
(2014) 02 BOM CK 0321

In the Bombay High Court

Case No : Chamber Summons No. 1921 of 2011 in Summary Suit No. 3600 of 2003

P.N. Writer & Co. Ltd.

APPELLANT

Vs

Rudra Finance Ltd. and Others

RESPONDENT

Date of Decision : 11-02-2014

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 37 Rule 2, Order 6 Rule 17

Citation : (2014) 02 BOM CK 0321

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

Bench : Single Bench

Advocate : Viraj Tulzapurkar Sr. Advocate and Paritosh Jaiswal i/b Kanga and Co, Advocates for the Appellant

Judgement

S.C. Gupte, J.—The Chamber Summons is taken out by the Plaintiff for impleading the Respondents as party Defendants in the present suit and also to carry out amendments as per the Schedule annexed to the Chamber Summons.

2. The facts of the case may be briefly stated thus:-

3. The Plaintiff has filed the present suit against the Defendant as a Summary Suit on the basis of an agreement contained in the Defendant's letter dated 9 November 2000 (Exhibit "B" to the Plaintiff), by which the Defendant has agreed to pay the sum claimed to the Plaintiff. The Plaintiff had availed of Inter Corporate Deposits ("ICD") for the sums of Rs.5 crores from the Defendant on the security of pledge of 12,260 shares of Infosys Ltd. The Plaintiff paid back a sum of Rs.3 crores of ICDs over a period, against which 5050 shares (out of the 12,260 pledged shares) were released by the Defendant from the pledge, leaving a balance of 7210 shares. As of 9 November 2000, the balance of outstanding ICDs stood at Rs.2 crores. A pay order of Rs.2 crores was issued by the Plaintiff in favour of the Defendant towards the refund of the balance ICDs. The letter issued by the Defendant, on the basis of which the present suit is filed, contained an undertaking to release from the pledge 7210 shares of Infosys lying under the

said pledge with the Catholic Syrian Bank Ltd., who is one of the Respondents sought to be joined by the amendment sought, within 7 to 10 clear working days from the date of the clearance of the said Pay Order. It further recorded an undertaking on the part of the Defendant that failing release of the shares, the Defendant would pay an interest at the rate of 16.50% per annum at the market value of the said shares as at 9 November 2000 from the date of expiry of 7 to 10 clear working days until the date of release of the said shares. On the basis of the undertaking contained in the said letter, the Plaintiff sued the Defendant for a decree in the sum of Rs.8,35,42,487/- consisting of principal sum of Rs.5,65,98,500/- being the value of the shares pledged by the Plaintiff and interest at 16.5% p.a. till the date of the suit.

4. It is the case of the Plaintiff in the present Chamber Summons that when the Summary Suit was listed for an ex-parte decree, the proposed Defendant No. 2 appeared in the witness box and stated that Defendant No. 1 was a defunct Company with no assets. It is the case of the Plaintiff that on the basis of this statement, it was realised by the Plaintiff that the decree, that may be passed against the Defendant, would be a mere paper decree. In these premises, the Plaintiff claims to be constrained to file the present Chamber Summons for (i) impleading the proposed Defendant No. 2 (as the legal heir of the real party for whom the shares were pledged) and the pawnee, proposed Defendant No. 3, (ii) setting out the true transaction between the parties and (iii) claiming the suit reliefs against proposed Defendant No. 2 jointly and severally with the existing Defendant.

5. The case of the Plaintiff in the present Chamber Summons is basically this:-

One Raffles Corporation was a sole proprietary firm of one Bharat Thakkar, who was the then Managing Director of the Original Defendant. Pursuant to negotiations that took place in December, 1999 and January, 2000 between the Plaintiff on the one hand and the Defendant represented by the said Bharat Thakkar as well as the said Raffles Corporation on the other hand, an arrangement was arrived at between the Plaintiff and the Defendant. Under this arrangement, it was agreed that the Defendant would lend an advance to the Plaintiff as and by way of Inter-Corporate Deposits. The repayment of the said amounts would be secured by a pledge of the shares of Infosys Ltd. held by the Plaintiff. It is the case of the Plaintiff that the amount of the Inter -Corporate Deposits came from M/s. Raffles Corporation, of which the said Bharat Thakkar was the sole proprietor; that though this amount was paid to the Plaintiff through the original Defendant, the amount was actually arranged by M/s. Raffles Corporation through their financial facilities available with the Respondent Bank and for which the shares of Infosys Ltd. held by the Plaintiff were pledged by the Plaintiff with the Respondent Bank. The transaction which really took place between the parties is described by the Plaintiff thus. On the pledge of the Plaintiff's shares, the bankers of M/s. Raffles Corporation released funds to M/s. Raffles Corporation, which were then routed through the Defendant to the

Plaintiff in the form of ICDs. The corporate character of the Defendant, according to the Plaintiff, was used by the late Bharat Thakkar to avoid any personal liability which he would have otherwise incurred had the suit transaction been entered into between the Plaintiff and M/s. Raffles Corporation instead of between the Plaintiff and the Defendant. The Plaintiff has produced various documents to show the chain or interlink between the Defendant, the said Bharat Thakkar and Raffles Corporation. On the basis of these documents, it is claimed by the Plaintiff that the corporate veil should be pierced and the said Bharat Thakkar and his proprietorship, namely, Raffles Corporation, should be made liable for release of the shares pledged by the Plaintiff with the Respondent Bank.

6. It is submitted by Mr. Tulzapurkar, the learned Counsel appearing for the Plaintiff that the real transaction was between the Plaintiff and the said Bharat Thakkar, who is the Proprietor of Raffles Corporation and that the presence of the said Raffles Corporation, which is now represented by the widow of said Bharat Thakkar, is necessary in order to enable the Court to effectively conclude and settle all the questions involved in the suit. He submitted that it is necessary to bring on record the various facts showing an inter-connection between the Defendant, the said Bharat Thakkar and his proprietorship, namely, M/s. Raffles Corporation.

7. On the other hand, the learned Counsel appearing for the Respondent, who is proposed to be added as Defendant No. 2, submits that the facts alleged by the Plaintiff in support of its case for amendment were all within the knowledge of the Plaintiff on the date of the filing of the present suit. There is no explanation offered by the Plaintiff for seeking the present amendment after a delay of more than 8 years. It is submitted by the learned Counsel that a fresh suit against the proposed Defendant, on the basis of the amended claim, would be barred by the law of limitation on the date of the application for amendment and that the Court should decline the amendments on that ground alone.

8. It is submitted by the learned Counsel for the Plaintiff in rejoinder that the Plaintiff has not introduced any new cause of action but that he simply requires the Court to lift the corporate veil and grant relief against the real party with whom the transaction was entered into. In the alternative, he submits that it is merely a case of mis-description of the party and that he should be permitted to correct the description of the party at any stage of the proceeding and the law of limitation does not come in way of such amendment.

9. It is clear from the frame of the suit, as originally filed by the Plaintiff, that the Plaintiff sued the Defendant on an agreement contained in the Defendant's letter of 9 November 2000. The suit is filed as a Summary Suit with an averment that no relief, which does not fall within the ambit of Rule 2 of Order XXXVII of the Code of Civil Procedure, 1908, is being claimed in the suit herein. The suit, as framed, does not indicate any connection between the Defendant, the late Bharat Thakkar and/or the said Raffles Corporation. The cause of action in the plaint concerns enforcement of the agreement executed by the Defendant on 9

November 2000. The facts concerning the Inter-Corporate Deposit of the value of Rs.5 crores received from the Defendant against the security of pledge of shares owned by the Plaintiff form mere background facts in which the Defendant has issued the letter of 9 November 2000. Non-performance of the agreements contained in the said letter forms the basis of the cause of action. It is now alleged by the Plaintiff for the first time in the Chamber Summons that though the transaction was ostensibly between the Plaintiff and the Defendant, the real party with whom and for whose benefit the transaction was entered into, was the said Bharat Thakkar and/or M/s. Raffles Corporation. It is now alleged by the Plaintiff that having regard to the various documents, all of which were within the knowledge of the Plaintiff, when the present suit was filed, a link is established between the Defendant, the said Bharat Thakkar and M/s. Raffles Corporation and having regard to this link, the corporate veil should be pierced and the real person behind the transaction should be made accountable. This set of facts, now sought to be brought in, is a completely new set of facts. On the basis of this set of facts, an altogether new cause of action is introduced for arraigning the proposed Defendants.

10. The Supreme Court in the case of *Revajeetu Builders and Developers Vs. Narayanaswamy and Sons and Others*, considered both Indian and English authorities on the factors to be taken into consideration whilst dealing with applications for amendments. On an extensive analysis of the authorities, the following basic principles have been culled out by the Supreme Court:

- (1) Whether the amendment sought is imperative for proper and effective adjudication of the case;
- (2) Whether the application for amendment is bonafide or malafide;
- (3) The amendment should not cause such prejudice to the other side which cannot be compensated adequately in terms of money;
- (4) Refusing the amendment would in fact lead to injustice or lead to multiple litigation;
- (5) Whether the proposed amendment constitutionally or fundamentally changes the nature and character of the case; and
- (6) As a general rule, the court should decline amendments if a fresh suit on the amended claims would be barred by limitation on the date of application.

These are some of the important factors which may be kept in mind while dealing with application filed under Order 6 Rule 17. These are only illustrative and not exhaustive.

11. When an amendment is sought to be brought in what the Court is required to see is whether or not the amendment constitutes an introduction of a new cause of action or raise a different case or amounts to not more than a different or additional approach to the same set of facts. In the latter case, the amendment

would be allowed even after the expiry of the statutory period of limitation, whilst in the former case, the Court would not allow the amendment after expiry of limitation. In the present case, as indicated above, the amendment introduces a completely new set of facts and raises an altogether different case against the proposed Defendants, who were neither parties to the suit nor claiming through the parties to the suit.

12. The learned Counsel appearing for the Plaintiff relied on the judgment of the Supreme Court in the case of A.K. Gupta and Sons Vs. Damodar Valley Corporation, as well as the case of Mangharam Rupchand, Firm Vs. Haji Sorik Punhoo A.I.R. 1939 Sind 172 and Mura Mohideen Vs. V.O.A. Mohomed and Others, In A.K. Gupta and Sons case, the Supreme Court was concerned with a suit where the Plaintiff had originally claimed merely a declaration that on a proper interpretation of the contract between the parties, the Plaintiff was entitled to a certain rate of payment. The Plaintiff had not claimed originally the recovery of the amount actually payable to the Plaintiff on the basis of such rate though the valuation for the purposes of jurisdiction was on the basis of such payment being due. The Court considered the various authorities and found that it was not a case where a new set of facts was introduced to the prejudice of any right acquired by any party by lapse of time. The Court considered that the suit was on a contract; that the parties had sought interpretation of a clause in the contract only for a decision of the rights of the parties under it and for no other purpose; and that the amendment sought to introduce a claim based on the very contract which formed the cause of action in the suit as originally framed. The Court took into account the fact that the amendment did not seek to introduce any new case or facts. The facts, on which the amended claim was sought to be based, were not in dispute. The interpretation of the clause was sought only for quantifying the money claim and in the face of the Defendant's case that the Defendant was willing to pay any legitimate dues which could be found payable to the Plaintiff on a proper interpretation of the clause, the Court found that the Defendant was fully aware that the ultimate object of the Plaintiff in filing the suit was to obtain the payment of the amount on the basis of an interpretation which was claimed from the Court. It is in these circumstances that the Court came to a conclusion that there was no "new set of facts" introduced in that case. The facts of the case in A.K. Gupta & Sons were completely different and the law stated therein has no application to the facts of the present case. The other two cases relied upon by the learned Counsel for the Plaintiff concern mis-description of the parties. The principle to be deduced from these two cases is that the question is always whether it is a case of a mere mis-description or substitution of one party for the other. The Courts have come to a conclusion that in the case of a mis-description there is the same person or legal entity throughout, merely the name of such person or entirety is to be altered; but when one person, be it a legal or other person, is to be substituted for another, then the application cannot come under the head of mis-description. It cannot be said that the present case is a case of mis-description of parties. The corporate entity was

arrayed as a party to the suit on the basis of a written contract executed by it. Today, a new party is sought to be joined not on the basis that the original party was mis-described but that this new party was the real beneficiary in the place and stead of the original party. Such a case would be totally foreign to the suit as originally framed.

13. In that view of the matter, what the Plaintiff seeks to do by the present Chamber Summons is to introduce a new cause of action against new parties, which is clearly barred by the law of limitation. The Plaintiff cannot, therefore, be allowed to introduce such a cause of action or arraign the new parties.

14. The Chamber Summons is, therefore, dismissed. There shall be no order as to costs.