
(2002) 07 BOM CK 0058

In the Bombay High Court

Case No : Chamber Summons No. 1605 of 2001 in Suit No. 1577 of 1988

Maganlal Harilal Doshi and Others

APPELLANT

Vs

Sarvadaman Mansukhlal Doshi and Others

RESPONDENT

Date of Decision : 09-07-2002

Acts Referred:

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

Citation : (2002) 4 ALLMR 403 : (2003) 1 BomCR 241 : (2003) 1 BOMLR 752 : (2003) 1 MhLj 390

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

Bench : Single Bench

Advocate : D.J. Khambatta, instructed by Federal and Rashmikan, for the Appellant; Mustafa Doctor and A.S. Doctor, instructed by B. Munim and Co., for the Respondent

Judgement

D.G. Karnik, J.—Heard Mr. Khambatta for the plaintiffs and Mr. Doctor for defendant Nos. 1 to 23 and 39. The defendant Nos. 25 to 38, though served are absent. An Affidavit of service is filed on record. As the defendant No. 24 has died prior to the filing of the Chamber Summons, the plaintiffs seek leave to delete the name of defendant No. 24 from the Chamber Summons. Leave granted.

2. The plaintiff Nos. 1 to 11 and the defendants are lineal descendants of one Shri Harilal Doshi. They had formed a Company known as "Echjay Industries Pvt. Ltd" which is the plaintiff No. 12 herein. The family members were carrying on business through the said company. In the year 1983 or thereabout, Mansukhlal Harilal Doshi (original defendant No. 24) and his branch separated from the family. A new Company by name Echjay Forgings Pvt. Ltd. (defendant No. 39 herein) was formed. Certain assets of plaintiff No. 12 Company were agreed to be transferred to the defendant No. 39 company under the control of Mansukhlal Harilal Doshi and his branch.

3. Initially there was a family settlement in the family which was reduced to

writing on 27-5-1983. A supplemental deed of family arrangement was executed between the parties on 6-6-1984. For the purpose of transferring the assets of the plaintiff No. 12 Company to the defendant No. 39 Company, a petition was filed u/s 391 to 394 of the Companies Act bearing Company Petition No. 271 of 1985 connected with Company Application No. 328/84. Company Petition was allowed by an order dated 3-9-1986 ordering transfer of certain assets and properties of the plaintiff No. 12 Company to the defendant No. 39 company.

4. The property known as Echjay House at M. L. Dhanuka Marg (Carmichael Road) consisting about nine flats and the basement was initially possessed by family and plaintiff No. 12 Company. By reason of the family arrangement, it was agreed that one flat be transferred to the defendant No. 39. There was also an agreement relating to the transfer of the basement. However, whether the agreement was for transfer for whole of the basement or for it's joint use is not specifically agreed between the parties.

5. The plaintiffs filed the present suit for the purpose of enforcement of certain rights flowing under the family arrangement dated 27-5-1983 as modified by the supplement deed of family arrangement dated 6-6-1984. The plaintiffs have taken out the present Chamber Summons for the purpose of amendment of the plaint as specified in the Schedule. Amendment is strongly opposed by the defendant Nos. I to 23 and 39.

6. It is not disputed that the power to allow the amendment is wide and can be exercised at any stage of the proceedings. While it is true that the amendment cannot be claimed as a matter of right under all circumstances, it is equally true that the Court while deciding prayers for amendment Courts should not adopt the hypertechnical approach. Liberal approach is the general rule particularly in cases where the other side can be compensated with costs. Technicalities of law should not be permitted to hamper the courts in the administration of justice between the parties. Amendments are allowed in pleading to avoid uncalled for multiplicity of litigation.

7. Mr. M. Doctor, learned counsel for the contesting defendants however submitted that it is settled principle of law that if the amendment is such as would introduce a claim which was barred on the date when the application for amendment was made, it should not be allowed. Shri Khambatta, learned counsel for the plaintiffs on the other hand however, denied that there exists any such rule of law. In L.J. Leach and Company Ltd. Vs. Jardine Skinner and Co., , a request was made by the appellants in an appeal before the Supreme Court for amendment of the plaint by raising in the alternative a claim for damage for breach of contract for non delivery of the goods. The respondents resisted application contending that the amendment would introduce a new cause of action and that the suit on that cause of action was barred by limitation; the respondents also contended that plaintiffs appellants had ample opportunity to amend their plaint but, they failed to do so and that owing to lapse of time, the defendants would be seriously prejudiced if the new claim was allowed to be

raised. The Hon^{ble} Supreme Court observed that there was a considerable force in the objection but, yet allowed the amendment. In paragraph No. 16 of the judgment the Supreme Court observed :

"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."

8. It can thus be said that though generally a time barred amendment would not be allowed, it is not a rule of law; it is a rule of practice which court applies while considering whether it should or should not allow an amendment. The Court would not generally exercise the discretion in allowing an amendment which is clearly barred by limitation. However, when the facts are disputed and the Court is required to go into details to ascertain whether a particular claim would or would not be time barred, the Court may exercise a discretion in allowing the amendment, leaving the matter of the limitation to be decided at an appropriate stage of trial. Often, applications for amendment are made even before the evidence is adduced as is the present case. Only on the basis of the pleadings and some documents which may have been filed by the parties along with the pleadings, the Court may not be able to finally decide whether the claim which is sought to be added is really barred by limitation or not. In such a situation to deny the amendment, holding that the amendment is barred by limitation would put the plaintiff to jeopardy of a final adjudication and denial of his claim on the ground of limitation, without trial.

9. In the present case, it is not possible to hold with certainty whether the claim sought to be made by means of amendment is definitely barred by limitation. It would depend upon the evidence at trial. In the amendment, (Para ii of the Schedule) the plaintiffs have specifically. "No occasion arose for the plaintiffs to seek the implementation of the directions dated 11-9-1984 till late April, 1999 when the plaintiffs learnt that the defendant No. 39 as certainty and allowed claim to the said flat on the first floor". According to the plaintiffs, there was no occasion for them to seek the amendment till their claim was denied in April 1999. According to them, therefore, the amendment is not barred by limitation. It is also worthy to note that the contesting defendants have filed a Company Application No. 343 of 2001 in Company Petition No. 271/85 regarding the interpretation or effect of certain clauses of the previous order. This application which was filed in 2001 shows that disputes had arisen around that time when the plaintiffs rights were denied requiring them to amend the pleadings. In the circumstances, it is not possible at this stage to say positively whether amendment is such in respect of a claim or matter which is positively barred by limitation. As I have stated earlier, rule that claim barred by limitation on the date of application should not be allowed by an amendment is not a rule of law but a rule of practice and rule for exercise of a discretion of the court.

10. In the facts and circumstances, I am inclined to exercise the discretion to allow the amendment because it cannot be said positively that the proposed amendment introduced a time barred claim. However, by means of a proposed clause No. IV in the Schedule, the plaintiffs seek to claim interest, from the year 1988 till the amendment which would be positively barred by limitation. I am therefore, not inclined to allow clause No. IV of the Schedule to be added by means of an amendment.

11. The amendment proposed is late. The defendants must be compensated with costs. In the circumstances, plaintiff is allowed to amend the plaint as mentioned in the schedule excluding Clause (IV) (which is bracketed in red ball point ink in the Chamber Summons) subject to the payment of costs of Rs. 2,000/-. Costs to be paid prior to the carrying on the amendment. Amendment to be carried out within two weeks. Chamber Summons made absolute in the aforesaid terms.

Parties to act on a copy of the Chamber Summons duly authenticated by the Chamber Registrar.