

(2011) 05 DEL CK 0059

In the Delhi High Court

Case No : Regular Second Appeal No. 276 of 2007

Shri Pradeep Khanna

APPELLANT

Vs

Ashok Electric Company and Others

RESPONDENT

Date of Decision : 03-05-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 10(2), Order 6 Rule 17
Limitation Act, 1963 — Section 21, 22

Citation : (2011) 05 DEL CK 0059

Hon'ble Judges : Indermeet Kaur, J

Bench : Single Bench

Advocate : Ashim Vachher and Abhilash, for the Appellant; None, for the Respondent

Final Decision : Allowed

Judgement

Indermeet Kaur, J.—This appeal has impugned the judgment and decree dated 13.07.2007 which had reversed the finding of the trial judge dated 19.04.2005 whereby the suit filed by the Plaintiff M/s Thermoking seeking recovery of Rs. 2,43,103.00/- had been decreed along with the interest at 6% per annum. The impugned judgment had reversed this finding. Suit of the Plaintiff stood dismissed.

2. Plaintiff had filed the aforementioned suit for recovery of the aforementioned amount. Plaintiff was engaged in the business of manufacture and sale of electrical appliances. Defendant No. 1 is the partnership firm of whom Defendant Nos. 2 to 6 are partners. Goods were purchased by the Defendant from the Plaintiff; vide bill dated 28.08.99, various electrical geysers were supplied by the Plaintiff which were valued at Rs. 99,316.00/-. On 11.03.1999 again, electrical geysers were supplied to the Defendant No. 1 vide bill dated 11.11.1999. Total bill which was raised on the Defendant No. 1 was to the tune of Rs. 1,43,038.00/-. Part payment was made by way of demand draft No. 072148 dated 29.10.1999 of Rs. 50,000/-. Thereafter, Defendant No. 1 placed a further order with the Plaintiff;

this was in November, 1999; supplies were made by the Plaintiff. Part payment was again made by Defendant in the sum of Rs. 33,630/-. Defendant however failed to clear the balance arrears. This was in spite of legal notice. Present suit was accordingly filed.

3. In the written statement, preliminary objections were taken. On merits, it was denied that any amount was due to the Plaintiff. It was not denied that the orders were placed upon the Plaintiff company for the supply of geysers; however, liability was denied as the quality of the goods supplied were not as per the order.

4. On the pleadings of the parties, the following five issues were framed:

1. Whether there is no cause of action in favour of the Plaintiff to file the present suit? OPD.

2. Whether the suit filed by the Plaintiff is beyond the limitation? OPD.

3. Whether the Defendant is entitled to the decree of counter claim as prayed for? OPD.

4. Whether the Plaintiff is entitled to the decree for a sum of Rs. 2,43,103/- alongwith the interest as prayed for? OPP

5. Relief.

5. Oral and documentary evidence was led. All the issues were decided in favour of the Plaintiff. The suit was decreed. Counter claim filed by the Defendant was rejected.

6. The impugned judgment had reversed this finding. Court was of the view that the suit was barred by limitation. Section 21 of the limitation Act had been adverted to.

7. Counter claim of the Defendants also stood rejected.

8. This is a second appeal. It had been admitted and on 09.07.2008, the following substantial questions of law had been formulated:

(1) Whether by correcting the mis-description of a Defendant in a suit filed by the Plaintiff, which mis-description came to the notice of the Plaintiff, for the first time, through the written statement filed by the Defendant will make the suit time barred in terms of Section 21 of the Limitation Act?

(2) Whether by amendment in the plaint merely clarifying the name of the Defendant from a Proprietorship concern to a Partnership Firm would amount to instituting a fresh suit against such Defendants on the date when the said amendment was allowed?

9. On behalf of the Appellant, it has been urged that the finding in the impugned judgment qua the provisions of Section 21 of the Limitation Act is a perverse

finding; no new Defendant was either added or substituted and this is clear from the order of the trial court who had allowed the application of the Plaintiff under Order 6 Rule 17 of the Code. Attention has been drawn to the aforementioned order where the Court on 06.05.2003 had allowed the application of the Plaintiff seeking an amendment.

10. The Plaintiff had originally filed a suit against the Defendant Ashok Electric Co. impleading him as a sole proprietorship concern of Shanti Kumbhat. In the written statement, the defence raised was that Ashok Electric Company is not a proprietorship firm; it is a partnership firm comprising of five partners; details of the partners had been given in the said written statement. Thereafter an application had been filed by the Plaintiff seeking an amendment of the plaint; by way of this amendment he had sought to implead Ashok Electric Company as a partnership firm detailing the names of the partners. The Court had relied upon AIR 1990 NOC 28 (KANT) P. Mabusab & Sons v. T. Nagendrappa wherein a bench of this Court had noted as under:

where there was only mis-description of the Plaintiff and the claim, as originally made on behalf of the nonexistent firm necessarily include a claim on behalf of the alleged partner who in fact, was the proprietor of the concern and, therefore, correcting the description of the Plaintiff would not result replacing the Plaintiff; and the Defendant who had totally denied his liability, would also not be prejudiced by the amendment; and the cause of action for the suit also remained unaltered by the amendment. Hence the application for amendment application was allowed.

11. The application for amendment was accordingly allowed. The court was also of the view that the nature of the suit has not been changed; it shall remain the same. Amendment was accordingly allowed. This order was never challenged; it has since attained a finality.

12. Thereafter on the pleadings of the parties, the following five issues were framed:

1. Whether there is no cause of action in favour of the Plaintiff to file the present suit ? OPD
2. Whether the suit filed by the Plaintiff is beyond the limitation ? OPD 3. Whether the Defendant is entitled to the decree of counter claim as prayed for ? OPD
4. Whether the Plaintiff is entitled to the decree for a sum of Rs. 2,43,103/- alongwith the interest as prayed for ? OPP
5. Relief.

13. Parties had led the evidence. Issue No. 2 is relevant for the controversy in dispute. The trial Judge had returned the following finding:

The issue of the limitation is the main bone of contention between the parties in

the present suit. The gist, crux and thrust of the entire written final arguments filed on behalf of the Defendants is the point of limitation involved in the present suit. Ld. Counsel for the Defendant has relied upon judgment Ramalingam Chettiar Vs. P.K. Pattabiraman and Another, which reads as under:

Limitation Act, 1963 . S. 21(1) and proviso. Impleadment of new Defendant . Held, unless court expressly directs otherwise by a separate and further order under the proviso, suit would be deemed to have been instituted against such Defendant on the date of his impleadment, no any earlier date . Debt Laws. T.N. Revenue Recovery Act, 1864 (2 of 1864), Sections 59 and 38 . Limitation period for suit by person aggrieved by proceedings under.

Heavily relying upon the said judgment it has been argued that the cause of action arose in favour of the Plaintiff on 15.12.1999 and a part payment of Rs. 33,630/- was made by the Defendant and as per Schedule item -14 of Limitation Act three years have been provided as the limitation. It has been argued that the Plaintiff filed the present suit No. 232 of 2003 against Sh. Shanti Kumbhat, sole proprietor, Ashoka Electrical Company, within three year from the time at which the alleged cause of action arose but in that suit the present Defendant was not impleaded as a Defendant and in the absence of the present Defendant the suit instituted was incompetent. It has been argued that later on, on an application moved by the Plaintiff the present Defendant was impleaded as a party but since the amendment was allowed only on 6.5.2003, by that time already three and a half year were over and as such the suit is barred by time in view of S. 21 of Limitation Act because the suit by the Plaintiff has to be treated and instituted when the application for impleading the Defendant was allowed on 6.5.2003. It has been further argued that since there is no separate/ further order of the court, the case of the Plaintiff also does not fall within the ambit of Proviso to Section 21 of Limitation Act.

Chronology of the events of the present suit reveals that earlier the suit was filed with the memo of parties as under:

M/s Thermoking

A sole proprietorship concern;

with Shri Pradeep Khanna as its sole proprietor,

A-24, Naraina Industrial Area,

New Delhi-110028 Plaintiff

Versus

M/s Ashok Electric Company

A Sole Proprietorship concern:

With Smt. Shanti Kumbhat as its sole proprietor

138, Govidpa,
Street Naiken Street,
Chennai Defendant.

Later on the Plaintiff moved an application under Order 6 Rule 17 CPC for amendment of the plaint and the said application was allowed vide orders dated 6.5.2003 by the Ld. A.D.J. Delhi specifically on the ground that there was only a mis-description of the Defendant because earlier in the title of the plaint the Defendant M/s Ashok Electrical Company was described as a proprietorship concern with Sh. Shanti Kumbhat as its sole proprietor whereas the same was partnership concern and Sh. Shanti Kumbhat was one of the partners. Ld. Counsel for the Plaintiff has vehemently argued that the authority relied upon by the Defendant is not applicable to the facts and circumstances of the present case because in the case in hand no new party has been added/impleaded. It is true that there cannot be any deviation from the proposition of the law as laid down by the Apex Court of the land in the above mentioned authority. Hon"ble Supreme Court of India in the above said authority has said that unless court expressly directs otherwise by a separate and further orders under the proviso to Section 21 of Limitation Act, the suit would be deemed to have been instituted against the Defendants on the date of impleadment and not on the earlier date. In the above said authority, State of Tamil Nadu was not party in the earlier instituted suit but later on by way of the impleadment, the State of Tamil Nadu was impleaded as a party and in these circumstances Hon"ble Supreme Court of India gave the above said observation. But the question to be considered by this Court is as to whether the same situation prevails in the present suit or not. Needless to mention that earlier also in the present suit M/s Ashok Electric Company was the only Defendant and after the amendment also M/s Ashok Electric Company is the main Defendant and Defendants No. 2 to 6 are partners of the Defendant No. 1. The application for amendment was allowed vide orders dated 6.5.2003 mainly on the ground that there was mis-description of the Defendant because in the title of the plaint M/s Ashok Electrical Company was described as a proprietorship concern whereas the same is a partnership firm as is the stand of the Defendants in the written statement. To my mind, no new party has been added in the present suit and with utmost respect to the observation of Apex Court of the land in the above said authority, in my opinion, the ratio decidendi of this case is not applicable to the facts and circumstances of the present case. In my opinion, the submission of Ld. Counsel for the Defendant is fallacious when he says that new party has been impleaded by way of the amendment vide order dated 6.5.2003. In my opinion, the Defendant was the same and by way of the amendment the Defendant was only described properly. Needless to mention that the Defendants themselves admit that earlier the suit was instituted within the period of limitation.

In the light of the above said discussion, I have no hesitation to hold that the present suit has been filed within the period of limitation as such issue No. 2 is

decided in favour of the Plaintiff and against the Defendants.

14. The impugned judgment had however set aside the finding on limitation. All other issues were decided in favour of the Plaintiff. The Court had held that the Plaintiff has proved his case on merits; he is entitled to recover the amount as claimed by him. However the suit, in view of provisions of Section 21 of the Limitation Act is time barred. On all other scores, the impugned judgment had endorsed the finding of the trial Judge.

15. Learned Counsel for the Appellant has placed reliance upon 35 (1988) DLT Bush Boake Allen (India) Ltd. v. Red Club Products Corporation as also another judgment reported in Gopalakrishnan Chettiar and Another Vs. Annamma Devassye and Others, to support his submission. In Bush Boake Allen (Supra) the Plaintiff had filed a suit initially against the partnership firm without the details of the partners. Thereupon the Defendant had furnished a statement giving details of the partners. An application under Order 6 Rule 17 of the Code had been filed to implead the said persons as the Defendants as also one co-Defendant M/s Sher-e Punjab Trading Company through its proprietor Suhinder Singh. Application had been allowed. Provisions of Order 1 Rule 10 (2) of the Code had also been adverted to. Relying upon the judgment of the Apex Court reported in Devidas and Others Vs. Shrishailappa and Others, wherein it had been held as under:

... Failure to join a person who is a proper party but not a necessary party does not affect the maintainability of the suit nor does it invite the application of Section 22 of the Limitation Act. The rule that a person, who ought to have been joined as a Plaintiff to the suit and is not made a party will entail dismissal of the suit, if the suit, as regards him, be barred by limitation when he is joined, has no application to non-joinder of proper parties.... If fresh parties are merely joined for the purpose of safeguarding the rights subsisting as between them and others claiming generally in the same interest, the determination of the date of the institution of the suit as regards such freshly joined parties does not ordinarily affect the right of the original Plaintiff to continue the suit and will not attract the application of the general provisions of the Limitation Act.

16. The court had held that where the added party is already constructively a party to the suit, it is not in essence an order of adding or substituting a new party and Section 21 of the Limitation Act would not apply.

17. In this case also the partners of the Defendant firm were constructively parties as Defendants in the suit; the Defendant firm had been arrayed as a proprietorship firm through its proprietor Shanti Kumbhat and this Defendant firm had in fact fully represented all the partners; a partnership firm having no separate identity except through its partners. A firm is not a person; it is merely a qualitative name for individuals who are members of the firm; it is neither a legal entity nor a person; a firm name is merely a description of individual who compose the firm. Addition of the names of the partners was not an addition of

any new party within the meaning of Section 21 of the Limitation Act; it was a case of mis-description of parties who were constructively represented by its firm (Defendant No. 1). It was not a case of adding a new Defendant; Defendant No. 1 was mis-described as a proprietorship firm; it was a partnership firm comprising of five partners whose names had only subsequently been added. The provisions of Section 21 of the Limitation Act are not attracted.

18. Suit filed against the original proprietorship firm was admittedly in time. The order of the Court dated 06.05.2003 allowing the amendment application had also noted the observations of the Court in P. Mabusab & Sons (Supra) which observation has been quoted above.

19. The finding returned in the impugned judgment qua limitation is accordingly set aside. The impugned judgment had otherwise endorsed the finding of the trial Judge on all other counts and had held that the Plaintiff had been able to prove his case qua entitlement of recovery of the suit amount along with interest.

20. Substantial question of law is accordingly answered in favour of the Appellant and against the Respondent. Appeal is allowed. Suit of the Plaintiff stands decreed. Appeal is disposed of.