

17th August,
2021
(AK)
3 & 4

C.O. 3986 of 2019
IA No: CAN 1 of 2020
(Old No: CAN 2490 of 2020)
CAN 2 of 2020
(Old No: CAN 2686 of 2020)
CAN 3 of 2021
Narthun Prasad Shaw and another
Vs.
Asit Baran De and others
With
C.O. 1180 of 2018

Zircon Dealers Private Limited
Vs.
Asit Baran De and others

Mr. Debojyoti Basu
... For the Petitioner
in C.O. 3986 of 2019.

Mr. Suddhasatva Banerjee
Ms. Madrika Khaitan
... For the Petitioner
in C.O. 1180 of 2018.

Mr. Mrinal Kanti Das
Mr. Subhabrata Das
Mr. Amitabha Roy
...For the Opposite party No.1
in both the matters.

The two revisional applications have been filed respectively by the lessee in respect of a suit property and a transferee (assignee) claiming through such lessee.

By the impugned orders, the respective applications of the lessee and the assignees themselves, both for addition of the assignees as defendants to the suit, were rejected.

Learned counsel appearing for the petitioners in both the matters argue that in view of the specific averments made in paragraph nos.11 to 13 of the plaint, inter-alia alleging fraud in respect of the very deed of assignment, by which the assignees claim title to the property, and since most of the reliefs in the suit conceive of a relief ultimately against the assignees in the form of the eviction of such assignees from the suit property, the assignees are not only proper but necessary parties to the suit.

It is contended that, for all practical purposes, the assignees would be directly affected by the outcome of the suit in view of the nature of the allegations made therein and the reliefs claimed.

It is further contended on behalf of the lessee that there is a distinction between the footing on which an assignee and a sub-lessee stand, being that the former has title in the property in his/her independent capacity through the deed of assignment which is equivalent to that of the lessee whereas the sub-lessee merely claims through the lessee.

Learned senior counsel appearing for the plaintiff/opposite party in both the matters contends that the plaintiff is the *dominus litis* in a suit and it is for the plaintiffs to choose whom to implead as defendants.

By placing reliance on Rule 9 and Rule 10(2) of Order I of the Code of Civil Procedure, learned counsel

argues that the suit shall not be defeated by reason of non-joinder of parties unless such party is a necessary party to the suit.

It is, thus, contended that, in the event the applications for addition of party are allowed, it will open a flood-gate for the other assignees of the lessee to seek impleadment in the suit one by one, thereby preventing the suit from reaching its finality for an indefinite period.

Learned counsel places reliance on the judgment of *Raghuram Rao and others Vs. Eric P. Mathias and others*, reported at (2002) 2 SCC 624, in support of the proposition that the liability of the lessee is not extinguished by mere reason of alienation by way of assignment. As such, it was held by the Supreme Court, the lessee is a necessary party to the suit whereas an assignee could at best be a proper party.

Learned counsel next places reliance on *Manmatha Nath Chowdhury and others Vs. Nalinaksha Rai and others*, a Division Bench judgment of this Court, reported at AIR 1925 Calcutta 423, for the proposition that where a lessee transfers the lease, whether permanent or temporary, the claim to pay rent to the lessor is not extinguished by assignment under Section 108(j) of the Transfer of Property Act. It was further held by the Division Bench that, by assignment, the lessee no doubt divests himself of the contractual relation but the

personal covenant by which he undertook to pay rent for the leasehold is not affected by the assignment.

Learned counsel also places reliance on *Kanaklata Das and others Vs. Naba Kumar Das and others*, reported at (2018) 2 SCC 352, wherein the Supreme Court categorically held that the plaintiff or petitioner in proceedings, being the *dominus litis*, cannot be compelled to implead any third party to the proceedings unless that third party proves that he is a necessary party and without his presence suit cannot be proceeded with nor can be decided effectively.

Upon perusing the judgments cited by the opposite party, it is evident that there is no quarrel between the provisions of Rule 9 and Rule 10(2) of Order I of the Code of Civil Procedure. However, the two operate in subtly different footings. Whereas, by virtue of Rule 9, a suit shall not be defeated for non-joinder of a necessary party, Rule 10(2) confers power on the court, with or without the application of either party, to direct the name of a party to be struck out or joined to the suit, whether as plaintiff or defendant, whose presence before the court may be necessary in order to enable the court effectively and complete to adjudicate upon and decide all the questions involved in the suit.

On a conjoint reading of the cited judgments, it is evident that, although the plaintiff is the *dominus litis*, the plaintiff has not got absolute discretion of impleading

or non-impleading defendants, where the question of a necessary or proper party comes in.

In paragraph 11.4 of *Kanaklata Das (supra)*, the Supreme Court categorically held that the plaintiff, being the *dominus litis*, cannot be compelled to make any third person a party to the suit against his wish unless such person is able to prove that he is a necessary party to the suit.

It was further held by the Supreme Court that no person can compel the plaintiff to allow such person to become the co-plaintiff or defendant in the suit, more so when such person is unable to show as to how he is a necessary or proper party to the suit.

The expression “proper party” has been included to describe persons who are entitled to be added in a suit, particularly in the context of Rule 10 of Order I of the Code, which empowers the court to add both necessary and proper parties as parties to the suit.

Rule 9, on the other hand, pertains to the dismissal of a suit. Harmoniously construed, Rules 9 and 10 of Order I indicate that although a suit cannot be dismissed for non-joinder of a necessary party, the court is always empowered, with or without the application of any of the parties, to implead a party to the suit, who is either necessary or proper for the complete adjudication of the suit.

Manmatha Nath Chowdhury (supra) was rendered in a different context, wherein the Division Bench categorically held that the claim to pay rent to the lessor is not extinguished by assignment. However, in the present case, the reliefs sought are not restricted to rent in respect of the property but, as a necessary consequence for alleged non-payment of such rent, to have a decree of eviction, which would directly affect the assignees, who are in possession of the suit property.

That apart, specific allegation of fraud has been pleaded in paragraph nos.11 to 13 of the plaint. Since the assignees are the beneficiaries of such transactions, the veracity of which has been challenged on the ground of fraud, the assignees' prayer for being impleaded in the suit as defendants cannot be brushed aside as they are at least proper parties, necessary for effective adjudication of the *lis*.

In the present context, if the reliefs sought pertaining to the plaintiff obtaining vacant and peaceful possession of the suit property are removed or deleted from the plaint, the plaint would be rendered *ex facie* barred under Section 34 of the Specific Relief Act, 1963, since the declaration then remaining would be denuded of the essential consequential pleadings which are mandated under the said provision.

Since the reliefs regarding obtaining *khas* and peaceful possession upon eviction are an integral part of

the prayers made in the plaint, it cannot be said that the assignees, who are at present in possession of the suit premises, can be excluded, even upon having applied for being added as defendants in the suit.

In such view of the matter, the impugned orders, whereby the prayers of the lessee and the assignees, who are the respective petitioners in the present applications under Article 227 of the Constitution of India, was refused, suffers from patent jurisdictional error and ought to be set aside.

Accordingly, C.O. 3986 of 2019 and C.O. 1180 of 2018 are allowed, thereby setting aside the orders impugned therein and impleading the petitioners in C.O. 3986 of 2019 as defendants to the suit, bearing Title Suit No.25 of 2017, pending in the Small Causes Court at Sealdah.

Since this order is passed on contest in the presence of learned counsel for both sides, the date of this order shall be deemed to be the date of knowledge of the petitioners in both the suits for the purpose of calculating the limitation period for filing of written statements.

The parties as well as the court below shall act on the written communication of this order by the learned advocates for the parties, without insisting upon prior production of a certified copy of this order, and shall act upon server copy thereof.

It is expected that the trial court shall expedite the hearing of the suit in view of the long pendency of the same.

There will be no order as to costs.

Urgent website certified copies of this order, if applied for, be given to the parties upon compliance of all necessary formalities.

(Sabyasachi Bhattacharyya, J.)