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Court : Karnataka

Decided On : Nov-09-1998

Reported in : [1999]96CompCas361(Kar); 1999(2)KarLJ301

Judge : M.F. Saldanha, J.

Acts : [Code of Civil Procedure \(CPC\), 1908](#) - Order 23, Rule1; [Companies Act, 1956](#) - Sections 397, 398 and 402

Appeal No. : Company Petition No. 77 of 1989 connected with Company Application Nos. 258 of 1998 and 831 of 1997

Appellant : Devaraj Dhanram

Respondent : M/S. Firebricks and Potteries Private Limited, Bangalore and Others

Advocate for Def. : Sri K.G. Raghavan, Adv.

Advocate for Pet/Ap. : Sri P.B. Appaiah and ;Sri Udaya Holla, Adv.

Judgement :

ORDER

1. A seemingly innocuous application filed in Company Petition No. 77 of 1989 for permission to withdraw the petition with liberty to re institute it has generated a legal controversy of considerable importance. At first blush, it would seem that a litigant has the unfettered right to withdraw a proceeding and if the law permits reinstatement in the same or some other form provided the exercise is not vitiated by mala fides but the reason why the dispute has snowballed is because of the fact that some of the Courts have taken the view that if a Company Petition of this type is withdrawn that there would be a bar to incorporating the grounds or material from the petition that has been withdrawn in a subsequent proceeding which may be maintainable on additional grounds. The learned Counsels who represent the applicant have pointed out to me that it is out of abundant caution that the liberty of this Court has been sought and briefly stated, the reasons stated by them are that the petition in question was instituted in the year 1989 and that it has so far not been disposed off on merits. According to the applicants, there have been a host of developments over the years and they contend that it is very essential that all this additional material be incorporated in the form of a fresh petition. According to them, it would be very necessary to present a new petition and it is not either desirable or permissible to seek to graft on all the additional data to the existing proceeding and that this is the reason why the leave has been sought.

2. Mr. Raghavan, learned Counsel who represents the respondents has vehemently opposed the grant of any such liberty and he made it very clear to the Court that he is not raising the objection merely for the sake of opposing but that there is a very valid reason for this opposition. He states that it is rather unfortunate that the petitioner in the main Company Petition has fallen out with those who are managing the Company and that this hostility has crystallized into litigation which has its own fall out and aftermath. Learned Counsel submitted that as the present case will demonstrate, it was instituted in 1989 and has not been disposed off till 1998 and he submits that if the party is permitted to recommence the proceedings either at this stage or at a future point of time that it would amount to endless harassment of his clients and that this is the main ground on which he is opposing the grant of leave. I see considerable substance in this argument because, quite apart from the facts of the present case the Courts do come across a litigation being used for purposes of either settling scores or some other oblique

reason and the party who is required to contest or defend that litigation is undoubtedly subjected to all sorts of harassment, expenditure and even embarrassment. Also, having regard to the fact that these litigations drag on almost interminably, there is good ground for a party who is at the receiving end to insist on a degree of finality in litigation and opposing any attempt at elongation. There is a class of litigations that is undoubtedly vexatious and the Supreme Court has had occasion to categorise such litigation as 'fake litigation'. Courts do come across situations wherein parties start litigations and when they reach the stage of final hearing or disposal, adopt measures that are fully within the framework of the law to redirect that litigation into another one or to another forum or to turn it around and recommence it with the sole object of subjecting the opposite party to interminable turmoil. It is therefore extremely important that when applications of this type are made that the Court must adopt a very circumspect and judicious approach and that liberty is not to be mechanically granted. There may be genuine and valid reasons where the Court may decide to make an exception but by and large, the Courts must normally adopt the principle that one approach to the forum is enough and if the party does not come with a proper case or agitate it properly, that no second round will be permitted. Since these issues have arisen in this proceeding, it is necessary for the Court to say something about the situation.

3. Dealing with the main legalities of the application, Mr. Raghavan submitted that the principal ground on which the withdrawal is sought is that additional material namely developments subsequent to the date on which the petition was filed need to be taken into consideration. He raised a two-fold submission. Firstly, he contended that there have been interim stages in this proceeding when applications have been made to the Court pointing out various further developments and interim orders sought which, learned Counsel stated have been refused by this Court. The main thrust of his argument was that it is perfectly permissible for the Court to take into account developments both factual and legal that have taken place after the date of filing of the petition in the present petition without its being re instituted from the very inception. Learned Counsel drew my attention to two decisions:--

1. Needle Industries (India) Limited and Others v Needle Industries Newey (India) Holdings Limited and Others ;

2. 1950 Com. Cas. 555 (Cal.),

wherein the Supreme Court and the Calcutta High Court very clearly enunciated the proposition that subsequent events or developments can certainly be taken cognizance of by the Company Court hearing such an application. He thereafter drew my attention to a decision of the Bombay High Court reported in 1961 Com. Cas. 185 (Bom.), wherein the Court has held that amendments for purposes of recording developments subsequent to the date of filing can be permitted and he pointed out that under Section 402 of the Companies Act the Court has the power to look at subsequent events because all aspects of the case are required to be taken note of by the Court.

4. Another limb of argument adduced was with regard to the provisions of Order 23, Rule 1 and learned Counsel submitted that if there is a defect in the petition as it now stands or if it is wanting in any respect, that there is provision even in the CPC for corrective action to be taken. Reliance was placed on Baldeo Dass v Joshi Gauri Dutt and Others and Abdul Ghafoor v Abdul Rahman, though it was pointed out to me that if an application for corrective action is made, the point of time at which such an application comes is material and that if it is belated the Court should turn it down. Also, learned Counsel submitted that there has to be sufficient ground made out before such corrective application is sanctioned. There can be no two opinions with regard to the correctness of this submission which effectively means that even assuming that the petitioner desires to correct his course of action or present a more complete case that the law makes provision for this to be done within the existing proceedings.

5. Lastly, Mr. Raghavan pointed out to me that his apprehension with regard to the future possible course of action is a very real one because he stated that if the proceedings were to be restarted having regard to the amendments to the law that it would go to the Company Law Board and he pointed out that for a variety of reasons there is such a huge pile-up and backlog of cases pending there that it would be a long long time before the proceeding is culminated. This last aspect of

the matter may be the least important because the Court has to proceed basically on principles of law and even though I do concede that the last point is of relevance, it cannot override the earlier considerations.

6. The short point that has therefore crystallized as far as this application is concerned is as to whether on the peculiar and special facts of the special proceeding, the application is liable to be allowed or whether it should be rejected. As indicated by me, the submissions canvassed on behalf of the respondents are absolutely flawless and I would have straightaway upheld everyone of them. There is only one serious difficulty that has arisen in the present case which is that for no fault of the parties before me, the petition that was filed in 1989 has still not been disposed off on merits. A perusal of the order sheet will indicate that neither of parties has been responsible for any delay or protraction of the litigation. The contention raised on behalf of the applicant is that change in the complexion of the business of the respondents-Company and the developments that have taken place in the course of the last nine years have not been cosmetic but that they have been very substantial. A perusal of the applications that have been made earlier will indicate that this is in fact true. It may be that interim applications have been made setting out various facts and submissions but those have been heard and disposed off and they do not form part and parcel of the main petition. Mr. Raghavan submitted that there is nothing to stop the petitioners, if they so desire and if they are so advised, from applying to the Court for necessary amendments on the ground that the petition requires to be updated. That course of action may appear to be possible but in my considered view, that does not seem to be a line of action which a Court can uphold. The reason for this is that as far as the present case goes, the passage of time has been relatively long and the nature and volume of the material that will have to be added on to the original petition is so very substantial that any Court would take the view that a new petition is the right course of action as such grafting would overload and overhaul the existing petition to a point where it would be difficult to sustain or legally permit an amendment. The law clearly defines the parameters within which amendments can be permitted and one of the principal guidelines which a Court observes is that an amendment cannot and should not totally alter the original cause of action. This is the difficulty that would come up in the present case and that is why, despite

everything that has been pointed out on behalf of the respondents it may not be correct to refuse the permission to present a new petition. I do concede that by doing this, it would virtually mean restarting the litigation but that unfortunately appears to be inevitable. The Court has not adjudicated on the earlier petition and whatever material it contains is necessarily a part and parcel of the overall composite cause of action on which the Court has to decide. If the petitioner were to be precluded from using this material which is the foundation of this case, the Court itself would be handicapped because the petition would be an incomplete one. Therefore it stands to reason that liberty will have to be granted to incorporate the material which is contained in the present petition.

7. All that I can do to alleviate the effect of permitting such a course of action vis-a-vis the respondents whose interest also this Court is duty bound to protect is to direct that if at all the petitioner desires to re-present his case that they will have to do it latest by 30th November, 1998. The reason why I have imposed the deadline is because this is a nine year old litigation where one party contends that they have serious grievances, the opposite party complains of harassment. In this background, if the petition is presented to the Company Law Board, it shall be specifically pointed out to that forum that the proceeding had been pending before the High Court for nine years and that the High Court has expressed concern over the consequences of any further delay and convey the request to the Company Law Board that even if an exception is to be made, the re-filed petition be disposed off with utmost expediency, preferably within an outer limit of six months from the date on which it is filed. With these directions, the Company Application No. 258 of 1998 is allowed. No orders are necessary on Company Application No. 831 of 1997 which is disposed off. Company Petition No. 77 of 1989 is permitted to be withdrawn with liberty to re institute the proceeding within the time prescribed by this Court if so advised. It is clarified that if the proceeding is not refiled within the prescribed time period, Company Petition No. 77 of 1989 shall be treated as having been dismissed. No order as to costs.