
(1958) 03 CAL CK 0006

In the Calcutta High Court

Case No : Appeal from Original Order No. 86 of 1957

The Indian Overseas Bank Ltd.

APPELLANT

Vs

The Chamria Trading Company Ltd.

RESPONDENT

Date of Decision : 26-03-1958

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 10, Order 1 Rule 10(5), Order 28 Rule 2, 152
Limitation Act, 1877 — Section 22

Citation : (1959) 2 ILR (Cal) 80

Hon'ble Judges : Chakravartti, C.J.; Lahiri, J

Bench : Division Bench

Final Decision : Allowed

Judgement

Chakravartti, C.J.—The Appellant, who was the sole Defendant in a suit as originally framed and is the third Defendant now, complains of an order of Bachawat, J., dated April 9, 1957, by which the learned Judge allowed the Plaintiff to amend its plaint. In the plaint, as initially filed, the Plaintiff was shown as the Chamria Trading Company Ltd. By the amendment, the words, "The Chamria Banking and Trading Company Ltd. known as," have been directed and allowed to be added before the words "The Chamria Trading Company Ltd." The amendment allowed was not exactly the amendment prayed for, because the Plaintiff Respondent had asked for some further amendment of the cause title and also the addition of a whole paragraph in the body of the plaint. The learned Judge delivered no judgment, but since his order, as drawn up, mentions only the amendment which I have referred to, it is obvious that the rest were disallowed by him.

2. The amendment allowed by the impugned order was a second amendment of the plaint. Earlier, by an order, dated July 11, 1955, another amendment by which two Defendants were added to the suit had been allowed. It appears that, by its original plaint, the Plaintiff Respondent had claimed a certain declaration and a

certain money decree against the Appellant alone. Subsequently, the Plaintiff applied for leave to withdraw the suit, apparently on the ground that by reason of the absence of two necessary parties, it was bound to fail, but P.B. Mukherji, J", before whom the application was filed, directed him to apply for the addition of those two parties instead of withdrawing the plaint. The application was then made and allowed. Necessarily, the plaint had to be extensively amended and the prayers also were altered so as to make a claim for a money decree against one of the added Defendants, namely Defendant No. 2, the principal claim, the prayer for a similar decree against the present Appellant, being made only a prayer in the alternative.

3. It is nobody's case that there is now or was at any time any duly incorporated company of the name and style of The Chamria Trading Company Ltd. The Appellant accordingly contended before the learned trial Judge, and has contended before us as well, that the plaint filed by The Chamria Trading Company Ltd., being filed by a non-existent body, no valid suit ever came into existence on that plaint at all. The Chamria Banking and Trading Company Ltd. was however, a duly incorporated company and by the amendment which brought in that company as the real Plaintiff, a bad plaint had been allowed to be converted into a good one which was not. permissible under the law. The Plaintiff Respondent in reply to that contention set out at length the circumstances in which it found itself compelled to use the name, The Chamria Trading Company Ltd. In view of the order we are proposing to make, I do not think it necessary, nor will it be proper, to go into the correctness or otherwise of the contention of the Appellant or the Respondent's explanation. In short, the explanation was that the entity which had brought the suit was none other than the entity incorporated as The Chamria Banking and Trading Company Ltd. and that it was by reason of certain circumstances, over which the members of the Company had no control, that they had to use a name which would not include the word "Banking". The Appellant's contention is that even if that explanation was accepted, it would not validate the suit as originally brought and, therefore, its contention that the amendment had had the effect of removing an incurable defect from the suit and converted it into a good suit, remained. As I have stated already, I do not propose to go into the merits of that contention.

4. There was a second contention advanced on behalf of the Appellant. It was argued that, in any event, the amendment prayed for by the Plaintiff Respondent could not be allowed without notice of the application for amendment being served on the added Defendants which, admittedly, had not been done. The Plaintiff Respondent's reply was that it was not necessary to serve those Defendants with a notice of the application at all, because even no writ of summons of the suit had yet been served on them and, therefore, as against them, the suit had not yet commenced. The Respondent's reply to the Appellant's contention, accordingly, was that if before the Writ of Summons was issued on a Defendant, any amendment of the plaint was sought, such Defendant had no right to a notice of an application of the amendment and the Plaintiff was

not required to give such notice. The question before us is which of the rival contentions of the parties is correct.

5. Ordinarily, it would seem to be repugnant to common justice that after a person has been impleaded as a party to a suit and has actually been brought on the record, any change should be made in the structure of the suit without notice to him. It was, however, contended that if the proceedings in a suit commenced against an added Defendant only after the Writ of Summons had been served upon him, he was not interested in what took place before the proceedings so commenced. Nor was he prejudiced in any manner, if the plaint was amended at such a stage without notice to him. The substance of the argument, if I understood it aright, was that if a Defendant is once served with a Writ of Summons and thus informed of what the plaint is and thereafter the plaint is sought to be changed, he becomes naturally entitled to intervene and resist the change, if he thinks that it will operate to his prejudice. In such a case, he has once been confronted with a particular plaint, but at a later stage another plaint, wholly or partly different in form, is substituted for the original plaint and it is the substituted plaint which he is called upon to answer. It was contended that, in such a case, the justice of serving a notice upon him of the application for amendment was plain. But in the other case where no Writ of Summons had yet been served on a Defendant, the plaint, if amended before the service of a writ, will be the only plaint with which he will ever be confronted and, therefore, for him there will be no change of circumstances of which he can be entitled to claim notice.

6. In aid of his contention, the Learned Counsel for the Plaintiff Respondent invited our attention to certain provisions of law and certain rules. He referred us first to Rule 34 of Chapter XXXVIII of the Rules of the Original Side, next to Sub-rule (5) of Order 1, Rule 10 of the CPC and lastly to Order XXVIII, Rule 1 of the Rules of the English Supreme Court and the commentary there on in the Annual Practice, 1956 Edition. Having given my best consideration to these provisions relied upon by the Learned Counsel, I am of opinion that they furnish no answer to the question we have before us.

7. Taking first Rule 34 of Chapter XXXVIII of the Original Side Rules, it undoubtedly deals with amendments of pleadings and undoubtedly provides for amendments being made in certain cases without notice. But the cases to which the rule applies are only cases of a formal amendment such as rectification of clerical errors or errors in names, dates or sums. Obviously, the amendments contemplated by the rule are like those provided for in Section 152 of the CPC and not amendments of a substantive character at all. Indeed, if any inference is to be drawn from Rule 34, the inference, to my mind, is rather one against the Plaintiff's contention, because if the framers of the Rules were thinking of providing for amendments of pleadings without notice and limited the provisions only to cases of formal amendments, it may reasonably be presumed that, by implication, they excluded all other amendments from the operation of the Rule

and intended that such amendments must always be made on notice.

8. Rule 1 of Order XXVIII of the Rules of the English Supreme Court hardly carries the matter any further, so far as the Indian procedure is concerned. The notes under the Rule certainly deal with amendments before service and amendments after service as separate matters, but it is clear that what the notes are concerned with is an amendment of the writ and not amendment of the pleadings. What a writ in English practice means has been lucidly explained in "Odgers on Pleading and Practice". It is clear from the statements there that the writ is a command to the Defendant to enter appearance and to answer the claim and that although it must contain a statement of the claim, it is not the plaint or the Plaintiff's pleading. Apart from that distinction, it appears that even from the notes on which the Learned Counsel for the Plaintiff Respondent relied that after service of the writ, it could be amended only by an order of the Court and if it was to be so amended, notice to the Defendant was necessary. It appears that, under the English practice, before service of the writ, amendments of it can be made by the leave of the Practice Master and no recourse to the Court or a Judge in Chambers is necessary. Under the Indian practice, however, an amendment, can only be made, as far as I am aware, by an order of the Court and if even in England, when the amendment is to be made by an order of the Court, notice on the Defendant is required, it must equally be required under the Indian practice where all amendments are by the Court's order. It is to be noticed that there is nothing in the Indian Rules, corresponding to Rule 2 of Order XXVIII of the English Supreme Court Rules, under which the Plaintiff may without any leave amend his statement of claim, whether indorsed on the writ or not, at least once before the expiration of the time limited for reply. For all these reasons, I am of opinion that the Plaintiff Respondent can derive no assistance from Rule 1 of Order XXVIII of the English Supreme Court Rules.

9. There still remains Sub-rule (5) of Rule 10 of Order 1. The sub-rule says that subject to the provisions of the Indian Limitation Act 1877, Section 22, the proceedings as against any person added as Defendant shall be deemed to have begun only on the service of the summons. The meaning of this provision requires a little scrutiny, because the provision of Section 22 of the Limitation Act in that where, after the institution of a sui, a suit, a new defendant is substituted or added, the suit shall as regards him, be deemed to have been instituted when he was so made a party. If such be the effect of Section 22 and if the operation of Sub-rule (5) of Order 1, Rule 10, is to be subject to that section, the proceedings as against an added Defendant must be deemed to have been instituted when he was made a party and if that must be the date of the institution of the suit, it is not easy to see who is meant by saying that the proceedings against the Defendant shall be deemed to have begun only on the service of the summons. u/s 22 of the Limitation Act, the proceedings are to be deemed to be instituted when the Defendant is made a party, whereas under Sub-rule (5) of Rule 10 of Order 1, the proceedings must be deemed to have begun on the service of summons, which is apparently not reconcilable with the

former provision. But a reconciliation can be and has been made. The effect of Section 22 is that if a necessary party is added after the period of limitation, the suit must be dismissed, because the institution of the suit as against such party must be held to have, taken place after limitation had expired. The meaning of Sub-rule (5) or Rule 10 of Order 1, read with Section 22 of the limitation Act, appears to be that if, upon the addition of a Defendant, the suit survives Section 22, that is to say, does not become liable to be dismissed, then as regards other matters, the proceedings under it will be deemed to have commenced when the summons is served upon him. Such other matters are principally matters like discovery, inspection, the filing of affidavits of documents and the like. The meaning of the whole provision is that if a Defendant is added at a late stage and he is either not a necessary party or, although a necessary party, is added within the period of limitation, so that the suit continues to be a good suit, he, as the added Defendant, will have all the rights of a Defendant from the beginning, although, in the meantime, the suit may have made considerable progress.

This meaning of Sub-rule (5) of Rule 10 of Order 1 which the Learned Counsel for the Plaintiff Respondent himself suggested does not, however, establish that if a plaint is sought to be amended before the Writ of Summons has been served on certain of the Defendants, the amendment may be made without notice to them. Even in the case of Defendants originally impleaded, the same situation may arise, because the Plaintiff may seek to amend his plaint before the Writ of Summons has been served on them. If in the case of added Defendants, the plaint can be amended without notice to them, where the amendment is sought before the Writ of Summons is served upon them, equally should it be possible to amend a plaint without notice to even the originally impleaded Defendants when the amendment is sought before service of the writ upon them has been effected. This consequence of the contention advanced by him was realised by the Learned Counsel for the Plaintiff Respondent. He accordingly contended that both in the case of a Defendant originally impleaded and in the case of a Defendant subsequently added, the plaint Could be amended without notice to him, if the amendment was sought before the service of the Writ of Summons. The Appellant's contention necessarily was that in neither of these cases, could amendment be made without notice.

10. The question is not free from difficulty, but in my view, having regard to all the considerations which are relevant to the point, the Appellant's contention appears to me to be right. One circumstance which makes it right appears to me to outweigh all other circumstances. If an amendment is made in the absence of a Defendant, he will have no opportunity for resisting it at the stage it is applied for and allowed. The amendment may be one gravely prejudicial to his interests or may be one which cannot and ought not to be allowed in law, inasmuch as it alters the character of the suit altogether or deprives the Defendant of the advantage of certain statements made in the original plaint which are now deleted. If an amendment is allowed to be made without any opportunity being afforded to the Defendant to contest it, it is difficult to see when, so far as the

trial is concerned, he can press his objections at all. It was contended by the Learned Counsel for the Plaintiff Respondent that after the Writ of Summons had been served on the Defendant with a copy of the amended plaint, he would have ample opportunity to take an exception to the amendment by his written statement. I am unable to see how, even on such exceptions taken by the written statement, the trial Court which has already allowed the amendment can give effect to it. The order for amendment being an order made by the Court itself, it can be altered or modified or vacated only if a separate application is made for a review of the order and such application is allowed. I had some doubts as to whether, in the circumstances stated, the Defendant would at all come to know what the original plaint was like and what amendments had been made in it, but I was informed that if the correct practice was followed, the copy of the plaint supplied to the Defendant would have to show the amendments, because it would have to be a true copy of the plaint on the record of the Court and since the original plaint would show the amendments, the copy also would show them. I tried to ascertain what the practice in fact was, but was unable to obtain any information, because occasions where an amendment of the plaint is sought to be made before service of the Writ of Summons on the Defendant are almost unknown. Be that as it may, I shall assume that the Defendant will be in no difficulty as to coming to know what amendments had been made in the plaint. But his difficulty about challenging the amendments, so far as the trial Court is concerned, will be almost insurmountable. The only way in which this difficulty can be removed is to insist on the observance of the ordinary principle followed in the Courts that no order affecting any party shall be made without giving him adequate notice of it and adequate opportunity for being heard. I am, therefore, of opinion that as to amending a plaint before the service of the Writ of Summons on the Defendant, there can be no distinction between a case where the writ has not been served on a Defendant originally impleaded and a case where the writ has not been served on an added Defendant. The principle governing both the cases is the same and the principle, to my mind, is that no amendment ought to be allowed without notice to the Defendant likely to be affected. The Learned Counsel for the Plaintiff Respondent stated that to give notice of the proposed amendment to a Defendant who has not yet been served with the Writ of Summons would be a cumbersome procedure and would involve duplication of proceedings. Assuming that the procedure will be cumbersome and there would be some duplication, yet those would be the consequences of the Plaintiff's own default and such consequences can be no reason for the Courts not enforcing a rule which plainly accords with justice and equity.

11. For the reasons I have tried to give in some detail, I am of opinion that quite apart from the question as to whether the amendment prayed for could rightly be allowed or not, the Plaintiff Respondent was not entitled to have the amendment without notice to the added Defendants Nos. 1 and 2. The amendment which brought in as the Plaintiff a body which did not bear the same name as the body with which they had dealt and also introduced a money claim

against one of them, affected their interest vitally. Since no notice was served and the amendment was still allowed, the order allowing the amendment cannot be upheld. The consequence of our taking that view is not that the Plaintiff Respondent's application for amendment must be dismissed straightway. The consequence is that the application must be heard after all the Defendants have been served with notice of it. Defendant No. 3 having already been served, the remaining two Defendants must be served before the application can be properly heard and disposed of.

12. In the result, this appeal is allowed, the order of the learned Judge, dated the 9th of April, 1957, allowing a certain amendment of the plaint is set aside and the case is sent back to the trial Court in order that the Plaintiff Respondent's application may be heard and disposed of in accordance with law after service of notice of it on the added Defendants Nos. 1 and 2.

13. Costs of this appeal shall be costs in the cause.

14. Certified for two counsel.

Lahiri, J.

15. I agree.