

ORDER SHEET
APD 46 OF 2019
WITH
CS 361 OF 2012
GA 1 OF 2018
GA 1169 OF 2018
IN THE HIGH COURT AT CALCUTTA
Civil Appellate Jurisdiction
ORIGINAL SIDE

MAHUA MOITRA
Versus
DIPAK KUMAR GHOSH & ORS.

BEFORE:

The Hon'ble JUSTICE I. P. MUKERJI

The Hon'ble JUSTICE MD. NIZAMUDDIN

Date : 19TH JANUARY, 2021.

Appearance:
Mr. S. N. Mookherjee, Sr. Adv.
Mr. D. Sarkar, Adv.
Mr. B. Kumar, Adv.
Mr. D. Sen, Adv.
...For the appellant

Mr. Bikash Ranjan Bhattacharyya, Sr. Adv.
Mr. A. K. Shaw, Adv.
Mr. P. Chakraborty, Adv.
...For the respondents

The Court: This is an intended appeal by one Mahua Moitra from a judgement and order dated 30th April, 2018 passed by a learned single judge of this Court dismissing the suit for non-prosecution.

First of all, this Court has to consider whether leave has to be given to the intending appellant/applicant to prefer this appeal from the said judgement and order.

This suit was instituted in the year 2012 by one Mukul Roy, a member of the Trinamool Congress Party in a representative capacity for all the members of the party alleging that a certain book which had been written in 2012 by the defendant respondent contained highly libelous statements against the leader of the party.

Mr. Mookherjee, learned senior advocate appearing for the applicant/ intending appellant submits that the suit was instituted after taking leave under Clause 12 of the Letters Patent read with Order 1

Rule 8 of the Civil Procedure Code. The suit was duly advertised after such leave was obtained and became a representative suit.

He submitted that as would be apparent from the judgement and order, the reason for dismissal of the suit was failure on the part of the advocate-on-record for the plaintiff to lodge the writ of summons.

Learned counsel went on to add that subsequently, the plaintiff left the said party and joined another party. This was contemporaneous to the time when the suit was dismissed for non-prosecution. Hence, it was clear that at that point of time the plaintiff had no interest in the suit. More so thereafter.

Hence, another member of the said party be allowed to prosecute the suit in place of the original plaintiff who should be transposed as a defendant.

We are of the opinion that once leave was granted to the original plaintiff to institute and prosecute the suit in a representative capacity, considering the principles of Order 1 Rule 8 of the Civil Procedure Code, the cause of action on which the suit was founded should not be allowed to die for the reason that in all likelihood, he is not interested to prosecute it.

For this reason, we grant leave to the applicant, namely, Mahua Moitra to prefer this appeal.

Now, the question about the justification of the impugned judgment and order. Chapter VIII Rule 6 of the Original Side Rules prescribes a period of fourteen days to lodge the summons. It does not contain a sanction that if the summons is not lodged within that period, the suit would be dismissed. However, Chapter X Rule 35 of those rules provides that for non-prosecution of a suit, it may be dismissed on that ground.

It appears that an important provision in Order 1 Rule 8 was not shown to his lordship at the time of delivering the impugned judgement and order.

Order 1 Rule 8 (sub-rule 4) of the Code of Civil Procedure provides as follows :

“(1).....

(2).....

(3).....

(4) No part of the claim in any such suit shall be abandoned under sub-rule (1), and no such suit shall be withdrawn under sub-rule (3), of rule 1 of Order XXIII, and no agreement, compromise or satisfaction shall be recorded in any such suit under rule 3 of that Order, unless the Court has given, at the plaintiff's expense, notice to all persons so interested in the manner specified in sub-rule (2).”

The principle is that the representative plaintiff is not allowed to abandon the suit or withdraw from it or enter into any agreement or compromise unless notice of such intention is given to all the plaintiffs and consent is obtained from the Court.

Where a suit is dismissed under Order IX Rule 8 of the Civil Procedure Code for absence of the plaintiff, a fresh suit on the same cause of action is barred under Order IX Rule 9. Order IX of the Code does not bar a fresh suit if the suit is dismissed on account of failure to comply with any procedure leading to non-service of the summons.

If you read Order IX of the code with Chapter 8 Rule 6 and Chapter X Rule 35 of the Original Side Rules, even dismissal of a suit for non-lodgment of the writ of summons within time does not preclude filing a fresh suit on the self same cause of action.

In fact, in any of the cases provided under Order IX, the court has the power to restore the suit if sufficient cause is shown. Therefore the power to restore a suit dismissed on the ground of failure to take measures for lodging the summons or service thereof, if sufficient grounds are shown, also rests with the appeal court, if instead of making an application to set aside the decree dismissing the suit an appeal is preferred.

In Tusnial Trading Company versus Himangshu Kumar Roy and Ors. reported in 1985 (1) CHN 375, a Division Bench of this Court stated that lodging of summons is usually entrusted with the clerk of the plaintiff's advocate-on-record. For any lapse on the part of the clerk, the plaintiff should not suffer. The following principles were enunciated in paragraph 15 of that judgement :

“15. It has been submitted that Balai Lal Bose, a clerk of the appellant's Advocates-on-Record whose duty was to take steps for getting the writ of summons issued and lodging the same with the Sheriff's Department for service upon the defendants has not filed any affidavit. Surely the said Balai Lal Bose and the Advocates-in-Charge of the suit should have filed affidavits in the instant case. In the matter of filing the affidavit the decision is taken by the Advocates-on-Record of the party. It is for them to advise the lay client as to whose affidavit should be filed in the matter. Here we also find some negligence on the part of the Advocates-on-Record of the appellant. However, as stated earlier and as laid down in the cases mentioned above of the Supreme Court the innocent party should not be made to suffer for the negligence, laches and/or misdemeanour of his lawyer. To repeat after handing over the matter with necessary instructions to his lawyer and putting him in funds there is no obligation of a party in the absence of special circumstances to enquire from his lawyer as to whether proper steps are being taken in the matter. After discharging his obligation mentioned above a party in the absence of any special circumstances may rest assured that all necessary steps would be taken by his lawyer in the matter. In the facts and circumstances of the instant case and also for the reasons that rather heavy claim has been made by the appellant in the suit, the same should not be dismissed solely on the ground of the negligence, laches and/or default on the part of Advocates-on-Record of the appellant.”

The said principle was reiterated by a Division Bench of this Court in the unreported judgement delivered on 15th September, 2016 in APO No.330 of 1993, TCS 1 of 1989 in the case of Kotak Mahindra Bank Ltd Versus Tarit Appliances & Equipment Pvt. Ltd (In Liqn) connected with APO No.331 of 1993, TC 1 of 1989 Kotak Mahindra Bank Ltd Versus Tarit Appliances & Equipment Pvt. Ltd (In Liqn).

Mr. Bikash Ranjan Bhattacharyya, learned senior advocate appearing for the defendant/respondent tried to impress us that in the proposed amended plaint, Mukul Roy was arrayed as a defendant. Since he is still available and a party in the proceedings, there is no requirement of substituting the applicant as the plaintiff.

In our view, after the impugned order, the appeal was not preferred by the plaintiff. This gives us reason to believe that he is not interested in prosecuting the suit.

Furthermore, a very substantial issue regarding the reputation of a dignitary is involved in the suit. It should be tested out on a proper trial.

It appears from the averments made in the application that the community of interest represented by the original plaintiff represented at the time of institution of the suit is now represented by the applicant and not by the original plaintiff.

We grant prayer (a) and (b) of the application being GA No.1169 of 2018.

We set aside the judgement and order dated 30th April, 2018. We restore the suit. We allow amendments to the plaint similar to the cause title of the memorandum of appeal, the changes being insertion of plaintiff for appellant and defendants for respondents.

Let the amendment to the plaint be carried out within four weeks from the date of this order. At the same time, we grant leave to the applicant to prosecute the suit in the same representative capacity as the plaintiff.

Let advertisements in this behalf be inserted once in the Times of India and once in Anandabazar Patrika in the format settled by the Learned Registrar, Original Side, within six weeks of amendment of the plaint.

Let a fresh writ of summons be issued and the amended plaint be served on all the defendants.

The appeal (APD No.46 of 2019) and the connected application (GA No.1 of 2018, Old GA No.1169 of 2018) are, accordingly, disposed of.

(I. P. Mukerji, J.)

(Md. Nizamuddin, J.)