ORDER SHEET

APO No. 106 of 2021 with
CS No. 338 of 2013
IN THE HIGH COURT AT CALCUTTA
Civil Appellate Jurisdiction
ORIGINAL SIDE

KESHAR MULTIYARN MILL LIMITED & ANR.
Versus
ANIL KUMAR PATODIA AND ORS.

BEFORE:

The Hon'ble JUSTICE SOUMEN SEN

The Hon'ble JUSTICE UDAY KUMAR

Date : 15th November, 2022.

Mr. Jishnu Chowdhury,
Ms. Rajshree Kajaria,
Mr. Sarvapriyo Mukherjee,,Advs.
...for the plaintiffs
Mr. Reetobroto Kr. Mitra,
Mr. Ayan Dutta,
Mr. Abhishek Sikdar, Advs.
...for the appellant/defendant 40
Mr. Nirmalya Dasgupta,
Mr. R.L. Mitra,
Ms. Priyanka Dhar, Advs.
...for defendant nos. 3 to 6
Mr. Kuldip Mallick,
Mr. Krishnendu Paul Chowdhury, Advs.
...for defendant nos. 7 & 9
Mr. Sakya Sen,
Ms. Urmilla Chakraborty,
Mr. Sunil Kr. Singhania,
Ms. Twinkle Kaur, Advs.
...for defendant nos. 15,16,17 & 18

The Court : We have heard learned counsel for the parties.

The appellant is a company. The appellant was impleaded as defendant no. 40 in a suit for partition filed by Anil Kumar Patodia and another.

Initially, an interim order was passed on 27th September, 2013 by Justice Patherya in which an observation was made that in the event the respondent no. 40 was desirous of selling its unit, the same would not be effected without the leave of this Court. The said restriction was imposed to ensure that the best offer was received for sale of the unit of the respondent no. 40 on the assumption that the monies for purchase of the unit was paid by the respondent no. 41. The said order however made it clear that in the event it appears after filing of affidavits that the said monies was not infused by the respondent no. 41, the respondent no. 40 can sell the unit.

On the basis of the aforesaid observation, subsequently an application was filed by the respondent no. 40 praying, inter alia, for the sale of the said spinning mill. In the said application, all the parties have filed their respective affidavits. The defendant no. 7 in its affidavit has supported the case of the appellant-applicant that the said money was given by way of a loan and the respondent no. 40 is not a family company. The plaintiffs on the other hand in their affidavit have disclosed documents to show that they have contributed the money to the respondent no. 41 for the purpose of acquisition of the respondent no. 40. It is the contention of the plaintiffs that the trail of money would show that the real characteristics of respondent no. 40 is a family company.

Mr. Reetobroto Mitra, learned counsel representing the applicant-appellant, has submitted that even if the documents disclosed by the plaintiffs are taken to be true and correct, it would only show that they had given money to the respondent no. 41 by way of investment and it would not show that the said plaintiffs or any of the other respondents have any interest in the respondent no. 40 as the said company has a separate juristic entity unconnected with any of the parties to the suit. The books of account of the said company would not show that any money at any point of time was received from any of the plaintiffs or other contesting defendants, save and except a sum of Rs. 1 crore from the respondent no. 7 which was refunded later.

The learned counsel appearing for the respondent no. 15 submits that the property can be sold but subject to the appellant-applicant established a legal necessity. The said submission proceeds on the basis that it is the family company and the family properties cannot be sold without a legal necessity being established by the appellant.

The suit is pending for almost eight years. Most of the defendants did not file their written statements. The appellant has not filed its written statement. The appellant has also not filed the application for striking off their name. The issue whether the respondent no. 40 is a family company or not is required to be decided at the trial of the suit. The plaintiffs in the pleadings have stated that respondent no. 40 is acquired by respondent no. 41 for the benefit of the family members of the Patodia family and it is having the characteristics of a family company. The plaintiffs disclosed certain documents in support of their claim. Whether those documents would ultimately establish their right to have a claim on the respondent no. 40 or their claim that the respondent no. 40 is a family company of the Patodia need to be decided in the suit. The learned Trial Judge, in refusing to modify the earlier order, has correctly observed that this triable issue cannot be conveniently decided on the basis of affidavit-evidence as there is no material on the basis of which at the interlocutory stage it can be conclusively established that the defendant no. 40 is not a family company.

We are aware of the principle that the one who assets the properties belonging to the joint family has to prove that the property is a joint family property. The proof and existence of a joint family does not invariably lead to the presumption that the property held by any member of the family is joint family property and the onus is on the person who assets that any item of property is joint property. The plaintiff is required to prove that when the property was acquired, there was sufficient nucleus of the joint family fund with which the acquisition could have been made and also that such fund was actually available to the acquirer.

There is no presumption of a property being joint family property only on account of existence of a joint hindu family as observed in **D.S. Lakshmaiah and Ors. vs. L. Balasubramanyam and Ors.** reported in **2003 (10) SCC 310** at paragraph 18 which reads :

> "18. The legal principle, therefore, is that there is no presumption of a property being joint family property only on account of existence of a joint Hindu family. The one who assets has to prove that the property is a joint family property. If, however, the person so asserting proves that there was nucleus with which the joint family property could be acquired, there would be presumption of the property being joint and the onus would shift on the person who claims it to be self-acquired property to prove that he purchased the property with his own funds and not out of joint family nucleus that was available."

There has to be unimpeachable evidence at the interlocutory stage to hold that the defendant no. 40 is not a family company of Patodias. On the basis of disclosures made by the plaintiffs whatever it is worth need to be assessed at the trial. It may be that at the trial of the suit it may appear that the plaintiffs fail to prove its claim but at this stage it could not be conclusively decided in favour of the defendant no. 40.

In the event the plaintiffs and the defendant no. 15 failed to establish their claim as regards the defendant no. 40 the learned Single Judge may while disposing of the suit provide adequate compensation to the defendant no. 40 for not being able to sell the property. The defendant no. 40 in its written statement may make a claim for compensation for not being able to sell the property by reason of the claim made by the plaintiffs and the defendant no. 15 over and in respect of defendant no. 40.

In such circumstances, we do not find any reason to interfere with the order of the learned Single Judge. The appellant shall file its written statement within three weeks from date. All the respondents, who have not yet filed their written statements, may file their respective written statements within the aforesaid time. The aforesaid direction is peremptory. In default, the suit may be heard ex parte against such of the defendants who would not comply with this direction.

The appeal is accordingly disposed of.

(SOUMEN SEN, J.)

(UDAY KUMAR, J.)

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