This court in the case of ***Deepa Dua vs. Tejinder Kumar Muteneja (supra)***. held as follows:-

> "22. The plaintiff has not placed on record a copy of the application filed by the plaintiff to withdraw the suit in the Karkardooma Courts. Hence I am not aware what relief was sought by plaintiff in the said application. A perusal of the

order dated 04.07.2012 clearly indicates that no permission to withdraw the suit under Order XXIII Rule 1 CPC has been given by the Court. There is no application of mind by the court of being satisfied with the ingredients of Order XXIII Rule 1(3) CPC, namely, that the suit must fail by reasons of some formal defect or there is sufficient ground for allowing the plaintiff to institute fresh suit for the subject matter of the suit or part of the plaint.

23. In the absence of a specific order to the said effect, it is clear that no permission under Order 23 Rule 1 CPC was given to the plaintiff to withdraw the earlier suit."

13. Similarly, the Allahabad High Court in ***Lallu v. The Board of Revenue, U.P., Allahabad & Ors***.*(supra),* held as follows:

"4. This view of the Board of Revenue is manifestly erroneous in law. The Court is empowered to grant the liberty to institute a fresh suit only after finding that the suit must fail by reason of some formal defect or that there are other sufficient grounds for granting the liberty. After recording these findings the Court must pass a specific order granting liberty to institute a fresh suit. If no such specific order is passed granting liberty to institute a fresh suit, it is not permissible to infer such an order by "constructive interpretation," as the Board has done. Where two reliefs are prayed for and the Court specifically grants one relief, the only inference that can be drawn is that the other relief has been refused."

14. In the present case, a perusal of the order dated 03.08.2011 permitting the respondents to withdraw the suit does not specifically permit withdrawal of the suit with liberty to institute a fresh suit based on the same cause of action. However, the question remains whether the manner in which the order is framed, as to whether the petitioner could have filed another suit based on the same cause of action.

15. However, I need not specifically answer this issue in view of the fact that in my opinion, the subsequent suit filed by the respondents is not based on the same subject matter as the suit which was filed first.

16. The first suit is filed seeking a decree of declaration regarding the resolution passed by the Board of Directors of petitioner No.1's company dated 18.10.2009. It also seeks mandatory injunction to restrain the petitioners from holding Extraordinary General Meeting proposed to be held on 27.10.2009. It also seeks a declaration that the plaintiff continues as director on the board of the petitioner.

17. The second suit however, seeks a declaration that resolution passed by the Extraordinary General Meeting of petitioner No.1's company is null and void. It also seeks damage and compensation of Rs.25 lacs. It does not seek any relief regarding resolution of the Board of Directors dated 18.10.2009, which was subject matter of the first suit. It is manifest that two suits are filed at different stages of the proceedings. The first suit was filed after a resolution had been passed by the Board of Directors on 18.10.2009 to drop the respondent from the Board of Directors. The suit is filed on 24.10.2009 i.e. before to Extraordinary General Meeting held on 27.10.2009. Hence, when the first suit was filed no relief of declaration that the resolution of the Extraordinary General Meeting was held on 27.10.2009 as null and void could have even been sought as no such meeting had taken place till then. Further, it is obvious that the second suit seeks damage which are not sought in the first suit. The only commonalty of the relief sought appears to be that in the first suit the respondent has sought a declaration that he continues as a director on the board of petitioner No.1's company whereas in the second

suit he seeks a mandatory injunction to make respondent No.1 as one of its directors in accordance with law.

18. Order 23 Rule 1 (4) CPC precludes a party from instituting a fresh suit only in respect of the same subject matter which was the subject matter of the first suit which was withdrawn/abandoned.

19. As to what would constitute "subject matter" the Supreme Court in ***Vallabh Das v. Madan Lal & Ors., AIR 1970 SC 987***, held as follows:

> "5. Rule 1, Order 23, CPC empowers the courts to permit a plaintiff to withdraw from the suit brought by him with liberty to institute a fresh suit in respect of the subject-matter of that suit on such terms as it thinks fit. The terms imposed on the plaintiff in the previous suit was that before bringing a fresh suit on the same cause of action, he must pay the costs of the defendants. Therefore we have to see whether that condition governs the institution of the present suit. For deciding that question we have to see whether the suit from which this appeal arises is in respect of the same subject-matter that was in litigation in the previous suit. The expression "subject-matter" is not defined in the Civil Procedure Code. It does not mean property. That expression has a reference to a right in the property which the plaintiff seeks to enforce. That expression includes the cause of action and the relief claimed. Unless the cause of action and the relief claimed in the second suit are the same as in the first suit, it cannot be said that the subject-matter of the second suit is the same as that in the previous suit. Now coming to the case before us in the first suit Dr. Madan Lal was seeking to enforce his right to partition and separate possession. In the present suit he seeks to get possession of the suit properties from a trespasser on the basis of his title. In the first suit the cause of action was the division of status between Dr. Madan Lal and his adoptive father and the relief claimed was the conversion of joint possession into separate possession. In the present suit the plaintiff is seeking possession of the suit properties from a trespasser. In the first case his cause of action arose on the day he got separated from his family. In the present

> suit the cause of action, namely, the series of transactions which formed the basis of his title to the suit properties, arose on the death of his adoptive father and mother. It is true that both in the previous suit as well as in the present suit the factum and validity of adoption of Dr. Madan Lal came up for decision. But that adoption was not the cause of action in the first nor is it the cause of action in the present suit. It was merely an antecedent even which conferred certain rights on him. Mere identity of some of the issues in the two suits does not bring about an identity of the subject matter in the two suits. As observed in Rakhma Bai v. Mahadeo Narayan, I.L.R. 42 Bom. 1155 the expression "subject matter" in Order 23, Rule 1, CPC means the series of acts or transactions alleged to exist giving rise to the relief claimed. In other words "subject matter" means the bundle of facts which have to be proved in order to entitle the plaintiff to the relief claimed by him. We accept as correct the observations of Wallis C.J. in Singa Reddi v. Subba Reddi, I.L.R. 39 Mad. 987 that where the cause of action and the relief claimed in the second suit are not the same as the cause of action and the relief claimed in the first suit, the second suit cannot be considered to have been brought in respect of the same subject matter as the first suit."

20. Hence, it is only where the cause of action and the relief claimed in the second suit are the same as in the first suit, Order 23 Rule 1 CPC would apply. The mere identity of some issues in the suits does not bring about an identity of the subject matter in the two suits. The first suit in present case pertains to the resolution of the Board of Directors seeking ouster of the respondent No.1 from the Board of Directors meeting dated 18.10.2009. The second suit pertains to the resolution of the Extraordinary General Meeting dated 27.10.2009. Both resolutions are possibly different stages of the ultimate result which petitioner No.1 sought to achieve namely removal of the respondent No.1 from the Board of Directors of petitioner No.1's

company. Hence, removal of respondent No.1 from the Board of Directors was the common topic of the two suits but it arose from different events, i.e. the first suit arising from the resolution of the Board and the second suit arising from the resolution of the Extraordinary General Meeting. The reliefs are different.

21. In the light of the above legal and factual position, in my opinion, the subject matter of the two suits filed by the respondents are different and order 23 Rule 1 (4) CPC would not be applicable to the facts of the case. Hence, though for different reasons I uphold the directions of the trial court dismissing the application filed by the petitioner under Order 7 Rules 10 and 11 CPC.

22. There is no merit in the present petition and the same is accordingly dismissed. All pending applications also stand dismissed.

(JAYANT NATH)
JUDGE

JANUARY 11, 2017/rb/v