

IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
ORDINARY ORIGINAL JURISDICTION

CHAMBER SUMMONS NO.717 OF 2014  
IN  
SUMMARY SUIT NO.2468 OF 2012

The State Trading Corporation  
of India Ltd.

.. Applicant/  
Proposed Co-Plaintiff

IN THE MATTER BETWEEN:

Standard Chartered Bank  
Versus

.. Plaintiff

ICICI Lombard General Insurance  
Company Ltd.  
and

.. Defendant

The State Trading Corporation of  
India Ltd.

.. Intervenor/  
Proposed co-plaintiff

Mr.Sharan Jagtiani with Ms.Neha Prashant i/b. ALMT Legal for  
applicant  
Mr.Kingshuk Banarjee i/b. Wadia Ghandy & Co. for plaintiffs  
Mr.V.Dhond, Senior Advocate with Shyam Kapadia i/b. Tuli & Co. for  
defendant

CORAM : K.R.SHRIRAM, J.

Reserved on : 7<sup>th</sup> July 2015

Pronounced on : 10<sup>th</sup> August 2015.

P.C.

1] This suit has been filed by the plaintiff to recover from

the defendants various amounts claimed by the plaintiffs under an Export Credit Insurance Policy dated 14<sup>th</sup> June 2008, issued by the defendants in favour of the plaintiffs and State Trading Corporation, the applicant herein. Under the said policy, the defendant had covered the insured in the sum of Rs.175 Crores upon the terms and conditions mentioned therein. The insured mentioned in the said policy is State Trading Corporation of India Ltd., i.e., the applicant and joint insured is Standard Chartered Bank, New Delhi, the plaintiff.

2] For the purpose of this chamber summons, brief narration of the facts is required. The applicant operates, inter alia, as an intermediary or a cannalising agent for sale and marketing of gold jewelery and to facilitate and promote its export with foreign buyers. The applicant is a Government of India Enterprise, operating under Union Ministry of Commerce and Industry.

3] The applicant had entered into an agreement with one Masumi Overseas Pvt. Ltd., whereby Masumi Overseas was to obtain export orders for gold jewelery from prospective buyers in the name of the

applicant and the applicant would export the jewelery. Pursuant to this arrangement, documents would be raised upon the applicant and the applicant would get paid based on the bills raised. Pursuant to that arrangement, the applicant approached the plaintiff to discount invoices issued by the applicant in favour of the foreign buyers and to pay 90% of the value invoiced to the applicant following the discounting. The plaintiff agreed and executed a receivables purchase agreement dated 25<sup>th</sup> March 2008 with the applicant. To cover the risk of the foreign buyers defaulting in payment for the goods supplied by the applicant, the applicant along with the plaintiff approached the defendant for an insurance cover. The defendants, pursuant to insurance policy dated 14<sup>th</sup> June 2008 agreed to insure the receivables of the applicant/ plaintiff from the foreign buyers. Subject to the terms and conditions of the policy the defendant agreed to indemnify the insured viz., the applicant and the plaintiff, in the event the foreign buyers fail to remit the insured debt. Under the agreement between the plaintiff and the applicant, the plaintiff had a right of recourse against the applicant, inasmuch as, if the foreign buyers did not pay, the plaintiff could look to the applicant to return the money which the plaintiff has paid by

discounting the invoice. Under the insurance policy issued by the defendant read with its amendments, it is provided that the plaintiff will have an insurable interest under the policy to the extent that the plaintiff finances specific insured debts. Therefore, the plaintiff will be entitled to claim under the policy only to such amount which the plaintiff has paid to the applicant under the receivables discounting agreement.

4] Since some of the foreign buyers defaulted in making payment of their respective payment the plaintiff lodged a claim with the defendant under the insurance policy on 7<sup>th</sup> July 2010. The defendant rejected the claim on 23<sup>rd</sup> August 2010. This suit, therefore, came to be lodged on 9<sup>th</sup> October 2010. The claim in the suit is for a principal amount of Rs.33,27,95,654.51 with interest thereon at 12% p.a. For the purpose of this chamber summons, we are not considering the merits of the case. The same could be considered at the appropriate stage and time.

5] Before the plaintiff filed the suit, the plaintiff had, under its receivables purchase agreement dated 25<sup>th</sup> March 2008, also called

upon the applicant to pay the amount which is being claimed in the present suit. The applicant did not pay and hence, the plaintiff filed an application under the Recovery of Debts Due to Banks and Financial Institutions Act. Though the applicant initially opposed the claim made by the plaintiff against the applicant in the Debt Recovery Tribunal, New Delhi, the applicant and the plaintiff filed consent terms on 6<sup>th</sup> September 2013. As per the consent terms, the applicant paid to the plaintiff a sum of Rs.23,29,56,958.15. This constituted 70% of the principal amount. It was also agreed between the applicant and the plaintiff that upon receipt of the said sum of Rs.23,29,56,958.15, the suit filed by the plaintiff, being the present suit, will be prosecuted by the applicant and the applicant would be joined as co-plaintiff. It was also agreed that if the applicant cannot be joined as co-plaintiff, the plaintiff will give such authority to the applicant as required, to prosecute the present suit in the name of the plaintiff by the applicant. It was also agreed that the balance of 30% of the amount, if the applicant succeeds by getting a decree in the present suit, shall be shared between the plaintiff and applicant, whereby the applicant will pay 30% of the principal amount aggregating to a sum of Rs.9,98,38,696.36 or 30%

of the decretal amount, whichever is lower.

6] The applicant having paid that amount to the plaintiff, has taken out the present chamber summons, praying to be impleaded as co-plaintiff in this suit and, thereafter to permit amendments to the plaint as per the schedule annexed to the chamber summons. In the affidavit in support of the chamber summons, the approach of the plaintiff is very simple, i.e., the applicant is an insured under the policy issued by the defendant and hence has to be joined as co-plaintiff. It is also stated that the right to relief in respect of the applicant is same and identical to the relief sought by the plaintiff and also arises under the same transaction against common opposite party and, therefore, common question of law and fact arise requiring adjudication qua the plaintiff.

7] The defendant has opposed the chamber summons on two main grounds, viz., the chamber summons is an attempt to by-pass the law of limitation and second, the applicant has no cause of action against the defendant.

According to the defendant, the pleaded case of the plaintiff arises out of an insurance policy as a result of the defendant's refusal to pay the claim made by the plaintiff and the applicant stands exactly in the same position insofar as its alleged right to sue is concerned. It is further contended by the defendant that the cause of action arose on the date the claim was rejected, i.e., 23<sup>rd</sup> August 2010 and since the present chamber summons has been filed by the applicant only on 25<sup>th</sup> July 2014, after a period of three years and 327 days, the applicant's claim is ex- facie barred by law of limitation. Therefore, the applicant ought not to be allowed to profess its time barred claim by joining the plaintiff in this suit.

8] On the stand of no cause of action, it is the case of the defendant that the applicant has been paid the amount due to it under the receivables purchase agreement by the plaintiff and the plaintiff's endorsement to the policy is providing that any amount payable by the defendant would be paid only to the plaintiff whose receipt alone shall be a full and valid discharge for all the insured, unless the plaintiff specifically instructs the defendant that monies are required to be paid to the applicant. In view thereof, the

applicant has not suffered any loss and, therefore, has no cause of action. It was also submitted very vociferously by the Counsel for the defendant that the applicant had taken a stand in the proceedings filed by the plaintiff before the DRT, New Delhi that by virtue of the endorsement of the policy in favour of the plaintiff, the applicant has by way of endorsement transferred/ relinquished all its rights under the insurance policy in favour of the plaintiff and once having relinquished the rights, cannot call itself an insured under the policy. The Counsel for the defendant, at this stage it is necessary to mention, had in the beginning of the arguments conceded that the applicant was also an insured under the policy. But his argument was even if the applicant is shown as an insured under the policy, by virtue of the endorsement on the policy and the stand taken by the applicant in the DRT proceedings that it had transferred and relinquished all its rights in favour of the bank, the applicant is no more an insured under the policy.

9] Under Order I Rule 1 of the Code of Civil Procedure, 1908, all persons may be joined in one suit as plaintiffs where any right to relief in respect of or arising out of the same act or transaction or

series of acts or transaction is alleged to exist in such persons, whether jointly or severally or in the alternative; and if such persons brought separate suits any common question of law or fact would arise.

10] In the present case, the indisputable fact or the admitted fact was that the applicant is the insured under the policy issued by the defendant and the plaintiff is the joint insured. The claim is for non payment of a claim made under the insurance policy issued by the defendant. The applicant's claim against the defendant is the same as that of the plaintiff and arises out of the same transaction and any question of fact and law which may arise either in the present suit qua the plaintiff and the applicant shall be the same and if the applicant would have been a co-plaintiff at the beginning itself, the defendant could not have ever objected to the same. The applicant's claim is based on condition of its status as a co-insured under the insurance policy issued by the defendant. Therefore, as the policy stands, there can be no objection if the applicant joins as a co-plaintiff. If one looks at it the other way, if the defendant had paid the claim under the policy, the defendant would have, by virtue of

the endorsement, paid to the plaintiff the amount to the extent plaintiff had discounted and the balance amount to the applicant. This position in my view would not be altered under any circumstances, even if the applicant had taken a stand before the DRT that it was not bound or liable to pay any amount to the plaintiff. If the situation was for e.g. when the applicant had issued 10 invoices and discounted only 8 with the plaintiff and all the 10 invoices were not paid by the foreign buyers, certainly, the amount under the claim would have been payable to both the applicant and the plaintiff in the proportion of 2 : 8.

11] In any event, even though the applicant had taken a stand that it was not liable under the policy or it had relinquished all its claims, transferred and/or relinquished all its rights under the insurance policy to the plaintiffs, the fact is that the applicant realised that it was not a correct stand and entered into consent terms. Moreover, whether the applicant relinquished and transferred its rights to the plaintiff or not is essentially an issue between the plaintiff and the applicant and defendant is not at all concerned with that. The defendant is only liable to pay, if at all it is liable, to the insured

named in the policy, i.e., the applicant and the plaintiff and that payment will also be in the proportion as agreed between the plaintiff and the applicant and endorsed as such in the policy.

12] Besides, relinquishment/transfer also has to be effected by an instrument or writing. The defendant cannot rely on pleadings which pleadings also has been given a go-bye in view of the consent terms entered into between the plaintiff and the applicant in the Debt Recovery Tribunal proceedings. In the present case, there is no instrument of relinquishment or transfer and in any case the defendant is not party to any such understanding between the plaintiff and the applicant. It is also necessary to note that the insurance premium for the present policy was of Rs.2.50 Cores which has been paid by the applicant to the defendant.

13] Under Order I Rule 10, sub-rule (2), the Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person

who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added.

14] Mr.Dhond, Senior Counsel for the defendant submitted that the name of a party can be struck out or added only by the court on its own accord or upon an application of either party viz., the plaintiff or the defendant and not a third party because sub-rule 2 says “applicant or either party”. I disagree with the submissions of the learned Senior Counsel because the sub-rule (2) says “.... either upon or without the application of either party....”, which would mean that upon the application of either party or upon the application of parties who are not parties to the suit. If we have to accept Mr.Dhond's submission, then, no third party who would suffer prejudice by any order passed in any suit can apply for leave to intervene in the proceedings.

15] Mr.Dhond also submitted that only such persons can be added whose presence may be necessary in order to enable the court

effectually and completely to adjudicate upon and settle the question involved in the present suit and this suit can be effectually and completely adjudicated upon without adding the applicant as party. According to Mr.Dhond, the plaintiff is also a co-insured and if the plaintiff continues, then, there is no need to add the applicant as co-plaintiff. This submission of Mr.Dhond is also not acceptable because the admitted fact is that the applicant is the insured under the policy. The applicant has paid Rs.2.50 Crores as insurance premium. The applicant has paid Rs.23,29,56,958.15 and odd to the plaintiff as per the consent terms filed in the DRT. The applicant is the exporter, whose risk of non payment by the foreign buyers is covered under the policy and, therefore, the applicant is certainly necessary for effectually and completely adjudicate upon and to settle all the questions involved in the suit.

16] The Counsel for the plaintiff and the defendant harped a lot on the expression “at any stage of the proceedings” used in sub-rule (2) of Order I Rule 10. The Counsel for the applicant also relied upon the judgement of the Division Bench of this Court in the matter of Kahini Developers Pvt. Ltd. Vs. Mukesh Morarji Panchamatia &

Ors.<sup>1</sup> The Counsel for the defendant stated that if the applicant had filed an independent suit, the suit would be barred by limitation and, therefore, that has to be considered first before the court decided on the chamber summons. Whereas, the counsel for the applicant relied upon this judgement in the case of *Kahini Developers* (supra) and submitted that the applicant has to be first added as plaintiff and only after being added as plaintiff, should the court look into the aspect as to whether the suit as far as the applicant is concerned, is barred by limitation or not.

17] In the case of ***Kahini Developers*** (supra), the plaintiff sought to amend a suit for specific performance to add a claim for damages. Reliance was placed on, *inter-alia*, the proviso to Section 21(5) of the Specific Relief Act, that states that such amendment be allowed at 'any stage of the proceedings'. The amendment was opposed by raising a plea of limitation. In this context, the Division Bench of this Court stated :

*"1 ... Even as a matter of first principle an application for amendment must be distinguished from the cause of action which is sought to be set up by the amendment. As a matter of general principle, though an application for amendment is allowed, the question as to whether the cause of*

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1 (2013) 3 Mah.L.. 440; (2013) 3 Bom C.R. 646

*action is within limitation would have to be determined and adjudicated upon. While allowing an amendment, it is always open to a Civil Court to direct that the amendment shall not relate back to the institution of the proceeding. The Court would therefore have to determine at trial whether the cause of action is within limitation or is barred.*

*(Emphasis Applied)*

Therefore, from this judgment, it does appear that the Court can and ought to consider the issue of limitation only at the stage of Trial. The similarity in the language of Order 1 Rule 10(2) of the CPC and to the proviso to Section 21(5) of the Specific Relief Act, i.e., "Any stage of the proceedings" is also relevant.

18] Section 21 of the Limitation Act, 1963 reads as under:-

*"21. Effect of substituting or adding new plaintiff or defendant.—(1) Where after the institution of a suit, a new plaintiff or, defendant is substituted or added, the suit shall, as regards him, be deemed to have been instituted when he was so made a party:"*

*Provided that where the court is satisfied that the omission to include a new plaintiff or defendant was due to a mistake made in good faith it may direct that the suit as regards such plaintiff or defendant shall be deemed to have been instituted on any earlier date.*

Sub-section 1 provides that where after the institution of a suit, a new plaintiff or defendant is substituted or added, the suit shall, as regards him, be deemed to have been instituted when he was so made a party. The expression used is “substituted or added”. It is used in past-tense. Therefore, only when a party is added as a plaintiff, can the suit as regards him be deemed to have been instituted when he was so made a party. Therefore, in my view, whether a suit as regards the applicant is time barred or not is not relevant for adding applicant as party plaintiff. I also gain support for this view of mine from the proviso to sub-section 1, because that empowers the court to conclude that even if a party is added as plaintiff after the institution of the suit, the suit as regards such plaintiff can be deemed to have been instituted at an early date. For the court to come to the conclusion that the suit shall be deemed to have been instituted on an earlier date by the applicant, the applicant should be given a chance to prove its case by leading evidence on the issue of limitation which is a mixed question of law and facts. Therefore, the applicant has to be certainly added first, before we consider the issue of limitation.

19] Mr.Dhond submitted that the proviso will also get triggered only if it was due to a mistake made in good faith and the applicant has not stated anywhere that it was not added as plaintiff earlier due to mistake made in good faith. Mr.Dhond submitted that in any event such a statement can be made only by the plaintiff and not by the applicant. I am afraid, I cannot agree on this count also with Mr.Dhond because section 21(1) nowhere states that an application has to be made only by the plaintiffs. More over, just because the applicant has not used the expression that it was not added as plaintiff by mistake or it was under a bonafide belief that it need not be joined as plaintiff in the suit makes no difference because this point will come up for consideration only when the issue of limitation vis-a-vis the applicant comes up for consideration at a later stage and for that to be considered, the applicant certainly has to be added as party to the suit. It has to be remembered and as rightly observed by this court in the matter of *Nutech Engineering Technologies Ltd. & Anr. (respondents) in the matter between: Nevada Properties Pvt. Ltd. Vs. Alice Infrastructure Pvt. Ltd. & Ors.*<sup>2</sup> the reason for having provisions like Order I Rule 10 is to minimise litigation and determine the real controversy in a suit. It is

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2 2014 (4) Bom. C.R. 466

also to be noted that by adding the applicant to the suit as a co-plaintiff no prejudice is going to be caused to the defendants. The plaintiff who is dominus litus also has no objection to joining the applicant as co-plaintiff. In fact, the plaintiff wants the applicant to be joined as co-plaintiff for the applicant having paid Rs.23 Crores and odd is certainly exposed to the risk that is covered under the policy and, therefore, is justified in seeking the prayer as sought in this chamber summons.

20] In this case of **Nutech Engineering** (supra), the Court was considering a chamber summons to substitute a defendant under Order 1 Rule 10 of the CPC. The proposed defendant raised the plea that the said substitution was barred on account of Section 21 of the Limitation Act, 1963 since the suit against the proposed defendant would have been barred on the date on which the amendment was sought. Significantly, the judgment emphasised that the enquiry to decide the issue of addition of the party under Order 1 Rule 10 of the CPC is different and distinct from the enquiry into the proviso to Section 21 of the Limitation Act. The Ld. Single Judge was pleased to hold that an amendment sought by a party could not be denied on the ground that the proposed substitution

would be barred by the law of limitation and the question of limitation was reserved to be adjudicated at the trial.

The Court considered Section 21 of the Limitation Act, 1963 as well as Order I, Rule 10(2) as follows :

*“10. Proviso to Section 21(1) of the Limitation Act permits the court to treat the suit as having been instituted on any earlier date (i.e., earlier to the date of application for joinder) on being satisfied that the omission to include the proposed defendant was due to a mistake made in good faith. The question that needs to be examined in the present case is whether, either due to a bona fide error in description or any other mistake made in good faith, as claimed by the plaintiff, the proposed defendants were not actually included in the suit herein.*

*11 This question is different from the one to be considered for the case of joinder under Order 1 Rule 10 : Whereas under Order 1 Rule 10 the question is whether there is lack of good faith in the application for new joinder, under the proviso to Section 21 the question is whether there is good faith in the earlier non-joinder. The plaintiff must show that despite exercise of good faith, a mistake was made by not joining the correct defendant. In other words, despite exercise of due diligence, the plaintiff could not find out who the correct defendant ought to be. Both the plaintiff and the defendants have relied upon various documents which throw light on the aspect of due diligence or otherwise on the part of the plaintiff in omitting to implead the correct defendants. The matter obviously requires to be proved at the trial by leading of evidence. That question cannot be decided, or at any rate, need not be decided, at this stage, since it would involve leading of extensive evidence. Subject to the plea of limitation being kept open, the proposed defendants can always be added.”*

In allowing the amendment application whilst keeping the issue of limitation open the Court placed reliance on the decision of the Apex Court in **Ragul Thilak D. John. V. S. Rayappan, (2001) 2 SCC 472**, which was affirmed in **Baldev Singh V. Manohar Singh, (2006) 6 SCC 498**.

21] In the light of the above, the appropriate stage for considering the issue of limitation and due diligence, mistake or good faith, must be after allowing the present amendment and impleading the applicant as a co-plaintiff to the present suit.

22] Mr. Dhond relied upon a judgement of the Madras High Court in the matter of *R. Lucas S/o.Rajamanickam and Anr. Vs. Jayachandra W/o. A.K.V.Nityanandam and Anr.*,<sup>3</sup> to submit that when there is nothing to indicate that the mistake in not impleading another plaintiff in time was a bonafide mistake, the suit would be regarded as having been commenced by the new plaintiff at the time when it was first instituted. There is no quarrel with this proposition.. But the fact is that we can consider this aspect only after the applicant is joined as co-plaintiff. Mr.Dhond also relied upon a judgement of this Court in the case of *Shekhar s/o.Govindrao*

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3 (2001) 2 M.L.J. 307

*Kinkhede Vs. Shweta wd/o. Shekhar Kinkhede and Ors.*,<sup>4</sup> to submit that where there is a conscious decision on the part of the plaintiff not to add the applicant as plaintiff while executing the suit, it cannot be a mistake as required under the proviso to section 21 of the Limitation Act. This decision also does not take the case of Mr.Dhond any further. First of all, facts in that case were totally different from the facts in the present case. In that case, despite being called upon, the plaintiff refused to add the applicant as co-plaintiff. In this case, the plaintiff in view of the fact that it had discounted the bills of the applicant, had filed a suit in its own name as per the policy. The applicant having paid part of that amount to the plaintiff, certainly will be entitled to make a claim under the policy. Moreover, as to why the plaintiff did not add the applicant etc. can be considered only after adding the applicant as plaintiff.

23] The counsel for the plaintiff made a big issue on the omission of the applicant to forward a copy of the miscellaneous application filed by the application in the Debt Recovery Tribunal as willful suppression. I find nothing turns out on this point in view of the fact that the plaintiff and the applicant had entered into consent terms

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4 2009 (6) Mh.L.J. 217

and there was no writing or instrument relinquishing the rights.

24] It is also mentioned in the recital of the bankers' endorsement to the policy issued by the defendant that to the extent that the bank finances specific insured debts the plaintiff will have an insurable interest under the policy. The defendant acknowledges that the bank has received a sum of Rs.23,29,56,958.19 from the applicant. To that extent, the defendant will contend at the hearing of the suit that the plaintiff has no insurable interest under the policy. To avoid any such plausible situation and without getting into the said issue on merits, this would also be an alternative reason to permit the applicant to be impleaded as co-plaintiff.

25] In the circumstances and in the interest of justice, the chamber summons had to be allowed and is made absolute in terms of prayer clauses (a) and (b). It is also clarified that the issue of limitation as regards the applicant is kept open.

26] Amendments to be carried out by the applicants/ plaintiffs within one week from today. Copy of the amended plaint be served

upon the defendant within one week thereafter. Applicant has to, however, pay to the defendant costs for this application in the sum of Rs.25,000/- within four weeks by cheque drawn in favour of the Advocate for the defendant.

( K.R.SHRIRAM, J.)