

(2002) 07 BOM CK 0136

In the Bombay High Court

Case No : Chamber Summon No. 284 of 2001 in Suit No. 1663 of 2000

Hari Shankar Singhania and Others

APPELLANT

Vs

Dr. Gaur Hari Singhania and Others

RESPONDENT

Date of Decision : 10-07-2002

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 6 Rule 17

Citation : (2003) 1 ALLMR 548 : (2003) 1 BOMLR 764 : (2003) 2 CivCC 604 : (2002) 4 MhLj 938

Hon'ble Judges : D.G. Karnik, J

Bench : Single Bench

Advocate : D. Madson, M.S. Doctor and Shringarpure, instructed by Hariani and Co, for the Appellant; S.N. Kadam, instructed by Malvi Ranchoddas for defendant Nos. 1 to 9 and Salil Shah, instructed by Mulla and Mulla for defendant Nos. 10 to 17, for the Respondent

Judgement

D.G. Karnik, J.—Heard Mr. Madon for the plaintiff, Mr. Kadam for defendant Nos. 1 to 9 and Mr. Shah for defendant Nos. 10 to 17. The defendants oppose the chamber summons on the ground namely that the case made by means of amendment is such that it would have been barred by limitation if the suit was instituted on the date of the application for amendment.

2. In Jai Jai Ram Manohar Lal Vs. National Building Material Supply Gurgaon, while allowing the amendment, the Apex Court observed thus :

"Rules of procedure are intended to be a handmaid to the administration of justice. A party cannot be refused just relief merely because of some mistake, negligence, inadvertence or even infraction of the rules of procedure. The Court always gives leave to amend the pleading of a party, unless it is satisfied that the party applying was acting mala fide or that by his blunder, he had caused injury to his opponent which may not be compensated for by an order of costs. However, negligent or careless may have been the first omission, and, however, late the proposed amendment, the amendment may be allowed if it can be made

without injustice to the other side."

After this judgment, there can hardly be any doubt that allowing of an amendment is a rule and refusing it is an exception. Mr. Kadam and Mr. Shah appearing for the defendants state that the present case falls within the exception and amendment should be refused.

3. More than four decades ago in *L.J. Leach and Company Ltd. Vs. Jardine Skinner and Co.*, , a four bench judgment of the Supreme Court observed in para 16.

"It is no doubt true that courts would as a rule, decline to allow amendments, if a fresh suit on the amended claim would be barred by limitation on the date of the application. But that is a factor to be taken into account in exercise of the discretion as to whether amendment should be ordered and does not affect the power of the court to order it, if that is required in the interests of justice.

In the case of *L.J. Leach Co. Ltd.* the Apex Court while laying down that limitation is only a factor to be taken into account in exercise of discretion whether amendment should be ordered and not affecting the power of court to order it, allowed the amendment in the facts and circumstances of that case. This judgment of a four judge bench of the Apex Court which has held the field for more than 4 decades was applied recently in *Raghu Tilak D. John v. S. Raypa* reported in (2001) 2 SCC 472. In para 6 of the judgment, the Apex court observed:

"The dominant purpose of allowing an amendment is to minimize litigation. The plea that the right sought by way of amendment is barred by time is arguable in the circumstances of the case, as is evident from a perusal of the averments made in para 8(a) to 8(f) of the plaint which was sought to be incorporated by way of amendment. I feel that in the circumstances of the case, the plea of limitation being disputed could be made the subject matter of the issue after allowing the amendment prayed for."

4. Thus, the Hon"ble Supreme Court held that it is not in every case wherein the plea of limitation be raised that amendment should be disallowed. If the plea of limitation is disputed bona fide, it could be made the subject matter of the issue after allowing the amendment. It is only where it is clear on the facts of the case that the plea raised by way of amendment is surely time barred on the date of application for amendment that the court would refuse the amendment. Where it is doubtful whether the plea raised by limitation is or is not barred by limitation on the date of amendment and evidence would be required to determine whether a suit as amended is or is not barred by limitation refusing the amendment at the threshold is to prevent adducing of the evidence before trial. Thus, where the court feels that it is not possible to determine certainly and without evidence, on the face of the pleadings and material already on record, whether the proposed amendment is or is not barred by limitation, the court may not shut out an amendment. In the present case, it cannot be said with certainty before the

evidence is adduced whether the pleadings which are sought to be added by means of amendment were barred by limitation on the date of the application for amendment.

5. The matter can be looked at from another angle. The original suit was instituted on 18-4-2000. In paragraph No. 5 of the plaint, it is stated that the firm (M/s Juggilal Kamal Bankers) was dissolved w.e.f. 19-3-1987 on agreed terms as recorded in the Deed of Dissolution dated 26-3-1987. It is further stated that by Clause 4 of the Deed of Dissolution, parties have agreed to distribute the assets of the partnership as soon as possible and the parties would strive to accomplish it by 31-3-1987. However, the date 31-3-1987 was not a final cut off date. In para 26 of the plaint, it is stated that the cause of action accrued in favour of the plaintiff any where between 18-10-1988 and 18-3-1989. Relying on these averments made in the plaint, Mr. Kadam learned counsel for the defendants submitted that the suit as instituted itself was covered either by article No. 5 or article 54 of the Limitation Act and was barred by limitation, the amendment was also consequently barred by limitation. If the contention that the suit as originally instituted itself was barred by limitation is correct then, allowing an amendment would not cause any prejudice to the defendants because, even the amended suit would also be so barred. It is to be noted that by means of an amendment, the plaintiffs are not seeking to add any new prayer. They are only trying to add certain facts. The suit as to the existing prayers if barred by limitation, as contended by Mr. Kadam, would continue to be barred and mere addition of certain materials or facts would not affect the defendants in their defence.

6. On the date of filing an application for amendment by means of chamber summons, neither of the defendants had filed written statement. Chamber summons had come up for hearing before me on 1-7-2002 when on the request of the parties, it was adjourned for one week. It is only on that day i.e. 1-7-2002 the defendant Nos. 10 to 17 filed their written statement. Defendant Nos. 1 to 9 have not yet filed their written statement. Thus, amendment is sought at an early stage and even before the defendants disclosed their defence.

7. For these reasons, I am inclined to allow the amendment subject to costs. In the circumstances. Chamber summons is made absolute subject to payment of costs of Rs. 2000/- (Rs. 1000/- for defendant Nos. 1 to 9 and Rs. 1000/- for defendants Nos. 10 to 17). Costs to be paid and amendment to be carried out within two weeks. Defendants Nos. 10 to 17 shall have liberty to file additional written statement to the amended portion of the plaint.