IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

CHAMBER SUMMONS NO. 1244 OF 2014
IN
SUIT NO. 1513 OF 2011

M/s.ABG Shipyard Ltd. .. Applicant/Org. Pltff.

<u>In the matter between :</u>

M/s.ABG Shipyard Ltd. .. Plaintiff
Vs.
M/s. Globe Eco Logistic Ltd. .. Defendant

Mr.Nimay Dave a/w. Mr.Shiv Kumar Iyer, Mr.Nihal Shaikh i/b Bose & Mitra & Co. for applicant/plaintiff.

Mrs.Kalyani G. Parmar for defendant.

CORAM : K.R.SHRIRAM, J.
DATED : 16TH JANUARY, 2015

P.C.

1 This chamber summons is taken out on behalf of the plaintiff for leave to amend the plaint as per the schedule annexed thereto.

2 Before we go into the amendment, it is necessary to briefly mention the facts of the case. The plaintiff had imported a consignment from Korea. As per the Contract of Purchase, the seller in Korea shipped it by sea to Mumbai Port. The Shipper had also insured the cargo with one M/s.Dongbu Insurance Company Limited as it was a CIF Sale. The defendant was

entrusted to move the cargo from Mumbai Port to the plaintiff's factory at Surat. During the course of transportation by the defendant, the trailer carrying the consignment met with an accident resulting in the consignment falling off the trailer and getting damaged. This claim is for the loss suffered by the plaintiff due to the damage caused to the consignment.

3 In paragraphs 8 and 9 of the plaint, the plaintiff has referred to the insurance policy and also the fact that the insurance company, who in this application is proposed to be added as plaintiff no.2, has not paid the insurance claim. In paragraph 9 of the plaint, it is stated as under :

> 9 The plaintiff states that the said consignment is still lying at Surat waiting repairs to the said machine is in the region of USD 1,600,000. The plaintiff has not yet been indemnified by m/s. Dongbu Insurance Company Limited, Insurance Company, under the insurance policy and owing to the large amount involved towards cost of repairs, the repairs have not yet been carried out. The plaintiff states that repairs can only be carried out by highly qualified and field technicians for carrying out the said repairs. The plaintiff had lodged a claim on the insurance company under the Marine Insurance Policy (Certificate No.727070697659-000-00). The said claim is yet to be settled. When the claim is settled by the insurance company, the plaintiff will subrogate its right to them and the suit would be amended accordingly.

4 It is the case of the plaintiff/applicant that the insurance company has not paid the plaintiff the insurance claim amount and the insurance company

having been subrogated the rights of the plaintiff, it wishes to be added as plaintiff no.2. Consequential amendment to the plaint is also required to be carried out to bring these facts on record. In the plaint, it is also mentioned that the surveyors appointed by the insurance company had estimated repair cost to be in the region of US$ 1600,000. The plaintiff has received a final report in which the damage is mentioned to be US$ 1,756,711.92. These are the amendments which the plaintiff wishes to introduce by way of this chamber summons.

5 The counsel for the defendant strongly opposes the chamber summons on three counts. According to the counsel for the defendant, firstly, by bringing in the amendment whereby the insurance company is allowed to be added as plaintiff, it amounts to changing the entire cause of action. The second count raised is that the claim is barred by limitation to the extent of the increased amount. The third count is that plaintiff no.1 admittedly having received the claim amount from the insurance company cannot maintain this action any more and now if the insurance company is added as plaintiff no.2, the defendant will have to defend this suit resulting in prejudice to the defendant. The counsel also stated that the insurance company, according to the plaintiff, paid and got subrograted all its rights sometime in the end of December 2011. The chamber summons is taken out

on 3rd December 2014 and therefore, it has been taken out belatedly and therefore should be rejected.

6 As held by the Apex Court in the matter of ***Surender Kumar Sharma Vs. Makhan Singh*** [1], it is settled law that mere delay and latches in making the application of amendment cannot be a ground to refuse the amendments. It is also trite that even if the amendment prayed for is belated, while considering such belated amendment, the Court must bear in mind of doing full and complete justice justice in the case where the party against whom the amendment is to be allowed, can be compensated by cost or otherwise. Paragraph 7 of the said judgment reads as under :

> 7 As noted herein earlier, the prayer for amendment was refused by the High Court on two grounds. So far as the first ground is concerned i.e. the prayer for amendment was a belated one, we are of the view that 3 even if it was belated, then also, the question that needs to be decided is to see whether by allowing the amendment, the real controversy between the parties may be resolved. It is well settled that under Order 6 Rule 17 of the Code of Civil Procedure, wide powers and unfettered discretion have been conferred on the Court to allow amendment of the pleadings to a party in such a manner and on such terms as it appears to the Court just and proper. Even if, such an application for amendment of the plaint was filed belatedly, such belated amendment cannot be refused if it is found that for deciding the real controversy between the parties, it can be allowed on payment of costs. Therefore, in our 4 view, mere delay and latches in making the application

1 (2009)10 SCC 626

> for amendment cannot be a ground to refuse amendment. It is also well settled that even if the amendment prayed for is belated, while considering such belated amendment, the Court must bear in favour of doing full and complete justice in the case where the party against whom the amendment is to be allowed, can be compensated by cost or otherwise. [See B.K. N. Pillai Vs. P. Pillai and another [AIR 2000 SC 614 at Page 616]. Accordingly, we do not find any reason to hold that only because there was some delay in filing the application for amendment of the plaint, such prayer for amendment cannot be allowed.

7 So far as the ground of change in cause of action is concerned, in my view, there is no change whatsoever in the cause of action. The claim in the suit was for damage to cargo while being transported by the defendant. In the plaint, it is also mentioned that the insurance company is yet to pay the claim of the plaintiff under the insurance policy and once insurance company settles the claim of the plaintiff will subrogate its rights to the insurance company and the plaint will be amended accordingly. The insurance company having settled the claim of the plaintiff has been subrogated all rights, title and interest in the subject matter, which the plaintiff had including their claims. It is settled law that when the rights of an insured is subrograted to the insurance company, the insurance company is entitled to maintain an action against the third party but cannot do so in its own name and has to sue in the name of the insured. Moreover, even after the amendment, the claim in the suit will continue to be for damage to

the cargo in the course of transportation. Therefore, there is no change in cause of action.

8 On the next ground of limitation, the letter of subrogation is dated 30th December 2011. Therefore, in any event the application for amendment has been taken out within three years.

9 While considering an application for amendment, the question that needs to be decided is whether by allowing the amendment, the real controversy between the parties will be resolved or not? It is well settled that under Order 6 Rule 17 of the Code of Civil Procedure, wide powers and unfettered discretion have been conferred on the Court to allow amendment of the pleadings to a party in such a manner and on such terms as it appears to the Court just and proper. Even in the judgment of ***Revajeetu Builders and Developers Vs. Narayanswamy & Sons & Ors.***[2] relied upon by the counsel for the defendant, paragraph 63, which spells out the factors to be taken into consideration reads as under :

> 63 On critically analyzing both the English and Indian cases, some basic principles emerge which ought to be taken into consideration while allowing or rejecting the application for amendment.
>
> (1) Whether the amendment sought is

2 (2009) 10 SCC 84

> imperative for proper and effective adjudication of the case?
>
> (2) Whether the application for amendment is bona fide or *mala-fide*?
>
> (3) The amendment should not cause such prejudice to the other side which cannot be compensated adequately in terms of money;
>
> (4) Refusing amendment would in fact lead to injustice or lead to multiple litigation;
>
> (5) Whether the proposed amendment constitutionally or fundamentally changes the nature and character of the case? And
>
> (6) As a general rule, the Court should decline amendments if a fresh suit on the amended claims would be barred by limitation on the date of application.
>
> These are some of the important factors which may be kept in mind while dealing with application filed under Order VI Rule 17. These are only illustrative and not exhaustive.

10 In my view, the amendment application also is *bona-fide* particularly in view of the fact that in paragraph 9 of the plaint, the plaintiff had mentioned that the insurance company namely the proposed plaintiff no.2 is yet to settle the claim of the plaintiff and once settled, the plaintiff will apply for amendment of the plaint.

11 In the circumstances, the chamber summons is disposed as allowed in terms of prayer clause (a) with costs in the sum of Rs.10,000/- to be paid to

the defendant. The amount to be paid by way of cheque drawn in favour of the advocate of the defendant.

12 The plaintiff to carry out the amendment to the plaint on or before 31st January 2015 and serve a copy of the amended plaint upon the advocate for the defendant on or before 6th February 2015. The defendant to amend the written statement or file additional written statement on or before 2nd March 2015.

13 At this stage, the counsel for the plaintiff undertakes to file an affidavit to bring on record a letter dated 9th January 2015 that the plaintiff has received from the insurance company according their no objection to add the insurance company as co-plaintiff. The affidavit to be filed within one week from today. The counsel for the plaintiff, on instructions, undertakes to file independent Vakalatnama on behalf of the insurance company. The undertaking accepted.

14 The suit to be listed on 5th March 2015 for directions.

(K.R. SHRIRAM, J.)