

AD. 5.
August 11, 2021.
MNS/tbsr

C. O. No. 1437 of 2020
with
CAN 1 of 2020
(**Via video conference**)

Tibrewala Realtors Pvt. Ltd.
Vs.
Kesar Trading Co. Pvt. Ltd. and others

Mr. Jayanta Kumar Mitra,
Mr. Arindam Banerjee,
Mr. Kaushik Banerjee,
Ms. Rashmita Sen,
Mr. Abhishek Agarwas

... for the petitioner.

Mr. Biswajib Ghosh,
Ms. Sudipta Paul

...for the opposite party nos. 1 and 2.

Mr. Jewel Biswas

...for the opposite party nos. 3 to 5.

Mr. Anirban Roy,
Mr. Sanjib Seth

...for the opposite party no. 7.

Re: **CAN 1 of 2020**(Section 5 application)

While moving the application under Section 5 of the Limitation Act, 1963 (in short 1963 Act), for condonation of delay in filing the revisional application, learned senior counsel for the petitioner contends that the petitioner was not at fault in any manner for the delay occasioned in presenting the revision.

By placing reliance on a list of dates, learned senior counsel contends that the matter was initially challenged before this Court vide C.O. No. 1554 of 2016, which was disposed of by a co-ordinate Bench by its order dated August 17, 2017, wherein the learned single Judge refused to entertain the application under Article 227 of the Constitution of India preferred against the same impugned order, as challenged herein, on the ground that an alternative remedy was available to the petitioner. It was further enumerated in the said judgment that by making “reversionary amendment in the revisional jurisdiction which was prevalent earlier and when there is curtailment in such provision and despite such curtailment the instant nature of interlocutory order was well-revisable under Section 115A of the Code”.

It is submitted that, pursuant to such observation, the petitioner approached the District Court with a revisional application under Section 115A of the Code of Civil Procedure. However, after pendency of the same for a considerable period, an objection was taken by the opposite party no. 7 that the District Court did not have jurisdiction to take up the revisional application, in

view of the valuation of the suit being higher than the pecuniary jurisdiction of the District Court.

According to the petitioner, taking a cue from such submission, the petitioner withdrew the revisional application and preferred the current application under Section 115 of the Code before this Court.

It is submitted by learned senior counsel that the delay occasioned was due to the aforesaid developments, over which the petitioner had no control, as such.

Learned senior counsel, in support of the proposition that the courts ought to be liberal while adjudicating applications for condonation of delay, places reliance on the judgements reported at **AIR 1987 SC 1353 (Collector, Land Acquisition, Anantnag and Ors. Vs. Katiji and Ors.)** and **AIR 1998 SC 3222 (N. Balakrishnan Vs. M. Krishnamurthy)**. It is contended that, in the absence of any *mala fides* and/or deliberate negligence on the part of the petitioner, the court ought to condone the delay in preferring the revisional application, particularly, since the petitioner has a strong *prima facie* case on merits in the revisional application itself.

Learned counsel appearing for the opposite party no. 7, places reliance on a judgment reported at **(2010) 8 SCC 685 (Balwant Singh (Dead) Vs. Jagdish Singh and others)**, in support of the proposition that even if the term “sufficient cause” in Section 5 of the 1963 Act has to receive liberal construction, it must squarely fall within the concept of reasonable time and proper conduct of the party concerned. The purpose of introducing liberal construction, it was held, normally is to introduce the concept of “reasonableness” as understood in its general connotation. The Supreme Court went on to observe that the expression “sufficient” means adequate enough, as much as may be necessary to answer the purpose intended and embraces no more than that which provides a plentitude which, when done, suffices to accomplish the purpose intended in the light of existing circumstances and when viewed from the reasonable standard of practical and cautious men. The party is to show that besides acting *bona fide*, it had taken all possible steps within its power and control and had approached the court without any unnecessary delay.

Learned counsel for the opposite party no. 7 next cites a judgment reported at **(1999) 1 Cal LT (HC) 480 (Amiya Kumar Basu Vs. Pankaj Kr. Chakraborty & Ors.)**, and argues that a co-ordinate Bench of this Court, in the said case, took note of the provisions of Sections 115 and 115A of the Code and, on a comparison of the two, came to the specific conclusion that the District Court has jurisdiction to entertain revisional applications irrespective of valuation under Section 115A of the Code and that the jurisdiction of the District Court was concurrent with that of this court under Section 115.

As such, it is contended by learned counsel that, irrespective of the submission made on behalf of the opposite party no. 7 before the District Court, the present revisionist petitioner was the *dominus litis* as far as the revisional application was concerned and ought not to have withdrawn the application under Section 115A at such a belated stage, thereby taking the risk of approaching a court of concurrent jurisdiction for the same remedy.

Next placing reliance on sub-sections (3) and (4) of Section 115A of the Code, learned counsel places stress on the ingredient of law

that where any proceeding for revision is commenced before the District Court, the decision of the District Court on such proceeding shall be final and no further proceeding by way of revision shall be entertained by the High Court or any other Court. As such, it is argued that the time of commencement of such a revisional application before the District Court is the decisive factor in deciding whether the High Court could exercise its concurrent power under Section 115 of the Code, even after the petitioner took recourse to Section 115A of the Code. It is further submitted that sub-section (4) of Section 115A specifically restricts any further application by the same party from being entertained by either the High Court or the District Court if a revision has been preferred before the other alternative forum. Hence, there being a specific bar in law, the ignorance of law of the petitioner could not be a ground for condonation of delay within the contemplation of Section 5 of the 1963 Act, merely on the basis of a submission made on behalf of the opposite party no. 7 before the District Court.

Upon considering the submissions of the parties, it is appreciable that the learned counsel

for the opposite party no. 7 has raised an extremely interesting question as to whether the revisionist petitioner herein lacked *bona fides* inasmuch as it was within the knowledge of the petitioner at the relevant juncture, regarding the existence of sub-sections (3) and (4) of Section 115A of the Code.

Upon a conjoint reading of sub-sections (3) and (4), it is evident that the first of the said sub-sections clearly stipulates that where any proceeding for revision is commenced before the District Court, the *decision* of the District Court in such proceeding shall be final and no further proceeding by way of revision shall be entertained by the High Court or any other Court. Hence, contrary to the submission of opposite party no. 7, the relevant juncture is not the commencement of the revisional application but if and when a decision is taken thereon by the District Court.

Sub-section (4) of Section 115A of the Code only elaborates the scope of sub-section (3) and restricts any further application by the same party to the alternative forum, which has to be read in the light of sub-section (3).

In such view of the matter, the argument of the opposite party no. 7, that the present revision under Section 115 of the Code is not maintainable in law, although interesting, is not tenable in the eye of law.

Moreover, the opposite party no. 7 itself took the objection before the District Court as regards the maintainability of the revisional application before the said court on the ground of pecuniary jurisdiction. Although such point was erroneous in law and the plaintiff should have been wiser in not following such erroneous legal advice, it is not for the opposite party no. 7 to take advantage of its own wrong, since it ought not to be permitted to blow hot and cold at the same time regarding the objection as to lack of jurisdiction of the District Court. Such conduct of the opposite party no. 7 negates any negligence, if at all, on the part of the petitioner. Even if there was negligence of sorts, the same was due to the misleading objection taken by the opposite party no. 7 and cannot be held to be deliberate on the part of the petitioner.

That apart, the co-ordinate Bench of this Court, in its order passed in the previous application under Article 227 of the Constitution,

instead of converting the revisional application to one under Section 115 of the Code, particularly in view of the usual practice in this Court to describe such applications under Article 227 of the Constitution to fall under the civil revisional jurisdiction, and specifically directing the petitioner to approach the District Court under Section 115A of the Code, it cannot at all be said that the petitioner was at fault in following such observations. The 'fault', if any, was on our part and the same cannot be shifted upon the petitioner.

In such view of the matter, as the petitioner has made out a sufficient case for the delay occasioned in preferring the present revisional application, CAN 1 of 2020 is allowed, thereby condoning the delay in filing C. O. No. 1437 of 2020 and entertaining the said revisional application for being heard.

There will be no order as to costs.

Re: C.O. 1437 of 2020

The present revisional application is directed against an order whereby the plaint filed by the plaintiff/petitioner under Order VII Rule 11 of the Code of Civil Procedure was rejected.

Learned senior counsel appearing for the petitioner argues that the plaint does not disclose a cause of action and is palpably barred by law.

Learned senior counsel places reliance on several paragraphs of the plaint, in particular paragraph nos. 3, 4, 5, 8, 9, 10 and 11, along with the reliefs prayed for, in support of his submissions.

Learned counsel further submits that, as per the pleadings of the plaintiff himself, the petitioner was initially one of the directors of the Keshore Trading Company Private Limited and later on resigned from the directorship of the said company. Admittedly, the defendant no. 2 remained a director of the said company. It is further averred in the plaint that there was no full and final settlement of accounts of the assets of the company. However, the plaint goes on to assert that the plaintiff as well as the defendant no.2 were co-shares in respect of the suit

property, which are, evidently, the assets of the company itself.

In paragraph no. 8 of the plaint, it has been alleged that the defendant no. 2 has sold the suit properties claiming to be the absolute owner thereof and the plaintiff admitted the execution of a deed of sale, challenging the same on the grounds that it is illegal, void, *ultra vires* and not binding upon the plaintiff and defendant no. 7. In paragraph 11, however, the plaintiff claims to be a co-sharer in respect of the suit property in his individual capacity and have claimed such a declaration in the suit, pertaining to 2/3rd share of the properties as well as the movable assets of the defendant no.1- company and have also sought partition of such property.

Learned senior counsel contends, by placing reliance on a judgment reported at *AIR 1977 Supreme Court 2421(T. Arivandandam Vs. T. V. Satyapal and another)*, in support of the proposition that such vexatious and meritless suit should be nipped in the bud. Learned counsel further argues that, even on the basis of the plaint pleadings, the suit is not maintainable in law, nor does the plaint disclose any cause of action for the reliefs claimed therein.

While controverting such submissions, learned counsel for the opposite party no. 7 argues that the present revision is not maintainable in the eye of law, in view of the previous presentation of an application under Section 115A of the Code of Civil Procedure before the District Court, challenging the same impugned order. By placing reliance on sub-sections (3) and (4) of Section 115A of the Code (as amended in West Bengal), learned counsel submits that since a proceeding for revision was commenced before the District Court, no further proceeding could be initiated before this court or any other court.

That apart, learned counsel submits that the petitioner prayed, in the application under Order VII Rule 11 of the Code, for rejection of the plaint only against the defendant no. 3. It is contended that a plaint cannot be partially rejected, as is well-settled in law.

That apart, the petitioner has alleged in the application for rejection of plaint that the suit should be dismissed for “want of cause of action”. However, want of cause of action cannot be a ground for rejection of the plaint. Only if no cause of action is disclosed, can the plaint will be

rejected within the purview of Order 7 Rule 11 of the Code. The court at such stage cannot go into the merits of the matter to explore whether any cause of action has actually been made out.

That apart, no specific bar of law exists to preclude the plaintiff/opposite party no. 7 from filing the suit. The general premise of the petitioner's arguments, both in the court below as well as this court, is that the suit is barred by company law. Such vague allegation cannot be lead to the rejection of a plaint.

Moreover, it is argued that the plaint cannot be labelled as 'vexatious' from any perspective.

Upon considering the submissions of learned counsel for the parties, the validity of the interpretation of sub-sections (3) and (4) of Section 115 of the Code, as projected by the opposite party no. 7, ought to be tested on the anvil of law.

Although it is stipulated in sub-Section (3) that, where any proceeding for revision is 'commenced' before the District Court, the decision of the District Court on such proceeding shall be final and (additionally) no further proceeding by way of revision shall be

entertained by the High Court or any other court, such expression should be interpreted in totality and a stray phrase cannot be culled out therefrom for being construed independently.

Sub-Sections (3) and (4), read as a whole, clearly indicate that the bar envisaged therein is in respect of the revisionist petitioner shopping forums by exploring different courts having concurrent jurisdiction. The clear intention of the Legislature, as evident from the language of sub-Section (3) of Section 115A, is that if there is any conclusive finality by way of an order being passed by one of the forums having concurrent jurisdiction, the revisionist-petitioner cannot go back and take a second chance before a different forum exercising concurrent power of revision.

That apart, the specific term “entertained” as used in sub-Section (3) of Section 115A, can only signify a High Court taking up the revisional application for being heard on merits, upon being *prima facie* satisfied that there is an arguable question involved.

In the present case, there was no scope of entertaining the revisional application before the withdrawal of the similar application under Section 115A of the Code from the District Court.

Today, for the first time, the revisional application was heard for the purpose of admission and adjudication. Prior to that, it was accompanied by an application for condonation of delay under Section 5 of the Limitation Act, 1963, which precludes any presumption that the revisional application was entertained, since the revisional application remained *non est* in the eye of law till the application for condonation of delay was allowed.

Since the condonation application has been allowed only today, when the revisional application under Section 115A stands withdrawn long back, there was no question of prior entertainment of the revisional application by this Court. Hence, the same has been entertained and heard only today, which obviates the bar stipulated in Section 115A sub-Section (3) of the Code.

As regards the merits of the matter, irrespective of the stray phrase in the prayer portion of the application under Order VII Rule 11 that the plaint should be rejected in respect of defendant no. 3, such statement cannot be taken out of context to mean that the petitioner prayed for partial rejection of the plaint. There is ample

scope of multiple interpretations of the said statement, one being that the application was filed only by the defendant no. 3, which might have prompted the said defendant to couch the prayer in such language.

That apart, the language employed in an application under Order VII Rule 11 of the Code cannot be relevant for the purpose of a consideration by the court under the said provision. Order VII Rule 11 of the Code of Civil Procedure permits the court, even *suo motu*, to reject a plaint. An application under the said provision can, at best, be for the purpose of drawing the attention of the court to a particular irregularity. Thus, the said contention of the opposite party no. 7, regarding partial rejection being sought, cannot be accepted.

On a plain and meaningful reading of the plaint in its totality, it is evident from the entire pleadings that the plaintiff admitted that the suit property was purchased by one Keshore Trading Company Private Limited, which is a company, being an independent juristic entity in the eye of law. Basic corporate jurisprudence demands that a company has to be treated as an independent

juristic person, distinct and different from its directors, in their individual capacities.

In view of the opposite party no. 7 having claimed himself to be an erstwhile director of the company, the plaintiff, *ex facie*, does not have any *locus standi* to claim ownership of the assets of the company, immovable and/or movable.

Nowhere in the plaint has the plaintiff stated how he became an owner of the suit property in his individual capacity, independent of his directorship of the company-in-question. That apart, even if such claim was made, it would be mutually exclusive with the other pleading in the plaint, to the effect that the suit properties are assets of the company and belong to the company. The two stands are mutually exclusive and cannot be juxtaposed to give rise to a bundle of facts which can be termed, in unison, as “cause of action” for the reliefs claimed in the suit.

It is axiomatic in company jurisprudence that the directors of a company cannot claim to be the owners of the assets of the latter, which is a separate juristic entity.

Moreover, there cannot arise any question of seeking partition in respect of such assets by one of the ex-directors of the company and/or

even any present director thereof, in their individual capacity.

As far as the first relief claimed in the plaint is concerned, the same, shorn of the other reliefs (which have already been held above to be not maintainable), would tantamount to a standalone negative declaration, which cannot stand in law on its own footing. Such being the case, the suit was *ex facie* filed mala fide and with the vexatious intention to harass the defendants.

As such, the suit should be nipped in the bud by rejecting the plaint instead of compelling the defendants to go on litigating unnecessarily and indefinitely on a harassing cause of action.

Moreover, the revisionist petitioner is justified in contending that the plaint does not disclose a cause of action, at least for the reliefs claimed in the plaint and, hence, is barred under Order VII Rule 11 of the Code. That apart, the proposition that a company is a juristic entity, is a basic, axiomatic and cardinal principle of corporate jurisprudence, which has been reflected in manifest manner in the entire Companies Act, 2013 as well as its previous version of 1956.

Even otherwise, it is well-settled that no relief can be granted on mutually exclusive claims made by the plaintiff.

Keeping in view the above discussions, the plaint in Title Suit No. 231 of 2011 ought to have been rejected. The trial court refused to exercise jurisdiction vested in it by law in rejecting the petitioner's application under Order VII Rule 11 of the Code instead.

Accordingly, C. O. No. 1437 of 2020 is allowed, thereby rejecting the plaint of Title Suit No. 231 of 2011 pending before the Civil Judge (Senior Division), Third Court at Howrah.

Interim orders, if any, passed in the present proceeding and/or the suit, thus, stand automatically vacated.

There will be no order as to costs.

Urgent photostat certified copies of this order, if applied for, be made available to the parties upon compliance with the requisite formalities.

(Sabyasachi Bhattacharyya, J.)