
(1998) 11 MAD CK 0082

In the Madras High Court

Case No : C.M.P. No. 13849 of 1998, In O.S.A. No. 131 of 1998

Bank of Rajasthan Ltd.

APPELLANT

Vs

Transocean Bulk Carriers Ltd. and Others

RESPONDENT

Date of Decision : 17-11-1998

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 10

Citation : AIR 1999 Mad 105 : (1999) 1 MLJ 316

Hon'ble Judges : K. Natarajan, J;C. Shivappa, J

Bench : Division Bench

Advocate : L. Jayakumar, for the Appellant; C.A. Sundaram, (for No. 6) and R. Thiagarajan, (for No. 7), for the Respondent

Final Decision : Dismissed

Judgement

C. Shivappa, J.—The question for consideration in this civil miscellaneous petition is whether the petitioner is a proper and necessary party

and entitled for impleading at the appellate stage?

2. The applicant is seeking for impleading as 7th additional respondent in O.S.A. No. 131 of 1998.

3. O.S.A. No. 131 of 1998 is against the judgment and decree of the trial Court passed in C.S. No. 1151 of 1995. The suit was recovery of Rs.

1,22,00,000/- in respect of the alleged return of two cheques issued by the respondent No. 1/ defendant in the suit. During the pendency of the

suit, the respondent No. 6, namely, M/s. Scotts Engineering, got impleaded and subsequently the Supreme Court by order dated 16-11-1995 filed

by respondent No. 6, appointed the official Receiver to act as Receiver for carrying out the work of ship breaking with the respondent No. 6. The

amount that may be realised by sale should be deposited up to the maximum of

Rs. 1 crore. The respondent No. 6 complied with the order of Supreme Court by depositing Rs. 1 crore being the sale proceed of the ship breaking.

4. The trial Court by order dated 8-6-1998 decreed the suit against respondents 1 to 5, but dismissed as against respondent No. 6. While

dismissing the suit, the trial Court observed that the appellant/plaintiff was not entitled to claim of Rs. 1 crore deposited with the Administrative

General and this amount has to be paid to the respondent No. 6, viz. Scots Engineering, who claims to be the lawful owner of the vessel M.V.

Sagar. The respondent No. 6 with the intention of reducing its liability gave a letter dated 23-6-1998 authorising the bank to collect the said sum of

Rs. 1 crore from the Official Receiver of the High Court of Madras. On the basis of that letter, it is contended that he has an interest in the subject-

matter of the appeal and he is both a necessary and a proper party. However, it is also averred that the bank reserves its rights to initiate legal

action for recovery of the due amount. It is stated that in the event of decree against respondent No. 6, the appellant thereafter might obtain an

order for the return of Rs. 1 crore which is with the Administrative General, because the amount has no relevance with the return of two cheques.

Therefore, the applicant bank is seeking to intervene in this appeal as a third party. Lastly, it is urged that non-impleading would cause hardship to

the bank, as the bank is a necessary party.

5. The appellant contended that the third party can seek impleadment provided if he has a direct and substantial interest in the subject-matter of the

litigation and his presence is absolutely essential to enable the Court to effectually and completely adjudicate upon and settle all questions involved

in the suit or appeal proceeding. But, in the instant case the applicant is alleging assignment of the rights by the respondent No. 6 in favour of the

applicant by virtue of a letter dated 23-6-1998 to claim the money which is available in the hands of the Administrative General and Official

Trustee, Tamil Nadu. It is contended that the present applicant is neither a proper nor a necessary party to the present appeal proceedings and the

litigation which was between the appellant and respondents 1 to 5 is pending for over four years and he has not chosen to whisper anything about

the alleged loan or the hypothecation, but has come forward with the present

application at this belated stage, that too, at the appeal stage. Even assuming without conceding that the proposed applicant if at all has any right or claim in law as against M/s. Scott Engineering, it has to work out its remedy independently in appropriate proceeding and not in the present appeal. When the claim to the said money held by the Administrative General and Official Trustee is very much in dispute, it has no nexus to the inter se transaction between the respondent No. 6 and the proposed applicant. Even, if there is any claim, by the proposed applicant, he has to establish it in appropriate proceeding in accordance with law and he cannot work out the remedy in this appeal about the amount due to him under hypothecation which is extraneous to the suit between the appellant and respondents 1 to 5. The appellant as plaintiff has every right to select a party against whom he has to claim relief and the proposed applicant cannot be thrust when the cause of action is totally different.

6. The respondent No. 6 admitted that he had borrowed the money from the Bank of Rajasthan to purchase the vessel and huge amounts have to be paid towards interest on the loans besides the principal, but has not said anything about impleading as additional party respondent.

7. Order 22, Rule 10 of the CPC applies to appeals u/s 107, Sub-section (2) and Rule 11. Section 107, CPC is a general provision relating to

appeals. Rule 10 contemplates that in other cases of an assignment, creation or devolution of any interest during the pendency of a suit, the suit

may, by leave of the Court, be continued by or against the person to or upon whom such interest has come to be devolved. The rule is based on

the principle that the trial of a suit cannot be brought to an end merely because the interest of a party in the subject-matter of the suit has devolved

upon another during the pendency of the suit, but that such a suit may be continued with the leave of the Court against the person acquiring the

interest. It is settled in law that where a suit is brought by or against a person in a representative capacity and there is devolution of the interest of

the representative, this rule has to be applied. Where the suit property is transferred during the pendency of the appeal, if the transferee applied for

being impleaded, the application may be considered by the Court. Where there is nothing to show that the vendors had been acting against the

transferee in the appeal, then also, the mere circumstance that the properly has

been transferred does not give right to get impleaded.

8. In (Kommuru) Venkata Rao Vs. (Korella) Sesharattama, this Court has taken the view that a simple mortgage is not such an assignment. In

(Firm) Ram Kumar-Rameshwar Lal Vs. Prem Sukh Das and Others, , it was held that mere attachment would not create such interest. The word

claiming under, though wide enough to include a person, derives an interest from the party to the suit, still where the creation or devolution of any

interest or an assignment requires proof by an independent cause of action and the consequence is that he will not be bound by the result of the

litigation and he has still a right to continue the proceeding independent of the cause of action of the plaintiff/appellant, such a person need not be

brought on record as additional party. Where the cause of action is different, relief sought for is against defendants 1 to 5, an alleged assignment

does not create any interest, in other words, does not per se confer a right to come on record under Rule 10, because the right of the promisee to

be impleaded arises as the assignee of a transferable right to sue, and not as the holder of an interest in the property. It is not his case that he

derived any interest during the pendency of the suit, having nexus to the cause of action, without his presence there would be likelihood of

prejudice to his right.

9. Doctrine of ""Dominus litis"" is applied to one, who though not originally a party has made himself such, by intervention or otherwise, and has

assumed the entire control and responsibility for one side, and it is treated by the Court as liable for costs and a person who is really and directly

interested in the suit as a party. When the cause of action is between the appellant and respondents 1 to 5 for recovery of Rs. 1,22,00,000/- being

the amount of two cheques, there is no direct interest of the proposed applicant and the plaintiff and it is a lis between plaintiff and defendants 1

to 5 and any transaction between respondent No. 6 and the proposed applicant is independent of the cause of action of the appellant. Therefore, it

cannot be said that the proposed applicant has a direct interest in the suit claim.

10. The first respondent is the owner of the ship. Second respondent is the agent of the first respondent in India. Third respondent is the Managing

Director of the first respondent. The fourth respondent is the representative of the first respondent. Fifth respondent is the partner of second

respondent, who signed on behalf of defendant No. 1. Thus, the lis is between the plaintiff and defendants 1 to 5. Sixth respondent got impleaded

as a person having interest in the ship. It is submitted that the sixth respondent has also filed a suit C.S. No. 1038 of 1995, which was later

transferred to City Civil Court and numbered as O.S. No. 383 of 1996 as against the owner of the vessel for a declaration that respondent No. 5

is the purchaser of ship. So, the title to the ship is involved in that suit and hypothecation is a matter to be established.

11. The learned counsel, on the basis of the finding on Issue No. 10 that the appellant herein is not entitled to receive Rs. 1 crore deposited with

the Administrative General and that it has to be paid to the sixth respondent and in view of the letter of sixth respondent authorising him to collect

the sum of Rs. 1 crore from the Official Receiver of the High Court, Madras, contended that the petitioner has an interest in the subject-matter of

the suit.

12. In order to substantiate his contention, he cited several decisions, namely, a) Kamta Prasad and Others Vs. Smt. Vidyawati and Others, ; b)

G.D.F. Luis v. I.P.H. Fernandes, AIR 1977 Goa 4 Firm of Mahadeva Rice and Oil Mills and Others Vs. Chennimalai Goundar, ; d) Terai Tea

Co. Pvt. Ltd. Vs. Kumkum Mittal and others, ; e) Kisan Uchattar Madhyamik Vidyalaya Samiti, Deoria and Others Vs. IIIrd Addl. District Judge,

Deoria and Others, ; f) Surendra Prasad Vs. Shailendra Prasad and Others, ; g) Adapa Venkateswra Rao and another Vs. Mohammad Suleman

and others, andh) C. KR. C.N.K.R. Adhappa Chettiar and Others Vs. R.M. Meenakshi Achi and Others, . All these cases are distinguished

hereunder and they have no bearing to the case on hand.

13. In Kamta Prasad and Others Vs. Smt. Vidyawati and Others, , the High Court of Madhya Pradesh, reading the two provisions, namely, Order

XXII, Rule 10, and Order I, Rule 10 of the Code of Civil, Procedure, held that if the interest is assigned of the subject-matter of the suit, the

assignee may apply to be impleaded as a party even at an appellate stage and if the ultimate decree which may be passed in the said litigation vitally

affecting his rights, he may be added as a party under Order 1, Rule 10 (2), CPC. But, however, the Court held that while considering such

application, discretion has to be exercised judicially. Of course, the expression

""at any stage of the proceedings"" employed in Order VI, Rule 17, the Court is competent to allow either party to alter or amend the pleading at any time even before the judgment is pronounced, as till then, the Judge has the seisin over the case and is not functus officio. That was a case, where a suit for partition, injunction and for possession was instituted. During the pendency of the suit, one of the defendants executed two sale deeds transferring certain extent of lands. Later, defendants absented themselves in the suit. The trial Court proceeded ex parte and closed the hearing after recording the evidence and fixed the case for pronouncing judgment on 14-3-1992. Then the petitioners, having come to know that the suit is pending and the judgment is not pronounced, applied for impleading them as party, as defendants have transferred their interest and the petitioners are vitally interested in the judgment which may ultimately be passed. The trial Court rejected the application holding that they are not necessary parties to the suit. In such a situation, the Court keeping in view the interest acquired in the suit subject-matter and likelihood of his right being affected in the event of a decree, permitted such a party to be impleaded as a party and held that the plaintiff was also free to demonstrate that the transfer is null and void. But, the factual situation is totally different in this case, where the plaintiff has no interest in the transaction claimed by the proposed applicant. It is a matter inter se between the respondent No. 6 and the applicant.

14. Section 130 of the Transfer of Property Act contemplates execution of an instrument and such instrument is valid as against such transfer. Sub-clause (2) of Section 130 contemplates that the transferee of an actionable claim may, upon the execution of instrument of transfer, sue or institute proceedings for the same in his own name without obtaining transferor's consent to such suit or proceedings. Section 131 contemplates notice to be in writing and signed. Whether the letter dated 23-6-1998 is an assignment transferring the claim, is a matter to be established to entitle him to the claim on the basis of that letter, which claim cannot be enforced against the plaintiff as he was not a party to any of those transactions. In the suit of the appellant such a question cannot be gone into and to decide the question whether the plaintiff is entitled for the suit claim, the presence of the applicant is not necessary. Where his presence is not required to effectually

adjudicate the issue involved, he has no right to be impleaded.

15. The test is whether the issue involved has any connection to the party claiming impleading or whether his non-inclusion vitally affects his right?

When the transaction between himself and respondent No. 6 constitutes a different cause of action and his claim is subject to proof of the transaction between him and the sixth respondent which can be secured by resorting to a legal remedy, he is an unnecessary party, that too, at the appellate stage.

16. The learned counsel relied on a decision in *G.D.F. Luis v. I.P.H. Fernandes*, AIR 1977 Goa 4. This case has no application to the case on

hand on two grounds, viz., 1) the plaintiff cannot be compelled to fight against a person against whom he does not wish to fight and against whom

he does not claim any relief, and 2) an agreement which is alleged to have been entered into between the sixth respondent and the intervenor, if at

all such an agreement is proved to have been entered into, gives rise to a cause of action totally different from the cause of action on which the

present lis is based, viz., return of two cheques, which is the subject-matter of the suit. The addition of intervenor as a party to the proceeding is

not necessary for final adjudication of the real issue involved in the suit. If allowed, prejudice is bound to be caused to the appellant by introduction

of such an irrelevant matter, which is extraneous to the suit cause of action. The plaintiff being the dominus litis in order to put the intervenor as a

party, the proposed party must have a defined, subsisting, direct and substantive interest in the litigation which interest is either legal or equitable

and which right is cognisable in law. In fact, meticulous care should be taken to avoid the adding of a party when the addition is intended merely as

a ruse to ventilate certain other grievances of one or the other of the parties on record which is neither necessary or expedient to be considered by

the Court in the pending litigation. Therefore, this decision supports the contention of the appellant than that of the applicant.

17. In *Firm of Mahadeva Rice and Oil Mills and Others Vs. Chennimalai Goundar*, , this Court has formulated certain tests in the case of adding of

parties, under Order 1, Rule 10, CPC. They are :-- ""1) If, for the adjudication of the ""real controversy"" between the parties on record, the

presence of a third party is necessary, then he can be impleaded; 2) It is

imperative to note that by such impleading of the proposed party, all controversies arising in the suit and all issues arising thereunder may be finally determined and set at rest, thereby avoiding multiplicity of suits over a subject-matter which could still have been decided in the pending suit itself; 3) the proposed party has a defined, subsisting, direct and substantive interest in the litigation, which interest is either legal or equitable and which right is cognisable in law; 4) Meticulous care should be taken to avoid the adding of a party if it is intended merely as a ruse to ventilate certain other grievances of one or the other of the parties on record which is neither necessary or expedient to be considered by the Court in the pending litigation; and 5) It should always be remembered that considerable prejudice would be caused to the opposite party when irrelevant matters are allowed to be considered by Courts by adding a new party whose interest has no nexus to the subject-matter of the suit"". If these tests are not satisfied, the proposed party was not a proper or a necessary party and the Court had no jurisdiction to add him as a party to the suit at any stage including the appellate stage. The essence of the test is to avoid multiplicity of proceedings between the parties. Where the cause of action alleged by the applicant has no nexus to the claim made by the plaintiff, the question of avoiding multiplicity of suits between the parties does not arise.

18. Terai Tea Co. Pvt. Ltd. Vs. Kumkum Mittal and others, . It was a case where there were two suits, viz., a) suit challenge ing certain transactions entered into between plaintiffs and some others in relation to certain property entered into between plaintiffs and certain opposite parties; and b) suit for specific performance in respect of same property. Then the Supreme Court directed both to be heard together and also added plaintiff in the suit for specific performance as party defendant in the first suit challenging transactions, because addition was necessary to avoid multiplicity of judicial proceedings, which is not the same situation in the instant case. In other words, whether in the event of a decree, the proposed intervenor has to challenge the decree to preserve his right? is the test. Even in the event of a decree, in no way it binds the right or interest which the intervenor is claiming under respondent No. 6. Therefore, this decision has no application.

19. In *Kisan Uchattar Madhyamik Vidyalaya Samiti, Deoria and Others Vs. IIIrd Addl. District Judge, Deoria and Others*, , the Court thought that

in the event when a collusive decree is obtained against the real owner or interested person without impleading him as a party and when the decree

will become final, then at a very late stage the person vitally affected or the real owner may come to know about it. This would lead to defeat the

interest of justice which should not be permitted in a Court of law and to avoid such ugly situations the Court thought that impleading is necessary.

If the plaintiff seeks relief against a particular person, it is not the look-out of the Court to see whether the relief can be claimed against the

other persons, nor is it duty of the Court to investigate whether the necessary parties have been added or left out. Because the plaintiff is the

dominus litis, if we implead the intervenor, it amounts to thrusting a person who has no direct interest with the plaintiff, to be a party.

20. *Surendra Prasad Vs. Shailendra Prasad and Others*, . That was a case where the suit properties were claimed as joint family properties. Since

it touched the status and character of the property, omission to implead a particular party who claims the property seems to be deliberate, and

hence, the Court thought that presence of such person is necessary for effective and final adjudication of the litigation between the parties, which is

not the same factual situation in the instant case.

21. *Adapa Venkateswra Rao and another Vs. Mohammad Suleman and others*, is a case where in a suit for specific performance by a purchaser,

another purchaser of the same property sought for impleading inter alia contending that in the event of a decree, his right is likely to be affected.

There, the persons who sold away the property have not evinced any interest in the suit, and, as such, on the ground, it cannot be said that they

have no interest. The Court in order to avoid further litigation permitted the impleadment. This case has no relevance to the case on hand.

22. *C. KR. C.N.K.R. Adhappa Chettiar and Others Vs. R.M. Meenakshi Achi and Others*, : That was a case where the intervenor had

purchased the property and came to know that defendants 1 and 2 have no interest in contesting the matter, having sold the entire interest in the

property. In that situation, since she has acquired the right in the suit subject-matter, she was allowed to come on record.

23. This Court in *S.S. Viswanathan Vs. Union of India*, , has taken the view that any person who has to be impleaded should have a subsisting interest in the subject-matter of the suit. A mere convenience or benefit which might possibly result to a party applicant by adding another party to the pending suit is not the test to be applied. The test is whether for the purpose of the adjudication of the ""real controversy"" between the parties, the presence of the intervenor is essential?. No amount of assertion on the part of the parties to a lis to the effect that it would avoid multiplicity of suits, that it would be convenient for purposes of trial that it would not cause prejudice to any party would be of any avail. If the cardinal test, namely, for a final adjudication of the ""real controversy"" such addition is necessary, is not satisfied, then it cannot be said with any reasonable certainty that the proposed party is a proper or necessary party. This view was taken consistently by this Court in *In Re: Kelloth Ibrahim Haji and Others*, .

24. In *Bharatha Panicker Vs. Krishnakumari and Another*, , this Court took the view that it is not possible to bring the third party in the proceeding, who will be an intruder advancing an independent case of his, which is alien to the controversy already existing in the suit.

25. In *Razia Begum Vs. Sahebzadi Anwar Begum and Others*, , the Supreme Court while observing that generally the question of addition of parties is not one of initial jurisdiction of the Court, but of a judicial discretion which has to be exercised in view of all the facts and circumstances of a particular case, held that the party seeking to be added as a party should have a direct interest as distinguished from a commercial interest, in the subject-matter of the litigation. It was further held that in cases covered by those statutory provisions, the Court is not bound to grant the declaration prayed for, on a mere admission of the claim by the defendant, if the Court has reasons to insist upon a clear proof apart from the admission. In the instant case, there is no direct and real controversy between the plaintiff and the intervenor. If at all there is any interest, it is a commercial interest between the respondent No. 6 and the intervenor. Where, the question of hypothecation and assignment are covered under the statutory provisions, mere admission or a letter to claim certain amount does not give a right, as he has to independently prove the assignment apart

from a reference in the letter.

26. In Vattam-Ramakrishnayya Vs. Vattini Satyanarayana and Others, this Court took the view and held that what the Court ought to see is

whether there is anything which cannot be determined owing to his absence or whether a third person will be prejudiced by his not being joined as

a party. If this test is applied, there is nothing which cannot be determined without the presence of the intervenor with reference to the cause of

action of the appellant. In the event of such determination, the intervenor will have no prejudice because the entitlement of the plaintiff stands on an

altogether different footing, whereas that of the intervenor's claim constitutes a different cause of action.

27. In AIR 1931 229 (Privy Council) , the Court took the view that where the impleadment would necessitate a commencement of the

proceedings, de novo the opportunity of joining as additional parties should not be allowed.

28. Looking from these angles, the cause of action being distinct, the claim set up by the intervenor is yet to be proved according to law as against

respondent No. 6, there is already a lis pending between them in O.S. No. 383 of 1996 on the file of the City Civil Court, Madras, where 6th

respondent has sought for a declaration that he is the purchaser of the ship and there is no real controversy between the plaintiff and the intervenor

and it being a commercial transaction, statute requires certain obligations to be fulfilled and lastly, it will have the effect of a de novo trial therefore,

the application is liable to be dismissed.

29. However, we make it clear that any observations made, in this order is only for the disposal of this application for impleading. It need not be

construed that we expressed opinion on the claim of the intervenor as against respondent No. 6. If so advised, he may work out his remedy in a

properly constituted suit in accordance with law.

30. With this observation, the petition is dismissed. Parties to bear their own costs.