
(2014) 09 BOM CK 0070

In the Bombay High Court

Case No : Chamber Summons (L) No. 1106 of 2014 in Suit No. 2101 of 1996

Ultra Merchandise and Retails Limited

APPELLANT

Vs

In Entertainment India Limited

RESPONDENT

Date of Decision : 24-09-2014

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 10(2), Order 1 Rule 13, Order 1 Rule 9, Order 14 Rule 14, Order 14 Rule 5

Citation : (2014) 6 ABR 239

Hon'ble Judges : G.S. Patel, J

Bench : Single Bench

Advocate : Rashmin Khandekar a/w Ravi Suryavanshi, Sankalp Dalal i/b Naik, Naik and Co, Advocate for the Appellant; Mayur Khandeparkar a/w Amruta Hajarnis i/b Dave and Girish and Co, Advocate for the Respondent

Judgement

G.S. Patel, J.—This case is a needlessly large storm in a very small teacup. In its Chamber Summons, the Defendant seeks to amend its written statement. No new facts are proposed to be added. The Defendant only seeks leave to add a legal submission based on facts already exhaustively pleaded. Mr. Khandeparkar, learned counsel for the Defendant, submits that the Chamber Summons is entirely unobjectionable. Mr. Khandekar, learned counsel for the Plaintiff, disagrees. He opposes the chamber summons saying that the amendment sought is one that is barred by law and wholly impermissible.

2. Having heard both counsel at some length, and having, with their assistance, considered the very many authorities that they have placed before me, I propose to make an order allowing the Chamber Summons.

3. It is not necessary to set out the facts in any great detail. This much will suffice: The suit is an action in copyright infringement in respect of certain allegedly unauthorised telecasts of the Plaintiff's television programmes or films (or both) by the Defendant. The Plaintiff seeks injunctions and damages. The Defendant filed a written statement on 27th March 2014. In this, material for the

present purposes, is the assertion in paragraph 6(ii) to the effect that the illicit broadcast were not made by the Defendant, but by the Defendant's franchisee, one Rajendra Pandey. The Defendant claims that it is on account of Pandey's illegal action that the Defendant has been sued. The Defendant has terminated the franchise agreement with Mr. Pandey. There are parallel proceedings between Pandey and the Defendant in this court.

4. Issues were framed by consent on 4th April 2014. On the averments already made in the written statement, Mr. Khandeparkar submits that the Defendant should be permitted to amend the Written Statement to introduce what he calls a purely legal submission, viz., that the suit is bad for non-joinder of a necessary party. I am not, of course, at this stage, examining whether this proposed amendment has any merit at all but only to the question of whether or not it should be permitted.

5. Mr. Khandekar submits that the provisions of Order I Rule 13 of the Code of Civil Procedure, 1908 ("CPC") are unambiguous. They require that a plea of joinder should be taken at the earliest possible opportunity and, in any event, at or before the settlement of issues. It is only when a ground for objection as to joinder has arisen subsequently that it can be taken later. If not taken, the objection is deemed to have been waived.

6. Mr. Khandeparkar's answer to this is that Order I Rule 13 of the CPC can never govern the taking of an objection as to the joinder of a necessary party. The reason, he submits, suggests itself: if a necessary party is not joined, the suit must fail, and this is true whether or not a plea is taken, and whether or not an issue is framed.

7. These are the relevant provisions of the CPC:

Or.I, R.9 Misjoinder and non-joinder

No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the Court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it:

[Provided that nothing in this rule shall apply to non-joinder of a necessary party.]

Or.I, R.13. Objections as to non-joinder or misjoinder

All objections on the ground of non-joinder or misjoinder of parties shall be taken at the earliest possible opportunity and, in all cases where issues are settled, at or before such settlement, unless the ground of objection has subsequently arisen, and any such objection not so taken shall be deemed to have been waived.

Section 99-No decree to be reversed or modified for error or irregularity not affecting merits or jurisdiction

No decree shall be reversed or substantially varied, nor shall any case be remanded, in appeal on account of any misjoinder [or non-joinder] of parties or causes of action or any error, defect or irregularity in any proceedings in the suit, not affecting the merits of the case or the jurisdiction of the Court:

[Provided that nothing in this section shall apply to non-joinder of a necessary party.]

(Emphasis supplied)

8. The italicized portions of this extract were all introduced by the 1977 amendment 1. From this, it is at once clear that while Order 1, Rule 9 and Section 99 were amended (in the context of non-joinder of a necessary party), there was no such amendment to the Order 1, Rule 13. This is why Mr. Khandeparkar says that Mr. Khandekar's reliance on Order 1, Rule 13 to the exclusion of the other two provisions is plainly wrong. What Order 1, Rule 9 and Section 99 say is that no suit can fail, nor can any decree be reversed, only the ground of non-joinder or misjoinder of a party, but this cannot and does not apply to the non-joinder of a necessary party: that is always fatal. Therefore, Mr. Khandeparkar submits, this is a plea that can never be one of those capable of being "waived" under Order I, Rule 13. Indeed, even if not taken, if a court finds that a necessary party has not been joined, the suit must fail, for a necessary party is one in whose absence no effective order can be made. In *Udit Narain Singh Malpaharia Vs. Additional Member, Board of Revenue, Bihar*, the Supreme Court put it thus:

"The law on the subject is well settled: It is enough if we state the principle. A necessary party is one without whom no order can be made effectively; a proper party is one in whose absence an effective order can be made but whose presence is necessary for a complete and final decision on the question involved in the proceeding."

(Emphasis supplied)

This statement of law has stood the test of time: four decades later, this view was reaffirmed in *Balvant N. Viswamitra and Others Vs. Yadav Sadashiv Mule (dead) through Lrs. and Others*, In a sense, then, Mr. Khandeparkar's application is *ex majore cautela*: he pleads no new facts; the issue arises on the facts as pleaded. Under Order XIV, Rule 5, the Court could frame that issue anyway, on the pleadings as they currently stand:

Order 14 Settlement of issues and determination of suit on issues of law or on issues agreed upon

3. Materials from which issues may be framed The Court may frame the issues from all or any of the following materials:

(a) allegations made on oath by the parties, or by any persons present on their behalf, or made by the pleaders of such parties;

(b) allegations made in the pleadings or in answers to interrogatories delivered in the suit;

(c) the contents of documents produced by either party.

5. Power to amend and strike out issues²

(1) The Court may at any time before passing a decree amend the issues or frame additional issues on such terms as it thinks fit, and all such amendments or additional issues as may be necessary for determining the matters in controversy between the parties shall be so made or framed.

(2) The Court may also, at any time before passing a decree, strike out any issues that appear to it to be wrongly framed or introduced.

9. Mr. Khandeparkar relies on a decision of a Full Bench of the Assam High Court in Chandra Mohan Saha and Another Vs. Union of India (UOI) and Another, in support of his proposition that such a plea of non-joinder of a necessary party can never be waived and is therefore not subject to the discipline of Order I, Rule 13. The Full Bench decision is admittedly prior to either the 1977 amendment to Order 1 Rule 9 the proviso to Rule 9 and Section 99 did not exist at the time but, Mr. Khandeparkar says, powerfully presaged that amendment and, in any case, proceeded on sound first principles. In paragraph 7, the Full Bench said:

7. On behalf of the petitioner, it has been contended that the point of non-joinder of parties not having been specifically raised at the trial, it should not have prevailed in the appellate Court. Reliance is placed on Rule 13 of Order 1, Civil P. C., to show that the objection not having been taken at an early stage, it should be deemed to have been waived. Rule 13, however, has no application to a case where a necessary party to the suit is not before the Court and no effective decree can be made in the absence of such a party. The suit in such cases is inherently defective and the point can be taken at any stage, provided no new facts have to be alleged or proved. If, therefore, it is held that the Railway Administration of Assam was a necessary party to the suit and has not been made a party, then the objection must prevail and the order of the Court below should be affirmed. If, on the contrary, it is held that the Railway Administration, as such need not be made a party and is adequately represented, then the order of remand must be held to be vitiated with illegality and material irregularity, and the case must go back to the Court below for disposal according to law.

10. After first attempting unsuccessfully to distance himself from this view by citing both history and geography, Mr. Khandekar says that is all very well, but it is not the Bombay view. In Y.G. Chavan Vs. Parvatibai, a learned single Judge of this Court took precisely the opposite view, and disagreed with the Assam High Court's Full Bench. It is, Mr. Khandekar says, this view of Mr. Justice Vimadalal that is binding.

11. This decision was also before the 1977 amendment to the CPC. An amendment of the written statement was sought in the midst of examination-in-

chief of the Plaintiff, in those days not taken on affidavit but in Court. The amendment was to correct a pleading that was described as "erroneous", and it was submitted that the error was an oversight, a submission despatched in short order by Mr. Justice Vimadalal. The essential supporting averment was altogether missing, as paragraph 2 of that decision clearly shows. Reliance was placed on draft issues without the necessary averments in the pleadings. Correctly read, therefore, what Mr. Justice Vimadalal's decision says is that in order to raise the plea of non-joinder there must be a supporting averment in the pleading. It cannot be that sans averment such a plea is taken. Paragraph 2 of the decision reads:

2. I would not perhaps have been averse to the granting of the amendment in the form in which it appears in the draft handed in by Mr. H.K. Shah but, I am, afraid, in view of the provisions of Order I, Rule 13 of the CPC it is not open to me to grant such an amendment, once issues have been framed by me, as they already have been in the present case. Order I, Rule 13, CPC enacts in mandatory terms, not only that objections on the ground of non-joinder must be taken at the earliest possible opportunity, but that they must be taken "in all cases where issues are settled at or before such settlement, unless the ground of objection has arisen subsequently thereto." It is nobody's case in the present suit that the ground of objection has arisen subsequent to the framing of issues. It is true that in the draft issues that were handed in by Mr. H.K. Shah after pleadings were read, he did seek to raise an issue on the ground of non-joinder of necessary parties, but that does not, in my opinion, get rid of the bar of Order I, Rule 13 of the Code of Civil Procedure. In the absence of the necessary averment in the Written Statement, such an issue could not be raised and was, therefore, struck out by me from the draft submitted by Mr. H.K. Shah. A party cannot surmount the bar of Order I, Rule 13 of the CPC merely by inserting an issue in the draft issues submitted by him without the necessary averment being there in the pleading to support that issue. When Order I, Rule 13 refers to the raising of an objection on the ground of non-joinder or misjoinder of parties, in my opinion, it clearly refers to such objection being raised either by amendment of the pleadings at the proper time or by framing an issue in those cases in which the necessary averments are to be found in the pleading of the party concerned. The fact that such an issue was sought by Mr. H.K. Shah in the draft issues submitted by him cannot therefore be: of any avail to him for the purpose of getting over the bar of Order I, Rule 13 of the Code of Civil Procedure.

12. Mr. Khandekar is quick to point out that the Full Bench view of the Assam High Court was cited before Mr. Justice Vimadalal, who disagreed with its view as expressed in paragraph 7:

3. ... I am afraid, I cannot however accept the view taken by the Assam High Court in Chandra Mohan's case for the simple reason that an objection on the ground of non-joinder would be raised only in cases in which it would be fatal to the maintainability of the suit. If a party who has not been joined in a suit is

merely a proper party to the suit as distinguished from a necessary party, it would be futile to raise any objection of the nature contemplated by Order I, Rule 13 of the Code of Civil Procedure. Such an objection would never be raised because, in view of the provisions of Order I, Rule 9 it would not be fatal and the Court could always proceed with the suit in regard to the rights and interests of the parties actually before it. It is true that under Order I, Rule 10(2) of the CPC an application for amendment by the addition of a party may be made whether the party sought to be joined be a necessary party, or a proper party to the suit. In my opinion, however, it is not possible to conceive how Order I, Rule 13 of the CPC could possibly apply to the non-joinder of a party who is merely a proper party to the suit as distinguished from a necessary party thereto. With respect to the learned Judges of the Assam High Court who decided Chandra Mohan's case cited above, it is in respect of the non-joinder of necessary parties alone that Order I, Rule 13 could possibly come into play, and I am therefore unable to agree with the view taken by them in the said case. If the Court is unable to pass a decree by reason of the fact of the non-joinder of a necessary party who ought to have been joined, the Court may add such party suo motu, or may decline to pass the decree prayed for by the plaintiff, but that does not necessarily lead to the conclusion that a party could raise the plea of non-joinder at any stage subsequent to the stages contemplated by Order I, Rule 13 of the Code of Civil Procedure.

13. The point of distinction between these two views is this: the Chandra Mohan Full Bench of the Assam High Court was of the opinion that Order 1 Rule 13 of the CPC had no application to a plea of non-joinder of a necessary party. In substance, it held that this plea is fundamental and goes to the root of the matter (if not of jurisdiction per se) as no effective decree can be passed absent a necessary party. Mr. Justice Vimadalal was of the view that Order 1 Rule 13 only ever applied to the non-joinder of a necessary party, and there was no question of its application to a party who was merely proper, as the suit could proceed and be decided anyway even without the addition of a proper party. I must confess that I find the view taken by Mr. Justice Vimadalal very problematic. Indeed, it seems to me to be entirely incorrect. The non-joinder of a necessary party is an inherent and fatal defect in the suit; no decree can possibly result. The logical consequence to the Chavan v. Parvatibai view must necessarily be that where a plea of non-joinder of a necessary party is not taken, a decree can result. That cannot possibly be the case. The proposition that no plea of non-joinder of a proper party can ever be taken is, I think, also not free from doubt. Such pleas are often taken, and are entirely legitimate. An issue can be drawn on them as well for the simple reason that while the suit will proceed and a decree one way or the other will result, should the plaintiff succeed, the non-joinder of a proper party might conceivably alter the nature and extent of the decree since, without a proper party, the decree might not be, in the words of the Supreme Court, "complete and final".

14. In any case, this may now be entirely academic following the 1977

amendment to the CPC. The provisos to Order 1 Rule 9 and Section 99 make it abundantly clear that no decree is to be reversed only on the ground of non-joinder of a party, unless that party is a necessary party. Therefore, in such a case, the non-joinder of a necessary party always defeats a suit. If that be so, then there is no question of a "waiver" of such a plea of non-joinder of a necessary party at all. Moreover, there is no question any longer of a plea of non-joinder of a proper party never being taken, or of Order I, Rule 13 not applying to such a plea, or of it having application only to the plea of non-joinder of necessary party. If the view of Mr. Justice Vimadalal is to be applied even after the 1977 amendment, then those provisos are rendered meaningless: the view that a plea of non-joinder of a proper party "would never be raised because, in view of the provisions of Order I, Rule 9 it would not be fatal and the Court could always proceed with the suit in regard to the rights and interests of the parties actually before it" is a view that is negated by the introduction of those provisos. They contemplate the taking of such a plea of non-joinder of a proper party, but make it clear that the want of such a plea cannot defeat a suit or serve to reverse a decree. Indeed, the entire paradigm now stands inverted: Order I, Rule 13 only ever applies to a plea of non-joinder of a proper party. That is the only plea capable of being waived. A plea of non-joinder of a necessary party can never be waived, and can be raised at any time, subject of course to the essential requirement that there must be a supporting pre-existing averment in the pleadings. The Assam High Court's view, like the view in *Chavan v. Parvatibai* predates the 1977 amendment. However, while the Assam High Court's view survives the amendment, the view in *Chavan v. Parvatibai* does not.

15. This is also precisely the view taken several years after the 1977 CPC amendment by another learned single Judge of this Court at its Panaji seat. In *Smt. Maria Tecla Goes Pereira Vs. Denzyl Lobo and Another*, Dr. Justice E.S. Da Silva had before him a second appeal in a suit for declaration, title and permanent injunction, one that was partly decreed by the Trial Court. The declaration sought was of a tenancy. Dr. Justice Da Silva said in terms that Order 1 Rule 13 of the CPC, i.e., the waiver of a plea of joinder, cannot prevent the dismissal of a suit for non-joinder of a necessary party. In that case, the necessary averments were all already in place. The issue of non-joinder, the Court held, relying inter alia on the Assam Full Bench view in *Chandra Mohan* goes to the "root of jurisdiction", and is a plea that can be taken at any stage. This, Mr. Khandeparkar submits, is clearly the correct position in law, and I believe he is right.

16. Mr. Khandekar responds by saying that *Maria Tecla* is per incuriam as it did not consider *Chavan v. Parvatibai* at all, and that was as binding on the *Maria Tecla* court as it is on me.³ Quite apart from the fact that I agree with the view of Dr. Justice Da Silva, and leaving aside the jurisprudential entanglement that is likely to result on Mr. Khandekar's formulation, I do not see how the *Chavan v. Parvatibai* decision can be said to be any longer a correct statement of the law after the 1977 amendment, one that, as I have noted, makes all the difference.

Besides, the later view taken by Mr. Justice Da Silva is after the 1977 amendment and ought to be preferred for that reason alone.

17. Mr. Khandekar's reliance on the decision of another learned single Judge of this Court in *Ukha Chamatya Bhil Vs. Chatursingh Bilji Bhil and Others*, is also of little assistance to him. Before that court, none of the decisions in *Chandra Mohan Saha*, *Chavan v. Parvatibai* or *Maria Tecla* were cited. This was a writ petition against order of the Civil Judge, Senior Division framing an additional issue on non-joinder of a necessary party. On the facts, the Court found that there was no foundation in pleadings for any such plea. That being so, there was no question of framing any such issue. I am in respectful agreement with that decision as well.

18. It is not Mr. Khandeparkar's suggestion that the amendment should be allowed and the plea permitted to be taken even absent the necessary averments in the Defendant's written statement. To the contrary: he is at some pains to point out that the necessary averments are all in place. Only the formal plea of non-joinder remained to be taken. The party said to be a necessary party has been named and identified. His role in the matter has been described. Action between him and the Defendant has been set out. The Defendant has categorically said that it is this necessary party, Pandey, who is responsible. Nothing further is sought to be added to this factual matrix.

19. To support any such plea of non-joinder of a necessary party, an averment in the pleading is essential. There is no dispute about this in any of the authorities cited. The only question is whether, with such averments in place, where a plea is not specifically taken of non-joinder of a necessary party, it can ever be said to be waived under Order 1, Rule 13. In my view, it cannot. The non-joinder of a necessary party always defeats a suit, and provided that the necessary averments are in place, such a plea, being a question of law, can be taken at any time. The waiver in Order 1 Rule 13 applies to situations where the necessary averments do not exist or where the plea is sought to be introduced in respect of the joinder of a proper party. In either of those cases, there would be a waiver. It is not correct to say that Order 1, Rule 13 only applies to the joinder of a necessary party and never to the joinder of a proper party. A plea of non-joinder of a proper party can always be taken and an issue can always be struck on it, provided of course that it is supported by averments in the pleadings. In such a case, the resultant decree will follow, but without the proper party it may not, in the words of the Supreme Court, be "a complete and final decision". That is the distinction between the pleas of non-joinder of a necessary party and of a proper party. It is also therefore incorrect to say that a plea of non-joinder of a proper party cannot or would not ever be raised. It could, and an issue will be struck on it, for it might well affect the nature and extent of the final decree.

20. I have not the slightest hesitation in allowing the amendment. But, in any event, and to obviate any possibility of allowing the storm to which I earlier referred brew any further, I am also exercising my discretion under Order XIV

Rule 5, something Mr. Khandekar readily concedes lies within my remit to do, and framing an additional issue of non-joinder of a necessary party on the averments as they stand in the pleadings.

21. Chamber Summons made absolute in terms of prayer (a). Amendment to be carried out by 30th September 2014. Reverification dispensed with. It is not necessary to serve a copy of the amended written statement afresh; it is sufficient if the Defendant's Advocates send to the Plaintiff's Advocates a print of the proposed amendment indicating its place of insertion.

22. In addition, the following is framed as Issue No.1A:

1A. Whether the suit as filed is bad for non-joinder of a necessary party?

This sufficiently covers prayer (b) of the Chamber Summons, which is disposed of in these terms.

23. For completeness, the entire set of issues, with the new issue added, is appended to this order.

1 Act 104 of 1976, with effect from 1st February 1977. 2 With effect from 1st July 2002. Rule 5 was substituted by Section 11 of Act 22 of 2002, for Rule 5 as it stood immediately before its omission by Section 24(ii) of the CPC (Amendment) Act, 1999 (46 of 1999). 3 Y.V. Anjaneyulu Vs. Income Tax Officer,