(2014) 04 BOM CK 0174

In the Bombay High Court

Case No : Chamber Summons (Lodging) No. 45 of 2014 in Suit No. 2878 of 2011

Nevada Properties Pvt. Ltd. APPELLANT

Vs

Alice Infrastructure Pvt. Ltd. and Others RESPONDENT

Date of Decision : 16-04-2014

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 10, Order 6 Rule 17
Limitation Act, 1963 — Section 21, 21(1)

Citation : (2014) 4 BomCR 466

Hon'ble Judges : S.C. Gupte, J

Bench : Single Bench

Advocate : Akshay Patil, Mr. Mayur Bhojwani, Ms. Shristi Verma, i/b. M/s. Manilal Kher Ambalal and Co, Advocate for the Appellant; Mustafa Doctor, Mr. Nimay Dave, Mr. Amey Nabar, Mr. Jahaan Dastur, i/b. M/s. Hariani and co. for Defendant Nos. 2, 3, 6, 7 and Mr. Sharan Jagtiani, Mr. Yayha Goghari, i/b. M/s. Sonal Doshi and Co. for Defendant No. 4, Advocate for the Respondent

Judgement

S.C. Gupte, J.—This Chamber Summons is taken out by the Plaintiff for deletion of Nutech Engineers & Power Systems Ltd. as Defendant No. 5 to the suit and implead the Respondents-Nutech Engineering Technologies Ltd. and Nutech Enterprises-as Defendant Nos. 5 and 5A in the Suit. The Plaintiff is a private company promoted for acquiring commercial premises in the city of Mumbai. Defendant Nos. 2 and 3, who are related to the promoter of the Plaintiff company, are promoters of Defendant No. 1. Defendant No. 2 was also a director of the Plaintiff. It is the Plaintiff''s case that Defendant Nos. 2 and 3 defrauded the Plaintiff and siphoned off its funds. The Suit is for recovery of a sum of about Rs. 13.58 crores which is claimed to have been illegally and fraudulently siphoned away by Defendant Nos. 2 and 3 in collusion with various entities who are arraigned as other Defendants to the Suit. The Suit is based on forensic accounting studies by an accountant identifying transfer of funds from the Plaintiff''s account by Defendant Nos. 2 and 3 in favour of the entities joined as Defendants. It is the case of the Plaintiff that these accounting studies revealed an entity "Nutech Engineers" to whom funds to the tune of Rs. 70 Lacs were unauthorisedly transferred. The Plaintiff came across during its search the existence of a company by the name of "Nutech Engineers and Power Systems Ltd." and bona fide believed that company to be the transferee identified as "Nutech Engineers" and arraigned it as Defendant No. 5 to the Suit. When Defendant Nos. 2, 3, 6 and 7 filed their Written Statement, the Plaintiff realized that the transferee entities were Nutech Engineering Technologies Ltd. and Nutech Engineers (a proprietorship) and not Nutech Engineers and Power Systems Ltd. The Plaintiff, thereupon, filed Chamber Summons No. 938 of 2011 for impleadment of the correct entities. That Chamber Summons was withdrawn with liberty to file a fresh Chamber Summons, when it was revealed in a reply to that Chamber Summons that the proprietor of Nutech Engineers had changed in the meanwhile and it was now known as Nutech Enterprises. The present Chamber Summons is filed in pursuance of that liberty for impleading the company-Nutech Engineering Technologies Ltd. and the proprietorship-Nutech Enterprises.

2. The Chamber Summons is opposed by the Defendants. It is submitted by the Defendants that the trial of the Suit has already commenced with the issues having been framed and no amendment is permissible unless the case falls within the proviso to Rule 17 of Order VI of the Code of Civil Procedure. The Defendants submit that the case does not fall under the proviso. They also submit that the suit against the proposed Defendants is barred by the law of limitation and in the premises, the amendment cannot be allowed.

3. On the first question, namely, the commencement of trial, a Division Bench of an Court in the case of Mahadeo Bhanje Vs. Balaji Pathade and Rajendra Bhanje, , after an extensive review of authorities on the point, held that the trial in a civil suit commences from the date of filing of affidavits in lieu of examination in chief of the witnesses and the proviso to Order 6 Rule 17 of the CPC comes into play only after the stage of filing of such affidavits. Evidently, that has not happened in this case. There is, thus, no question of applicability of the proviso to Order 6 Rule 17 in the present case. The learned Counsel for the Defendants relied upon several judgments of the Supreme Court as well as our court to contend that the trial of the suit actually commences with the framing of issues and not with the filing of the affidavits of evidence. I refuse to be drawn into this discussion. After all the Division Bench of our court in Mahadeo Maruti Bhanje (supra) has, after an extensive review of all authorities including the ones cited by the Defendants, come to a conclusion that the trial commences with filing of affidavits of evidence and that judgment is binding on me.

4. The second question is: whether in the facts of the case, the proposed amendment ought to be allowed. Under Order 1 Rule 10 the court may at any stage of the proceedings order that the name of any party improperly joined to be struck out and the name of any person who ought to have been joined to be added. In the present case, the Plaintiff claims to have improperly added Nutech

Engineers & Power Systems Ltd. as Defendant No. 5 instead of Nutech Engineering Technologies Ltd. and Nutech Enterprises who were the real transferees of the alleged illegally siphoned off funds and therefore, ought to have been joined. There is obviously power in the court to grant the amendment proposed on that basis.

5. The Plaintiff''s claim in the suit is, as noted above, inter alia for unauthorized transfers of funds by Defendant Nos. 2 and 3 from the account of the Plaintiff to the accounts of third parties, who were claimed as close business associates of Defendant Nos. 2 and 3. It is the Plaintiff''s case that none of the promoters and directors of the Plaintiff except Defendant No. 2 was aware of this fraud and siphoning off of funds. The Plaintiff had appointed an accountant to conduct forensic accounting studies which identified the transferred funds. It was revealed from these studies that payments to the tune of Rs. 70 Lac were transferred to an entity with the name "Nutech Engineers". The Plaintiff was not aware of the details of this entity. Defendant Nos. 2 and 3 were not furnishing any information about "Nutech Engineers". Search in the records of the Registrar of Companies revealed the existence of "Nutech Engineers and Power System Ltd." The Plaintiff verily believed the entity "Nutech Engineers" to be this "Nutech Engineers and Power Systems Ltd." The Plaintiff actually corresponded with M/s. Nutech Engineers and Power System Ltd. in this behalf. In its reply, M/s. Nutech Engineers and Power Systems Ltd. simply denied having received any amount and claimed that it "was yet to understand the amount shown in the tabular statement when it was realized through which same". The Plaintiff, in the premises, proceeded to file the Suit impleading inter alia M/s. Nutech Engineers and Power Systems Ltd. After the Suit was filed and summons was served, Defendant No. 5, Nutech Engineers and Power Systems Ltd., did not appear. When Written Statement was filed by Defendant Nos. 2, 3, 6 and 7, it was revealed therein that payments from the Plaintiff''s account were actually made to entities with the names ''Nutech Engineering Technologies Ltd.'' and ''Nutech Engineers'' (which had since been taken over by Nutech Enterprises) and not to "Nutech Engineers and Power Systems Ltd." and that the former entities along with Defendant No. 4 belonged to one B.N. Khurana, who was claimed as a close associate of Defendant Nos. 2 and 3. The Plaintiff thereafter caused another search taken at the Registrar of Companies and ascertained the existence of M/s. Nutech Engineering Technologies Ltd. By way of abundant caution, the Plaintiff also called upon the advocates of Defendant Nos. 2, 3, 6 and 7 to confirm whether ''Nutech Engineers'' and ''Nutech Engineering Technologies Ltd.'' were the same entity and if not, to furnish further particulars of ''Nutech Engineers''. All these facts clearly show an error on the part of the Plaintiff about the entity ''Nutech Engineers''. A statement of Punjab National Bank addressed to the police (which is relied upon by the Defendants themselves) shows ''Nutech Engineers'' and the limited company ''Nutech Engineering Technologies Ltd.'' being the payees holding the same account number, namely, ''26614777/8''. This is definitely a source of some confusion concerning the entity ''Nutech Engineers''-

whether the same was or was not a limited company. The mistake, which was revealed after Written Statement was filed by the Defendants, is now sought to be corrected.

6. The object of the rule contained in Order 1 Rule 10 is to save honest and bona fide claimants from being non-suited and discourage contests on technical pleas. A mistake made foolishly or carelessly but honestly may well be within this rule. After all, whether under Order 1 Rule 10 or under Order 6 Rule 17, the dominant purpose of allowing an amendment is to minimize the litigation and determine the real controversy between the parties to a Suit. Any error or mistake, as long as the same is not fraudulent or motivated by bad faith, should not non-suit a party.

7. In that view of the matter, there could be no objection to allowing the amendment and deleting the existing Defendant No. 5 (who is improperly added) and joining the proposed Defendant Nos. 5 and 5A (who ought to have been added) to the Suit.

8. That still leaves one question open: Is the Suit against the new Defendants barred by limitation. Ordinarily, u/s 21 of the Limitation Act, where a new defendant is substituted or added, the suit as regards him shall be deemed to have been instituted when he was so made a party. For this purpose the material date is the date of the application for impleadment and not the date on which the party is actually brought on record. Ordinarily therefore, the date of joinder would be the date of the application for joinder. It is claimed by the Defendants that on the date of the application for joinder the suit is barred by limitation against the proposed Defendants. In answer, it is submitted by the Plaintiff that this is not a case of a new impleadment but correction of a misdescription originally contained in the plaint. Alternatively, it is submitted that the omission to include the proposed Defendants was due to a mistake made in good faith. In the premises, it is claimed that the suit should be deemed to have been instituted against the newly added Defendants on the date of the presentation of the plaint itself.

9. Proviso to Section 21(1) of the Limitation Act permits the court to treat the suit as having been instituted on any earlier date (i.e. earlier to the date of application for joinder) on being satisfied that the omission to include the proposed defendant was due to a mistake made in good faith. The question that needs to be examined in the present case is whether, either due to a bona fide error in description or any other mistake made in good faith, as claimed by the Plaintiff, the proposed Defendants were not actually included originally in the suit herein.

10. This question is different from the one to be considered for the case of joinder under Order 1 Rule 10. Whereas under Order 1 Rule 10 the question is whether there is lack of good faith in the application for new joinder, under the proviso to Section 21 the question is whether there is good faith in the earlier

non-joinder. The Plaintiff must show that despite exercise of good faith, a mistake was made by not joining the correct defendant. In other words, despite exercise of due diligence, the Plaintiff could not find out who the correct defendant ought to be. Both the Plaintiff and the Defendants have relied upon various documents which throw light on the aspect of due diligence or otherwise on the part of the Plaintiff in omitting to implead the correct defendants. The matter obviously requires to be proved at the trial by leading of evidence. That question cannot be decided, or at any rate, need not be decided, at this stage, since it would involve leading of extensive evidence. Subject to the plea of limitation being kept open, the proposed Defendants can always be added.

11. The Supreme Court in the case of Ragu Thilak D. John Vs. S. Rayappan and Others, observed as follows:

If the aforesaid test is applied in the instant case, the amendment sought could not be declined. The dominant purpose of allowing the amendment is to minimise the litigation. The plea that the relief sought by way of amendment was barred by time is arguable in the circumstances of the case, as is evident from the perusal of averments made in paras 8(a) to 8(f) of the plaint which were sought to be incorporated by way of amendment. We feel that in the circumstances of the case the plea of limitation being disputed could be made a subject-matter of the issue after allowing the amendment prayed for.

This dictum was affirmed by the Supreme Court later in the case Baldev Singh and Others Etc. Vs. Manohar Singh and Another Etc., . The dictum can aptly be applied to the facts of the present case.

In that view of the matter, the Chamber Summons is allowed subject to the plea of limitation against the newly added Defendants, to be agitated in the trial of the suit. There shall be no order as to costs. Amendment to be carried out within a period of four weeks from today.