
(1981) 11 CAL CK 0018
In the Calcutta High Court
Case No : Appeal No. 140 of 1980

Prasant Chandra Sen

APPELLANT

Vs

United Commercial Bank and Another

RESPONDENT

Date of Decision : 05-11-1981

Acts Referred:

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

Citation : AIR 1982 Cal 555

Hon'ble Judges : Sabyasachi Mukharji, J;C.K. Banerji, J

Bench : Division Bench

Advocate : S.N. Mukharji and S. Sarkar, for the Appellant; S. Sinha, for the Respondent

Judgement

Sabyasachi Mukharji, J.—This appeal is arising out of an order passed and judgment delivered by Mr. Justice Salil K. Roy Chowdhury on the 27th April, 1980 dismissing an application for amendment of written statement filed by defendant No. 2. It appears that a suit was filed in this case by the United Commercial Bank, the plaintiff on the 22nd June, 1970 against the principal debtor, which was a company being wound up by the Company Court by an order dated the 23rd July, 1979. Subsequently the plaintiff had obtained leave u/s 446 of the Companies Act, 1956 to continue the suit against the Official Liquidator, so far as defendant No. 1 was concerned which was the company in liquidation and by an order dated 3rd Dec., 1979 such leave was granted and the plaintiff took out an application under Chap. 13A of the Original Side Rules of the Calcutta High Court for summary judgment. The defendant No. 2, the present appellant also took out an application for particulars of the plaint as well as leave to file the written statement. Both these applications had appeared before the learned trial Judge and by an order dated the 15th Feb., 1980 the hearing of the suit was expedited and the defendant No. 2 was directed to file its written statement within one week from date, cross order was given for discovery. Direction was given for inspection forthwith thereafter and the suit was directed to appear in the list for hearing irrespective of part heard on the 5th March, 1980 at the top of the list.

The suit duly appeared in the list but the defendant No. 2 had asked for time on that occasion as he could not discover the documents and the time was granted. On the 31st March, 1980, an application, resulting in the order of the learned trial Judge, was made by defendant No. 2 asking for leave to amend the written statement. In this connection, it would be appropriate to state, as we have mentioned, that the suit was against two defendants, viz., defendant No. 1 which was a company in liquidation and the defendant No. 2 who was the guarantor. The suit was for money claim against the company in liquidation and it was alleged that the defendant No. 2, the present appellant had guaranteed the repayment, in writing furnished to the plaintiff, of the outstanding dues of the plaintiff from the defendant No. 1 in the account. We may incidentally point out that it appears that initially perhaps the plaintiff had contemplated to institute the suit against four defendants because in para 2 of the plaint it was stated: "The defendants Nos. 3 and 4 were at all material times and are the Directors of the defendant-company." It was thereafter stated that the defendant No. 2 too was a Director of the defendant-company. But the suit as filed does not contain any allegations, as appearing from the Paper Book, against defendants Nos. 3 and 4, who were described to be the other Directors of the company. Be that as it may, the suit was filed for certain money in cash credit account against the defendant No. 1 and defendant No. 2 as guarantor. In the written statement filed by the defendant No. 2 it was stated in para 8 as follows:

"8. With reference to para 12 of the plaint, the defendant denies that this defendant has guaranteed the repayment of the outstanding dues of the plaintiff in the said accounts either duly or at all or that there is any question of this defendant failing or neglecting to pay to the plaintiff as alleged or at all. This defendant disputes that any demand was made on this defendant, as alleged or at all. Save as aforesaid, this defendant denies each and every allegation contained in para 12 of the plaint."

In para 10, it was pleaded that further and/ or in the alternative and/or in any event, the defendant No. 2 took certain defences which were stated in various clauses in sub-paras (i) to (ix). In Sub-clause (vi) of paragraph 10 the defence was as follows:

"(vi) The alleged provision in the contract of guarantee which purports to affect the rights conferred on this defendant as guarantor under Sections 133, 134 and 135 of the Contract Act is illegal, contrary to law, null and void and no effect can be given thereto."

2. In the amendment which the defendant No. 2 was seeking in the application before the learned trial Judge, the defendant No. 2 wanted to plead as follows:

"At the time when the alleged guarantee was offered by this defendant one Mr. Satya Bhusan Chakrabarty, an Industrialist and the owner of Dragon Engineering Works, who carries on business at 457, Grand Trunk Road, Howrah-2, had guaranteed for the repayment of the dues of the bank to the extent of three

lakhs in the presence of the then Bank Manager. It was agreed that the alleged guarantee offered by the defendant No. 2 will not come into effect unless all remedies were exhausted against the said Satya Bhusan Chakraborty. The plaintiff-bank agreed to such proposal and on such representation and the agreement made by the Bank through the then Manager this defendant offered his alleged guarantee to the extent of Rs. 2,00,000/- knowing full well that he will never be called upon to pay that money. It appears now that the plaintiff-Bank has compromised and/or exonerated Satya Bhusan Chakraborty from any liability. This defendant submits that in the circumstances the alleged guarantee offered by this defendant has come to an end and he is not liable to pay any amount having regard to the fact that the guarantee by Satya Bhusan Chakraborty has been released behind the back of this defendant and/or without his consent."

This application, as we have mentioned before, came up before the learned trial Judge and he had dismissed this application.

3. From the judgment, it appears, the learned trial Judge was of the view that this application was made belatedly to defeat the claim of the plaintiff. Secondly, the learned trial Judge was of the view that this defence was inconsistent with the defence already taken by the defendant No. 3. It further appears that the learned trial Judge was of the view that version sought to be pleaded in the written statement was in the words of the trial Judge "tissue of lies thought out by the defendant No. 2 and his lawyers only to delay the matter as long as possible". The learned trial Judge was of the view that this was a frivolous application and if such an application was allowed no suit could be heard. The learned trial Judge further emphasised that as the company was in liquidation, the matter should be heard expeditiously. We may incidentally point out that it is true that the hearing in Company matters particularly the companies which are in liquidation should be done expeditiously but it is not a suit by a company, in liquidation, seeking to recover money from its debtor for liquidation of its debts. It is a suit against "he company in liquidation and in respect of which the directors of the company, which is in liquidation, were being sought to be made liable as guarantors. The propriety of the said decision of the learned trial Judge refusing to allow the amendment is the subject matter of appeal before us.

4. It was firstly contended that the order appealed from was not appealable. It is quite evident and there is no dispute that under Order 43 of the Civil P. C. this is not an appealable order. The only question that arises is whether this is a judgment in terms of Clause 15 of the Letters Patent. Whether a particular decision is a judgment in terms of Clause 15 of the Letters Patent has been the subject matter of clarification and adjudication by several authorities both of the Supreme Court as well as the High Courts. It is not desirable, as the Supreme Court has emphasised, or possible to give exhaustive definition of what amounts to a judgment. It must depend primarily upon the facts and circumstances and the nature of the right adjudicated. In this connection we may refer to the

observations of the Full Bench decision of the Calcutta High Court in the case of Nurul Hoda and Others Vs. Amir Hasan and Another, , where the Full Bench observed that:

"the following tests should be applied in considering whether a particular order amounted to a "judgment" or not, namely (i) whether the order in question put an end to the proceedings so far as the Court dealing with the proceeding was concerned, in which the order was sought and made, (ii) the order should involve determination of some right or liability affecting the merits of the matter, (iii) an adjudication or a decision, which was not anything more than a step towards obtaining the final adjudication on the merits of the dispute in the proceeding was not a judgment within the meaning of the Letters Patent, (iv) where the question involved an adjudication on the question of limitation or jurisdiction of the Court, in certain cases, such decision would amount to a "judgment"."

In this case it was emphasised on behalf of the appellant that this involved determination of the right of the defendant to plead the immunity on the ground sought to be pleaded in the amended written statement and inasmuch as that right has been denied by the refusal of the amendment there has been an adjudication of that right, that is to say, the defence of being discharged from liability because of the alleged conduct of the plaintiff. In the Supreme Court case of Shah Babulal Khimji Vs. Jayaben D. Kania and Another, of the report Mr. Justice A.N. Sen in a concurring judgment observed, inter alia, as follows :

"..... What kind of an order will constitute a judgment within the meaning of Clause 15 of the Letters Patent and will become appealable as such necessarily depends upon the facts and circumstances of each case and on the nature and character of the order passed. The question whether a particular order constitutes a judgment within the meaning of Clause 15 of the Letters Patent to be appealable under the provisions thereof has come up for consideration before the various Courts in a number of decisions. Very many decisions have been cited in the present case and they have been considered by my learned Brother, Fazal Ali, J. in his judgment. The question indeed is not free from difficulties and divergent views have been expressed by different Courts and by various learned Judges"

Mr. Justice A.N. Sen further observed that in several cases the Courts have viewed this question from different angles. But the test is, as emphasised by the Supreme Court, first in order to be a judgment it must involve a final pronouncement which would put an end to the proceeding so far as the Court dealing with that question was concerned. Secondly, the decision, must involve the determination of some right or liability though it might not be necessary that there must be a decision on merits and whether, as the Supreme Court emphasised, there has been a determination of liability has to be found out from the nature and from the facts and circumstances of the case. In this case the defence of the defendant No. 2 that they stood discharged from being liable under the guarantee because of the alleged conduct sought to be pleaded in the

proposed amendment has been denied by the impugned order passed by the learned trial Judge.

5. Reliance was placed on certain observations of the Supreme Court in the case of *Shanti Kumar R. Canji Vs. The Home Insurance Co. of New York*, . Our attention was drawn to para 8 where the Court at page 1722 of report observed as follows:

"The view of the High Courts at Calcutta and Madras with regard to the meaning of "judgment" are with respect preferred to meaning of "judgment" given by the Rangoon and Nagpur High Courts. We are in agreement with the view expressed by the High Court at Calcutta in the *M.B. Sirkar and Sons Vs. Powell and Co.*, as to when an order on an application for amendment can become a judgment within the meaning of Clause 15 of the Letters Patent. If an amendment merely allows the plaintiff to state a new cause of action or to ask for a new relief or to include a new ground of relief all that happens is that it is possible for the plaintiff to raise further contentions in the suit but does not decide whether the contentions are right. Such an amendment does nothing more than regulate the procedure applicable to the suit. It does not decide any question which touches the merits of the controversy between the parties. Where, on the other hand, an amendment takes away from the defendant the defence of immunity from any liability by reason of limitation, it is a judgment within the meaning of Clause 15 of the Letters Patent. The reason why it becomes a judgment is that it is a decision affecting the merits of the question between the parties by determining the right or liability based on limitation. It is the final decision as far as the trial Court is concerned."

6. This passage was relied on behalf of the appellant in support that this could be construed as a judgment. On the other hand, the above passage was relied on to emphasise that these were only the illustrations which could be considered whether the order was appealable and it was sought to be argued that anything beyond this meant not to be appealable under Clause 15 of the Letters Patent. Even if we apply the above test that is to say (hat the amendment took away from the defendant the defence of immunity from any liability by reason of limitation, it would be a judgment within the meaning of Clause 15 of the Letters Patent. In that case the Court was concerned with the amendment of the plaint. But in our opinion the same principles would apply where by an impugned order the defence of immunity is being deprived by refusal of the amendment sought for.

7. Reliance was placed on behalf of the respondent on certain observations of the Division Bench of the Madras High Court in the case of *Mahalingam v. C. Natesa Aiyar*, AIR 1917 Mad 350. There, though the Court held that an order refusing amendment would not be appealable the reason upon which the Court proceeded seems to be clear. Mr. Justice Seshagiri Aiyer observed that as the order was infructuous and could not affect the rights of the plaintiff in that case to litigate his claim, the plaintiff had no right of appeal against it. Quite apart from that, it

appears to us that the meaning of the expression "judgment" has been clarified in several decisions which we have referred to hereinbefore. It must depend upon the facts and circumstances of each case. Therefore, it appears to us that in view of the nature of the defence which was sought to be raised and which defence has been refused by the impugned order passed by the learned trial Judge by refusing to allow the amendment, in our opinion, in the facts and circumstances of the case this order amounts to a judgment in terms of Clause 15 of the Letters Patent and as such is appealable.

8. The next aspect which calls for consideration is whether the learned Judge was right in refusing to allow the amendment. The learned Judge is right in so far as the learned Judge observed that if the application was mala fide in such a case the Court was not bound to allow such an application for amendment. The question, however, is whether the application in the instant case was mala fide or not. In the instant case, as we have mentioned before, the suit had appeared in the list from the 5th of March, 1980 though it was filed in June 1979 and the previous application under Chap. 13A of the Rules of the Original Side of this Court was refused and leave to file the written statement was given within certain time. It is true that the suit has appeared in the list from the 5th March, 1980 and the Application for amendment was made on the 31st March. The explanation given in the application for amendment was that there was a consultation on the 26th March with "he learned lawyers appearing in the proceedings and as a result of the consultation it was felt that without the amendment the appellant would be estopped from pleading his case. In those circumstances the application was made. In the background of the facts and circumstances of the case and in the background of the loan given by the bank particularly in a case in which a director of the company was made a guarantor, in our opinion, it cannot be said that the application was so belated or frivolous as to merit dismissal on the ground of the abuse of the process of the Court. The learned Judge further relied on certain other grounds which we have mentioned before namely, that the ground was without merit and secondly this was inconsistent pleading. An inconsistent claim can be made in the written statement by amendment. Reliance in this connection may be placed on the observations of the Calcutta High Court in the case of Nrisingh Prosad Paul Vs. Steel Products Ltd., . The learned advocate for the respondent however pleaded that a vested right of the plaintiff was sought to be dislodged by the proposed amendment and if such was the case, according to him, the amendment should not be entertained. He drew our attention to the observations of the Supreme Court in the case of Modi Spinning and Weaving Mills Co. Ltd. and Another Vs. Ladha Ram and Co., . There the facts were entirely different. Firstly by the proposed amendment an attempt was sought to be made to retract from the original written statement and that too after 3 years from the filing of the written statement. That attempt might or might not constitute an amendment in the real sense. Here it is not such a case. In para 8 of the original written statement there is a complete denial of the claim by the bank against the appellant. In the

amendment one of the additional grounds sought to be included was that a compromise was effected with the defendant No. 1 and the defendant No. 1 had been released by the bank behind the back of the appellant (sic). Therefore, we are of the opinion that on the merit also this amendment should have been allowed by the learned trial Judge. It was sought to be urged on behalf of the appellant that in making the observations the learned trial Judge expressed his views about the falsity or otherwise of the version of the appellant and as such it raised a question of jurisdiction. We do not propose to pursue the matter on this aspect in the view we have taken on the other aspect of the matter. But in view of the fact that the appellant had made the application and the suit was appearing in the list we allow this appeal and set aside the order of the learned trial Judge but we direct that the appellant should pay the costs thrown away at the trial assessed at 30 GMs. within four weeks from date and the amendment is to be effected within six weeks thereafter on a signed copy of the minutes and the suit would appear in the appropriate list as expeditiously as possible thereafter.

9. Costs of this appeal will abide by the result of the suit. Leave is given to reverify the written statement.

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

C.K. Banerji, J.

11. I agree.