

Hindustan Computers Vs. Dart Computers Ltd. and Others

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Court : Mumbai

Decided On : Jan-28-2013

Judge : R.G. Ketkar

Appeal No. : Writ Petition No.3130 of 2010

Appellant : Hindustan Computers

Respondent : Dart Computers Ltd. and Others

Advocate for Def. : Mr. Anilkumar

Advocate for Pet/Ap. : Mr. Uday Malte

Judgement :

P.C.

Heard Mr. Uday Malte, learned counsel for the petitioner and Mr. Anilkumar, learned counsel for the respondents at length.

2. By this petition under Articles 226 and 227 of the Constitution of India, the petitioner, hereinafter referred to as 'plaintiff' has challenged the Judgment and order dated 11.2.2010 passed by the Civil Judge (Sr.Dn), Malegaon, below Exhibit-49 in Special Civil Suit No.76 of 2004. By that order, the learned trial Judge rejected the application taken out by the plaintiff for amending the Plaint.

3. The plaintiff-M/s Hindustan Computers instituted Special Civil Suit No.76 of 2004 on 4.9.2004 for recovery of Rs.44,81,820/- from the respondents, hereinafter referred to as 'defendants'. The plaintiff was sued as under:-

"M/s.Hindustan Computers, Through - Upendra lad, Age 39 years, Occ: Business."

The defendants resisted the suit by filing Written Statement on 30.10.2004. Issues were framed on 28.10.2005. On 19.6.2009 the plaintiff filed application for amendment of the Plaint. The plaintiff proposed amendment in the description of the suit as under :

(a) After "M/s Hindustan Computers" and before "Upendra" following words be added in place of "Through"- Proprietary concern, Proprietor Mrs Neeta Upendra Lad represented by General Power of Attorney Holder"

(b) After word "Business", "and Service" words be added."

The plaintiff also proposed to add para-1 (a) after para-1 of the Plaint, which reads as under :

"1(a) The plaintiff Hindustan Computers is the Proprietary concern and Mrs Neeta Upendra Lad who is wife of Mr Upendra Devendra Lad, is a proprietor of Hindustan Computers. Mr Upendra Devendra Lad as a General Power of Attorney holder for Hindustan Computers renders help to deal with all business transactions of Hindustan Computers. Even at the time of negotiations with present defendants, Mr Upendra Devendra lad has assisted in negotiating with defendants. The agreement dated 20.2.2003 and subsequent cancellation agreement dated 11.7.2003 have been also executed between the plaintiff and defendants on which Mr Upendra Devendra Lad has put his signature on behalf of plaintiff on the request by the proprietor. The proprietor of Hindustan Computers Mrs Neeta Upendra Lad has executed General Power of Attorney in favour of husband Mr Upendra Devendra Lad on 16.10.2002 and such General Power of Attorney is also notarized with the Notary. Mr Upendra Devendra Lad personally has knowledge of all the dealings of Hindustan Computers. Mr Upendra Devendra Lad witnessed and participated in all transactions and dealing with the present defendants, and

as such, he is filing the present suit in his capacity as a General Power of Attorney Holder of Mrs Neeta Upendra Iad for and on behalf of Hindustan Computers."

The defendants resisted the application by filing reply dated 7.8.2009. By the impugned order, the learned trial Judge rejected the application. It is against this order, the plaintiff has instituted the present petition under Articles 226 and 227 of the Constitution of India.

4. The petition was admitted by issuing Rule on 20.10.2010 and ad-interim relief in terms of prayer clause (B) was confined to the stay of the suit.

5. In support of this petition, Mr. Malte invited my attention to the copy of the Plaint in Special Civil Suit No.76 of 2004 and in particular description of the plaintiff. He also invited my attention to the application for amendment made by the plaintiff on 19.6.2010. He submitted that the learned trial Judge rejected the application on the following grounds:

(i) The application for amendment was made belatedly;

(ii) The proposed amendment is likely to change the nature of the suit and also adversely affect the right of the defendants;

(iii) The proposed amendment will hit the suit by law of limitation and

(iv) The trial of the suit has already commenced.

6. Mr. Malte submitted that the reasons given by the learned trial Judge while rejecting the application for amendment are wholly unsustainable. In so far as the ground nos.(i) and (iv) for rejecting the application are concerned, he submitted that the trial is yet to commence. In other words, he submitted that Issues were framed on 28.10.2005 and the plaintiff is yet to file his affidavit of evidence in lieu of Examination-in-chief. He submitted that the Apex Court in the case of Vidyabai and Ors Vs. Padmalata and Anr, 2009 (4) MH.L.J. 730 has observed in paragraph 8 that the date on which the issues are framed is the date of first hearing and the date on which the affidavit in lieu of examination in-chief is filed by the witness is the date of commencement of the proceedings. He, therefore, submitted that the

trial is yet to commence. The learned trial Judge has committed serious error in recording finding that the amendment proposed is absolutely belated. The ground no.(ii) for rejecting the application is that the proposed amendment is likely to change the nature of the suit. He submitted that by giving description of the plaintiff, the nature of the suit has not changed. The amendment proposed by adding paragraph 1(a) is clarificatory in nature and therefore the learned trial Judge has committed serious error in coming to the conclusion that the proposed amendment is likely to change the nature of the suit and consequently is likely to adversely affect the right of the defendants. In so far as ground no.(iii) for rejecting the application is concerned, the learned trial Judge held that the proposed amendment is hit by law of limitation. However, no reasons have been assigned for arriving at his conclusion. He submitted that if at all the amendment application is moved belatedly yet before commencement of the trial, the learned trial Judge could have imposed costs on the plaintiff before allowing the application for amendment. He, therefore, submitted that the impugned order deserves to be quashed and set aside, thereby allowing the application made by the plaintiff for amendment of the application.

7. On the other hand, Mr Anilkumar supported the impugned order. He invited my attention to the Plaint in Special Civil Suit No.76 of 2004 and the description of the plaintiff as also the verification made by Shri Upendra Lad. He submitted that in the entire body of the Plaint, there is no whisper as to in what capacity Mr Lad is representing the plaintiff M/s Hindustan Computers. He also invited my attention to the verification made in the present petition and submitted Mr Upendra Lad could not have verified the petition in this manner.

8. Mr Anilkumar invited my attention to the following documents:

(i) Application made by defendants under Order IX Rule 8, Order VII Rule 11 read with Section 9-A of C.P.C for dismissal of the suit and in particular paragraphs 6 and 8 thereof.

(ii) Agreement dated 19.2.2003 executed between defendant no.1 and plaintiff at Nagpur wherein M/s Hindustan Computers is represented through Proprietor Shri Upendra Lad;

(iii) Notices dated 22.3.2003, 8.12.2003, 22.3.2004, 1.4.2004, 7.5.2004, 11.5.2004, 20.5.2004, 25.5.2005 issued through Advocate Shri J.K. Patil, wherein Mr Upendra D Lad is shown as Proprietor of Hindustan Computers;

(iv) Notice dated 5.8.2004 issued by Shri L.B.Kulkarni Advocate wherein Shri Upendra Lad is shown as proprietor of Hindustan Computers;

(v) Affidavit of evidence in lieu of examination in chief in Summary Case No.1419 of 2002 wherein Shri Upendra Lad is described as proprietor of Hindustan Computers.

(vi) Cross-examination in that case, wherein Upendra D.Lad has deposed as under ; "It is not true to say that I am deposing falsely that I am owner of M/s Hindustan Computers".

(vii) Statement of defendant no.2 who was accused in Criminal Case No.1419 of 2004 recorded under section 313 of Cr. P.C.

(viii) Findings recorded by the learned Magistrate while disposing of Criminal Case on 22.1.2008.

(ix) General Power of Attorney dated 16.10.2002 executed by Hindustan Computers through its proprietor Ms Neeta Upendra Lad in favour of Upendra Lad and the discrepancy in the Power of Attorney.

9. Mr.Anilkumar also invited my attention to Order 3 Rule 2 of CPC dealing with "Recognized agents". He submitted that the plaintiff had instituted suit on 4.9.2004 and the defendants filed written statement on 30.10.2004. Issues were framed on 28.10.2005 and the matter was adjourned for the plaintiff to file affidavit of evidence. The matter was adjourned at the instance of the plaintiff who did not take steps to file affidavit on more than 31 occasions. It is in these circumstances the defendants filed Exhibit-42 on 18.12.2008 for dismissal of the suit. The matter was adjourned for filing reply to the application filed by the defendants and thereafter the present application was filed by the plaintiff after five years of filing of the suit and after about four years of framing of the issues and about 18 months after the judgment of the learned Magistrate. He, therefore, submitted that the

learned trial Judge has rightly rejected the application having regard to the conduct of the plaintiff and, therefore, no interference is called for at the hands of this Court.

10. In support of these submissions, he relied upon the following judgments:

(i) Jammu and Kashmir Bank Ltd Vs. Ghulam Rasul Naquishbandi, AIR 1958 Jammu and Kashmir 20,

(ii) Ram Prasad Dagaduram Vs. Vijaykumar Motilal Hirakhanwala, AIR 1967 SC 278, in particular paragraphs 16 and 17 thereof.

11. I have considered the submissions made by the learned counsel appearing for the parties. I have also perused the material on record.

12. As noted earlier, the learned trial Judge has rejected the application for amendment on four grounds :

(i) The application for amendment was made belatedly;

(ii) The proposed amendment is likely to change the nature of the suit and also adversely affect the right of the defendants;

(iii). The proposed amendment will hit the suit by law of limitation and

(iv) The trial of the suit has already been commenced.

13. In so far as ground no.(i) and (iv) are concerned, the learned trial Judge has held that the application for amendment was belatedly moved. Even accepting the application was belatedly moved, the learned trial Judge could have considered imposition of costs if the trial has not commenced. The learned trial Judge was of the view that though these facts were within the knowledge of the plaintiff, Ms Neeta Lad and her husband Upendra D. Lad, the application should not have been moved belatedly. The reason given by the learned trial Court for rejecting the application for amendment on the ground of delay, cannot be upheld as no prejudice is shown to have been caused to the defendants. Having regard to the nature of the proposed amendment, quoted herein above, the learned trial Judge

should not have refused the amendment. The learned trial Judge also wrongly came to the conclusion that the proposed amendment is likely to change the nature of the suit. The suit instituted by M/s Hindustan Computers and the prayers are also one and the same. The only amendment about description of plaintiff and paragraph 1(a), in my opinion, is of clarificatory in nature. The reason given by the learned trial Judge is that the proposed amendment is likely to change the nature of the suit and consequently adversely affect the rights of the defendants and therefore cannot be sustained.

14. The learned trial Judge rejected the amendment on the ground that the proposed amendment will be barred by law of limitation. However, no reason is given in support of this finding. I refrain to go into this aspect in view of the order which I propose to make. The learned trial Judge has finally held that the trial has already commenced.

15. It is not in dispute that the plaintiff has not filed affidavit of evidence in lieu of examination-in-chief. In view of the Judgment of the Apex Court in the case of Vidyabai (supra), in my opinion, the learned trial Judge has committed error in coming to the conclusion that the trial has already commenced. The reasons for rejecting the application for amendment, therefore, cannot be sustained.

16. Mr. Anilkumar relied upon the Judgment in the case of Jammu and Kashmir Bank Ltd (supra). In that case, the appellant-Jammu and Kashmir Bank Ltd instituted a suit for recovery of Rs.2962-12-6 on the basis of a Pronote dated 12.6.1945 executed by one Ghulam Rasul Naqishbandi in favour of the plaintiff bank. Summons were issued to Ghulam Rasul Naqishbandi s/o Ahad Shah Naqishbandi. He contested the suit. Issues were framed and while the plaintiff's witness was being cross-examined it transpired that the person intended to be sued was not the one who was before the court. The plaintiff, therefore, made application for summoning the real defendant. The plaintiff was ordered to amend the plaint and another application was made by the plaintiff that proceedings against Kh. Ghulam Rasul Naqishbandi s/of Kh Ahad Shah who was before the Court be discharged and summons be issued against the real defendant Ghulam Rasul Naqishbandi s/o Mahmud Shah Naqishbandi. The trial Court issued

summons to the new defendant in accordance with the prayer made by the plaintiff. Ghulam Rasul Naqishbandi son of Mahmud Shah appeared before the Court and pleaded that the suit against him was barred by limitation. This plea found favour with the trial Court and the plaintiff's suit was dismissed. It was in that context the High Court observed that the suit was brought against the real defendant not on 23.4.1951 but on 27.2.1952 and the plaintiff's claim for interest which accrued during the year 1945 was barred by time and could not be recovered from the defendant. Accordingly, the suit of the plaintiff was partly decreed.

17. In the present case, there is no question of substitution of the defendant. But it is merely description of the plaintiff with a clarificatory paragraph. I am, therefore, of the opinion that the judgment in the case of Jammu and Kashmir Bank Ltd. (supra) does not advance the case of the defendant.

18. Mr Anilkumar also relied upon the Judgment of the apex Court in the case of Ram Prasad Dagaduram (supra). In that case, Vijaykumar instituted the suit on the ground that he was adopted by Tarabai on 16.7.1948 as a son to her deceased husband Motilal Hirakhanwala and, therefore, became entitled to enforce the mortgage as her sole heir on her death on 23.4.1952. The suit was instituted on 9.2.1954 to enforce a mortgage which was executed by the appellant before the Apex Court on 13.12.1934 in favour of Tarabai, the proprietor of the firm of Narayandas Chunilal. The appellant resisted the suit and denied that Vijaykumar was adopted by Tarabai. It was stated that Tarabai died leaving behind three daughters, viz., Rajkumari, Premkumari and Mahabalkumari, the mother of Vijaykumar, as her heirs. It was denied that Vijay Kumar had a right to enforce the mortgage. The learned District Judge held that the adoption of Vijay Kumar was not established and hence dismissed the suit. Aggrieved by the decision, Vijaykumar preferred an appeal in the High Court of Hyderabad which was transferred to High Court of Bombay. Pending that appeal, Vijaykumar made an application in appeal on 3.11.1958 for an order adding his mother Mahabalkumari as a co-plaintiff with him as she was willing to be so added, and her sisters Rajkumari and Premkumari who were not available for joining in the suit as plaintiffs, as defendants.

He also sought permission to add a new paragraph to the Plaint, in which after reiterating his right to enforce the mortgage as the adopted son of Motilal and Tarabai, he stated. 'In case, however, the plaintiff's adoption is held not to be proved or not to be valid, the estate of Motilal and Tarabai Hirakhanwala and of M/s Narayandas Chunilal will vest in Tarabai's three daughters, viz., Rajkumari, Premkumari and Mahabalkumari'. The prayers in the Plaint were also sought to be amended by asking that the decree sought might be passed in favour of Vijaykumar and Mahabalkumari. The said application was opposed by the appellant and the same was allowed by this Court. Mahabalkumari was added as an appellant and Rajkumari and Premkumari as respondents. Premkumari filed a written statement denying the adoption of Vijay Kumar and his right to enforce the mortgage. Rajkumari never appeared in the proceedings arising out of the suit. The appeal was, thereafter, allowed by the High Court. The High Court refused to go into the question of adoption and passed a preliminary mortgage decree for foreclosure in favour of Mahabalkumari, Rajkumari and Premkumari and further directed that the suit as brought by Vijay Kumar would stand dismissed.

Hon'ble Mr Justice A.K.Sarkar, C.J., observed in paragraph 4 that sub rule (1) of Order 1, rule 10, however, cannot justify the order of addition of parties, for it only permits addition of a plaintiff and does not provide for the addition of a defendant while the order directs addition of both a plaintiff and two defendants. The addition of Mahabalkumari as a plaintiff could not be made under the sub-rule unless it was necessary for the determination of the real matter in dispute. Adding her as a plaintiff would have availed nothing unless Rajkumari and Premkumari were also added as defendants, and that could not be done under the sub-rule. No decree could have been passed in her favour alone if the case of adoption failed, for she would then be entitled to the mortgagee's right along with her sisters. The addition of Mahabalkumari as plaintiff only would have been futile; it would not have helped in the decision of any matter in dispute.

In paragraph 5, it was further observed that sub rule (2) of Order I, Rule 10 permits the addition of both plaintiffs and defendants in certain circumstances. The order, however, was not sought to be justified under that provision in view of Section 22 of the Limitation Act. The suit as regards the parties added under this sub-rule had

to be deemed to have been instituted when they were added. It was not in dispute in that case that a suit filed on the date when the three sisters were added, to enforce the mortgage would have been barred. The addition of Rajkumari and Premkumari as defendants should not have been ordered in view of the bar of limitation and such addition would not have resulted in any decree being passed. In paragraph 9, it was observed that the order adding parties was not supportable and if that order goes, the decree which is in favour of the added parties cannot stand, for they are then strangers to the suit. As there was no decree in favour of Vijay Kumar and as in fact the suit considered as brought by him has been dismissed by the courts below and there is no appeal by him, the appeal was allowed.

Hon'ble Mr Justice Bachwat, in a separate but concurring judgment, observed in paragraph 15 that admittedly the name of the original plaintiff was not a mis-description of the names of Tarabai's daughters. It was also not a case where a wrong defendant was sued as representing the estate of a deceased person and subsequently the real representative is added as a defendant. In paragraph 20 it was observed that as regards Mahabalkumari, Rajkumari and Premkumari the suit must be regarded as instituted on 4.11.1958. As far as they are concerned, the suit was barred by limitation and no decree can be passed in their favour. The decree passed by the High Court in their favour was not sustained and was set aside. It is in that context the Apex Court allowed the appeal and the decree passed by the High Court in favour of Mahabalkumari, Rajkumari and Premkumari was set aside and the decree passed by the trial Court was restored.

19. As noted earlier, in the present case, there is no question of either substitution of the defendant or addition of the defendant. The only amendment is about description of the plaintiff and incorporation of paragraph 1(a) which is clarificatory in nature. In my opinion, this case does not advance the case of the defendant.

20. In view of the above, the impugned order cannot be sustained and the same is liable to be quashed and set aside. Rule is made absolute in terms of prayer clause (A) with no order as to costs.

21. The application for amendment at Exhibit 49 in Suit No.74 of 2004 is allowed. The plaintiff shall carry out amendment within four weeks from today. The defendants are at liberty to file additional Written Statement within two weeks from service of copy of the amended Plaint. It is, however, clarified that issue of limitation is kept open.

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