
(1977) 12 CAL CK 0029
In the Calcutta High Court
Case No : Suit No. 267 of 1974

I.T.C. Limited

APPELLANT

Vs

M.M.P. Lines Pvt. Ltd. and Others

RESPONDENT

Date of Decision : 15-12-1977

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 6 Rule 17
Limitation Act, 1963 — Article 44, 58

Citation : AIR 1978 Cal 298

Hon'ble Judges : Sabyasachi Mukharji, J

Bench : Single Bench

Advocate : P. Ginwala, B.R. Gupta and P. Chowdhury, for the Appellant; Anindya Mitra, G.K. Biswas, Shyama Poddar, Dipak Dey, S.K. Lahiry and Hirak Mitra, for the Respondent

Final Decision : Allowed

Judgement

Sabyasachi Mukharji, J.—This is an application for amendment of the plaint. The suit in question was filed on 25th June, 1974. The Master's Summons for the application for amendment of the plaint was taken out on 25th June, 1977. The summons was made returnable on the 4th July, 1977 and on the 4th July, 1977 directions for affidavits were obtained from the Court. The suit is by the plaintiff, I. T. C. Ltd. against seven defendants. The main defendant, however, is the defendant No. 1 and the plaintiff alleged that the defendant No. 1, of which the defendants Nos. 2 and 3 are the Directors and guarantors, had borrowed some money and the plaintiff had agreed to lend and advance to the defendant No. 1 the said moneys on, inter alia, the terms that they would pledge two Trawlers to the plaintiff as security for repayment of the amounts advanced. Both the trawlers were insured with the National Insurance Company Ltd. being the defendant No. 5 herein. The material fact for the present purpose is that one of the Trawlers viz. Akashi Maru was lost on 15th Sept. 1973. It is alleged that on 30th Oct. 1973 the plaintiff wrote to the defendant No. 5 about the assignment of the policies of the insurance in favour of the plaintiff and claimed damages

payable under the insurance policies. On 3rd Nov. 1973 the defendant No. 5 wrote back to say that the defendant No. 5 was not informed about the assignment of the policies, Thereafter the suit was filed, as I have mentioned before, on the 25th June, 1974 and there was an order of injunction restraining the insurance company from making any payment to the defendant No. 1. In opposition to that application on the 27th June, 1974 on behalf of the defendant No. 5 a statement was made in Court stating that in respect of Akashi Maru the amount covered by the policy had been paid to the defendant No. 1. Originally the plaintiff in the suit had claimed, inter alia, a decree for specific performance against the first defendant and a declaration that the plaintiff is entitled to a lien or charge on the Trawlers to secure the said amount of Rs. 5,22,000/ and a further declaration, inter alia, that the plaintiff is entitled to the benefit of the insurance policies mentioned in para 8 of the plaint and to any moneys payable thereunder and such moneys are charged with liability for payment of the plaintiff's claim and for other relief to which it is not necessary for me to refer for the purpose of this application.

2. In the proposed amendment, the plaintiff seeks to amend the plaint by stating that the payment made by the 5th defendant had been made with knowledge of the assignment and was therefore illegal and made fraudulently and in collusion with the first and the fifth defendants. Consequently the plaintiff has sought to amend the prayers in the plaint by asking a declaration that the payment made by the fifth defendant under the policies has not discharged the fifth defendant of its liability to pay the plaintiff and a decree to pay Rs. 5 lakhs or Rs. 3 lacs as to be determined by this Court.

3. On behalf of the respondents, viz., the respondents Nos. 1 and 5, it was urged that the amendments sought to introduce a new cause of action and, therefore, it should not be allowed. It was further submitted that the amendment sought to introduce a claim on cause of action which had become barred by lapse of time. Reliance in this connection was placed on Article 44 (b) of the Schedule to the Limitation Act, 1963. It was said that the period of limitation for a cause of action on a policy of insurance of this nature starts from the date of the occurrence causing the loss, or where the claim on policy is denied, either wholly or partly, the date of such denial, and the period of limitation is 3 years from the accrual of the cause of action.

4. Now, the question in this case is when did the cause of action arise? The loss indisputably had occurred on the 15th Sept., 1973. Therefore, the application for amendment, even if it is taken to have been made on the 25th June, 1977, was beyond the period of 3 years from the date of occurrence causing the loss. But learned advocate for the respondent No. 5 contended and, in my opinion, rightly, that the second limb of the article from which the period began to run, extends the period in favour of the plaintiff. Therefore, where the claim on the policy is denied either wholly or partly, the limitation begins from the date of such denial. Now, in this case then it has to be found out when the claim on the policy has

been denied. On behalf of the petitioner it was urged that the claim on the policy has been denied on the date when statement was made in the written statement filed on the 23rd May, 1975. On behalf of the respondent No. 1, however, it was urged that the claim on the policy has not been denied at all in this case. If one accepts this argument urged on behalf of the respondent No. 1 that the claim on the policy has not been denied but on the other hand the claim on the policy has been discharged, then, of course, the present claim of the plaintiff cannot be said to have become barred by virtue of Clause (b) of Article 44 of the Schedule to the Limitation Act. Article 58 of the Limitation Act states that for a declaration of the nature that the plaintiff has sought for, the period of limitation is 3 years when the right to sue accrues. Then again, the question would be for a suit of this nature, when can one say the right to sue accrued? Now, in this case the correct position in my opinion, is that the defendant No. 5 is denying the claim of the plaintiff to get payment, in the facts and circumstances of the case, on the policy as assigned to them. Therefore, either way one looks at it, either under Clause (b) of Article 44 or Article 58, the period of limitation would run from the time when the defendant No. 5 denies the claim of the plaintiff to get the payment of the money on the policy as assigned to them. Such would be the date because that would be the time when the claim on the assigned policy is denied to the plaintiff. That would also be the date when the plaintiff becomes entitled to obtain a declaration that the plaintiff has a right to get payment on the denial of that right by the defendant. Looked at it from that point of view, in my opinion, in this case the period of limitation would begin to run, as was urged on behalf of the petitioner, from the 23rd May, 1975. If that is the position, then of course the application, even if it is treated as an application made on the 4th July, 1977, cannot be rejected on the ground of limitation. It is well known, however, that there is no limitation as such for application for amendment. But in granting an application for amendment if there is any question of the introduction of any cause of action, which would be barred by Lapse of time if a new suit was instituted on that cause of action, that is a factor which the Court should and as has been enjoined take into consideration in allowing such an amendment application. But the limitation as such is not the only deciding and guiding factor. It is one of the elements that should be taken into consideration in dealing with the justice of the situation. In this connection reference may be made to the observations of the Supreme Court in the case of L.J. Leach and Company Ltd. Vs. Jardine Skinner and Co., . In the instant case the present amendment sought is not foreign to the claim. It arises out of the claim originally made. The claim arises out of an attempt or payment made by the fifth defendant. The controversy is that the fifth defendant had knowledge, according to the petitioner, of such an assignment. The fifth defendant denies such knowledge of assignment. In the pleading originally framed the ingredients of this controversy were pleaded but this has now been clarified and made into a new form of action as was the case before the Supreme Court in the decision referred to hereinbefore. The Supreme Court also reiterated the same principles in the case of Pirgonda Hongonda Patil Vs. Kalgonda Shidgonda Patil and

Others, . On behalf of the respondents, however, reliance was placed on a decision in the case of *Municipal Corporation for Greater Bombay Vs. Lala Pancham of Bombay and Others*, in aid of the proposition that fraud, as sought to be pleaded in the instant case, is a new cause of action and relying on the observations of the Supreme Court in the case of *Shanti Kumar R. Canji Vs. The Home Insurance Co. of New York*, on behalf of the respondent it was urged that where vested right was sought to be divested by allowing an amendment, the Court should not do so unless the Court found on materials the reason for doing so. In this case there is, in my opinion, looked at it from the point of view in which I have viewed the original plaint, there is no question of divesting any vested right of the defendant. Furthermore, as I said, the claim proposed to be made was embedded in the original pleading and is certainly not foreign to the claim.

5. There is another point that was taken, in this case it was stated that the limitation ran from the 23rd of June, 1974 when statement about the payment was made in Court and if that was the position, then by the 27th June, 1977, if the present amendment sought to be a new claim, would become barred by limitation. On the other hand, on behalf of the petitioner it was urged that the summons was taken out on the 25th June, 1977 and therefore, the application should be deemed to have been made on that date. In the case of *Govind Das v. Pran Kumar* (1959) 63 Cal WN 877, the Division Bench of this Court has held that the Master when he discharged functions under Rule 3 or Rule 5 of Chapter VI of the Rules of this Court, could not be said to be doing any judicial act. These were purely ministerial acts. Taking out of a chambers summons, to which the Master had affixed his signature, did not amount to making an application to the Court. The Division Bench observed following the decision in the case of *Khetter Mohun Sing v. Kassy Nath Sett* ILR1893 20 Cal 890, that taking out of a chambers summons, to which the Master had affixed his signature, does not amount to making an application to the Court. On this authority it was contended that the application to the Court was not made prior to the 4th July, 1977 and if the amendment sought to introduce new cause of action from the date 27th June, 1974, then that would have become barred when the application was made. It however, appears that Section 3. Sub-section (2) Clause (c) of the Limitation Act, 1963 provides that an application by notice of motion is made when the application is presented to the proper officer of that Court. There was prior to the Limitation Act, 1963, certain amount of controversy between the different High Courts as to when an application by notice of motion in a High Court can be treated to have been made to the Court. That was set at rest by the provisions of Clause (c) of Sub-section (2) of Section 3 of the Limitation Act, 1963. The basis upon which the Division Bench of this Court in the decision referred to (*Govind Das v. Pran Kumar* (1959) 63 Cal WN 877) proceeded was the authority of the Division Bench of this Court in the case of *Khetter Mohun Sing v. Kassy Nath Sett* ILR 1893 20 Cal 890 and the ratio of the said decision was that an application could not be said to be made until notice was given by the summons, and

therefore, the ratio upon which the Division Bench proceeded was that until notice had been given, the application could not be said to have been made. Notice by the different procedures of the High Court might be given either by notice of motion or by Chambers Summons. If that is the position, then, in my opinion, the principle of Clause (c) of Sub-section (2) of Section 3 would be applicable in this case and the application in this case was to be made when the notice of the summons was taken out, that is to say, on the 25th June, 1977. But in the view that I have taken on the other aspect of the matter that the time had not started to run until the statements filed in the written statements of May, 1975, I need not rest my decision in allowing this application on this aspect of the matter.

6. For the reasons aforesaid, the prayer for amendment is allowed and there will be an order in terms of prayers (i), (ii) and (iii). The amendments to be effected within 3 weeks on a signed copy of the minutes. The applicant will pay the costs of this application to the different sets of appearing respondents and also the cost of additional written statements, if any. This order however, will not prejudice the rights and contentions of the parties. The plaintiff, within a fortnight from the amendment being effected will serve upon the defendants copies of the amended plaint and the defendants will be at liberty to file additional written statements, if any within a fortnight therefrom.