Prem Lala Nahata & Anr vs Chandi Prasad Sikaria on 2 February, 2007

Equivalent citations: AIR 2007 SUPREME COURT 1247, 2007 (2) SCC 551, 2007 AIR SCW 1120, (2007) 2 JCR 335 (SC), (2007) 3 CALLT 45, (2007) 3 CTC 101 (SC), (2007) 52 ALLINDCAS 223 (SC), 2007 (3) CTC 101, 2007 (2) SCALE 496, (2007) 1 ALL WC 772, (2007) 102 REVDEC 711, (2007) 1 ALL RENTCAS 698, (2007) 1 CAL HN 105, (2007) 1 CURCC 266, (2007) 1 KER LT 910, (2007) 2 RAJ LW 1294, (2007) 1 RECCIVR 870, (2007) 3 ICC 145, (2007) 2 SCALE 496, (2007) 1 WLC(SC)CVL 753, (2007) 67 ALL LR 166, (2007) 2 CIVLJ 813, (2007) 2 SUPREME 1, (2007) 2 CIVILCOURTC 237, (2007) 2 LANDLR 63, (2007) 2 MAD LJ 1177, (2007) 4 MAD LW 1, (2007) 5 BOM CR 220

Author: P.K. Balasubramanyan

Bench: S.B. Sinha, P.K. Balasubramanyan

CASE NO.:
Appeal (civil) 446 of 2007

PETITIONER:
PREM LALA NAHATA & ANR

RESPONDENT:
CHANDI PRASAD SIKARIA

DATE OF JUDGMENT: 02/02/2007

BENCH:
S.B. SINHA & P.K. BALASUBRAMANYAN

JUDGMENT:

J U D G M E N T (Arising out of SLP(C) No.23272 of 2005) P.K. BALASUBRAMANYAN, J.

Leave granted.

1. The appellants are the plaintiffs in C.S. No. 29 of 2003 filed on the original side of the Calcutta High Court. They are mother and daughter. They together sued the respondent, the defendant, for recovery of sums allegedly due to them from him. Appellant No.1 sought recovery of a sum of Rs. 10,93,863/- with interest thereon and appellant No. 2 sought recovery of a sum of Rs.10,90,849/- with interest. Their claims were based on transactions they allegedly had with the respondent herein, through Mahendra Kumar Nahata, the husband of appellant No.1 and father of appellant No.2. In essence, the claim of appellant No. 1 was that a sum of Rs. 5 lakhs had been lent by her to

the respondent and the same had not been repaid and the same was liable to be repaid with interest and damages. The case of appellant No. 2 was also that she had lent a sum of Rs. 5 lakhs to the respondent and the same along with interest and damages was due to her. It was their case that the transactions had been entered into through Mahendra Kumar Nahata, and that through Nahata, they have had prior dealings with the respondent. They had averred thus in paragraph 4 of the plaint:

> "The said Nahata in his usual course of business was known to the Defendant for many years and sometime in April, 2000 while acting on behalf of the Plaintiffs, the said Nahata at the request of Defendant had duly arranged for two loans of Rs.5,00,000/- to be lent and advanced by each of the Plaintiffs to the Defendant and this Suit has been brought to recover the said loans with interest and special damages arising from the Defendant's failure to repay the said loans within the stipulated date therefor as is stated more- fully hereinafter."

The respondent not having repaid the money and having repudiated their claim by filing suits against them, the suit for recovery of the amounts was being filed.

2. The respondent had earlier filed two suits for recovery of amounts allegedly due from the appellants. Money Suit No. 585 of 2001 was instituted by the respondent against appellant No. 2 herein claiming recovery of certain amounts after setting off the amount of Rs. 5 lakhs taken from appellant No. 2. He had accepted that Rs. 5 lakhs had been paid by the appellant but pleaded that it was not a loan, but it was as part of a business transaction set out in that plaint. The respondent had also filed Money Suit No. 69 of 2002 against appellant No.1 herein for recovery of certain amounts on the same basis and after setting off the sum of Rs.5 lakhs alleged to have been paid by her. The suits were filed in the City Civil Court at Calcutta. The said suits were pending when the appellants together instituted their suit C.S. No. 29 of 2003. Their suit, as noticed, was on the basis that the sums of Rs. 5,00,000/- each paid by them to the respondent were by way of loans.

3. The appellants moved A.L.P. No. 10 of 2003 on the original side of the Calcutta High Court invoking clause 13 of the Letters Patent read with Section 24 of the Code of Civil Procedure (for short "the Code") seeking withdrawal of Money Suit No. 585 of 2001 and Money Suit No. 69 of 2002 for being tried with C.S. No. 29 of 2003 on the plea that common questions of fact and law arise in the suits and it would be in the interests of justice to try and dispose of the three suits together. Though the respondent resisted the application, the court took the view that it would be appropriate in the interests of justice to transfer the two suits pending in the City Civil Court at Calcutta to the original side of the High Court for being tried and disposed of along with C.S. No. 29 of 2003 filed by the appellants. The said order for withdrawal and joint trial became final.

4. While matters stood thus, the respondent herein, the defendant in C.S. No. 29 of 2003, made an application G.A. No. 4458 of 2003 praying that the plaint in C.S. No. 29 of 2003 be rejected under Order VII Rule 11 of the Code on the ground that the cause of action of each of the appellants, the plaintiffs in that suit, did not emanate from any common source and there was no interdependence or nexus between the causes of action put forward by the respective plaintiffs in the suit and that

there was no common foundation for the right to relief claimed by them. It was pleaded that the appellants, the plaintiffs could not have joined as plaintiffs in one suit in terms of Order I Rule 1 of the Code and could not have united their independent causes of action in the same suit in terms of Order II Rule 3 of the Code. It was submitted that there was not only misjoinder of parties but there was also misjoinder of causes of action. It was on this basis that the prayer for rejection of the plaint under Order VII Rule 11(d) of the Code was made. The appellants, the plaintiffs, resisted the application. They contended that the claim of the plaintiffs emanated from the dealings at the instance of Nahata, husband of plaintiff No.1 and father of plaintiff No.2 with the defendant and that there was no defect of misjoinder of causes of action in the suit. They submitted that the plaint was not liable to be rejected under Order VII Rule 11(d) of the Code.

5. The trial judge on the original side, considered the question whether the plaint filed by the appellants was liable to be rejected under Order VII Rule 11(d) of the Code on the basis that the suit appeared from the statements in the plaint to be barred by any law. The learned Judge took the view that there was no law barring a suit in which there was misjoinder of parties or a misjoinder of causes of action, though, of course, for the purposes of convenience, a court would avoid the misjoinder of causes of action or misjoinder of parties. But on the basis of such a defect, the plaint could not be rejected by invoking Order VII Rule 11(d) of the Code since it could not be held that a suit which suffers from the defect either of misjoinder of parties or misjoinder of causes of action or both, is barred by any law. Thus, the application filed by the respondent herein, the defendant in C.S. No. 29 of 2003, was dismissed.

6. The respondent purported to file an appeal challenging that order under clause 15 of the Letters Patent. The Division Bench held that the suit was bad for misjoinder of causes of action and hence the trial court was not justified in not invoking Order VII Rule 11(d) of the Code and in not rejecting the plaint. The Division Bench, did not reject the plaint, but, gave the appellants an opportunity to elect to proceed with the present suit at the instance of one of them and thus confine the plaint claim to one of them and the transaction relied on by that plaintiff. Aggrieved by this decision of the Division Bench this appeal has been filed by the plaintiffs.

7. Though arguments were addressed on the maintainability of the appeal filed by the respondent before the Division Bench under clause 15 of the Letters Patent, (in which one of us, Balasubramanyan, J. finds considerable force) counsel for the appellant fairly brought to our notice the decision in Liverpool & London S.P. & I Association Ltd. Vs. M.E. Sea Success I and another (2004 (9) SCC 512) to which one of us (Sinha J.) was a party, which has taken the view that an appeal under clause 15 of the Letters Patent lies even in a case where the trial judge refuses to accede to the prayer of a defendant to reject a plaint under Order VII Rule 11 of the Code. Of course, that was a case where the rejection was sought under Order VII Rule 11 (a) of the Code on the basis that the plaint did not disclose a cause of action. For the purpose of this case, we accept the position enunciated therein. We also do not think it necessary to consider whether there is any distinction between prayers for rejection sought under clause (a) of Rule 11 of Order VII of the Code and clause (d) of Rule 11 of Order VII of the Code and we proceed on the basis that the Letters Patent Appeal under clause 15 filed by the respondent herein was maintainable.

8. But it is a different question whether a suit which may be bad for misjoinder of parties or misjoinder of causes of action, is a suit barred by law in terms of Order VII Rule 11(d) of the Code. The Code of Civil Procedure as its preamble indicates, is an Act to consolidate and amend the laws relating to the procedure of the Courts of Civil Judicature. No doubt it also deals with certain substantive rights. But as the preamble vouchsafes, the object essentially is to consolidate the law relating to Civil Procedure. The very object of consolidation is to collect the law bearing upon the particular subject and in bringing it upto date. A consolidating Act is to be construed by examining the language of such a statute and by giving it its natural meaning uninfluenced by considerations derived from the previous state of the law.

9. Based on this understanding, we can consider the respective positions of Order I and Order II in the scheme of things. Order I deals with parties to a suit and provides who may be joined as plaintiffs and who may be joined as defendants. It also deals with the power of the Court to direct the plaintiffs either to elect with reference to a particular plaintiff or a particular defendant or to order separate trials in respect of the parties misjoined as plaintiffs or defendants. It also gives power to the Court to pronounce judgment for or against one of the parties from among the parties who have joined together or who are sued together. The order also specifies that a suit shall not be defeated by reason of the misjoinder or non-joinder of parties, so along as in the case of non-joinder, the non- joinder is not of a necessary party. The Code also gives power to the Court to substitute the correct person as a plaintiff or add parties or strike out parties as plaintiffs or defendants, at any stage, if it is found necessary.

10. Order II deals with frame of suits. It provides that every suit shall be framed as far as practicable so as to afford ground for final decision upon the subjects in dispute and to prevent further litigation concerning them. It is also insisted that every suit shall include the whole of the claim that a plaintiff is entitled to make in respect of its subject matter. There is a further provision that the plaintiff may unite in the same suit several causes of action against the same defendant and plaintiffs having causes of action in which they are jointly interested against the same defendant, may unite such causes of action in the same suit. It provides that objection on the ground of misjoinder of causes of action should be taken at the earliest opportunity. It also enables the Court, where it appears to the Court that the joinder of causes of action may embarrass or delay the trial or otherwise cause inconvenience, to order separate trials or to make such other order as may be expedient in the interests of justice.

11. Thus, in a case where a plaint suffers from the defect of misjoinder of parties or misjoinder of causes of action either in terms of Order I Rule 1 and Order I Rule 3 on the one hand, or Order II Rule 3 on the other, the Code itself indicates that the perceived defect does not make the suit one barred by law or liable to rejection. This is clear from Rules 3A, 4 and 5 of Order I of the Code, and this is emphasised by Rule 9 of Order I of the Code which provides that no suit shall be defeated by reason of non- joinder or misjoinder of parties and the court may in either case deal with the matter in controversy so far as it regards the rights and interests of the parties actually before it. This is further emphasised by Rule 10 of Order I which enables the court in appropriate circumstances to substitute or add any person as a plaintiff in a suit. Order II deals with the framing of a suit and Rule 3 provides that save as otherwise provided, a plaintiff may unite in the same suit several causes of

actions against the same defendant and any plaintiffs having causes of actions in which they are jointly interested against the same defendant may unite such causes of action in the same suit. Rule 6 enables the Court to order separate trials even in a case of misjoinder of causes of action in a plaint filed.

12. After the amendment of Order XVI Rule 1 in England, it was held by the Court of Appeal in England in Thomas Vs. Moore [(1918) 1 K.B. 555] thus:

> "Whatever the law may have been at the time when (1894) A C 494 was decided, joinder of parties and joinder of causes of action are discretionary in this sense, that if they are joined there is no absolute right to have them struck out, but it is discretionary in the Court to do so if it thinks right."

The Privy Council in Mahant Ramdhan Puri Vs. Chaudhary Lachmi Narain [A.I.R. 1937 Privy Council 42] pointed out:

> "It is desirable to point out that under the rules as they now stand, the mere fact of misjoinder is not by itself sufficient to entitle the defendant to have the proceedings set aside or action dismissed."

Of course, their Lordships were speaking in the context of Section 99 of the Code. Their Lordships referred to the above quoted observation of the Court of Appeal in Thomas Vs. Moore (supra) in that decision. It is therefore clear that a suit that may be bad for misjoinder of causes of action is not one that could be got struck out or rejected by a defendant as a matter of right and the discretion vests with the court either to proceed with the suit or to direct the plaintiff to take steps to rectify the defect. In fact, the Privy Council in that case noticed that the suit was bad for misjoinder of causes of action. It further noticed that the trial judge had in spite of the complications created thereby, tried and disposed of the suit satisfactorily. Therefore, there was no occasion for the court to dismiss the suit on the ground of misjoinder of causes of action at the appellate stage.

13. It is well understood that procedure is the handmaid of justice and not its mistress. The Scheme of Order I and Order II clearly shows that the prescriptions therein are in the realm of procedure and not in the realm of substantive law or rights. That the Code considers objections regarding the frame of suit or joinder of parties only as procedural, is further clear from Section 99 of the Code which specifically provides that no decree shall be reversed in appeal on account of any misjoinder of parties or causes of action or non-joinder of parties unless a Court finds that the non-joinder is of a necessary party. This is on the same principle as of Section 21 of the Code which shows that even an objection to territorial jurisdiction of the Court in which the suit is instituted, could not be raised successfully for the first time in an appeal against the decree unless the appellant is also able to show consequent failure of justice. The Suits Valuation Act similarly indicates that absence of pecuniary jurisdiction in the Court that tried the cause without objection also stands on the same footing. The amendment to Section 24 of the Code in the year 1976 confers power on the Court even to transfer a suit filed in a Court having no jurisdiction, to a Court having jurisdiction to try it. In the context of these provisions with particular reference to the Rules in Order I and Order II of the Code, it is clear

that an objection of misjoinder of plaintiffs or misjoinder of causes of action, is a procedural objection and it is not a bar to the entertaining of the suit or the trial and final disposal of the suit. The Court has the liberty even to treat the plaint in such a case as relating to two suits and try and dispose them off on that basis.

14. Order VII Rule 11 (d) speaks of the suit being "barred by any law". According to the Black's Law Dictionary, bar means, a plea arresting a law suit or legal claim. It means as a verb, to prevent by legal objection. According to Ramanatha Aiyar's Law Lexicon, 'bar' is that which obstructs entry or egress; to exclude from consideration. It is therefore necessary to see whether a suit bad for misjoinder of parties or of causes of action is excluded from consideration or is barred entry for adjudication. As pointed out already, on the scheme of the Code, there is no such prohibition or a prevention at the entry of a suit defective for misjoinder of parties or of causes of action. The court is still competent to try and decide the suit, though the court may also be competent to tell the plaintiffs either to elect to proceed at the instance of one of the plaintiffs or to proceed with one of the causes of action. On the scheme of the Code of Civil Procedure, it cannot therefore be held that a suit barred for misjoinder of parties or of causes of action is barred by a law, here the Code. This may be contrasted with the failure to comply with Section 80 of the Code. In a case not covered by sub-section (2) of Section 80, it is provided in sub-section (1) of Section 80 that "no suit shall be instituted". This is therefore a bar to the institution of the suit and that is why courts have taken the view that in a case where notice under Section 80 of the Code is mandatory, if the averments in the plaint indicate the absence of a notice, the plaint is liable to be rejected. For, in that case, the entertaining of the suit would be barred by Section 80 of the Code. The same would be the position when a suit hit by Section 86 of the Code is filed without pleading the obtaining of consent of the Central Government if the suit is not for rent from a tenant. Not only are there no words of such import in Order I or Order II but on the other hand, Rule 9 of Order I, Rules 1 and 3 of Order I, and Rules 3 and 6 of Order II clearly suggest that it is open to the court to proceed with the suit notwithstanding the defect of misjoinder of parties or misjoinder of causes of action and if the suit results in a decision, the same could not be set aside in appeal, merely on that ground, in view of Section 99 of the Code, unless the conditions of Section 99 are satisfied. Therefore, by no stretch of imagination, can a suit bad for misjoinder of parties or misjoinder of causes of action be held to be barred by any law within the meaning of Order VII Rule 11(d) of the Code.

15. Thus, when one considers Order VII Rule 11 of the Code with particular reference to Clause (d), it is difficult to say that a suit which is bad for misjoinder of parties or misjoinder of causes of action, is a suit barred by any law. A procedural objection to the impleading of parties or to the joinder of causes of action or the frame of the suit, could be successfully urged only as a procedural objection which may enable the Court either to permit the continuance of the suit as it is or to direct the plaintiff or plaintiffs to elect to proceed with a part of the suit or even to try the causes of action joined in the suit as separate suits.

16. It cannot be disputed that the court has power to consolidate suits in appropriate cases. Consolidation is a process by which two or more causes or matters are by order of the Court combined or united and treated as one cause or matter. The main purpose of consolidation is therefore to save costs, time and effort and to make the conduct of several actions more convenient

by treating them as one action. The jurisdiction to consolidate arises where there are two or more matters or causes pending in the court and it appears to the court that some common question of law or fact arises in both or all the suits or that the rights to relief claimed in the suits are in respect of or arise out of the same transaction or series of transactions; or that for some other reason it is desirable to make an order consolidating the suits. (See Halsbury's Laws of England, Volume 37, paragraph 69). If there is power in the court to consolidate different suits on the basis that it should be desirable to make an order consolidating them or on the basis that some common questions of law or fact arise for decision in them, it cannot certainly be postulated that the trying of a suit defective for misjoinder of parties or causes of action is something that is barred by law. The power to consolidate recognised in the court obviously gives rise to the position that mere misjoinder of parties or causes of action is not something that creates an obstruction even at the threshold for the entertaining of the suit.

17. It is recognised that the court has wide discretionary power to control the conduct of proceedings where there has been a joinder of causes of action or of parties which may embarrass or delay the trial or is otherwise inconvenient. In that situation, the court may exercise the power either by ordering separate trials of the claims in respect of two or more causes of action included in the same action or by confining the action to some of the causes of action and excluding the others or by ordering the plaintiff or plaintiffs to elect which cause of action is to be proceeded with or which plaintiff should proceed and which should not or by making such other order as may be expedient. (See Halsbury's Laws of England, Vol. 37, paragraph 73). Surely, when the matter rests with the discretion of the court, it could not be postulated that a suit suffering from such a defect is something that is barred by law. After all, it is the convenience of the trial that is relevant and as the Privy Council has observed in the decision noted earlier, the defendant may not even have an absolute right to contend that such a suit should not be proceeded with.

18. The Division Bench has mainly relied on an unreported decision of a learned Single Judge of the same High Court in Margo Trading & Six others vs. Om Credit Private Limited, a copy of which was provided for our perusal. On going through that decision it is seen that the learned Judge has not adverted to or considered Rule 9 of Order I or its effect on the aspect of misjoinder of parties and has also not given due importance to the effect of the other provisions in that Order. Nor has the learned judge given due importance to the effect of the rules in Order II and in particular to Rule 6. We find that there have been very many decisions of the same High Court on the aspect of misjoinder of parties or of causes of action. But it is difficult to say that any of those decisions has taken the view that a plaint was liable to be rejected under Order VII Rule 11(d) of the Code on such a defect being pointed out. On the other hand, in Harendra Nath Vs. Purna Chandra [A.I.R. 1928 Calcutta 199] the Division Bench quoted from Payne Vs. British Time, Recorder Co. LTd. [(1921) 2 K.B. 1], the following passage:

> "Broadly speaking, where claims by or against different parties involve or may involve a common question of law or fact bearing sufficient importance in proportion to the rest of the action to render it desirable that the whole of the matters should be disposed of at the same time the Court will allow the joinder of plaintiffs or defendants, subject to its discretion as to how the action should be tried."

and continued:

> "This is a good working rule for practical purposes and, applying it to the present case, it seems to us clear that the action as framed is justified by O.1, Rr.1 and 3, Civil P.C. Looking at the matter, however, from the point of view of O.1, R.2, we are of opinion that the trial of the suit as laid is likely to be somewhat embarrassing, especially as some of the questions that will arise so far as property A is concerned, will have no bearing upon the claim as regards properties B, C, D and E and also because the question of costs, in so far as the deity is concerned will arise, which, if possible, must be kept separate from these which the plaintiff will incur or be entitled to recover in his personal capacity.
>
> We, accordingly, set aside the orders passed by both the Courts below and direct that the plaint be treated as comprising two suits: one at the instance of the plaintiff as shebait of the deity Nandadulal Thakur in respect of property A and the other at the instance of the plaintiff in his personal capacity in respect of the properties B, C, D, and E, and the two suits be separately tried."

The legal position in an identical situation as ours has been considered by a learned judge of that Court in Assembly of God Church Vs. Ivan Kapper & Anr. [2004 (4) Calcutta High Court Notes 360]. The learned judge has held that a defect of misjoinder of parties and causes of action is a defect that can be waived and it is not such a one as to lead to the rejection of the plaint under Order VII Rule 11(d) of the Code. As we see it, the said decision reflects the correct legal position. The decision in Margo Trading (supra) does not lay down the correct law. The decision of this Court in Mayar (H.K.) Ltd. & Ors. Vs. Owners & Parties, Vessel M.V. Fortune Express & Ors. [(2006) 3 S.C.C. 100] does not touch on this aspect and is concerned with a case of suppression of material facts in a plaint.

19. In the case on hand, we have also to reckon with the fact that the suits filed by the respondent against the respective appellants based on the transactions combined together by the appellants, have already been withdrawn for a joint trial with the present suit, C.S. No. 29 of 2003. In those two suits, the nature of the transaction the respective appellants had with the respondent have to be decided after trial. In the present suit, the appellants are claiming the payments which also form the basis of the claim of the respondent against the respective appellants in his two suits. In the present suit, C.S. No. 29 of 2003, all that the appellants have done is to combine their respective claims which are in the nature of counter claims or cross suits to the suits filed by the respondent. The ultimate question for decision in all the suits is the nature of the transactions that was entered into by the respondent with each of the appellants and the evidence that has to be led, in both the suits, is regarding the nature of the respective transactions entered into by the respondent with each of the appellants. To a great extent, the evidence would be common and there will be no embarrassment if the causes of action put forward by the appellants in the present suit are tried together especially in the context of the two suits filed by the respondent against them and withdrawn for a joint trial. In the case on hand, therefore, even assuming that there was a defect of misjoinder of causes of action in the plaint filed by the appellants, it is not a case where convenience of trial warrants separating of the causes of action by trying them separately. The three suits have to be jointly tried and since the

evidence, according to us, would be common in any event, the Division Bench was in error in directing the appellants to elect to proceed with one of the plaintiffs and one of the claims. We do not think that on the facts and in the circumstances of the case one of the appellants should be asked to file a fresh plaint so as to put forward her claim. Even if such a plaint were to be filed, it will be a clear case for a joint trial of that plaint with the present suit and the two suits filed by the respondent. In any event, therefore, the Division Bench was not correct in interfering with the decision of the learned single judge. The effect of withdrawal of the two suits filed by the respondent against the appellants for a joint trial has not been properly appreciated by the Division Bench. So, on the facts of this case, the decision of the Division Bench is found to be unsustainable and the course adopted by it unwarranted.

20. We are of the view that on the facts and in the circumstances of the case and the nature of the pleadings in the three suits that are now before the Original Side of the Calcutta High Court, it would be just and proper to try them together and dispose them of in accordance with law for which an order has already been made. A joint trial of the three suits based on the evidence to be taken, in our view, would be the proper course under the circumstances.

21. We therefore allow this appeal and reversing the decision of the Division Bench restore the decision of the learned single judge. We request the learned single judge of the High Court to try and dispose off the three suits expeditiously in accordance with law.