
(1978) 08 CAL CK 0022
In the Calcutta High Court
Case No : C.R. Case No. 4213 of 1974

Indian Overseas Bank Ltd.

APPELLANT

Vs

Thermolith Products Private Ltd. and Others

RESPONDENT

Date of Decision : 30-08-1978

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 3, Order 1 Rule 3A

Citation : AIR 1979 Cal 112 : 82 CWN 1126

Hon'ble Judges : Murari Mohan Dutt, J; D.C. Chakravarti, J

Bench : Division Bench

Advocate : B.C. Dutt and P.K. Bose, for the Appellant; G.S. Rawat, (for No. 8) and Shyamal Sen, (for No. 7), for the Respondent

Final Decision : Dismissed

Judgement

M.M. Dutt, J.—This Rule is at the instance of the plaintiff, the Indian Overseas Bank Ltd., and it is directed against order No. 116, dated July 27, 1974 of the Subordinate Judge, First Court, Alipore. By the said order, it has been held by the learned Subordinate Judge that the defendants Nos. 7 and 8 have been wrongly added as parties to the suit. The learned Subordinate Judge has directed the plaintiff bank to elect as to which of the defendants Nos. 1 to 8 it would proceed against.

2. The suit out of which this Rule arises is one for the recovery of the sum of Rs. 80,967.78 advanced by the plaintiff bank to the defendant No. 1, a company, of which the defendants Nos. 2 to 4 are the Directors. The defendant No. 6 assigned to the plaintiff certain direct bills drawn by the defendant No. 6 on the defendants Nos. 7 and 8, in liquidation of the liabilities of the defendant No. 1 to the plaintiff. The defendant No. 5 is the surety and he executed a letter of guarantee in favour of the plaintiff thereby guaranteeing due repayment to the plaintiff up to a sum of Rupees 60,000/- in the event of the plaintiff not receiving payment from the defendants Nos. 7 and 8. It is the case of the plaintiff that in spite of repeated demands the defendants Nos. 7 and 8 have refused to pay any

amount in respect of the said direct bills alleging that no sum was due by them under those bills. Upon the said allegations, the plaintiff impleaded the said defendants Nos. 7 and 8 in the suit.

3. The defendant No. 8 raised a preliminary objection as to the maintainability of the suit against it and also the jurisdiction of the Court, It was contended on behalf of the defendants Nos. 7 and 8 that in view of the provision of Order 1, Rule 3 of the Civil P. C., they were wrongly joined in the suit. Further, it was contended that as they did not reside and carry on business within the jurisdiction of the Court, the Court could not try the suit as against them. The learned Judge upheld the contentions of the defendants Nos. 7 and 8 and, as stated above, directed the plaintiff to elect as to against which of the defendants it would proceed in the suit. Hence this Rule.

4. The principal question that is involved in this Rule is whether the defendants Nos. 7 and 8 have been wrongly joined in the suit as contended on their behalf. Rule 3 of Order 1 of the Civil P. C, provides that all persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if separate suits were brought against such persons, any common question of law or fact would arise. In order to support the joinder of the defendants Nos. 7 and 8, two conditions must be fulfilled, namely, (1) whether the right to relief against the said defendants can be said to be in respect of or arising out of the same act or transaction or series of acts or transactions and (2) whether any common question of law or fact would arise if separate suits were brought against them. The right to relief claimed by the plaintiff against the defendants Nos. 1 to 6 is based on the loan transaction between the plaintiff and the defendant No. 1. On the other hand, the right to relief claimed by the plaintiff against the defendants Nos. 7 and 8 is based on the assignment by the defendant No. 6 to the plaintiff of certain direct bills payable by the defendants Nos. 7 and 8 to the defendant No. 6. These two transactions are completely different and one has no connection with the other. It is difficult to say that the right to relief as claimed by the plaintiff against the defendants including the defendants Nos. 7 and 8 arises out of the same act or transaction or series of acts or transactions. Moreover, no common question of law or fact would arise between the plaintiff and the defendants Nos. 1 to 6 on the one hand and the plaintiff and the defendants Nos. 7 and 8 on the other. The cause of action against the defendants Nos. 1 to 6 is different from that against the defendants Nos. 7 and 8. So far as the defendants Nos. 1 to 6 are concerned, the cause of action is the advancement of the loan by the plaintiff to the defendant No. 1 and failure of the defendant No. 1 to repay the same to the plaintiff. On the other hand, the cause of action as against the defendants Nos. 7 and 8 is the assignment to the plaintiff by the defendant No, 6 of certain direct bills payable by the defendants Nos. 7 and 8 and the failure of the defendants Nos. 7 and 8 to pay the said bills. The cause of action against the defendants Nos. 7 and 8 is completely different from

that against the defendants Nos. 1 to 6. The facts which are to be proved and enquired into so far as the defendants Nos. 7 and 8 are concerned will be quite different from those in respect of the defendants Nos. 1 to 6. The bills which have been assigned by the defendant No. 6 to the plaintiff relate to the price of certain goods alleged to have been supplied by the defendant No. 6 to the defendants Nos. 7 and 8. The plaintiff has to prove that the said goods were supplied and that the defendants Nos. 7 and 8 have not paid the price thereof. In this connection, it may be stated that the defendants Nos. 7 and 8 have inter alia denied that any sum is due by them on account of the said bills. Thus it appears that the provision of Order 1, Rule 3 of the Civil P. C. is not applicable for the purpose of the joinder of defendants Nos. 7 and 8 along with other defendants. The learned Judge, in our opinion, has rightly held that the defendants Nos. 7 and 8 have been wrongly joined in the suit.

5. It has been urged by Mr. Bankim Chandra Dutt, learned Advocate appearing on behalf of the plaintiff petitioner, that in view of the provision of the new Rule 3-A inserted by the Civil P.C. (Amendment) Act, 1976, the suit may be separately tried against the defendants Nos. 1 to 6 and defendants Nos. 7 and 8. Rule 3-A provides that where it appears to the Court that any joinder of defendants may embarrass or delay the trial of the suit, the Court may order separate trials or make such other order as may be expedient in the interest of justice. It is contended by Mr. Dutt that the words "any joinder" in Rule 3-A include also a wrong joinder of a defendant. We are unable to accept the contention. In our opinion, unless the joinder of the defendants is a proper joinder, the provision of Rule 3-A will not apply. A suit cannot be tried against a person who has been wrongly joined. When a person is joined in the suit as a defendant without any cause of action against him the suit will not be maintainable against him. In such a case, there cannot be any question of joint or separate trials against such person. Similarly, Order 2, Rule 6 of the amended Code provides that where it appears to the Court that the joinder of cause-of-action in one suit may embarrass or delay the trial or is otherwise, inconvenient, the Court may order separate trials or make such other order as may be expedient in the interests of justice. Rule 6 also contemplates proper joinder of causes-of-action and not improper or wrong joinder of causes-of-action. In these circumstances, the contention made on behalf of the petitioner is without any substance and is rejected.

6. It has been held by the learned Judge that the defendants Nos. 7 and 8 carry on their business outside the jurisdiction of the Court. There is no averment in the plaint that the goods in respect of the disputed bills were supplied to the defendants Nos. 7 and 8 within the jurisdiction of the Court. The endorsement of the said bills in favour of the plaintiff by the defendant No. 6 was also made outside the jurisdiction of the Court. In these circumstances, it has been held by the learned Judge that the Court has no jurisdiction to try the suit as against the defendants Nos. 7 and 8. In view of the said finding of the learned Judge, it is difficult to appreciate how the learned Judge could put the plaintiff to election as

to against which of the defendants it would proceed in the suit Mr. Dutt submits that if separate suits had been brought against the defendants Nos. 7 and 8, the defendant No. 6, the assignor of the bills would also be a necessary party. It is also submitted by him that the defendant No. 6 has its factory within the jurisdiction of the Court below, and accordingly, in view of the provision of Section 20(b) of the Code of Civil Procedure, the suit can be proceeded with against the defendants Nos. 7 and 8 with the leave of the Court. In our opinion, if the plaintiff ultimately elects to proceed against the defendants Nos. 6, 7 and 8 and can prove that the defendant No, 6 carries on business within the jurisdiction of the court below, the plaintiff will be at liberty to pray for leave for proceeding against the defendants Nos. 7 and 8 u/s 20(b), If any leave is prayed for by the plaintiff, the court below will consider the same. The plaintiff, however, shall make the election within three weeks from the date of arrival of the records in the court below.

7. Subject to the observation made above, this Rule is discharged. There will, however, be no order for costs.

D. C. Chakbavarti, J.

8. I agree.