SUPREME COURT OF INDIA

Firdous Omer (D) By Lrs. and Others

Vs

Bankim Chandra Daw (D) By Lrs. and Others

Appeal (Civil) 3185 of 2006 (Arising Out of S.L.P. (C) No.13231 of 2003)

(S. B. Sinha and P. K. Balasubramanyan, JJ)

28.07.2006

JUDGMENT

P. K. BALASUBRAMANYAN, J.

Leave granted.

1. The original plaintiff, Sheikh Mohammad Omer, the predecessor-in-interest of the appellants herein, filed the suit C.S. No.145 of 1983 in the High Court of Calcutta praying for a declaration that he was a valid and lawful tenant in respect of the plaint schedule premises and indicated in the plan annexed to the plaint, for a perpetual injunction restraining the defendants, the owner and those who were claiming under or through him from the interfering with his possession of the premises and for other consequential reliefs. The case of the plaintiff was that he had taken the suit premises on lease for being enjoyed along with the adjacent premises belonging to him and that on the expiry of the term of the lease which was for 25 years, the plaintiff continued to be a tenant from month to month and the owner and those claiming under or through him, were not entitled to interfere with his right as a tenant. The defendants, the owner and those claiming under or through him, resisted the suit by denying the claim of the plaintiff that he was a tenant from month to month and setting up a plea that on the expiry of the term of the lease relied on by the plaintiff, the plaintiff had abandoned the premises, the owner had taken possession of it and there was no subsisting tenancy in his favour as claimed by the plaintiff.

2. Pending suit, the plaintiff died and his legal representatives were brought on record as additional plaintiffs 1(a) to 1(e). The owner, defendant No.1 also died and his legal representatives were also brought on record.

3. For about 15 long years, it seems that the suit was not even listed. On 21.7.1999, the suit appeared in the scrutiny list of the Master under the Rules of the Original Side of the Calcutta High Court. No one appeared on behalf of the additional plaintiffs. The Master adjourned the suit to another date in the same month. On 29.7.1999, the suit again appeared before the Master in the scrutiny list. Again, there was no representation on behalf of the plaintiffs. The Master therefore directed that the suit be posted before the trial judge in the special list in terms of Rule 35 of Chapter X of the Original Side Rules.

4. Thus, the suit appeared in the special list of the Judge trying the cause on 30.8.1999. In spite of repeated calls, none appeared on behalf of the plaintiffs. The suit was hence dismissed for non prosecution in terms of Rule 35 of Chapter X of the Original Side Rules. For convenience, the said Rule can be set down hereunder:

"35. Disposal of suits for want of prosecution. Suits and proceedings which have not appeared in the Prospective List or in the Warning List or Peremptory List within six months from the date of institution, may be placed before a Judge in Chambers, on notice to the parties or their Advocates acting on the Original Side, to be dismissed for default, unless good cause is shown to the contrary, or be otherwise dealt with as the Judge may think

proper."

Thus, the suit stood dismissed for default on 30.8.1999.

5. It is said that on 7.9.1999, the order of dismissal was drawn up, completed and filed. On 7.12.1999, the plaintiffs filed an application for restoration of the suit, after condoning the delay, if any, in making the application. The said application did not indicate under what provision the same was being filed. It was pleaded that there was no latches on the part of the plaintiffs and the suit happened to be dismissed for default under unfortunate circumstances. The delay had occurred because the plaintiffs were not made aware of the dismissal. The said application was opposed by the respondents to that application. It was contended that the application was not maintainable. The application was belated and that the trial Judge had become functus officio since the order of dismissal had attained finality by the same being drawn up, completed and filed on 7.9.1999 and that even otherwise, there was no ground made out for restoration of the suit dismissed for default. The learned trial judge took the view that in view of the decision of the Division Bench of the High Court in M/s Nanalal M. Varma and Co. (Gunnies) P. LTD. Vs. Gordhandas Jerambhai & Ors. 1965 AIR(Cal) 547, the suit dismissed for default under Rule 35 of Chapter X of the Original Side Rules could not be restored to file once the order had been drawn up, completed and filed. Though the learned judge was inclined to condone the latches on the part of the plaintiffs, he felt bound by the decision and the practice followed in that court and hence dismissed the application as not maintainable, without going to the merits of the application. The plaintiffs have approached this Hon'ble Court with this Petition for Special Leave to Appeal challenging that order of the learned

Single Judge of the High Court.

6. Before proceeding to consider the contentions raised, one aspect requires to be noticed. It is seen that on 20.7.2002, when the application for restoration was pending, petitioner No. 1(e) therein, plaintiff 1(e), S.M. Naqi, one of the legal representatives of the deceased original plaintiff, died. The surviving petitioners in the application, the other legal representatives of the original plaintiff, did not take steps to bring on record the legal representatives of the said petitioner S.M. Naqi. Even in this Court, the additional plaintiffs or the petitioners in the Petition for Special Leave to Appeal, purported to implead that Naqi as Respondent No.11 as if he were alive. It may be noted that the order rejecting the application filed by the plaintiffs was made by the High Court on 2.7.2003 and the petition for special leave to appeal was filed on 17.7.2003, both after the death of S.M. Naqi, one of the legal representatives of the original plaintiff and petitioner No. 1(e) in the application for restoration of the suit. In this Court, an attempt was made by the petitioners to bring on record the legal representatives of the S.M. Naqi as if the death of Naqi occurred during the pendency of the petition for special leave to appeal.

7. In this context, learned counsel for the respondents raised a preliminary objection to the hearing of the appeal on merits. He contended that the dismissal of the suit for default has become final as against S.M. Naqi, one of the legal representatives of the deceased original plaintiff, since he died pending the application for restoration of the suit and his legal representatives were not brought on record and in view of this, this court cannot proceed to allow the appeal and restore the suit, even if it were possible, since it would give rise to inconsistent decrees in the suit, one of dismissal of the suit against Naqi, which has become final and the other, a restoration of the suit in favour of the other legal representatives of the original plaintiff and the re-opening of the suit. Learned counsel contended that such re- opening of the suit qua the surviving plaintiffs would only be an exercise in futility since the Court cannot pass a decree inconsistent with the decree of dismissal, that has become final as against Naqi. Learned counsel relied on the leading case in State of Punjab vs. Nathu Ram in support. Learned counsel for the plaintiffs could not give any effective answer to this submission on behalf of the defendants. The contention that the other legal representatives substantially represented the estate of the original plaintiff cannot take the appellants far. The question is not whether the estate of the original plaintiff is substantially represented or not, the question is, what is the consequence of the death of one of the legal representatives of the original plaintiff pending the application for restoration of the suit that stood dismissed. The decree of dismissal as against that legal representative has become final. Therefore, the court cannot pass an inconsistent decree in the same suit by granting a decree to the other legal representatives. This is the position adopted by this Court in the decision relied on by the learned counsel for the respondents and followed subsequently by this Court in Ram Sarup Vs. Munshi & Ors. . Thus, the preliminary objection has to be upheld and it has to be held that the relief of re-opening the suit cannot be granted to the appellants since its dismissal has become final as against S.M. Naqi, one of the legal representatives of the original plaintiff.

8. Learned counsel for the respondents also raised the contention that according to the decisions of the Calcutta High Court and the practice followed in that Court, a dismissal of the suit under Rule 35 of Chapter X of the Original Side Rules amounts a judgment and it was appealable under clause 15 of the Letters Patent. Hence an appeal therefrom would lie before the Division Bench of the High Court. He also raised an alternative contention that if the application for restoration of the suit is

treated as one under Order IX Rule 9 of the Code of Civil Procedure, then again, an appeal would lie to a Division Bench of the High Court under Order XLIII Rule 1(c) of Code of Civil Procedure, 1908. He therefore submitted that in any event, a direct approach to this Court was not permissible. Though, there may be some force in these contentions as well, we do not want to go into that question for the purpose of this case, especially in the context of what we have said earlier.

9. The question that arises for consideration is whether an application for restoration of the suit dismissed under Rule 35 of Chapter X of the Original Side Rules of the Calcutta High Court is maintainable and if it is maintainable whether an application could be entertained only if it is filed before the order dismissing the suit is drawn up, completed and filed. The question whether the power under Section 5 of the Limitation Act could not be exercised by the Court in an appropriate case, and what is the effect of exercise of that power, also arises. In M/s Nanalal M. Varma and Co. (Gunnies) P. LTD. Vs. Gordhandas Jerambhai & Ors. (supra), the Calcutta High Court held that when a suit is dismissed under Rule 35 of Chapter X of the Original Side Rules, when neither party appeared before the judge, the suit was not called on for hearing and hence Order IX Rule 3 of the Code did not apply. The Division Bench also held that when the order dismissing the suit had been drawn up, completed and filed, the jurisdiction of the Court came to an end and thereafter the trial judge, had no power to reconsider the matter on the application made by the plaintiff to set aside the order dismissing the suit. The Division Bench also held, relying on an earlier decision of that Court in Udoychand vs. Khetsidas [28 Calcutta Weekly Notes 916], that an order dismissing the suit for want of prosecution when it is placed before the trial judge under Rule 35 of Chapter X of the Original Side Rules, was a 'judgment' within the meaning of clause 15 of the Letters Patent and was hence appealable. This view of the Calcutta High Court had been followed in The Administrative General of West Bengal Vs. Kumar Purnendu Nath Tagore 1970 AIR(Cal) 231, wherein the Court reiterated, that a suit dismissed on the original side for non prosecution, could not be restored under Order 9 of the Code of Civil Procedure even if an application for restoration is made within time. The Court also reiterated that when an Order dismissing the suit for non- prosecution is drawn up, signed and perfected; the concerned court had no power to recall that order. But the court held that the power under Order XLVII Rule 1 of the Code could be exercised in an appropriate case and the suit could be restored by reviewing the dismissal. The same view was adopted in a subsequent decision short- noted in Sethia Mining Manufacturing Corporation Ltd. Vs. Khas Dharamband Colliery Co. Ltd. 1979 AIR(NOC) 163 (CAL.]

10. Keeping out for the moment, the Rules of the Original Side of the Calcutta High Court or the practice followed in that Court, it appears to us that it was a case where the suit was dismissed for default or for non- prosecution. Such a dismissal, no doubt, was on the basis that the suit was placed before a Judge trying the cause under Rule 35 of Chapter X of the Original Side Rules. But the dismissal still remains a dismissal for default of the plaintiff. It could be a dismissal under Rule 3 of Order IX, if both sides were not present when the suit was called on for hearing or it could be a dismissal under Rule 8 of Order IX, if the defendant alone appeared and the plaintiff did not appear. In either case, the plaintiff could apply either under Rule 4 or under Rule 9 of Order IX of the Code for restoration of the suit, on showing sufficient cause for non-appearance. The application, no doubt, had to be made within the period prescribed therefor under the Limitation Act, which is 30 days from the date of dismissal, under Article 122 of the Limitation Act, 1963. Apparently, under the practice followed in the Calcutta High Court on the Original Side, the order is drawn up, completed and filed after the expiry of 30 days from the date of the order. Section 5 of the Limitation Act of 1908 proprio vigore did not apply to proceedings under Order IX of the Code of

Civil Procedure and the decision of the Calcutta High Court in M/s Nanalal M. Varma and Co. (Gunnies) P. LTD. Vs. Gordhandas Jerambhai & Ors. (supra) dealt with a case which arose when the 1908 Act was in force and Section 5 of the Limitation Act was not applicable. But after the enactment of the Limitation Act, 1963, Section 5 has application to all applications other than an application under Order XXI of the Code of Civil Procedure subject to any special law. That means that time for filing an application under Rule 4 or under Rule 9 of Order IX of the Code, or under any other provision, unless excluded, could be extended if sufficient cause is made out therefor. Therefore, the fact that on the expiry of 30 days from the date of the order, the order was drawn up, completed and filed, would not make the court concerned functus officio since that court in an appropriate case can exercise its jurisdiction under Section 5 of the Limitation Act and extend the time for filing the application under Rule 9 or Rule 4 of Order IX of the Code. Thus, it appears to us that in view of the applicability of Section 5 of the Limitation Act, to proceedings under Order IX of the Code, the position adopted in M/s Nanalal M. Varma and Co. (Gunnies) P. LTD. Vs. Gordhandas Jerambhai & Ors. (supra) and followed subsequently by the Calcutta High Court cannot now be adopted.

11. After all, a dismissal of the suit for non- prosecution or for non-appearance of the plaintiff is not a decree as specified by the Section 2(2) of the Code itself. Hence it is not appealable as a decree. Of course, the Calcutta High Court seems to have taken the view that the order of dismissal would amount to a judgment and hence appealable under clause 15 of the Letters Patent. We do not think it necessary to decide for the purpose of this case, whether dismissal of a suit for default on the part of the plaintiff would amount to a judgment within the meaning of clause 15 of the Letters Patent. We leave that question open for the present.

12. We also feel that the view of the Calcutta High Court, no doubt, backed by the procedure followed in that court and the practice of that court that once the order of dismissal is drawn up, completed and filed, the court loses its power to restore the suit in an appropriate case, seems to deprive the court of a power which every court has, of restoring a suit so as to enable the parties to contest the same on merits. It is even possible to argue, that the power to dismiss a suit for default, carries with it the power to restore that suit. That apart, in view of the power available under Section 5 of the Limitation Act to extend the period of limitation for making an application for restoration of the suit, the rigid view adopted cannot be said to survive. May be, the view that the order was a judgment and it was appealable under clause 15 of the Letters Patent, also induced the theory of the trial judge becoming functus officio on the order of dismissal being drawn up, completed and filed. After all, law of procedure is the handmaid of justice and Rule 35 of Chapter X of the Original Side Rules itself must be taken to confer a power on the trial judge to restore a suit which he had dismissed for default if sufficient cause in that behalf is shown especially in the context of Section 5 of the Limitation Act, 1963. The fact that the records have been consigned to the record room cannot interfere with the power of the court to do justice in a cause. We are therefore inclined to hold that the position adopted by the Calcutta High Court that on the expiry of the 30 days from the date of dismissal of a suit for default and on the order of dismissal being drawn up, completed and filed, the court becomes functus officio is not sustainable.

13. Coming back to the case on hand, since we find that in case we were to allow this appeal and restore the suit, that will result in an order inconsistent with the order dismissing the suit as against S.M. Naqi, one of the legal representatives of the deceased original plaintiff, which has become

final, we are unable to grant the appellants any relief. Thus, we decline to interfere with the decision of the High Court. We may also notice that the appellants have not acted bona fide in impleading the deceased co-plaintiff as a respondent in the Petition for Special Leave to Appeal as if he were alive and then seeking to bring on record his legal representatives in this Court.

14. Thus, though on law, we are inclined to disagree with the High Court that the suit could not be restored, we decline to interfere with its decision for the reason mentioned above. We dismiss the appeal. In the circumstances, we make no order as to costs.