

(1938) 12 BOM CK 0004
In the Bombay High Court
Case No : O.C.J. Suit No. 1373 of 1937

Motilal Tribhovandas Choksey

APPELLANT

Vs

Shankarlal Chhaganlal

RESPONDENT

Date of Decision : 06-12-1938

Acts Referred:

Citation : AIR 1939 Bom 345 : (1939) 41 BOMLR 536

Hon'ble Judges : Kania, J

Bench : Single Bench

Judgement

Kania, J.—This suit was originally filed as a summary suit in the name of the plaintiff as a firm, and a declaration as required by Order XXX, Rule 2(i), disclosing the names of six partners in the firm was also filed. Order XXX, Rule 2(3), provided as follows:

Where the names of the partners are declared in the manner referred to in Sub-rule (2), the suit shall proceed in the same manner, and the same consequences in all respects shall follow, as if they had been named as plaintiffs in the plaint.

The suit filed in that way was therefore a suit filed by the six persons against the defendant. Reading the plaint in that way, the cause of action was that the defendant had given instructions to the six plaintiffs to effect transactions on his behalf ; that they worked as his brokers, and as a result of carrying out his transactions the six plaintiffs had suffered a loss and they claimed the same from the defendant. As the defendant was a resident of Surat, it was alleged in the plaint that a part of the cause of action (without stating what part) had arisen in Bombay within the jurisdiction of this Court, Leave under Clause 12 of the Letters Patent was obtained at that stage and the plaint was filed.

2. When the plaintiff firm (six plaintiffs) took out a summons for judgment, the defendant raised the contention that he had dealings with Motilal Tribhovandas Choksey, the individual, and not with the plaintiff firm. He contended that the firm, i.e. the six plaintiffs together had no cause of action against him at all and

the suit should therefore be dismissed. On this contention the learned Chamber Judge granted unconditional leave to defend to the defendant.

3. Thereafter the plaint was amended and Motilal Tribhovandas Choksey, the individual, continued the suit in his own name. Consequential amendments were made in the plaint which made the cause of action as follows : Motilal, the individual, was employed by the defendant as a broker. Motilal was given instructions to put through the transactions in shares for and on behalf of the defendant which Motilal did. As the defendant failed to carry out his obligations under the transactions, Motilal suffered a loss and, in this suit, claimed to recover the same from the defendant. When these amendments were made and Motilal himself continued the suit, no leave under Clause 12 of the Letters Patent was obtained.

4. In the written statement the defendant has raised a contention that this Court has no jurisdiction to try this suit. In para. 12 of the written statement the defendant denied that a material part of the cause of action arose in Bombay. The defendant further contended and submitted that in any event this Court had no jurisdiction to try this suit.

5. When the suit reached hearing, Mr. Mehta for the defendant pointed out that when Motilal, the individual, claimed to proceed with the suit he had not obtained leave under Clause 12 of the Letters Patent, and the Court had no jurisdiction to try the suit.

6. The question goes to the root of the jurisdiction of the Court, and when the facts are pointed out, it is the duty of the Court to consider the question, whether the same has been raised by the defendant or not. In the present case the facts are not disputed. The obtaining of leave under Clause 12 of the Letters Patent is the foundation of the jurisdiction, and it has been held that such leave must be obtained before the institution of the suit and cannot be granted afterwards. In *Rampurab Samruthroy v. Premsukh Chandamal* ILR (1890) Bom. 93 it was held that the leave granted was confined to the cause or causes of action set forward in the plaint at the time the leave was granted; hence the plaint cannot be amended so as to alter the cause of action. If an amendment, which would alter the cause of action, was made, it necessarily follows that fresh leave should be obtained in respect of the altered cause of action. In the present case it seems clear to me that the cause of action alleged to exist in the six persons against the defendant for their alleged employment as brokers by him, is clearly different from the alleged cause of action claimed to exist in Motilal the individual. The cause of action, which is a right to sue vested in six persons alleged to be doing business together, is not the same as the right which exists in one individual. In the first case these persons are together appointed agents for the defendant and the act of one or the other of them will bind the rest. They will all be liable and can only give a joint discharge. When the claim is made by Motilal, he alone is alleged to be the agent appointed by the defendant, he alone is under the obligation to carry out the instructions and he alone is liable to the

defendant and can enforce the claim for damages, or indemnity, if any, against the defendant. The two causes of action being thus entirely different and no leave having been obtained when Motilal the individual desired to carry on the suit, this issue must be found against the plaintiff and the suit should therefore be dismissed with costs.

7. The counterclaim is made expressly conditional, i.e. if it is held by the Court that the plaintiff is entitled to sue the defendant in respect of the dealings mentioned in the plaint. Having regard to the defect in filing the plaint the suit is dismissed. The Court is not therefore in a position to determine whether the plaintiff is entitled to sue the defendant in respect of the dealings mentioned in the plaint. Leave is therefore granted to the defendant to withdraw his counterclaim as it is a conditional counterclaim and the condition is not fulfilled. Liberty to the defendant to file a fresh suit on the same cause of action. No order as to costs of the counterclaim.