

(1999) 08 BOM CK 0095

In the Bombay High Court

Case No : Chamber Summons No. 857 of 1999 in Admiralty Suit No. 16 of 1995

Fordie Metals Ltd.

APPELLANT

Vs

M.V "Tibor Szamuely"

RESPONDENT

Date of Decision : 20-08-1999

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 10, Order 1 Rule 10(2)

Citation : AIR 2000 Bom 174 : (1999) 4 ALLMR 203 : (2000) 3 MhLj 444

Hon'ble Judges : R.M. Lodha, J

Bench : Single Bench

Advocate : Rahul Narichania and Sudeep Dasgupta, instructed by N. and Narichania, for the Appellant; V.K. Rambhadran, for Defendant Nos. 1 and 2, for the Respondent

Judgement

R.M. Lodha, J.—Heard Mr. Narichania, the learned counsel for the applicants and Mr. Rambhadran, the learned counsel for defendants.

2. By this chamber summons taken out by Banque National De Paris (Suisse) S.A. seeking leave of the Court, it is prayed that the applicants be permitted to be impleaded to the present suit in place and stead of plaintiffs and they be permitted to amend the plaint as per the Schedule annexed to the chamber summons and also to carry out the consequential amendments therein as may be required. The applicants have also prayed that the suit be deemed to have been instituted as on 21 -3-1995 viz. on the date of institution of the present suit.

2A. In the affidavit in support of this chamber summons it is stated that though the plaintiffs filed the present suit against the defendants for recovery of a sum of U.S. Dollars 145,349.68 along with interest thereon, for arrest and sale of the 1st defendant vessel or any other ship/ships or vessels belonging to or in the beneficial ownership of the owners of the 1st defendant vessel or of the 3rd defendant together with all its paraphernalia and for sale of the same under the directions, orders and supervision of the Court and for application of the sale proceeds thereof to the satisfaction of the plaintiffs claim, the entire claim was

instituted" for the benefit of the applicants. It is also stated in the affidavit in support of chamber summons that the suit was filed by the present plaintiffs in its name not with a dishonest motive or intention but it was believed by both the plaintiffs and the applicants that there was/is no bar to plaintiffs filing the suit notwithstanding the assignment. Upon the plaintiffs-Company going into liquidation and the liquidator having been appointed, immediately thereafter on 17-1-1996 liquidator Mr. P. Bernard Harrington intimated the applicants that the amounts due to the company in respect of the matter in question cannot be assigned to the Bank and that the Bank shall be entitled to realisation which may ultimately be forthcoming. It is thus stated in the affidavit in support of the chamber summons that filing of the suit by the plaintiffs in its name was a bona fide error/mistake and that now the applicants be substituted in place of present plaintiffs and allowed to continue the suit henceforth.

3. There is no dispute that the plaintiffs Fordie Metals Limited had assigned their rights to the receivables, namely, all future receivable resulting from deliveries of goods to be financed wholly or partially with the aid of applicant-Bank and all receivables relating to invoices which the assignees have already or shall in the future shall communicate to the Bank. The said assignment took place on 4-6-1993 which is annexed as Exhibit "A" along with the affidavit in support of the chamber summons and it reads thus :

"We hereby assign all rights to the receivables described below :--

-- All future receivable resulting from deliveries of goods to be financed wholly or partially with the aid of your bank,

-- All receivables related to invoices which we have already or will in the future communicate to your bank. The sending of a copy of a photocopy of an invoice is sufficient to establish the assignment to the bank of the related receivable.

These assignments are intended to repay our current and future borrowings from your bank, but we acknowledge that we remain liable for the ultimate repayment of such borrowings.

The bank is authorised to notify the debtor of the assignments as it shall deem appropriate.

This deed of assignment as well as any possible legal proceedings arising therefrom shall be subject to Swiss Law. The place of execution, the Court of proceedings against customers resident abroad, and the Court having exclusive jurisdiction for all proceedings whatsoever, shall be at the place where the office or branch dealing with the customers is located. The bank shall nevertheless be entitled to initiate proceedings at the domicile of the customers or in any other appropriate Court.

FORDIE METALS LIMITED 30, HOMEFIELD ROAD WIMBLEDON VILLAGE,
LONDON SW104OF"

4. The present suit has been filed by the plaintiffs on 20-3-1995 for the reliefs already indicated above against the defendants. It appears that soon after the filing of the suit the present plaintiffs went in liquidation and Mr. P. Bernard Harrington was appointed as liquidator. At the instance of the plaintiffs the 1st defendant vessel was arrested and for getting the vessel released, the 1st defendant furnished security by way of Bank guarantee in the month of April, 1995, A motion was also taken out by the defendants in the month of April, 1995 praying for dismissal of the suit on the ground of want of jurisdiction of this Court. The said motion is said to have been dismissed in the month of June, 1999. It is true that in the plaint the plaintiffs have not stated a word about the assignment of rights in favour of applicants-Bank, namely, Banque National De Paris (Suisse) S.A. It is also true that no steps were taken by the plaintiffs in informing the Court as soon as it went in liquidation and the liquidator was appointed to manage the affairs of plaintiffs-Company. However, from these facts it cannot be inferred that plaintiffs acted with ulterior motive or with mala fide intention. It is clear that immediately after the liquidator was appointed, he on 17-1-1996 intimated the applicants-Bank that all realisations in respect of assignment, if recovered by the plaintiffs shall be for the benefit of the Bank and that the Bank shall be entitled to all those realisations ultimately forthcoming. This clearly indicates that there was no hidden motive on behalf of the plaintiffs and that they filed the suit for the reliefs prayed against the defendants for the benefit of the applicants.

5. The question that falls for determination in the present case is whether in a suit filed by a party who has already assigned his right or claim in the suit to some other party can file the suit and during the pendency of the suit can the assignee pray for substitution in place of original assignee and continue with the suit.

6. When an assignment, creation or devolution of any interest takes place during the pendency of a suit, a specific provision is made in Rule 10 of Order 22, C.P.C. which provides that in cases of 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 or devolved. The present provision is of no help in the present case since admittedly the assignment did not take place during the pendency of the suit but rather it had already taken place prior to the filing of the suit.

7. Order 1, Rule 10 of CPC makes a provision thus :

"10. Suit in name of wrong plaintiff.-- (1) Where a suit has been instituted in the name of the wrong person as plaintiff or where it is doubtful whether it has been instituted in the name of the right plaintiff, the Court may at any stage of the suit, if satisfied that the suit has been instituted through a bona fide mistake, and that it is necessary for the determination of the real matter in dispute so to do order any other person to be substituted or added as plaintiff upon such terms as the Court thinks just.

(2) Court may strike out or add parties--The Court may at any stage of the proceedings, either upon or without the application of either party and on such terms as may appear to the Court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added."

.....

8. The aforesaid provision empowers the Court to substitute the plaintiff in the suit who is a wrong person by right plaintiff if the Court is satisfied that the suit has been instituted through a bona fide mistake and also that it is necessary for determination of real matter in controversy. Similarly the Court has also power to substitute a plaintiff in the suit where it is doubtful that it has been instituted in the name of the right plaintiff if the Court is satisfied that the suit has been instituted through a bona fide mistake and it is necessary for determination of real controversy between the parties.

9. In *Hughes v. Pump House Hotel Company* (1902) 2 KBD 485, the question was whether an action has been commenced in the name of wrong person as plaintiff through a bona fide mistake and though the original plaintiff has no cause of action, the Court has jurisdiction to order the substitution of another person as plaintiff. The Court of appeal upon considering all relevant practice and procedure held that the jurisdiction of the Court is not taken away to order the substitution of plaintiff by another person where the original plaintiff though had no cause of action commenced the proceedings through a bona fide mistake. Collin M. R. in the said King's Bench Division held thus :

"The plaintiff commenced an action against the defendants, and a question arose whether the plaintiff had made an absolute assignment of his claim against the defendants, or only an assignment of his claim against the defendants, or only an assignment by way of charge only, and on the decision of that point depended the plaintiff's right to bring an action. Wright, J. took one view of the case, and the Court of Appeal took another, and that in itself is evidence that the plaintiff had made a bona fide mistake in commencing the action in his own name. That puts in the jurisdiction of the Court under Order 16, Rule 2, to order that another person should be substituted or added as plaintiff upon such terms as may be just. So long as the doubt as to who should bring the action was bona fide, there can be no question as to the jurisdiction of the Court, and on the facts it is plain that it was a genuine doubt. The two cases of *Duckett v. Cover*, 1877 (6) Ch D 82 and *Ayscough v. Bullar* 1889 (41) Ch D 341 are clear authorities on the point raised before us. In each case the right asserted by the new plaintiff excluded that of the original one. In those cases plaintiffs were added, but there can be no difference in principle whether a plaintiff is added or substituted, and both adding and substituting are specifically mentioned in the rule. I think, therefore, that the

objection raised by the defendants fails, and that the order was rightly made."

Cozens-Hardy L.C. in the very judgment observed thus :

"This case seems to me to fall clearly within the words of Order. 16, Rule 2. There has been a bona fide mistake of law as to whether there had been an absolute assignment of the plaintiffs claim, or an assignment by way of charge only. It is said that the rule does not apply where it is shown that the plaintiff has no right to action; but there are abundant authorities to the contrary effect. In *Carswell v. Hyland* 1867 (3) TLR 708 there was an addition of a plaintiff in a case in which the original plaintiff was heir-at-law of a deceased trustee, and had no right of action, the right being vested in the added plaintiff as legal personal representative; and in others of the cases which have been cited the failure of the right of the original plaintiff to bring the action was the reason for the addition of another person as plaintiff. There is no difference, as was suggested, between the addition and the substitution of a plaintiff. When once the case is shown to be within the rule, there is jurisdiction to add or to substitute. I think, therefore, the order appealed from was right."

10. In *Diayadaru Chandrasekaralingam Vs. Arigapudi Nagabhushanam and Another*, , the learned single Judge of that Court held thus :

"It seems to be that even if the assignment is valid the right of action originally residing in the assignor has not ceased. It is true Section 130, Transfer of Property Act says that where an actionable claim is transferred all the rights and remedies of the transferor are transferred. I do not deny this. All that I say is that the transferor may maintain the action and afterwards hand over the amount when collected to the transferee."

11. In *Laxmi Kumar Srinivas Das Vs. Krishnaram Baldev Bank and Another*, while construing the expression "Where a suit has been instituted in the wrong person as plaintiff under Order 1, Rule 10(1)," it was held that the said expression must be construed to include those suits which are instituted by the person who had no right to do so. It was held thus :--

"(3) *Shri Kanhyalal*, learned counsel for the petitioners, contends that where the original plaintiff had no right of suit, the suit must be deemed not to have been validly commenced and such a defect could not be cured by an amendment and so the plaint ought to be rejected and that a fresh suit must be filed. I do not think there is any substance in this argument; for, the words in Rule 10, Order 1 of CPC are in direct contrast with the argument addressed. The words "where a suit has been instituted in the name of the wrong person as plaintiff" are quite clear and must be construed to include those suits which are instituted by persons who had no right to do so.

If it is laid down in any ruling that no amendment is possible or permissible in a case where the original plaintiff had no right to sue, I should, with all respect, disagree with that interpretation as it would contravene the clear provisions

embodied in Order 1, R. 10. I am fortified in this view by a ruling reported in *Krishna Bai v. Collector and Govt. Agent, Tanjore* ILR (1907) Mad 419 (A) and another reported in AIR 1934 159 (Nagpur) (B).

12. The learned counsel for the defendants however relied on two decisions of this Court, namely, *Sayad Abdul Hak Sardar Diler Jung Bahadur, C.I.E. v. Gulam Jilani Valad Imdad Alikhan* ILR (1896) (Bom) 677 and *Bhanu Tukaram Shet v. Kashinath Pandshet* ILR (1896) Bom 537. In *Sayad Abdul Hak Sardar Diler Jung Bahadur's* case (supra) the Division Bench of this Court observed that the defendant who has assigned all his rights in the subject-matter of the suit, and has no longer any interest in it, has no right to be made a co-plaintiff. It was further observed that the plaintiff who has no right of action when he brings his suit cannot remedy the defect and acquire the right by joining with him persons who have the right of action.

13. In *Bhanu Tukaram Shet's* case (supra) this Court held that if a plaintiff at the time he brings his suit has no interest in the subject-matter thereof, the joinder of a person as co-plaintiff who has an interest cannot alter the plaintiffs position or confer on him any right of suit.

14. The Privy Council in AIR 1939 170 (Privy Council) after considering the provisions of Order 1, Rule 10, C.P.C. approved the proposition laid down by Kings Bench Division in *Hughes v. Pump House Hotel Company Ltd.* (1902) 2 KBD 485 and held thus :--

"It has long been recognised that one or more of several persons jointly interested can bring an action in respect of joint property and if their right to sue is challenged can amend by joining their co-contractors as plaintiffs if they will consent or as co-defendants if they will not. Such cases as (1879) 11 Ch D 121 and (1898) 2 QB 380 are examples of this principle. Nor indeed would it matter that a wrong person had originally sued though he had no cause of action : see (1902) 2 KB 485. Once all the parties are before the Court, the Court can make the appropriate order and should give judgment in favour of all the persons interested whether they be joined as plaintiffs or defendants. Prima facie therefore the trial Court in the present case should have given judgment in favour of the eight of the original partners who survived, though some of them had been made defendants : see (1898) 2 QB 380."

It appears that the Privy Council approved the law that when a right to sue of a party is challenged and if the case under Order 1, Rule 10, C.P.C. is made out, it did not matter that a wrong person who had originally sued had no cause of action. In view of the law laid down by the Privy Council, it is not necessary for me to go into the details of the two judgments of this Court in *Sayad Abdul Haksardar Diler Jung Bahadur, C.I.E. v. Gulam Jilani Valad Imdad Alikhan* ILR (1896) Bom 677 and *Bhanu Tukaram She v. Kashinath Pandshet* ILR (1896) Bom 537. The other High Courts have also applied the principle stated by Kings Bench in *Hughes* case which I have already noted above.

15. Since the plaintiffs proceeded under bona fide mistake that they had right to institute the suit for the claim made in the suit though there was an assignment in favour of the Bank, the applicants can be permitted to be substituted in place of plaintiffs.

16. Accordingly, I am of the view that the applicants can be allowed to be substituted in place of the plaintiffs under Order 1, Rule 10(1) and this is a proper case where the Court should exercise its discretion under Order 1, Rule 10, C.P.C.

17. Before I close, I make it clear that since the defendants intend to raise the plea of limitation against the applicants, that I am not going into the question of prayer (c) made in the chamber summons and that the question of limitation, if raised by the defendants in the written statement, shall be examined in the trial and that by this order nothing is to be read that question of limitation has been decided directly or indirectly.

18. Accordingly, chamber summons is made absolutely in terms of prayers (a) and (b). Prayers (a) and (b) read thus ;--

(a) That the applicants be permitted to be impleaded as plaintiffs in the present suit in place and stead of the plaintiffs;

(b) The applicants be permitted to amend the plaint as per the schedule annexed hereto and also to carry out the consequential amendments therein as may be required."

19. Necessary amendment be carried out within four weeks from today.