

(1985) 03 CAL CK 0022
In the Calcutta High Court
Case No : Suit No. 158 of 1984

Kanthal India Ltd.

APPELLANT

Vs

Anant Prasad Bhatia and Others

RESPONDENT

Date of Decision : 15-03-1985

Acts Referred:

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

Citation : AIR 1987 Cal 24

Hon'ble Judges : C.K. Banerji, J

Bench : Single Bench

Advocate : Biswaroop Gupta and Surhid Roy Chowdhury, Advsd. (for No. 1), Gour Roy Chowdhury, (for No. 2) and B.K. Chatterjee, (for No. 3), for the Respondent

Judgement

C.K. Banerji, J.—These are three applications. The two applications are for revocation of leave under Clause 12 of the Letters Patent taken out by the defendants Nos. 1 and 2 respectively. The other is an application for amendment of the plaint taken out by the plaintiff. By consent of the parties all the three applications are taken up and are heard together.

2. Mr. Biswaroop Gupta, learned Counsel for the defendant 1 in the application taken out on his behalf for revocation of leave under Clause 12 of the Letters Patent submitted that on the basis of the plaint filed in this suit no cause of action against the defendant 1 arose within the jurisdiction of this Court. Therefore, so far as the said defendant is concerned this Court has no jurisdiction to entertain or try the suit. Mr. Gupta also urged that in any event the plaint does not disclose any cause of action whatsoever against the defendant No. 1. Therefore, no leave could be granted under Clause 12 of the Letters Patent inasmuch as the suit itself was not maintainable against the defendant 1. Similar contentions were also raised by Mr. Gour Roy Chowdhury, learned counsel for the defendant 2 on whose behalf the other application for revocation of leave under Clause 12 of the Letters Patent has been taken out.

3. To appreciate the rival contentions of the parties in all these applications it is necessary to note what case the plaintiff has made out in the plaint as against the defendants. There are three defendants in this suit. The third defendant B. M. Singh & Sons is the sole selling agent of the products of the plaintiff and as such it has been made a party to this suit but no relief has been claimed against it in this suit as will appear from para 22 of the plaint, but the defendant has been joined in this suit as the plaintiff has been advised to implead the said defendant, as his presence is necessary for complete adjudication of the disputes. Thus the defendant 3 is a defendant, which in common parlance is known as pro forma defendant. The case of the plaintiff as laid in the plaint is that the defendant 2 was the Branch Manager of the plaintiff of its Varanasi Unit. The defendant 1 was a director of the plaintiff and is the father of the defendant 2. By a written agreement dated 1st June 1973 made within the jurisdiction of this Court in Calcutta the plaintiff appointed the defendant 3 as the sole selling agent of its products and as such agent the defendant 3 became entitled to receive from the plaintiff certain commission on percentage basis on the value of the products of the plaintiff sold. It is next pleaded that with effect from Aug. 1978 the defendant 3 appointed or engaged the defendant 1, inter alia, as its agent to watch the interest of the defendant 3 at Varanasi and the defendant 3 agreed to pay to the defendant 1 one per cent of the commission due to the defendant 3 from the plaintiff in respect of the Varanasi unit. The plaintiff was informed of the said arrangement between the defendant 3 and the defendant 1 by a letter dt. 4th Dec., 1978 by the defendant 3 which was received by the plaintiff at its registered office in Calcutta within the jurisdiction of this Court. It is also pleaded that the plaintiff duly made all payments to the defendant 1 and to the defendant No. 3 in terms of the above arrangement. It is next pleaded that the above arrangement was modified or varied with effect from 1st Aug., 1980 by an agreement between the defendant 1 and the defendant 3. One of such variation was that from Aug., 1980 every month an amount equivalent to about 1% of the commission due to the defendant 3 for the preceding month would be paid to the defendant 1 and this would be treated as payment on defendant 3's special account. The other variation was that all amounts paid to the defendant 1 by the plaintiff's Varanasi unit on behalf of defendant 3 should be confirmed by the plaintiff's Calcutta office as per existing practice and the said arrangement would continue until further advice was received from the defendant 3. The defendant No. 3 informed the plaintiff by a letter dt. 11th Sept., 1980 of the aforesaid arrangement which was received by the plaintiff at its registered office within the jurisdiction of this Court and the plaintiff agreed to comply with or to give effect to the same at its registered office within the jurisdiction of this Court. The defendant 1 acted as such agent of the defendant 3 at Varanasi and the plaintiff paid to the defendant 1 various amounts on account of the commission payable by the defendant 3 to the defendant 1 in the said special account on account of defendant 3. On or about Nov. 25, 1980 the defendant 3 sent a letter to the plaintiff from Calcutta within jurisdiction of this Court to the plaintiff's Varanasi unit, a copy of which was sent to the Calcutta

office of the plaintiff within the jurisdiction of this Court instructing or requesting the plaintiff not to make any more payment to the defendant 1 in the said special account and to suspend the authority of the defendant 1 to receive any further payment in the said special account for and on behalf of defendant 3. It is also pleaded that the defendants 2 and 3 had due knowledge of the said letter of the defendant 3. In spite of suspension of authority to receive any further money on behalf of defendant 3 in the said special account, the defendant 1 in collusion and conspiracy with the defendant 2 wrongfully and illegally and with the knowledge of the plaintiff withdrew from the said special account an aggregate sum of Rs. 65,000/- by three several cheques which were drawn on the Punjab National Bank at Varanasi.

It is next pleaded in the plaint that the plaintiff came to know of the withdrawal of the said amount of Rs. 65,000/-. There were meetings of the Board of Directors held on 31st March, 1981 and on the 16th and 17th March, 1981 and the defendant 1 attended those meetings of the Board of Directors. It is pleaded that the defendant 1 took the responsibility of having made payments and he would get defendant 3 acknowledge the receipt of the said amount of Rs. 65,000/- failing which he would take the liability personally, which, however, the defendant 1 failed to do. The said board meetings were held outside the jurisdiction of this Court. Thereafter the defendant No. 1 resigned from the Board of Directors of the plaintiff and his resignation was accepted at the board meeting of the plaintiff held on 23-6-1981. It is also pleaded that the defendant 3 disputed the unauthorised withdrawal of Rs. 65,000/- from the said special account by the defendant 1 and thereupon the plaintiff paid the said amount to the defendant 3 which defendant 1 was legally bound to pay to defendant 3 but failed to do so. It is also pleaded that the defendant 1 in collusion and conspiracy with the defendant 2 withdrew the said amount and by the said wrongful and illegal act caused deprivation of the said amount to the plaintiff.

4. The plaintiff also pleaded of its reputation being undermined and seriously affected. Adverse remarks had been made by its auditors. The Company Law Board charged the plaintiff for violation of the provisions of the Companies Act in respect of the said withdrawal by the defendant 1 and the plaintiff has also been lowered in the eyes of the defendant 3 who blamed the plaintiff for the said unauthorised withdrawal. Another pleading is made that the defendants 1 and 2 are debtors to the plaintiff and they are liable to seek the creditor to pay the said amount at its Calcutta office within the jurisdiction of this Court. From the case made out by the plaintiff as pleaded in the plaint, which I have elaborately set out it could not be said that the plaint does not disclose any cause of action whatsoever against defendants 1 and 2. The defendants 1 and 2 are father and son. The cheque books relating to Varanasi branch were in the custody of the Branch Manager, that is, defendant 2 and the account of the plaintiff in the branch of the Punjab National Bank at Varanasi, was operated by defendant No. 1 as a director of the plaintiff. This is pleaded in para 8(d) of the plaint. Therefore if both the defendants Nos. 1 and 2, as pleaded by the plaintiff, had knowledge

of the withdrawal of the authority of the defendant 1 to receive any amount from the said special account, then the defendant 2 who is said to have custody of the cheque book made over the same to the defendant No. 1 for drawing the said cheques and withdrawing the amount with such knowledge which the defendant 1 did also with such knowledge. Both of them would be liable to repay the same and the plaintiff would be entitled to recover the said amount. It is true that nothing is specifically pleaded with regard to the cause of action against the defendants 1 and 2 which arose within the jurisdiction of this Court so as to enable this Court to entertain or to try the suit. Mr. Anindya Mitra, learned counsel for the defendant 1 however, urged that the defendant 3 was appointed agent in Calcutta within the jurisdiction. Defendant 3 appointed defendant 1 as its agent on certain terms which were accepted by the plaintiff in Calcutta within the jurisdiction of this Court and thereupon the defendant 1 became entitled to draw the amount payable to him by the defendant 3 from the account of the plaintiff. Although the amount was withdrawn from the Varanasi branch of the bank but the plaintiff having its registered office at Calcutta within the jurisdiction of this Court the accounting was to be made at Calcutta where the plaintiff had its books of accounts. The defendant 3 pressed for payment of the amount withdrawn by the defendant 1 and the plaintiff gave the defendant 3 credit for the said amount at Calcutta within the jurisdiction of this Court. All these facts taken together formed the entire cause of action of the plaintiff and on the basis of those facts it could not be said that this Court has no jurisdiction at all to entertain and try the suit as against defendant 1 or the defendant 2. In any event, there was no lack of inherent jurisdiction and the Court would allow the amendment so that the lacuna, if any, could be filled up. Mr. Gupta however urged that the pleadings as it is as against the defendant 1 do not disclose that any part of the cause of action arose within the jurisdiction of this Court. The allegation that debtor must seek the creditor to pay, will also have no application because Section 49 of the Contract Act would have no application to this case. It was also urged by Mr. Gupta that the application for amendment was wholly mala fide. It was submitted that the suit was filed on the 6th March, 1984. The present application was made by his client the defendant 1 on the 2nd June, 1984. The affidavit-in-opposition was filed on behalf of the plaintiff on the 31st July, 1984. In the affidavit-in-opposition there was no whisper of any part of the cause of action having arisen within the jurisdiction of this Court which is now sought to be introduced by the amendment. The affidavit-in-reply to this application was filed on behalf of the petitioner in August, 1984 and thereafter on the 3rd Sept., 1984 the application for amendment was taken out. It was urged by Mr. Gupta that the proposed amendments are wholly mala fide and clearly an afterthought. Mr. Surhid Roychowdhury, learned junior of Mr. Gupta also submitted that the proposed amendments do not come within the four corners of Order 6, Rule 17 of the Civil P. C. They are not necessary for the purpose of determining the real question in controversy between the parties. What is sought to be done by the proposed amendments is merely to add that certain things had happened within the jurisdiction of this Court. The controversy if any, between

the parties remains the same as had been in the original plaint as filed. No new facts or circumstances are sought to be added which might be called amendments which may be necessary for the purpose of determining the real question in controversy between the parties. Therefore the amendments cannot be allowed. Various decisions have been cited by both the parties. Mr. B. K. Chatterjee, learned counsel for the defendant 3 also made an exposition on the aspect as to what constituted cause of action and if the plaint disclosed any cause of action. Mr. Gupta cited a decision of a single Bench of this Court in Mahaluxmi Bank Ltd. Vs. Chotanagpur Industrial and Commercial Association, where it was observed that the general rule is that where no place of payment is specified, either expressly, or by implication, the debtor must seek his creditor. This rule should be applied with caution in this country. The obligation to pay involves the obligation to find the creditor and to pay involves the obligation to find the creditor and to pay him at the place where he is when the money is payable where no other place for payment is fixed by the contract either expressly or by implication. In this case the money was withdrawn by the defendant No. 1 from the Varanasi branch of the Punjab National Bank and if payment was to be made in Varanasi there would be no reason why should the defendant 1 come all the way from Varanasi to Calcutta to make payment. Therefore, the jurisdiction cannot be attracted by introduction of the phraseology that the debtor must seek the creditor and therefore the defendants) and 2 had to make payment to the plaintiff at its Calcutta office nor is such a construction authorised by Section 49 of the Contract Act in which that principle is to be invoked in this country. On the question of jurisdiction Mr. Gupta referred to a decision of the Supreme Court in the State of Bihar Vs. Barakar Engineering and Foundry Works Ltd. (Oriental Coal Co), . Here the question was if the Calcutta High Court had territorial jurisdiction to entertain the suit. The suit was for refund of certain amount paid on account of sales tax by the Coal Company in respect of certain assessments which were subsequently set aside by an appellate order. Here the assessments were made in Calcutta. The cheques in respect of the payments were made over to the assessing authorities in Calcutta. The cheques were cashed in Calcutta. Even then the Supreme Court observed that the assessments made by the assessing authorities were valid assessments and therefore, it could not be said that the payments made by the plaintiff were made under any mistake of law and hence the fact that the cheques issued by the plaintiff were encashed in Calcutta would not afford any cause of action for filing the suit in the Calcutta High Court. Even if encashment of cheques gave rise to a cause of action but the refund had to be obtained from Bihar. Calcutta High Court had no jurisdiction to entertain or to try the suit. In Mst. Zohra Khatoon Vs. Janab Mohammad Jane Alam and Others, . An application for amendment of the plaint made before the Court below to remove the defect of jurisdiction. A Division Bench of this Court in appeal from the order of the court below observed that granting an amendment postulates an authority of the Court to entertain the suit and make an order for amendment therein but where the court inherently lacks jurisdiction to entertain the suit it cannot make any order

for amendment to bring the suit within its jurisdiction. In that case the Court will be exercising jurisdiction which it has not. The Division Bench further observed that if they did uphold the order of the learned Judge that the Court had no jurisdiction to entertain the suit then no amendment could be allowed either by the Court below or by the Court exercising same powers to bring the suit within the jurisdiction of the Court. The next decision is also that of a Division Bench decision of this Court in *Tarapada Shome v. Parbati Charan Sarkar* reported in (1983) 2 Cal LJ 44. Where it was observed that it is generally held that the Court which has no jurisdiction to entertain the suit is not competent to allow an amendment of the plaint which would bring the suit within its jurisdiction. When on the face of it the plaint shows that the Court has no jurisdiction to try it such Court cannot allow amendment of the plaint. Various decisions were referred to including the decision in *Mst. Zohra Khatoon (supra)*. Mr. B. K. Chatterjee appearing for the defendant 3 also cited two decisions. The two cases are (1) *Ujjal Talukdar Vs. Netai Chand Koley*, . This is a single Bench decision of this Court where the learned Judge quoting from a decision of Fry, L. J. in *Read v. Brown* reported in (1888) 22 QBD 128 observed that everything which, if not proved, gives the defendant an immediate right to judgment must be part of the cause of action. Cause of action does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved. Evidence of a fact should not be confused with the fact itself. Even an infinitesimal fraction of a cause of action will be part of the cause of action and confer jurisdiction on the Court within the territorial limits of which that little occurs. (2) *Ritu Sachdev Vs. Anita Jindal and Others*, . Here a Division of this Court observed that the question of jurisdiction be decided on the allegations in the pleadings and it must be decided before the case begins whether or not there is a jurisdiction. If, on the face of the pleading, the Court has jurisdiction, it matters not that later the suit as against the person who carried on business or resided within the jurisdiction is dismissed. Where leave has been granted under Clause 12 of the Letters Patent an application by defendant for revocation may raise questions far too difficult to determine upon affidavit evidence and in such case the question should not be decided on affidavit evidence. In a proper case an application to revoke the leave granted under Clause 12 may be entertained by the Court, but the question of difficulty and importance should not be dealt with by an application to revoke the leave under Clause 12 and to take the plaint off the file. The proper course is to dismiss the application to take the plaint off the file and to direct that the case do proceed on all points in the usual way. Mr. Anindya Mitter, urged that the Court will not revoke leave under Clause 12 of the Letters Patent if the Court has to go into the elaborate investigation as to question of law and fact. In support of his contention Mr. Mitter cited a decision in the case of *Parasram Harnandrai Vs. Chitandas and Others*, where Sinha, J. laid down the principles which cannot be considered by the Court in an application for revocation of leave under Clause 12 of the Letters Patent and one of the principles was that if the Court had to embark upon detailed investigation as to question of law and fact the application should not be allowed.

5. Mr. Mitter also urged that there was no lack of inherent jurisdiction of this Court. There was cause of action against the defendants 1 and 2. There have been some omissions in the pleadings which have created certain difficulties. In this context Mr. Mitter cited a decision of a Division Bench of this Court to which 1 was a party in the case of Prahladraai Agarwalla and Others Vs. Sm. Ranuka Pal and Others, . In this case the decision in Mst. Zohra Khatoon Vs. Janab Mohammad Jane Alam and Others, was considered and the principle enunciated therein was accepted. Here the suit was filed on the basis that this Court had concurrent jurisdiction with the Presidency Small Cause Court, Calcutta and the City Civil Court had no jurisdiction to entertain or try the suit and the court-fees were paid on that basis. Difficulties were felt thereafter in proceeding with suit. An application for amendment was made where the valuation of the suit was increased and court-fees on that valuation were paid. Such amendment was allowed on the basis that initially the suit as filed showed that this Court had jurisdiction to entertain the suit at least to the extent of a part of the claim although the basis might have been different but then by the amendment whatever difficulty was there was removed and court-fees were paid and the valuation was raised. The amendments were allowed. Two decisions of the Supreme Court which were cited were considered. Jai Jai Ram Manohar Lal Vs. National Building Material Supply Gurgaon, the Supreme Court observed that a party could not be refused just relief merely because of some mistake, negligence, or inadvertence and however negligent or careless might have been the first omission and however late the proposed amendment, the same might be allowed if it did not cause injustice to the other party.

6. In Ganesh Trading Co. Vs. Moji Ram, Supreme Court went further and observed :

"..... Defective pleadings are generally curable if the cause of action sought to be brought out was not ab initio completely absent. Even very defective pleadings may be permitted to be cured, so as to constitute a cause of action where there was none, provided necessary conditions such as payment of either any additional court-fees, which may be payable, or of costs of the other side. It is only if lapse of time has barred the remedy on a newly constituted cause of action that the Courts should ordinarily, refuse prayers for amendment of pleadings."

7. Mr. Mitter also urged that even if the plaint did not disclose that the Court had jurisdiction the plaintiff was entitled to show other facts that it had jurisdiction. In support of his contention Mr. Mitter cited following decisions viz. Subodh K. Chatterjee Vs. Union of India (UOI), . Here the learned Judge observed that in a suit filed in the ordinary or extraordinary original civil jurisdiction of this High Court the amendment of plaint showing the court has jurisdiction may be allowed. In Gaganmal Ramchand Vs. The Hongkong and Shanghai Banking Corporation, a Division Bench of the Bombay High Court observed that the power of the Court to allow amendment of pleadings under Order 6, Rule 17 is not in

any way restricted or controlled by Order 7, Rule 1 though a Court is bound to reject the plaint under Order 7, Rule 11(a). If the plaint which did not disclose any cause of action still the court has power to allow its amendment so that it could disclose a cause of action.

8. In my view the delay is not such which disentitles the plaintiff to make the application for amendment of the plaint. The question, is can an order for amendment be made if this Court had no jurisdiction to entertain or try the suit, so far as defendants 1 and 2 are concerned who are the real defendants in the suit. As already observed could it be said on the basis of the pleadings that the plaintiff has no cause of action at all against the defendants 1 and 2 at all ? Damages which the plaintiff claims to have suffered on account of wrongful acts and conduct of the defendants 1 and 2 as alleged by the plaintiff in its pleadings could not be said (to ?) have not been suffered by the plaintiff at Calcutta at its registered office where the Books of Account of the plaintiff are kept within the jurisdiction of this Court. Therefore, however, slender it may be this Court may be said to have jurisdiction to entertain the suit. The amendment of the plaint strengthens the case of the plaintiff by introducing certain pleadings to show that certain matters already pleaded took place within the jurisdiction of this Court. If the suit has to be tried then those pleadings would be necessary and would be relevant for the purpose of determination of the real controversy between the parties.

9. Accordingly, there will be no order on the two applications for revocation of leave under Clause 12 of the Letters Patent and also no order for costs. There will be an order as prayed for in the application for amendment of the plaint in terms of prayers (a), (b), (c) and (d). The amendments be carried out within a fortnight from date on the signed copy of the minutes. Stay of this order for one week as prayed on behalf of the defendants 1 and 2 is granted.

10. Department and all parties to act on a signed copy of the minutes.