CASE NO.:
Appeal (civil) 1855-1856 of 2004

PETITIONER:
Shipping Corporation of India Ltd.

RESPONDENT:
Machado Brothers & Ors.

DATE OF JUDGMENT: 25/03/2004

BENCH:
N.Santosh Hegde & B.P.Singh.

JUDGMENT:
J U D G M E N T

(Arising out of SLP)Nos.10033-10034 of 2003)

SANTOSH HEGDE,J.

Heard learned counsel for the parties.

Leave granted.

These two civil appeals arise out of a common order made by the High Court of Madras at Chennai in Civil Revision Petition (P.D.) No.309 of 2003 and CMP No.2222 of 2003. By the above order, the High Court upheld an order made by the City Civil Court at Chennai in I.A.No.20651 of 2001 in O.S.No.4212 of 1995. The said I.A. filed under Section 151 C.P.C. by the appellant herein was for the dismissal of the suit O.S.No.4212/95 which was filed by the respondent herein on the ground that the said suit had become infructuous.

The facts necessary for the disposal of these appeals are as follows:

The appellant herein had appointed the respondent as the Steamship Agent of the appellant for the purpose of handling tankers, bulk carriers, and tramp vessels, calling at the port of Tuticorin. It is the contention of the appellant that the said agreement provides for termination of the contract. On being dissatisfied with the conduct of the respondent, invoking the said clause of termination and for the reasons mentioned therein, by a notice dated 23.2.1995, the appellant terminated the said contract of agency. The respondent herein challenged the said termination by way of a suit in O.S.No.4212/95 in the City Civil Court at Madras (the trial court). In the said suit the respondent inter alia prayed for the following reliefs:

"The plaintiff, therefore, prays for a judgment and decree against the defendants 1 to 3 for a declaration to declare that the order of the termination issued by the 1st defendants on 23.2.1995 through telex terminating the Plaintiff's agency, as per the agreement dated 3.6.1988, is illegal, void and unenforceable."

During the pendency of the said suit, the respondent also prayed for an interim injunction restraining the appellant from interfering with the agency of the respondent. The trial court by an order dated 24.11.1995 was pleased to grant interim relief sought for by the respondent which became final consequent upon the appellant's challenge to the same made before the High Court being rejected.

During such continuation of the agency, the appellant

allegedly noticed certain financial irregularities and was contemplating to take fresh steps to terminate the agency once again. Anticipating such subsequent termination, the respondent herein filed another suit O.S.No.4849/2001 before the trial court praying for production of accounts of the appellant and appointment of an Advocate Commissioner to scrutinize the accounts of the parties.

During the pendency of the above noted two suits filed by the respondent, the appellant by a notice dated 23.8.2001 again terminated the agency of the respondent on the ground of respondent charging excess amount and on the charge of tampering with invoices and bills. The said notice stated that the appellant was terminating the agency under Clause 31 of the Agency Agreement and on expiry of 90 days from the date of the receipt of the said notice the agency will stand terminated.

On receipt of the above notice, the respondent filed another suit for permanent injunction in O.S.No.5100/2001. In the said suit, respondent sought for an interlocutory injunction but the trial court in the said application granted an order of status quo. The appellant attempted to get the said order of status quo vacated and having failed, it challenged the same in a revision petition before the High Court along with a prayer for dismissal of all the three suits pending before the trial court. The said revision petition came up for orders before the High Court on 7.12.2001 and the same was remanded with the direction that I.A.No. 14780 of 2001 should be heard with I.A.No.15301 of 2001. Thus when the matter stood remanded to the trial court, the appellant filed I.A. No.20651 of 2001 in O.S.No.4212/95 (the first suit) inter alia praying for the dismissal of that suit on the ground the same had become infructuous because of the subsequent and fresh notice of termination which was the subject matter of the third suit, namely, O.S.No.5100/2001.

The said I.A.No.20651/2001 for dismissal of O.S.No.4212/95 came to be rejected by the trial court on the ground that the same lacks in bona fide and allowing the application would cause prejudice to the respondent with regard to the continuation of the agency. The trial court also held since the injunction granted in the first suit had became final, same cannot be either defeated or vacated by seeking the dismissal of the suit. The said order of the trial court came to be once again challenged before the High Court in the above noted revision petition and the miscellaneous petitions. The High Court agreeing with the conclusions of the trial court also came to the conclusion that the dismissal of O.S. No.4212/95 on the ground that the same had become infructuous would result in vacating the order of interim injunction earlier granted in the said suit. The High Court also agreed with the trial court that such dismissal on the ground of suit having become infructuous would prejudice the respondent, hence, dismissed the petition.

It is against the said order of the High Court confirming the order of the trial court, the appellants are before us in these appeals.

Shri C.A.Sundram, learned senior counsel appearing for the appellant contended that the courts below failed to notice that a suit for declaration for the continuance of an agency which is in the nature of a personal service is barred under Section 14 of the Specific Relief Act. He also contended a suit for mere declaration is also barred under section 34 of the Specific Relief Act. He further contended at the most the respondent-plaintiff could have sought for damages in the event of it establishing wrongful termination and would not be entitled to a decree for specific performance to continue the agency. He also submitted since under the terms of the agency agreement itself a termination of the agreement is contemplated, the trial court could not have entertained a suit for declaration that such termination is bad and

further in aid of such a relief grant a mandatory order of injunction directing the continuation of agency during the pendency of the suit. He submitted the reasons given by the two courts below that dismissal of the suit would in effect amount to dissolving of the injunction granted as an interim measure is per se illegal because no suit could be continued only for the purpose of continuing an interim order. He also challenged the finding of the two courts below that the application filed by the appellant for dismissal of the suit is not a bona fide application.

The learned counsel relied on Order 7 Rule 11, Order 12 Rule 6, Order 15 Rules 1 and 3 and Order 23 Rule 1 of CPC to point out that apart from Section 151 of CPC even under those provisions of the Code there is a duty cast on the trial court to put an end to a litigation if the same had become infructuous. In the instant case, the learned counsel pointed out that there was only one agency agreement and in exercise of the right conferred by the termination clause in the said agreement the appellant had terminated the contract of agency of the respondent as far back as on 23.2.1995, but by virtue of the interim order granted by the courts below the appellant had to continue the same much against the interest of the appellant. Be that as it may, the learned counsel submits that a fresh cause of action had arisen which required the said agency agreement again to be terminated. Hence a notice of termination dated 23.8.2001 was issued nearly six years after the first letter of termination which in fact and in law substituted the first letter of termination. Consequent to which the first letter of termination became non existent and consequently the suit filed on that basis became infructuous because the cause of action, if any, which gave rise to the first suit disappeared. Hence, the courts below ought to have accepted the application of the appellant for the dismissal of the suit. The learned counsel also contended both the courts below have not given any finding as to the effect of the second termination notice vis-a-vis the existence of cause of action to continue the first suit and proceeded erroneously on the ground that dismissal of said suit would make the injunction ineffective, as if the interim order in a proceeding can survive after the disposal of the main matter or that the main matter can be kept pending to continue the interim order.

Shri P.R.Kovilan learned counsel appearing for the respondent supported the orders of the courts below and contended that the same are just and equitable. Learned counsel also submitted that a revision against the dismissal of an application under section 151 was not maintainable before the High Court because the same was an appealable order. He also supported the orders of the two courts below that the application filed for dismissal of the suit lacked bona fides and the appellant having failed to get the injunction in the said suit vacated has resorted to this mode of getting the injunction vacated. He submitted if the plaint showed the existence of a cause of action on the date of filing of the same, subsequent disappearance of cause of action would not make the suit bad or infructuous. He also contended allowing of the application of the appellant and dismissing the first suit as having become infructuous would cause great prejudice to the respondent.

From the argument of the learned counsel for the appellant, we notice his challenge to the impugned orders of the courts below is based on the following grounds :

(a) A suit challenging a notice of termination of an agency which is in the nature of a personal contract is not maintainable.

(b) A suit simplicitor for declaration without seeking any consequential relief is also not maintainable.

(c) Suit O.S.No.4212/95 having become infructuous with the eclipse of cause of action mentioned in the said plaint the court ought to have dismissed or disposed of the said

suit as contemplated under the various provisions of the Civil Procedure Code like Order 7 Rule 11, Order 12 Rule 6, Order 15 Rules 1 and 2 and Order 23 Rule 1.

(d) At any rate when the appellant brought to the notice of the court by way of an application under Section 151 of CPC that the original notice which is the foundation of the suit O.S.No.4212/95 having been superceded by a subsequent termination notice in regard to the very same contract of agency, the courts below ought to have in the interest of justice allowed the same and dismissed the suit as having become infructuous, keeping open the rights of the parties to be adjudicated in the other two suits pending before it.

From the argument of the learned counsel for the respondent, we notice the same is based on the following grounds:

(a) A revision against the dismissal of the application filed under section 151 before the High Court was not maintainable.

(b) The application for dismissal lacked bona fides.

(c) The respondent will be put to great hardship and prejudice if the said IA were to be allowed and its first suit is dismissed on the ground of having become infructuous because the protection of the interim order granted to it would be lost.

Having carefully considered the arguments of the parties and perused the records, we notice that the first three arguments addressed by the appellant though seems to indicate some legal backing still will not be entertained by us because that was not the basis on which application I.A.20651/2001 was filed by the appellant before the trial court. The only ground on which the said application was filed is that, in view of the subsequent termination notice the first termination notice disappeared consequently the cause of action also disappeared. This application did not question the maintainability of the suit on the grounds which are urged now before us nor the various provisions of CPC now urged before us ever urged in the said application, and that does not also seem to be the argument of the appellant before the courts below as could be seen from the contents of the two impugned orders. We do not think we should permit the appellant to raise these grounds for which sufficient foundation has not been laid in the pleadings and arguments before the courts below. At the same time, we are unable to accept the argument of the learned counsel for the respondent who contended that the revision petition filed by the appellant before the High Court was not maintainable because of the availability of a remedy by way of an appeal. We have carefully examined the various provisions of the CPC which provides or contemplates filing of an appeal but we find no such provision available to the appellant to file an appeal against the order made by the trial court on an application filed under Section 151 CPC. Nor has the learned counsel appearing for the respondent been able to point out any such provision therefore, the said argument has to be rejected.

This leaves us to consider the merits of the application filed by the appellant for dismissing the first suit O.S.No.4212/95 which is on the ground of the same having become infructuous. Before proceeding further to consider this question, we must notice the fact that the respondent has not disputed the fact that there is only one agreement of agency dated 3.6.1988 and that the said agency came to be first terminated by a notice from the appellant dated 23rd February, 1995 which was the basis of the suit O.S.No.4212/95 and the very same agency came to be terminated once again by another notice dated 23.8.2001. It is also not disputed nor is it the basis of the orders of the two courts below that by the issuance of the second notice, the earlier termination notice dated 23.2.1995 stood superseded. If that be so, the question

for our consideration is : whether the said suit O.S. No.4212/95 is liable to be dismissed as having become infructuous or, as has been held by the two courts below, whether the said suit should be kept pending to keep alive the interlocutory order made in the said suit. The further question to be considered is: can an application to dismiss the suit on the ground of same having become infructuous, be dismissed on the ground that the said application lacks bona fide or that the same would cause prejudice to the plaintiff because of the consequences of dismissal of that suit.

Coming to the maintainability of I.A.No.20651/2001, the learned counsel for the appellant in support of his contention that an application under Section 151 CPC for the dismissal of the suit on the ground of same having become infructuous was maintainable, has relied on number of judgments. In M/s. Ram Chand & Sons Sugar Mills Pvt.Ltd. Barabanki (U.P.) vs. Kanhayalal Bhargava & Ors. (AIR 1966 SC 1899) while discussing the scope of Section 151 CPC this court after considering various previous judgments on the point held:

"The inherent power of a court is in addition to and complementary to the powers expressly conferred under the Code. But that power will not be exercise if its exercise is inconsistent with, or comes into conflict with, any of the powers expressly or by necessary implication conferred by the other provisions of the Code. If there are express provisions exhaustively covering a particular topic, they give rise to a necessary implication that no power shall be exercised in respect of the said topic otherwise than in the manner prescribed by the said provisions. Whatever limitations are imposed by construction on the provisions of S.151 of the Code, they do not control the undoubted power of the Court conferred under Section 151 of the Code to make a suitable order to prevent the abuse of the process of the court."

From the above, it is clear that if there is no specific provision which prohibits the grant of relief sought in an application filed under Section 151 of the Code, the courts have all the necessary powers under Section 151 CPC to make a suitable order to prevent the abuse of the process of court. Therefore, the court exercising the power under section 151 CPC first has to consider whether exercise of such power is expressly prohibited by any other provisions of the Code and if there is no such prohibition then the Court will consider whether such power should be exercised or not on the basis of facts mentioned in the application. In the instant case, the appellant contends that during the pendency of the first suit, certain subsequent events have taken place which has made the first suit infructuous and in law the said suit cannot be kept pending and continued solely for the purpose of continuing an interim order made in the said suit.

While examining this question we will have to consider whether the court can take cognizance of a subsequent event to decide whether the pending suit should be disposed of or kept alive. If so, can a defendant make an application under Section 151 CPC for dismissing the pending suit on the ground the said suit has lost its cause of action. This Court in the case of Pasupuleti Venkateswarlu vs. The Motor & General Traders (1975 1 SCC 770 at para 4) has held thus:

"We feel the submissions devoid of substance. First about the jurisdiction and propriety vis-‘-vis circumstances which

come into being subsequent to the commencement of the proceedings. It is basic to our processual jurisprudence that the right to relief must be judged to exist as on the date a suitor institutes the legal proceeding. Equally clear is the principle that procedure is the handmaid and not the mistress of the judicial process. If a fact, arising after the lis has come to court and has a fundamental impact on the right to relief or the manner of moulding it, is brought diligently to the notice of the tribunal, it cannot blink at it or be blind to events which stultify or render inept the decretal remedy. Equality justifies bending the rules of procedure, where no specific provision or fairplay is not violated, with a view to promote substantial justice \026 subject, of course, to the absence of other disentitling factors or just circumstances. Nor can we contemplate any limitation on this power to take note of updated facts to confine it to the trial court. If the litigation pends, the power exists, absent other special circumstances repelling resort to that course in law or justice. Rulings on this point are legion, even as situations for applications of this equitable rule are myriad.

We affirm the proposition that for making the right or remedy claimed by the party just and meaningful as also legally and factually in accord with the current realities, the court can, and in many cases must, take cautious cognizance of events and developments subsequent to the institution of the proceeding provided the rules of fairness to both sides are scrupulously obeyed."

In the very same case, this Court quoted with approval a judgment of the Supreme Court of United States in Patterson vs. State of Alabama, (294 US 600) wherein it was laid down thus :

"We have frequently held that in the exercise of our appellate jurisdiction we have power not only to correct error in the judgment under review but to make such deposition of the case as justice requires. And in determining what justice does require, the Court is bound to consider any change, either in fact or in law, which has supervened since the judgment was entered."

Almost similar is the view taken by this Court in the case of J.M.Biswas vs. N.K.Bhattacharjee & Ors. (2002 (4) SCC 68) wherein this Court held :

"The dispute raised in the case has lost its relevance due to passage of time and subsequent events which have taken place during the pendency of the litigation. In the circumstances, continuing this litigation will be like flogging a dead horse. Such litigation, irrespective of the result, will neither benefit the parties in the litigation nor will serve the interests of the Union."

Thus it is clear that by the subsequent event if the original proceeding has become infructuous, ex debito justitiae, it will be the duty of the court to take such action as is necessary in the interest of justice which includes disposing of infructuous litigation. For the said purpose it will be open to the parties concerned to make an application under Section 151 of CPC to bring to the notice of the court the facts and circumstances which have made the pending litigation infructuous. Of course, when such an application is made, the court will enquire into the alleged facts and circumstances to find out whether the pending litigation has in fact become infructuous or not.

Having thus understood the law, we will now consider whether the courts were justified in rejecting the application filed by the appellant herein for dismissing the suit on the ground that the same had become infructuous. In this process, we have already noticed that there seems to be no dispute that the original termination notice based on which first suit O.S.No.4212/95 was filed, has since ceased to exist because of the subsequent termination notice issued on 23.8.2001, validity of which has already been challenged by the respondent in the third suit. While dismissing the application I.A.No.20651/2001 the courts below proceeded not on the basis that the original notice of termination has not become infructuous, but on the basis that the said application lacks in bona fide and if the said application is allowed the interlocutory injunction hitherto enjoyed by the plaintiff will get vacated and consequently the plaintiff will be prejudiced. The question for our consideration now is whether such ground can be considered as valid and legal. While so considering the said question one basic principle that should be borne in mind is that interlocutory orders are made in aid of final orders and not vice versa. No interlocutory order will survive after the original proceeding comes to an end. This is a well established principle in law as could be seen from the judgment of this Court in Kavita Trehan (Mrs.) & Anr. vs. Balsara Hygiene Products Ltd. (1994 5 SCC 380) wherein it is held :

"Upon dismissal of the suit, the
interlocutory order stood set aside and that
whatever was done to upset the status quo,
was required to be undone to the extent
possible."

Therefore, in our opinion, the courts below erred in continuing an infructuous suit just to keep the interlocutory order alive which in a manner of speaking amounts to putting the cart before the dead horse.

The next ground given by the courts below that the dismissal of the suit would prejudice the respondent, again on the ground of interlocutory order getting dissolved, cannot also be sustained. If the suit in fact has become infructuous consequences of dismissal of such suit cannot cause any prejudice to the plaintiff. As a matter of fact, the consequence should be to the contrary, that is, such continuance of infructuous suit would cause prejudice to the defendant.

We have already noticed that the courts below have also held that the application of the appellant lacks in bona fide. We fail to understand how this is so. If a party has a legal right to ask for dismissal of an infructuous suit, and pursuant to the said right it makes an application for dismissal of said suit, the same cannot be termed as an act in malice.

For the reasons stated above, we are of the opinion that continuation of a suit which has become infructuous by disappearance of the cause of action would amount to an abuse of the process of the court and interest of justice requires such suit should be disposed of as having become infructuous. The application under Section 151 of CPC in this regard is

maintainable.

For the reasons stated above, this appeal succeeds.

I.A.No.20651 of 2001 filed by the appellant in O.S.No.4212/95 is allowed. Consequentially suit O.S.No.4212/95 pending in the court of City Civil Court at Chennai is dismissed as having become infructuous. The appellant shall be entitled to cost throughout.