OCD 2

ORDER SHEET

APOT/184/2023
IA NO:GA/1/2023

IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
COMMERCIAL DIVISION

RASHMI METALIKS LIMITED
VS
THE OWNERS AND PARTIES INTERESTED
IN THE VESSES M.V. VAN NICE

BEFORE:
The Hon'ble JUSTICE SOUMEN SEN
AND
The Hon'ble JUSTICE UDAY KUMAR

Date: 20th June, 2023.

Appearance:
Mr. Ranjan Bachawat, Sr. Adv.
Mr. Sakya Sen, Adv.
Mr. Subhankar Nag, Adv.
Mr. Chayan Gupta, Adv.
Mr. Avishek Guha, Adv.
Ms. Debarati Das, Adv.
Ms. Akansha Chopra, Adv.
Ms. A. Dutta, Adv.
...for the appellant

Mr. Soumabho Ghose, Adv.
Ms. Tiana Bhattacharya, Adv.
Mr. Sayan Banerjee, Adv.
Mr. Diptendu Acharjee, Adv.
Ms. Riti Basu, Adv.
...for the defendant

The Court: By consent of the parties, the appeal and the application are taken up together and disposed of by this common judgment.

The appeal is arising out of an order dated 15th June, 2023 passed by the learned Single Judge in an admiralty suit dismissing the suit for non-prosecution. The learned Judge in dismissing the suit had relied upon three orders dated 6th February, 2023, 10th April, 2023 and 8th June, 2023 to arrive at a conclusion that these three orders would demonstrate that the plaintiff was not diligent in proceeding with the suit. The learned Single Judge has placed much reliance on the order dated 10th April, 2023 in arriving at a conclusion that the conduct of the appellant is indolent, lackadaisical and shows complete unpreparedness.

Mr. Ranjan Bachawat, learned senior counsel representing the plaintiff, submits that the delay in proceeding with the suit is not attributable to the plaintiff as by reason of change of advocate, sufficient time was not available to the present Advocate-on-Record to prepare the cause papers and to make the said suit ready for hearing. The plaintiff, in fact, filed an application for transferring the suit from Ordinary Original Civil Jurisdiction to Commercial Division of this Court and on the basis of such application, the suit was registered as a commercial suit on 10th April, 2023. It is submitted that the three orders relied upon by the learned Single Judge would not show any lack of diligence or unprepareness. There may be a delay in complying with the other provisions of the Commercial Courts Act, 2015 in relation to case management but merely because there has been a delay, the suit should not be dismissed for non-prosecution. It is submitted that there is no provision in the Code of Civil Procedure, since amended, or in the Commercial Courts Act, 2015 for dismissal of a suit in such circumstances.

It is submitted that Justice Patherya on 14th September, 2010 being satisfied with the merits of the matter directed furnishing of bank guarantee in a subsequent order dated 1st October, 2010. The said bank guarantee has been renewed from time to time and it is valid till December, 2023. It is submitted that the defendant had never objected to such extension of the bank guarantee and had kept the bank guarantee alive. No prejudice would be caused to the defendant in the event peremptory direction is passed with regard to the conduct of the trial.

Mr. Soumabho Ghose, learned counsel representing the respondent submits that in spite of the order dated 11th November, 2016 and several adjournments obtained by the plaintiff due to unpreparedness disclosures have not been made. There has been a total lack of diligence on the part of the plaintiff to proceed with the suit. Our attention is drawn to the order dated 11th November, 2016 in which lack of instruction was the reason shown by the learned Advocate representing the appellant for seeking an adjournment. The learned Single Judge observed that in the event the plaintiff is not represented on the returnable date, i.e., on 16th December, 2016, the suit may be dismissed. Other orders have been placed to show that in spite of repeated orders extending the time for discovery and inspection of the documents of the plaintiff, till date, the same has not been done. Mr. Ghose submits that the Court has inherent power to dismiss the suit as it is abuse of the process of law and in this regard he has relied upon a judgment of the Hon'ble Supreme Court in the case of *'K.K. Velusamy vs. N. Palanisamy'* reported at *(2011) 11 SCC 275* at paragraph 21.

There is no dispute that the suit was registered as a commercial suit on 10th April, 2023. After the suit was transferred to the Commercial Division, the case management mentioned in the Commercial Courts Act is required to be followed. The plaintiff did not file the statement of truth and Mr. Bachawat has candidly submitted that documents have not been disclosed as yet. Although it appears that extension was granted to the plaintiff to disclose documents, till date no such affidavit of documents has been filed. After the suit was transferred to the Commercial Division, the plaintiff ought to have followed the case management procedure for filing the statement of truth and the documents. However, this is not the ground on which the suit was dismissed for non-prosecution. The three orders on which reference have been made by the learned Single Judge do not record that the plaintiff was not diligent to proceed with the suit after it was marked as a Commercial Suit. However, the past conduct shows that the plaintiff is not diligent and we have been informed that the plaintiff has obtained change of advocates five times between 2010 till date, which does not speak high about the conduct of the plaintiff in proceeding with the suit. However, the conduct of the plaintiff is to be assessed after the suit was marked as a commercial suit, in which case, the procedure under the Commercial Courts Act, 2015 is required to be followed. There has been some initial delay on the part of the defendant in filing the written statement and also in disclosing the documents. Mr. Ghose has submitted that earlier two applications have been filed for release of the bank guarantees. Mr. Ghose also submits that it may not be equitable to keep the bank guarantee renewed and not to discharge it at this stage.

However, no effective order was passed in respect of the said two applications and the bank guarantee was directed to be kept renewed. In view of the fact that the suit is required to be heard on merits and now the plaintiff has given an undertaking that it would proceed with the suit diligently and would not pray for adjournment unless it is unavoidable, the plaintiff, upon furnishing an unconditional bank guarantee of Rs.1 crore in favour of the Registrar, Original Side, within a period of three weeks from date initially for a period of one year, shall be entitled to file statement of truth and discovery of documents within two weeks thereafter and shall be allowed to proceed with the suit. The bank guarantee shall be renewed from time to time till the disposal of the suit.

A copy of the unconditional bank guarantee shall be supplied to the Advocate-on-Record of the defendant after it is filed with the learned Registrar, Original Side.

The bank guarantee shall be allowed to be invoked in case of lack of due diligence on the part of the plaintiff in proceeding with the suit with the leave of the learned Single Judge.

We also make it clear that if the hearing of the suit is delayed due to lack of diligence on the part of the plaintiff and the delay is attributable to the plaintiff, the defendant shall be entitled to seek release of the bank guarantee which has now been kept renewed till December, 2023. Any further renewal of the bank guarantee furnished by the defendant shall be dependent upon the conduct of the plaintiff in the suit.

The impugned order dated 15th June, 2023 is set aside.

The appeal and the application are thus disposed of.

However, there shall be no order as to costs.

(SOUMEN SEN, J.)

(UDAY KUMAR, J.)

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