

State of U.P. and anr. Vs. Jaya Shree Textile and Industries Ltd. and anr.

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Court : Allahabad

Decided On : Dec-19-1984

Reported in : AIR1985All212

Judge : N.N. Sharma, J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Order 1, Rule 10 - Order 6, Rule 17;
[Companies Act, 1956](#) - Sections 394 and 394(2)

Appeal No. : Civil Revn. No. 307 of 1981

Appellant : State of U.P. and anr.

Respondent : Jaya Shree Textile and Industries Ltd. and anr.

Advocate for Def. : M.N.B. Singh and ;S.C. Agarwal, Advs.

Advocate for Pet/Ap. : Advs.

Disposition : Revision allowed

Judgement :

ORDER

N.N. Sharma, J.

1. This is a plaintiffs revision directed against order dt. 4-4-1981 by Sri Kripa Shankar III Addl. Civil Judge Kanpur in Original Suit No. 144 of 1977 by which he

rejected the application paper No. 22 Kha 1 of plaintiffs under Order 6, Rule 17 of the Civil P. C. for amendment of the plaint and upheld the objection of respondents paper No. 24 C2.

2. Suit No. 144 of 1977 was filed in the court concerned on 31-3-1977. The plaintiffs were State of U. P. and U. P. State Textile Corporation Ltd.

3. Defendant was M/s. Jaya Shree Textile & Industries Ltd. having its registered office at Rishra, district-Hooghly, West Bengal.

4. The suit was for recovery of Rs. 5,62,558.53P. together with interest pendente lite and future at 12 per cent per annum. Costs of the suit were also claimed.

5. It was alleged that State of U. P. had appointed plaintiff No. 2 its nominee for the supplies of Staple Fibre Yarn by the manufacturers against the allotment and had made various allotments in their favour.

6. Defendant M/s Jaya Shree Textile & Industries Ltd. from 3-8-1974 to 21-10-1974 had supplied to the U. P. State Textile Corporation Ltd applicant No. 2 certain quantities of staple yarn and applicant No. 2 made payments on the basis of the bills submitted to them by defendant.

7. Subsequently it transpired that the defendant had realised from applicant-plaintiff No. 2 several lacs of rupees in excess which was not at all due to it.

8. 'Consequently, a notice demanding the excess along with interest was sent to M/s Jaya Shree Textile & Industries Ltd at their registered office and address and the same was duly served but since no payment was made so the suit was filed in the court of learned IInd Civil Judge, Kanpur.

9. Pending the suit an application was made by M/s Indian Rayon Corporation Ltd alleging that the said Jaya Shree Textile & Industries Ltd. had been amalgamated with the Indian Rayon Corporation Ltd. under the orders of Calcutta High Court on 21st July 1976 and the Gujarat High Court at Ahmedabad on 13-7-1976 and the said M/s. Jaya Shree Textile & Industries Ltd stood dissolved by the order of the Calcutta High Court with effect from 18-10-1976 and consequently there was no

surviving legal entity and in fact Jaya Shree Textile & Industries Ltd. ceased to exist in the eye of law with effect from 18-10-1976 and the suit filed against the defendant was simply a nullity and liable to be dismissed.

10. On learning about these facts plaintiff sought leave to amend the plaint paper No. 22 Kha 1 under Order 6, Rule 17, C.P.C., on 20-1-1979 by which it was prayed that the liability of defendant related to the period when it was not amalgamated. However, in order to avoid legal complication plaintiffs sought addition of Indian Rayon Corporation Ltd. also as defendant to the suit This prayer was opposed by defendant on the ground that the suit was filed in the name of non-entity and amounted to a nullity and so no question of any amendment arose.

11. Learned trial Judge found that after the amalgamation of the Company under Section 394 Sub-clause (2) of the Companies Act and Section 92 Sub-clause (2) of the Companies Act the transferee Company would be liable for all the liabilities of the transferor Company. As the suit was filed initially against a dead Company so such leave to amend could not be allowed.

12. Aggrieved by this decision this revision has been filed.

13. I have heard learned counsel for the parties and perused the record.

14. On behalf of the revisionists it was pointed out that assuming for the sake of argument that the suit was filed against a dead person but when the plaintiff was kept in dark about the order of amalgamation and was no party to the proceedings under Section 394(2) of the Companies Act he had a good case to seek the proposed leave.

15. In this connection reliance was placed upon Karimullah Khan v. Bhanu Pratap Singh reported in AIR 1938 Nag 458 which posited :--

'Order 1, Rule 10 only contemplates that a suit should have been filed in the name of a wrong person irrespective of whether he is living or a dead person. There is no difference between a suit filed in the name of a dead plaintiff and one filed in the name of a wrong person as plaintiff. The suit filed in the name of a dead plaintiff is manifestly one that is filed in the name of a wrong plaintiff. Hence the

case comes within the ambit of Order 1, Rule 10 and the defect is capable of being cured if the mistake is shown to have occurred in good faith, provided that in permitting the amendment no injustice results to the defendant: , : AIR1927 Cal880 and (1908) ILR 31 Mad 86 Dissent: AIR 1925 Mad 1210 (FB); : AIR1930 All131 and AIR 1932 Lah 305, Rel on.

In a suit filed by the manager of the Court of Wards on behalf of a ward, the Manager is the real plaintiff. Any mistake in the name of the ward does not affect the substance of the suit and so amendment can be granted'

16. The next authority relied upon on behalf of the revisionists has been reported in Ganesh Trading Co. v. Moji Ram : [1978]2SCR614 . It was observed : --

'Where a suit for recovery of money due under a promissory note was filed by a firm through a partner, the amendment of plaint on ground that the partnership firm already stood dissolved on the date of filing the suit and that the suit is instituted by one of the partners of a dissolved firm could not be refused. It did not alter the cause of action or the character of the suit nor did change the identity of the plaintiff who remained the same. It only brought out correctly the capacity of the plaintiff suit.'

It was further observed at page 485 : --

'Procedural law is intended to facilitate and not to obstruct the course of substantive justice. Provisions relating to pleadings in civil cases are meant to give to each side intimation of the case of the other so that it may be met to enable courts to determine what is really an issue between parties, and to prevent deviations from the course which litigation on particular causes of action must take.'

17. Reliance was further placed upon Khaja Begum v. Gulam Mohiuddin reported in : AIR 1976 AP65 .

18. In that case money suit was filed against a dead sole defendant. The death of defendant was unknown to plaintiff. It was observed : --

'The section confers a general power to amend defects in a proceeding and so when a suit is filed against a dead person the plaint can be amended to substitute the legal representatives of the deceased. Therefore, when a money suit is filed against a dead sole defendant and the death is known only subsequently the suit is not void ab initio and can be continued against the legal representatives of the deceased if their substitution is made within the limitation period for the suit.

It cannot be said the section does not apply when there is a sole defendant since on his death before the suit there is 'no proceeding in a suit' within the meaning of the Section. Case law discussed'

19. It is a Division Bench case which has dealt with several authorities. In that case reliance was placed upon Section 153, C.P.C. which confers a general power on the court to amend any defect or error in any proceeding in a suit and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on such proceeding.

20. Reliance was next placed upon C. Raju v. Dinshaji Dadabhai Italia, reported in : AIR 1961 AP239 . In that case suit was filed against father and his son as surety. It subsequently transpired that the father was dead before the institution of the suit. It was held that it was open to the court upon the application of the plaintiff to implead the legal representatives of the deceased defendant as party defendants. It was further held that such amendment could be allowed if the suit was not barred by limitation against them on the date of the application.

21. In this connection my attention was also invited to proviso appended to Section 21 of Lim. Act No. 36 of 1963 which reads as below : --

Section 21. Effect of substituting or adding new plaintiff or defendant: --(1) Whereafter the institution of a suit, a new plaintiff or defendant is substituted or added, the suit shall as regards him, be deemed to have been instituted when he was so made a party :

Provided that where the court is satisfied that the omission to include a new plaintiff or defendant was due to a mistake made in good faith it may direct that the

suit as regards such plaintiff or defendant shall be deemed to have been instituted on any earlier date.'

22. It was further pointed out that in the instant case for State the period of limitation under Article 112 of Indian Limitation Act was 30 years as the State of U. P. is the plaintiff in the case and so the amendment sought was well within 30 years of accrual of cause of action which arose against M/s. Indian Rayon Corporation Ltd on 18-10-1976.

23. Next authority relied upon has been reported in Kannangara Ismail v. Palayat Kappadakkal Pavu Amma : AIR1955 Mad644 . The facts were as below : --

'A suit was filed against certain defendants who were dead at the time of filing it. The court in ignorance of that fact and on the assumption that they were alive on the date of the suit ordered their legal representatives to be brought on record on the application of the plaintiff. The suit was not time-barred as against the legal representatives on the date of application for impleading them as legal representatives. A decree was passed against these new defendants'

It was held :

'That the plaint could be considered as freshly instituted against the new defendants on the date when the application for impleadment was filed and hence the decree could not be said to be void ab initio. Case law referred.'

24. On behalf of respondent it was pointed out that Sri Jagdish Swaroop, learned counsel for the revisionists who argued this revision before me in his Book '[Companies Act, 1956](#)' 2nd Edition, Vol. I, at page 1003 himself observed :---

'The dissolution of a legal entity as a company is akin to the death of a living person, Salton v. New Beeston Cycle Co., (1900) 1 Ch. 43 : 69 LJ Ch 20(24). On its dissolution the company ceases to exist. Coxon v. Gorst (1891) 2 Ch. 73 : 60 LJ Ch 502 (503); Travancore National and Quilon Bank Ltd. In Re AIR 1939 Mad 318 (332).'

25. Learned counsel for the respondent also referred to Narendra Bahadur Tandon v. Shanker Lal reported in : [1980]2SCR821 which posited : --

'After the Company is dissolved the liquidator cannot thereafter claim to represent the Company and execute a registered deed of sale. Once the Company is dissolved it ceases to exist and the liquidator cannot represent a non-existing Company. If the liquidator is to discharge any duty or perform any function on behalf of the dissolved Company he should have express statutory authority. The Companies Act, 1913 contained no provision enabling the liquidator to do any act on behalf of dissolved Company. Section 209-H of the Companies Act 1913 enjoined the liquidator as soon as the affairs of the Company were wound up to make up an account of the winding up and to call a general meeting of the Company and a meeting of the creditors for the purpose of laying the accounts before the meetings. The only duty cast upon the liquidator thereafter was that under Section 244-B the liquidator should on the dissolution of the Company pay into the Reserve Bank of India, to the credit of the Central Govt. in an account called the Companies Liquidation Account any money representing unclaimed dividend or any undistributed assets in his hands on the day of dissolution. No other duty was stipulated to be performed by the liquidator under the provision of the Companies Act, 1913, after the dissolution of the Company. : AIR1967 All405 affirmed.'

26. Next reliance was also placed upon Hira Lal Patni v. Kali Nath, reported in : [1962]2SCR747 relating to an objection regarding territorial jurisdiction raised in executing Court. It Was held that a decree against a dead person was a nullity as the court which passed the decree was lacking an inherent jurisdiction.

27. The next authority relied upon on behalf of the respondent has been reported in : AIR1934 All25 , Bala Prasad v. Radhey Shiam. It was observed :--

'Where a suit is filed against several defendants, one of whom was dead at the time, the suit cannot be considered to have been instituted against the dead person, but it cannot be said, that there is no validly instituted suit against any one. In such a case the court can exercise all the powers which the Civil P. C. confers on it as regards addition of parties and amendment of the plaint.'

28. This authority helps the revisionist rather than the respondent.

29. Thus the contention was that since the defendant Company has been dissolved now so it could not be sued in any court.

30. Reliance was further placed upon C. Muttu v. Bharath Match Works, Sivakasi, reported in AIR 1964 Mys. 293.

31. It appears that the petitioner in that case filed a suit against one P. K. Periaswamy Nadar, proprietor, Bharath Match Works, Sivakasi, on 31-7-1958, for recovery of the sum of Rs. 974.49 NP with future interest and costs, in the court of II Addl. Subordinate Judge, South Kanara, Mangalore. Subsequently it was found that P. K. Periaswamy Nadar the defendant had died on 1-6-1958, that is, long prior to the date of the filing of the suit. The Petitioner, therefore, 'made an application under Order 22 Rule 4 and Section 151 of the C.P.C. on 19-8-1958 and prayed for permission to amend the plaint by deleting the name of P. K. Periaswamy Nadar and substituting the name of S. Thangamani Animal in the cause title of the plaint and other amendments were also sought as a consequence of deletion aforesaid. The Subordinate Judge allowed the application.

32. Newly added defendant filed a written statement raising several contentions. It was inter alia contended that as the sole defendant against whom the suit was originally instituted was dead before the suit was filed so no amendment of the plaint should have been allowed. It was held : --

'A suit against a dead person is a nullity. Where it is later on discovered that the person against whom the suit was filed was dead when it was filed, no amendment can be allowed for substitution of another person : [1962]2SCR747 Relied on.'

33. Thus it is obvious that that was a case against a dead person and not against defunct Company and is clearly distinguishable.

34. I have carefully considered all these submissions. None of these authorities cited by the parties before me contemplates a case of amalgamation under Section 394(2) of the Companies Act. It is true that after dissolution, a defunct

Company is akin to a dead person but it does not mean that its position is exactly that of a dead person.

35. It has been provided under Section 560 of the Companies Act that it was open to the Company, or any member or creditor of the defunct Company before the expiry of 20 years from the publication in the Official Gazette of the notice aforesaid, to raise objection against the striking off the name of the Company and the Court could revive the Company. Such revival of a dead person in flesh and blood could not be possible and thus it shows the difference between a dead person and a juristic person. Section 34(2) of the Companies Act contemplates perpetual succession of the Company. It is sometimes said that a Corporation is an immortal as well as invisible and intangible thing. A Company as soon as it is registered becomes a body corporate having perpetual succession which only means that the rights and privileges of the Company would not determine or vary upon the death or change of any of the individual members of the company but would continue so long as the company endures and is not dissolved in accordance with the provisions of the Act.

36. It is further significant to note that plaintiff was not a party to the amalgamation of the Company. It was laid in the leave to amend that despite the service of notice plaintiff was not informed earlier by the defendant about this amalgamation but the plaintiff learnt the same on 11-9-1978. The liability of the defendant related to that period prior to its amalgamation. So in order to avoid any legal complication the plaintiff was seeking amendment to the plaint.

37. It is notable that the liability of defendant was not under law of tort but under law of contract and the court has to go into the equitable considerations also while deciding such applications when plaintiffs were not blameworthy and M/s Indian Rayon Corporation Ltd was necessary party to be added as a defendant under Order 1, Rule 10, Sub-rule (2) of the Civil P. C. as its presence was necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions in suit, that Corporation should have been impleaded as a defendant in order to avoid duplication of the proceedings. If the suit was not maintainable against M/s Jaya Shree Textile & Industries Ltd. it would fail against

M/s. Jaya Shree Textile & Industries Ltd. but it does not mean that the court had no jurisdiction in these proceedings to allow the leave to amend.

38. I am in respectful agreement with the view as propounded in *Khaja Begum v. Gulam Mohiuddin* reported in : AIR 1976 AP65 (supra) and *Bala Prasad v. Radhey Shyam*, reported in : AIR 1934 All 25 (supra) which laid down that even when a suit is filed against a dead sole defendant, the suit was not void ab initio but the legal representative of the deceased could be substituted if substitution is made within the limitation period for the suit in exercise of the powers conferred by the Civil P. C. on the courts as regards addition to parties and amendment of plaint.

39. If the defendant was treated as a dead person it could not have successfully raised an objection against joinder of the transferee Company which was under a statutory obligation to wipe out the liability of the transferor Company. Such act of defendant was simply dishonest and unjust.

40. In this view of the matter, I find that it is just and equitable to allow the revision.

41. In the result, the revision is allowed. Leave to amend paper No. 22 Kha-1 is allowed on payment of Rs. 1000/- as costs to the contesting defendant by plaintiff. Costs of this Court shall be made easy. This order is subject to the payment of the aforesaid sum of Rs. 1000/- to the contesting defendant in the court below within three months of the receipt of the record in that Court. In case of default in the aforesaid payment of Rs. 1000/- the impugned order shall stand and this order shall not operate. Stay order dt. 20-7-1981 is vacated herewith. Send the record forthwith to the court below for a quick despatch.

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