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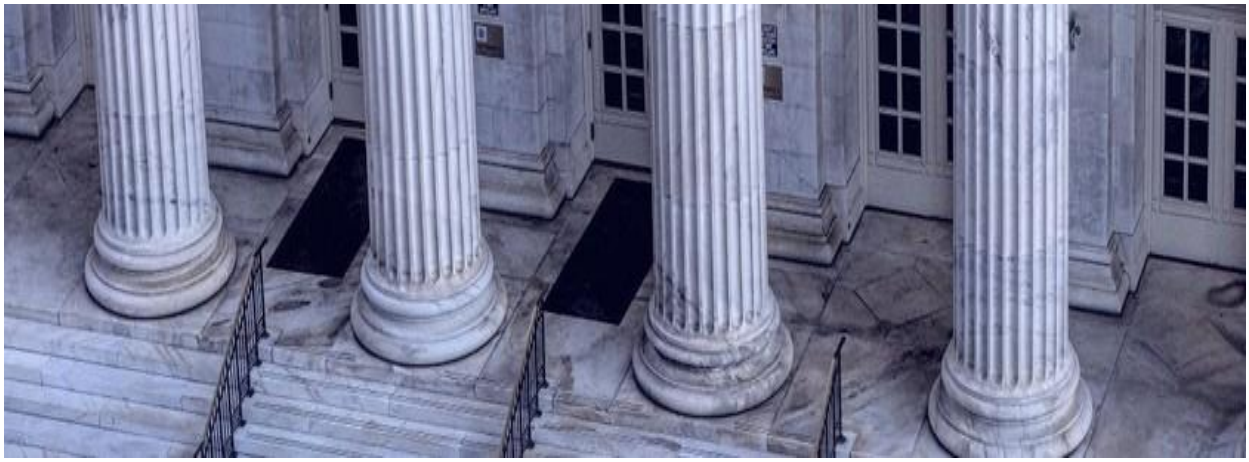
Between the lines...

A BRIEFING ON LEGAL MATTERS OF CURRENT INTEREST



KEY HIGHLIGHTS

* **Bombay High Court:** Arbitration clause can be invoked by assignee of rights under contract.

* **NCLT:** Dissenting secured creditor cannot be treated higher than other creditors under Section 53 of the IBC just because they enjoy security interest.

* **Bombay High Court:** "One-ness of interest"- the touch-stone for defendant to be transposed as plaintiff in case of part abandonment of suit claim.

I. Bombay High Court: Arbitration clause can be invoked by assignee of rights under contract.

The High Court of Bombay ("**High Court**"), by a judgment pronounced on March 1, 2023, in the matter of ***Siemens Factoring Private Limited v. Future Enterprises Private Limited [Commercial Arbitration Application No. 174 of 2022]*** has held that assignee, having stepped into the shoes of the assignor, can invoke arbitration clause in terms of the Arbitration and Conciliation Act, 1996 ("**Arbitration Act**").

Facts

Future Enterprises Private Limited ("**Respondent**") is engaged in a variety of household, consumer and fashion products and operates retail stores throughout India. The Respondent had entered into a Master Rental Agreement dated January 27, 2020 ("**MRA**") with LIQ Residuals Private Limited ("**LIQ**") for renting equipment, whereby the Respondent, in the capacity of renter, would forward a request to LIQ for renting an equipment and LIQ would get the equipment delivered to the Respondent.

Further, the Respondent executed rental schedule for distinct periods on February 14, 2020, February 28, 2020 and March 4, 2020, comprising of details of the equipment to be rented out and rental payable by the Respondent to LIQ. Pertinently, the signed rental schedule provided that it must be signed by the authorized signatory of the Respondent. Further, by virtue of entering into the MRA, the Respondent acknowledged that by forwarding a rental schedule for acceptance by LIQ, it shall pay the supplier towards the equipment supplied by it.

Subsequently, by virtue of distinct notification of assignments contained in letters dated February 17, 2020, February 20, 2020 and March 4, 2020, LIQ informed the Respondent, about the aforementioned assignment of rental payments in favour of Siemens Factoring Private Limited ("**Applicant**"), a non-banking financial company, and the assignment was acknowledged by the Respondent.

As per the Applicant, pursuant to the aforementioned assignment, a sale of receivable agreements was executed between the Applicant and LIQ on February 12, 2020, February 27, 2020 and February 29, 2020. In terms of the afore-mentioned receivable agreements, LIQ could sell the receivables under the MRA and provide collateral securities to the Applicant. Consequently, the Applicant was assigned the receivables by LIQ, payable to them under the MRA executed with the Respondent.

Further, LIQ also executed irrevocable power of attorney in favour of the Applicant. Hence, according to the Applicant, it was authorized to exercise all its rights and remedies under the MRA, including the recovery of dues from the Respondent and for enforcement of underlying securities and exercise their rights as the owner of the equipment including sale of the equipment.

Thereafter, when dispute arose between the Applicant and the Respondent, the Applicant issued a legal notice dated June 21, 2022 upon the Respondent, for payment of a sum of INR 4,88,06,155/- (Rupees Four Crores Eighty-Eight Lakhs Six Thousand One Hundred and Fifty-Five Only) as on June 20, 2022 along with applicable interest thereon. However, according to the Applicant, the Respondent willfully neglected and failed to comply with the demands raised by the Applicant in the aforementioned legal notice. In view thereof, the Applicant approached the High Court under Section 11 (*Appointment of arbitrators*) of the Arbitration Act, seeking appointment of a sole arbitrator to adjudicate the dispute between the Applicant and the Respondent.

Issue

Whether the assignee of rights under contract is legally entitled to invoke arbitration under the Arbitration Act, considering that the assignee was not a party to the original agreement between the assignor and the alleged defaulter.

Arguments

Contentions raised by the Applicant:

On the issue as to whether arbitration clause can be invoked by assignee of rights under contract, the Applicant referred to and relied upon the MRA executed between the Respondent and LIQ, wherein LIQ was defined to mean and include its successors in business, assigns and so on. Further, the MRA specifically covered reference in agreement or document as novated, supplemented or replaced from time to time. The Applicant further submitted that in terms of the MRA, the equipment financed under the MRA were to remain the property of LIQ and/or its assigns. Further, the Applicant also drew the attention of the High Court to Clause 8 of the MRA titled 'Assignment and Sub Letting' and Clause 27 of the MRA titled 'Assignment and Agency'.

Further, it was submitted by the Applicant that, basis perusal of the notification of assignment letter, even though not signed by the Applicant, it is clear that the Applicant has stepped into the shoes of LIQ, thereby leading to assignment of all liabilities and entitlements in terms of the MRA and also covers the right to invoke arbitration.

Contentions raised by the Respondent:

The Respondent opposed the relief sought by the Applicant on the ground that there is no valid arbitration agreement between the Applicant and the Respondent, in the absence of which, the Applicant is not entitled to invoke arbitration under the Arbitration Act. Further, the Respondent submitted that it cannot be assumed that the Applicant, which is an assignee of LIQ, has accorded its consent to the arbitration agreement. It was further submitted that since the Applicant has not signed the assignment letter containing an arbitration clause, the arbitration cannot be invoked by the Applicant, considering that Section 7 (*Arbitration agreement*) of the Arbitration Act necessitates an agreement in writing between the parties, from which, the intention to refer the disputes to arbitration must be evident. In view of the aforesaid contention, the notification of assignment in favour of Applicant does not amount to a binding arbitration clause. In other words, the Respondent's submission is that in the absence of an existing arbitration agreement between the Applicant and the Respondent, the Applicant could not have invoked arbitration, and hence, the relief of appointment of sole arbitrator under Section 11 of the Arbitration Act cannot be granted.

Observations of the High Court

The High Court examined the notification of assignment letter and *inter alia* observed that the notification of assignment also consists of an arbitration clause, similar to the arbitration clause as stipulated in the MRA, except that the arbitration clause provided in the notification of assignment letter contemplates appointment of sole arbitrator by the Applicant. The High Court further observed that notwithstanding the contention raised by the Respondent that the notification of assignment letter which

is not signed by the Applicant does not amount to a binding arbitration agreement in terms of Section 7 of the Arbitration Act; however, basis perusal of the MRA, it is clear that LIQ shall, on one hand, mean and include its successors in business, assigns and so on and the Respondent on the other hand. Hence, the arrangement between the parties would extend to their executors, administrators, substitutes, successors and permitted assigns. Hence, upon perusal of the clauses of MRA and the notification of assignment which was duly communicated to the Respondent and acknowledged by it, the High Court observed that the Applicant has stepped into the shoes of LIQ and stands substituted in its place. Further, by virtue of assignment, the Applicant is entitled to enforce all rights, discretions and remedies of the LIQ, as assigned to it, in respect of repayment of lease rental.

Further, on the issue as to whether the Applicant can invoke the arbitration when the arbitration clause contained in the notification of assignment is not signed by the Applicant, the High Court observed that the Applicant, by virtue of being an assignee, has stepped in the shoes of LIQ under the MRA, and is therefore entitled to invoke arbitration. Further, on the aspect of existence of a valid arbitration agreement between the parties, the High Court observed that an arbitration agreement can be a separate agreement between the parties agreeing that the disputes and difference arising between themselves to be referred for arbitration or an arbitration agreement may be in form of a clause contained in the agreement itself.

Therefore, the High Court dismissed the contention of the Respondent that the Applicant is not entitled to invoke arbitration because the arbitration clause comprised in an assignment document does not bind the Applicant, especially when the Respondent does not dispute the assignment of rights in favour of the Applicant. Hence, considering that the rights are specifically assigned in favour of the Applicant, the arbitration clause permitting the parties to refer the disputes for arbitration, can be invoked by the Applicant. Further, the High Court observed that merely because the notification of assignment is not signed by the Applicant, cannot be a bar against the Applicant from invoking arbitration.

Further, the High Court observed that the case of ***Vishranti CHSL v. Tattva Mittal Corporation Private Limited [ARBAP No. 3311 of 2020]***, which was relied upon by the Respondent to support its contention that it cannot be assumed that the Applicant had consented to the arbitration agreement, is not applicable to the facts and circumstances of the present case. Furthermore, the High Court analyzed an earlier decision of the High Court, in the matter of ***DLF Power Limited v. Mangalore Refinery and Petrochemicals Limited [2016 SCC OnLine Bom 5069]*** and arrived at the conclusion that an arbitration agreement can be assigned and particularly, in those cases where there is a specific provision for assignment of rights and liabilities and such assignment was duly accepted by the Respondent, the intention of the parties towards implementation of the rights, obligations, duties and benefits of the original contract is clearly evident.

The High Court observed that in the clauses of the MRA, it was permissible for LIQ to assign its rights under the MRA, in favour of any bank or financial institution, and the Respondent would acknowledge the assignee as the new owner of the equipment. Further, the High Court reiterated its observation that whether the notification of assignment letter was signed or not cannot be a determinative factor to decide whether the Applicant can invoke arbitration. Further, the High Court observed that the arbitration clause contained in the letter of assignment clearly stipulates that the Applicant has stepped into the shoes of LIQ and is therefore entitled to exercise and enforce all rights, discretions and remedies of the LIQ as assigned to them including the rights in respect of the payment of lease rental. Further, the High Court also observed that the letter of assignment was forwarded by LIQ and acknowledged by the Respondent, which amounts to acceptance that the Applicant has now stepped into the shoes of LIQ.

In view of the aforementioned facts and circumstances, the High Court arrived at the conclusion that from the intention of the parties, it can be clearly inferred that pursuant to assignment of rights and liabilities by LIQ in favour of the Applicant, the right to invoke arbitration also stands assigned. Therefore, when dispute arose between the Applicant and the Respondent with respect to payment of lease rental, the Applicant was entitled to invoke arbitration. Therefore, the High Court rejected the contention of the Respondent that there is no arbitration agreement between the Applicant and the Respondent and observed that there was no need for a separate execution of arbitration agreement the Applicant and the Respondent, considering that all the rights including the right to invoke arbitration had already been assigned by LIQ in favour of the Applicant and the same was acknowledged by the Respondent.

Decision of the High Court

In view of the abovementioned observations, the High Court was pleased to appoint a sole arbitrator to adjudicate the disputes having arisen between the parties.

VA View:

By way of the present judgment, the High Court has clarified a pertinent question of law that the Respondent cannot oppose the appointment of arbitrator(s) by resorting to the defense that the assignee of rights under contract cannot invoke arbitration under the Arbitration Act, merely because the assignee was not a party to the original agreement between the assignor and the alleged defaulter.

This judgment may be considered an important precedent which will preclude any defaulting party under a contract from trying to wriggle out of its legal obligations/liabilities, by opposing the appointment of arbitrator(s) and commencement of arbitration proceedings, and therefore secure the ends of justice and equity.

Pertinently, this judgment also clarifies the legal position that once the legal rights under a contract, including the right to invoke arbitration, has been assigned in favour of the assignee and the same has been acknowledged by the other party to the contract, there is no legal requirement for execution of a separate arbitration agreement between the assignee and the such other party.

II. NCLT: Dissenting secured creditor cannot be treated higher than other creditors under Section 53 of the IBC just because they enjoy security interest.

The National Company Law Tribunal, Kolkata ("**NCLT**") has, in its order dated March 1, 2023 ("**Order**"), in the matter of ***ICICI Bank Limited v. Pratim Bayal and Another [Interlocutory Application (IB) No. 471/KB/2022 in Company Petition (IB) No. 2078/KB/2019]***, held that just because a creditor enjoys security interest, it cannot be treated higher than other creditors who have financed the corporate debtor.

Facts

ICICI Bank Limited ("**Applicant**") was a secured financial creditor of BKM Industries Limited ("**Corporate Debtor**"). Pursuant to the admission of the Corporate Debtor into corporate insolvency resolution process, the Applicant submitted its claim for an amount of INR 15.52 Crores with the interim resolution professional on January 14, 2021. The claim of the Applicant was admitted.

The resolution plan ("**Plan**") that the resolution professional of the Corporate Debtor, Pratim Bayal ("**Respondent**") had accepted and recommended to the committee of creditors ("**CoC**") treated the Applicant at par with the other creditors who were eligible to get the realizations from the Plan in terms of Section 53 (*Distribution of assets*) of the Insolvency and Bankruptcy Code, 2016 ("**IBC**").

Aggrieved by the Plan, the Applicant (being the dissenting creditor) filed the present interlocutory application ("**IA**") before the NCLT, seeking directions on the Respondent to consider the priority of distribution of the realisations entailed in the Plan and to specifically take into account the priority assigned to the dissenting financial creditors, who were also secured creditors.

Issue

Whether dissenting secured creditor can be treated higher than other creditors under Section 53 of the IBC, merely because they enjoy security interest.

Arguments

Contentions of the Applicant:

The Applicant submitted that it was the sole term lender having first *pari passu* charge over the movable and immovable properties of the Corporate Debtor situated at Medak, Andhra Pradesh and Silvassa, Dadra and Nagar Haveli, as security for its outstanding dues vis-à-vis the Corporate Debtor.

The Applicant contended that at the time of determining the calculation methodology for the creditors proportional share, the interest of the Applicant, who had a security interest in its favour, had not been taken into consideration by the Respondent, and that the Applicant had been treated at par with the other creditors who were eligible to get their realisations from the Plan in terms of Section 53 of the IBC.

The Applicant submitted that it had been grossly prejudiced by the Plan under which it had been treated at par with the other creditors, thereby making it eligible to get a far lesser value of the proceeds of the Plan than it otherwise would have been entitled to under the IBC. Moreover, the security interest created in favour of the Applicant was being taken away by way of the Plan.

The Applicant also placed emphasis on Section 30(2)(b) (*Submission of resolution plan*) of the IBC which *inter alia* provides for payment of debt to financial creditors who do not vote in favour of the resolution plan, in such a manner as may be specified by the Insolvency and Bankruptcy Board of India ("**IBBI**"), but which cannot be less than the amount paid to such creditors in accordance with Section 53(1) of the IBC, in the event of liquidation of the corporate debtor.

Further, the Applicant contended that since there are no provisions under the IBC that abrogate security interest during insolvency resolution, its principles would be governed by Section 48 (*Priority of rights created by transfer*) of the Transfer of Property Act, 1882, under which the claim of the first charge holder prevails over the claim of the second charge holder.

The Applicant also alleged that there would be no incentive for a secured creditor to opt for the resolution of a corporate debtor, if the priority of a secured creditor having first charge as its security

interest is ignored. The secured creditor would rather opt for the liquidation of the corporate debtor by enforcing its security interest outside the purview of the IBC, which would in turn, not only defeat the primary objective of the IBC, that is, maximization of the value of assets of a corporate debtor through insolvency regime in a time bound manner, but would also result in the loss of essence of the IBC.

Contentions of the Respondent:

The Respondent submitted that the Plan was approved by 78.79% of the CoC in their commercial wisdom and an application for approval of the Plan had already been filed by the Respondent before the NCLT. The Respondent submitted that the Applicant's contention regarding the security interest created in the Applicant's favour being taken away by way of the Plan was legally flawed in light of Regulation 37(1)(d) (*Resolution plan*) of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, under which a resolution plan can include satisfaction or modification of any security interest.

The Respondent further submitted that while the Applicant had disputed the methodology of computation of its proportional share of the liquidation value receivable under Section 30(2)(b) of the IBC read with Section 53(1)(b)(ii) of the IBC; however, Section 30(2)(b) of the IBC read with Section 53(1) of the IBC only presupposes a notional relinquishment of security interest by a dissenting financial secured creditor, to the liquidation estate as per Section 52(1)(a) (*Secured creditor in liquidation proceedings*) of the IBC.

Section 30(2)(b) of the IBC does not provide any value that could notionally be realized by the Applicant if it were to proceed under Section 52(1)(b) of the IBC. Section 52 of the IBC is merely invoked in Section 53(1) of the IBC insofar as a relinquishment of security interest is governed by Section 52(1)(a) of the IBC. Any notional realisation by the Applicant as per Section 52(1)(b) of the IBC and further subsections of Section 52 of the IBC is irrelevant in the context of determining entitlement of a dissenting financial creditor under Section 30(2)(b) of the IBC.

The CoC had worked out the distribution of proceeds in accordance with the law and that there was no reason for any misapprehension on this account. Moreover, the Applicant was being paid a sum of money to achieve compliance with Section 30(2)(b) of the IBC, which stipulates a minimum payment of the liquidation value receivable by such dissenting secured financial creditor under Section 53(1) of the IBC.

The Respondent contended that inter-se priority of charges held by the secured creditors is irrelevant for the determination of pay-out to secured creditors under Section 53(1) of the IBC and to support its argument, the Respondent placed reliance on the case of ***Technology Development Board v. Anil Goel [Company Appeal (AT) (Insolvency) No. 731 of 2020]*** wherein the National Company Law Appellate Tribunal opined that "*the view taken by the Adjudicating Authority on the basis of judgment of Hon'ble Apex Court in "ICICI Bank vs. Sidco Leathers Ltd. (supra)" (which is pre-IBC), ignoring the mandate of Section 53 of I&B Code which has an overriding effect and came to be enacted subsequent to the aforesaid judgment rendered by Hon'ble Apex Court explicitly excluding operation of all Central and State legislations having provisions contrary to Section 53 of I&B Code, is erroneous and cannot be supported. For the foregoing reasons, the impugned order holding that the inter-se priorities amongst the Secured Creditors will remain valid and prevail in distribution of assets in liquidation cannot be sustained*."

Reliance was also placed by the Respondent on the case of ***India Resurgence ARC Private Limited v. M/s. Amit Metaliks Limited and Another [2021 SCC Online SC 409]*** ("**India Resurgence Case**") wherein the Hon'ble Supreme Court of India opined as that: *"Thus, what amount is to be paid to*

different classes or subclasses of creditors in accordance with provisions of the Code and the related Regulations, is essentially the commercial wisdom of the Committee of Creditors; and a dissenting secured creditor like the appellant cannot suggest a higher amount to be paid to it with reference to the value of the security interest."

Observations of the NCLT

The NCLT observed that the IA pertained to the prayer of the Applicant to treat it at par with the assenting financial creditors as they were also in the category of secured financial creditors.

The NCLT observed in the India Resurgence Case that, *"It needs hardly any emphasis that if the proposition suggested on behalf of the appellant were to be accepted, the result would be that rather than insolvency resolution and maximization of the value of assets of the Corporate Debtor, the processes would lead to more liquidations, with every secured financial creditor opting to stand on dissent. Such a result would be defeating the very purpose envisaged by the Code; and cannot be countenanced. We may profitably refer to the relevant observations in this regard by this Court in Essar Steel as follows: -- "Indeed, if an "equality for all" approach recognizing the rights of different classes of creditors as part of an insolvency resolution process is adopted, secured financial creditors will, in many cases, be incentivized to vote for liquidation rather than resolution, as they would have better rights if the corporate debtor was to be liquidated rather than a resolution plan being approved. This would defeat the entire objective of the code which is to first ensure that resolution of distressed assets takes place and only if the same is not possible should liquidation follow."*

The NCLT opined that just because a creditor enjoys the protection of a security interest, he cannot be treated any higher than the other creditors who may also have financed the Corporate Debtor while not enjoying any kind of protection in the shape of a security interest. Moreover, such creditors have consistently run the risk of not getting paid their dues in the shape of realizations from the security interest or otherwise, for a considerably longer period, while the secured creditor was very happily staying put with the protection of a security interest. If that were to be the case, all secured creditors would want to give a dissenting view to the CoC which would not lead to the maximization of the value of the corporate debtor and thus defeating the very purpose of resolution envisaged under the IBC.

Decision of the NCLT

In view of the aforesaid observations and precedents, the NCLT did not find any reason to interfere with the commercial wisdom of the CoC and accordingly, rejected the IA filed by the Applicant.

VA View:

The NCLT rightly did not interfere with the commercial wisdom of the CoC and based on the current judicial precedents, held that a dissenting secured creditor cannot be treated higher than other creditors under Section 53 of the IBC just because they enjoy security interest.

The NCLT has rightly relied on the India Resurgence Case and re-emphasised that entitlements extended to the creditors based on the value of security would result in more liquidation with every secured financial creditor opting to dissent, as against insolvency resolution and value maximization of the assets of the corporate debtor, thereby defeating the very purpose envisaged under the IBC.

Therefore, through this Order, the NCLT has upheld the primary objective of the IBC, being value maximization of the assets of the corporate debtor, and insolvency resolution, as against liquidation.

III. Bombay High Court: "One-ness of interest"- the touch-stone for defendant to be transposed as plaintiff in case of part abandonment of suit claim.

The High Court of Bombay ("**High Court**"), by a judgment pronounced on March 20, 2023, in the matter of ***Sou. Nalini @ Madhavi Madhukar Murkute v. Shri Deepak Manohar Gaikwad and Others [Writ Petition No. 10012 of 2019]*** ("**Petition**"), has held that a defendant whose interest is not identical with the plaintiff, cannot be permitted to be transposed as plaintiff in case of part abandonment of suit claim by the plaintiff.

Facts

The Petition under Article 226 (*Power of High Courts to issue certain writs*) and Article 227 (*Power of superintendence over all courts by the High Court*) of the Constitution of India, was filed by Sou. Nalini @ Madhavi Madhukar Murkute ("**Plaintiff/ Petitioner**") in special civil suit no. 2375 of 2011 ("**Suit**"), challenging an order dated June 6, 2019 passed by the Joint Civil Judge, Senior Division, Pune in an application filed under Order 23 Rule 1A of the Civil Procedure Code, 1908 ("**CPC**"). By the said order, the application came to be allowed permitting Supriya Dilip Gaikwad ("**Defendant No. 6/ Respondent**") who is the sister of the Plaintiff to be transposed as plaintiff in the Suit.

The Suit was filed by the Plaintiff seeking partition and separate possession in respect of various Suit properties. In the Suit, in respect of a portion of the Suit properties, it was alleged that the Defendant No. 6 executed a release deed and power of attorney in favour of her brothers, Deepak Manohar Gaikwad ("**Defendant No. 1**") and Shrikant Dilip Gaikwad ("**Defendant No. 3**") and based on those documents, the Defendant Nos. 1 and 3 executed certain documents in favour of the developer ("**Defendant No. 7**") for grant of development rights. The Defendant No. 6 filed her written statement, claiming equal right and share in the Suit properties along with the Plaintiff and in that way, supporting the claim of the Plaintiff. It was further pleaded by Defendant No. 6 that her signatures were taken on blank papers and she was taken to a government office under undue influence and with a misrepresentation that certain documents were required to be executed for entering the names of all the heirs to the ancestral property. Further, she contended that her signatures were misused to create false and fabricated documents.

The trial court granted interim injunction in respect of few of the Suit properties against Defendant Nos. 1 to 7, against which order, appeals were filed by the Defendant No. 7, Plaintiff and Defendant Nos.1 to 5. In those appeals, Plaintiff and Defendant Nos. 1 to 5 and Defendant No. 7 entered into a compromise. It is the case of the Plaintiff that during that compromise, Defendant Nos. 1 & 3 acted as power of attorney holder of Defendant No. 6. The said compromise recorded that interim injunction would not apply to the said portion of suit property. Accordingly, the Plaintiff undertook to withdraw the said suit in respect of the said portion of suit property and to hand over vacant and peaceful possession thereof to Defendant No. 7 for joint development. Defendant No. 7 was permitted to delete Defendant No. 6 at his own risk from his appeal from order.

Defendant No. 6 filed a review petition and challenged the said compromise, which according to her was executed behind her back. The review petition was disposed of with a clarification that the said order recording compromise would not be binding on Defendant No.6 and would not come in her way of agitating her rights in the suit properties.

Thereafter the Defendant No. 6 filed the application in the Suit, seeking transposition as Plaintiff in the Suit. It was opposed by the Plaintiff contending *inter alia* that Defendant No. 6 was trying to get a declaration in respect of the registered release deed, which relief was time barred. It was contended that whatever share the Defendant No. 6 was entitled to, would be determined by the Court in the partition Suit and as such, there was no need for her transposition. The application was allowed on June 6, 2019 by the trial court against which, the Petition came to be filed.

Issue

Whether a defendant whose interest is not identical with the plaintiff, can be permitted to be transposed as plaintiff in case of part abandonment of suit claim by the plaintiff.

Arguments

Contentions raised by the Petitioner:

It was contended by the Petitioner that the Defendant No. 6 was transposed in the Suit when there was conflict of interest in respect of some of the Suit properties. The interests of the Plaintiff and Defendant No. 6 were not identical and hence, transposition could not have been allowed.

It was urged that the provision of Order 23 Rule 1A of CPC was not applied in its proper perspective to the facts of the case. Here the interests of the parties were distinct as the Petitioner was not interested in the portion of the Suit property in which the Defendant No. 6 was interested, in respect of which portion, the Defendant No. 6 could continue with the dispute. Inasmuch as the portion of the Suit properties in which the Petitioner was concerned, there was no dispute, as the parties had entered into a compromise in respect thereof. Defendant No. 6, therefore, could pursue her claim against the rest of the defendants by way of a separate proceeding where various issues, including the issue of limitation could be decided. The Petitioner was not required to be a party to the said proceeding. Hence, there was a misjoinder of cause of action and misjoinder of parties, in allowing the Defendant No. 6 to be transposed as a Plaintiff in the Suit. It was therefore, urged that the impugned order be set aside.

The Petitioner relied upon the judgment of ***Kashibai Waman Patil (D) Through L.Rs. v. Shri Taukir Ahmed Mohammed Hanif Khan and Others [2015(6) All MR 340]*** ("**Kashibai Case**") to buttress her arguments**.**

Contentions raised by the Respondent:

The Respondent contended that the compromise in the appeal was entered into behind her back and as such she has no option but to file the application for her transposition as a Plaintiff.

It was further pointed out that the Hon'ble court while disposing off the review petition filed by the Respondent, wherein, it was specifically recorded that the compromise would not be binding on the Respondent with respect to a portion of the Suit property in which she is interested. This was on the premise that Respondent was not present while the compromise was entered into. It was thus, clarified, that the compromise would not come in the way of the Respondent to agitate her right in the Suit properties, including the disputed portion.

It was argued that the ingredients of Order 23 Rule 1A of CPC were satisfied and the only way to protect the interest of the Respondent in the Suit was to transpose her in the Suit. Order 23 Rule 1A of CPC makes a reference to 'withdrawal or abandonment of suit by Plaintiff under Rule 1' and hence, even in case of partial withdrawal of the Suit or part abandonment of Suit, the rule would apply and transposition could be ordered.

It was lastly urged that if the Respondent was not allowed to be transposed to prosecute the Suit, her interests would be compromised forever. Therefore, it was urged that the impugned order be not

interfered with. In support of her argument, the Respondent relied upon the judgment of ***R. Dhanasundari alias R. Rajeswari v. A.N. Umakanth and Others [(2020) 14 SCC 1]*** ("**R. Dhanasundari Case**").

On the other hand, it was argued by the Defendant No. 7 that the Plaintiff had given up her dispute in respect of the portion of the Suit property which was taken by the Defendant No. 7 for development from the brothers of Defendant No. 6 acting for themselves and on behalf of the Defendant No. 6. Thus, there was conflict of interest between the Plaintiff and Defendant No. 6. Hence, the Defendant No. 6 could not be transposed as the Plaintiff. It was further agitated, that Defendant No. 6 was attempting to dispute a registered document, which claim was *ex-facie* time barred. Hence, Defendant no. 6 ought to file a separate suit to be decided on its own merits.

Observations of the High Court

The High Court observed that the Suit was filed by one sister against two brothers, their wives, mother and remaining sister, along with third parties, purchasers, etc., seeking partition of the Suit properties. Later, the Plaintiff and her brothers along with the mother and the developer had chosen to compromise and to let go their dispute about the portion of the Suit property in which rights of development were given to the developer. The same was evident from the undertaking submitted by the Plaintiff, where she agreed to withdraw the Suit in respect of the said portion given to the developer. It was further agreed that the interim injunction granted by the trial court would not operate in respect of the said portion of the property.

In respect of the very same portion of the Suit property, the Defendant No. 6 has made serious allegations of her signatures being taken on blank paper on misrepresentation and undue influence and dispute as to the transfer in favour of the developer. These are separate and distinct causes of action to Defendant No. 6. The Court further went on to observe that, with such diametrically opposite interests claimed by Defendant No. 6 on one hand and the Plaintiff, it was impossible to accept that the interest of Defendant No. 6 was identical with the interest of the Plaintiff.

The High Court took note of the provision of Order 23 Rule 1A of the CPC, which when read in light of paragraphs 12 and 13 of the judgment of R. Dhanasundari Case would make it clear that because the interest of the existing Plaintiff as also Defendant Nos. 3 to 6 in that matter was found as "one and the same" against contesting Defendant Nos.1 and 2 therein, the transposition order under Order 23 Rule 1A of CPC was sustained. Therefore, the touch-stone was "one-ness of interest". The other difference in the facts of the present case was that, unlike R. Dhanasundari Case, in the present case, the Petitioner has not fully abandoned her claim.

The High Court went ahead to further differentiate between the facts of the present case and the facts in the judgment of Kashibai Case and in ***Jethiben v. Maniben [AIR 1983 Guj 194]*** and once again came to the conclusion that the said judgments would not support the case of the Defendant No. 6 as her interest was not identical to the interest of the Plaintiff.

In view of the aforesaid discussion, the High Court held that transposition of a defendant can be permitted in case of part abandonment of the claim by the plaintiff, if the defendant seeking transposition has identical interest with the plaintiff vis-à-vis both contesting defendants and subject matter property. If there is a conflict of interest between plaintiff and defendant seeking transposition,

in respect of even one defendant or in respect of even one of the suit property, then transposition of such defendant cannot be permitted.

The reason is that if a Defendant not having identical interest with the plaintiff in the suit is permitted to be transposed in a suit, then it would virtually mean that there will be more than one set of causes being permitted amongst parties in one suit and that will be clearly a mis-joinder of cause of action or a mis-joinder of parties or both. The High Court held that it would be anomalous to allow suit to proceed where one plaintiff wants to let go its dispute against some of the defendants in respect of some of the suit property and at the same time, defendant seeking transposition wants to proceed in respect of same subject property against the same set of defendants.

Finally, the High Court highlighted the flaws in the impugned order by observing that the trial judge had over-looked the key aspect of one-ness of interest amongst Plaintiff and Defendant No. 6 and merely, proceeded on the apprehension of the Defendant No. 6 not being baseless as to the withdrawal of the Suit. Further, the trial judge had wrongly proceeded on the footing that the conduct of the Plaintiff compromising part of the Suit claim with the Defendant Nos. 5 and 7 and filing application for deletion of Defendant No. 7 meant that the Plaintiff was going to withdraw the whole Suit.

Decision of the High Court

In view of the above-mentioned observations, the High Court allowed the Petition by setting aside the impugned order by holding that transposition of a defendant could be permitted in case of part abandonment of the claim by the Plaintiff, provided the defendant seeking transposition has identical interest with the plaintiff vis-à-vis both, contesting defendants and subject matter property. Defendant No. 6 was given liberty to adopt appropriate proceedings for her grievances and claims in respect of the suit properties, including the portion in dispute.

VA View:

By way of the present judgment, the High Court has clarified the position that a defendant cannot be allowed to be transposed as a plaintiff in a Suit where the defendant has failed to establish one-ness of the cause of action and the interest/claim with the plaintiff, against the other defendants.

The same would be applicable even in cases, which are partly withdrawn or abandoned by the Plaintiff, so as to avoid the anomaly of different causes of action and/or different claims being pursued by different parties, in the capacity of plaintiff, against the defendants in the same Suit. If the contrary is allowed, it would lead to actions which are liable to be brought about in separate suits/proceedings being taken in the same suit, further leading to irrational outcomes.

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