

6.2.2023
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Ct. no. 652
sb

**C.O. 4166 of 2019
With
CAN 1 of 2023**

**Smt. Suparna Paul & Anr.
Vs.
Sri Dipak Dutta & Ors.**

Mr. Debabrata Saha Roy
Mr. Neil Basu
Mr. Sankha Biswas ...for the petitioners

Mr. Sibnath Ganguly,
Ms. Bina Baidya ...for the opposite parties

This application under Article 227 of the Constitution of India has been preferred against order dated 13.11.2019 and order dated 5.6.2018 passed by the learned Civil Judge, Senior Division, Small Causes Court, Sealdah in Title Suit no. 23 of 2016.

The petitioners contended that the opposite party/plaintiff instituted aforesaid suit praying inter alia for a decree of declaration and recovery of compensation valued at Rs. 3,75,000/- and recovery of damages for damaging the machineries and glasswares valued at Rs. 1,41,430/- and recovery of interest valued at Rs. 2,00,000/-. The husband of the petitioner no. 1 as defendant no. 8 entered appearance and contested the said suit by filing written statement denying and disputing the allegations and contentions made in the plaint.

The plaintiff/opposite party herein alleged in the plaint that the defendant nos. 1 to 7 were owners of premises no. 7, U.K. Sen Lane, Kolkata-30 and have appointed defendant no. 8 as lawful attorney for developing, promoting and constructing several building for sale. The plaintiff further alleged that due to cordial request of defendant no. 1 to 7 and at the assurance of defendant no. 8, the plaintiff agreed to vacate the premises by removing all establishments from the said premises. Plaintiff further alleged in the plaint that the parties entered into an agreement with an assurance to compensate and accordingly agreed as per the terms of the agreement. The plaintiff further alleged that on or about 30.11.1999, they handed over vacant possession to the defendant no. 8 but while vacating they did not remove the machineries, glasswares and other materials and entrusted the defendant no. 8 to keep the same in his safe custody and the defendant no. 8 also assured the delivery of the same to the plaintiffs at his own costs and expenses. The plaintiff in his plaint has alleged that the goods of the plaintiff was delivered by the defendant no. 8 in damaged condition and thereby committed breach of his undertaking. They further alleged that they had made several correspondences with defendant no. 8 who failed to comply the same and accordingly the plaintiff instituted the instant suit. During pendency of the suit, the defendant no. 8 expired.

Learned counsel for the petitioner submits that after three years of death of defendant no. 8, the plaintiff/opposite party filed an application under Order 1 Rule 10 for adding the defendant nos. 9 and 10 who are the wife and son of deceased defendant no. 8 to be impleaded as a party in this suit. He further submits that in the said application under Order 1 Rule 10(2), the plaintiff/opposite party herein falsely alleged that the petitioner no. 1 had been running a construction company under the name and style of D.C. Paul & Co. and the petitioners herein are actively attached with the said company and as such they shall be added as defendant in the suit.

He further submits that deceased defendant no. 8 who was the husband of the petitioner no. 1 herein was appointed as constituted attorney in personal capacity and all benefits of agreement was enjoyed by the late husband of the petitioner no. 1 personally and that with the death of defendant no. 8, the power of attorney executed by defendant nos. 1 to 7 in favour of petitioner no. 1 lapsed and revoked automatically and as such the liability if any, borne upon the late husband of the petitioner cannot be shifted to his legal heirs being the defendant nos. 9 and 10. Accordingly, the petitioners are neither the necessary party nor proper party in the suit.

Learned court below had taken up said application under Order 1 Rule 10 on 5.6.2018 and was pleased to

allow the said application. Subsequently, the petitioner herein filed recalling application which was again refused vide other impugned order dated 13.11.2019. The petitioner further contended that while passing the impugned orders, learned court below failed to consider the true scope of order XXII Rule 4 of the code and plaintiff without initiating appropriate procedure for substitution attempted to add the petitioners as defendants without granting them opportunity of hearing. Learned counsel for the petitioners submits that the order impugned is illegal, irregular as the true scope of order XXII Rule 4 has not been considered and further more, the said order is unreasoned, non-speaking and cryptic order which is liable to be set aside.

Mr. Ganguly, learned counsel appearing for the opposite parties submits that as per agreement and also in terms of averments made in the plaint, said deceased defendant no. 8 was liable to compensate damages and interest in terms of agreement and assumed to pay compensation to plaintiff. His legal heirs namely, the petitioners herein are necessary as well as proper parties in the suit to answer about deceased defendant no. 8's liability to pay compensation from the estate of deceased defendant no. 8 and the suit is required to be heard and disposed of in their presence. Accordingly, he contends that the order passed by the court below, was justified and does not call for any interference by this court.

I have carefully considered the submissions made by both the parties. On perusal of the application, it appears that plaintiff in his plaint has specifically averred that the assurance was given by defendant no. 8 and on the basis of assurance the plaintiff agreed to vacate the said premises. Such agreement between the parties was allegedly a written agreement. It was agreed further that the defendants would compensate the plaintiff by money and it was also agreed that plaintiffs company shall deliver the materials to the defendant's factory and offices at their cost and at their care and responsibility. It is also stated in the plaint that on 3.11.1998, the defendants agreed and assured to pay Rs. 12,75,000/- towards compensation and accordingly Rs. 9,00,000/- was paid. The plaintiff further alleged in the plaint that they handed over vacant possession to the defendant no. 8 by executing a declaration in favour of the defendants who subsequently got sanctioned building plan for their project relying upon the said declaration. In paragraph 6 of the plaint, it has been specifically stated that at the request of the defendants and particularly defendant no. 8, the plaintiff vacated the premises without removing machineries, glasswares and other materials but entrusted the same to the defendant no. 8 who assured and undertook to deliver the same to the plaintiff's place at his own cost and expenses. The defendant no. 8 however delivered the materials mostly

in damaged condition and thereby committed breaches of his undertaking and accordingly, the plaintiff is entitled to claim balance amount with interest from defendant no. 8 as per schedule C of the plaint.

From the aforesaid averments made in the plaint, prima facie it appears that right to sue survives against the heirs of deceased defendant no. 8 with whom the plaintiffs made an agreement whereby the said defendant was agreed to pay compensation.

In **Pankaj Bhai Rameshbhai Zaklavadia Vs. Jethabhai Kalabhai Zalavadiya(deceased) through LRs & Others reported in 2017(4) ICC 759 (SC)**, the apex court was pleased to observe that the expression, “to settle all the questions involved in the suit” used in Order 1 rule 10(2) of the Code of Civil Procedure is susceptible to a liberal and wide interpretation, so as to adjudicate all the questions pertaining to the subject matter thereof. The parliament in it’s wisdom while framing this rule must be held to have thought that all material questions common to the parties to the suit and to the third parties should be tried once for all.

In **Banwari lal Vs. Barbir Singh reported in 2017(1) ICC 467 (SC)** , the apex court was pleased to held that Order XXII of the Code are not penal in nature, it is a rule of procedure and substantial rights of the parties cannot be defeated by Pedantic approach by

observing strict adherence to the procedural aspects of law.

Accordingly, in order to settle all questions involved in the suit including questions as to whether the legal heirs of deceased defendant no. 8 has any liability to pay the damages on behalf of the deceased defendant no.8 to the plaintiff are also involved and may be required to be adjudicated in the present suit and as such suit is required to be disposed of in the presence of the petitioner namely, added defendant nos. 9 and 10, who are the legal heirs of deceased defendant no. 8.

In view of aforesaid discussion, I find nothing wrong in the impugned order and I am not inclined to interfere ultimate finding of the court below.

Accordingly, C.O. 4166 of 2019 is dismissed. However, I want to make it clear that I have not gone into the merit of the allegations and as such all questions shall remain open to the parties before the trial court to agitate at the time of trial.

Pending application, if any, stands disposed of.

Urgent photostat certified copy of this order, duly applied for, be given to the parties upon compliance of all requisite formalities.

(Ajoy Kumar Mukherjee, J.)