IN THE HIGH COURT OF JUDICATURE AT MUMBAI

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.2059 OF 2016

Y. G. Jadhav … Petitioner
Vs.
M/s. R. R. Nabar & Co. and others … Respondents

Mr. Shankar P. Thorat for Petitioner.
Mr. Jayant Gaikwad i/b. Ajay Khandekar & Co. for Respondent No.1.
Mr. Girish M. Agarwal for Respondents No.2 and 3.

CORAM : R. G. KETKAR, J.
DATE : MARCH 01, 2016

P.C. :

Heard Mr. Thorat, learned Counsel for petitioner, Mr. Gaikwad, learned Counsel for respondent No.1 and Mr. Agarwal, learned Counsel for respondents No.2 and 3 at length. On the oral application made by Mr. Thorat, respondent No.4 is deleted from this Petition as no relief is claimed against it. Rule. Learned Counsel for respective respondents waive service. At the request and by consent of the parties, Rule is made returnable forthwith and the Petition is taken up for final hearing.

2. By this Petition under Article 227 of the Constitution of India, petitioner has challenged the judgment and order dated 28.01.2016 passed by the learned Judge, City Civil Court, Greater Mumbai in Chamber Summon No.2333 of 2015 in Suit No.9567 of 1993. By that order, the learned trial Judge rejected the Chamber Summons under Order VI, Rule 17 of the Code of Civil Procedure, 1908 (for short 'C.P.C.') taken out by the petitioner, hereinafter referred to as plaintiff, for amending the plaint.

3. Plaintiff has instituted Suit against respondents No.1 to 3 (defendants No.1 to 3) and defendant No.4 – M/s. Himatsingka Seide

Limited inter alia for declaration that plaintiff is owner of 300 shares of defendant No.4 (200 shares bearing distinctive Nos.2791101 to 2791200 and 1462801 to 1462900 plus 100 shares of rights issues) and further shares, if received through right issues, bonus on the aforesaid shares and total dividends on all the shares; for declaration that defendant No.1 negligently and wrongfully delivered 200 shares bearing No.2791101 to 2791200 and 1462801 to 1462900 (for short 'said shares') of defendant No.4 to defendant No.2 without any authority of whatsoever nature; for declaration that defendant No.2 illegally, wrongfully and deliberately taken delivery of the said shares of defendant No.4 and that collusion of defendant No.3 transferred the same to defendant No.3 and defendant No.3 obtained wrongful gain from the fraudulent transfer of the said shares and the shares of right issues and further dividends thereon; for mandatory order directing defendants No.2 and 3 to handover possession of share certificate of said shares of defendant No.4 and further 100 share certificates obtained through right issues and dividends thereon forthwith to the plaintiff.

4. During the pendency of the Suit, plaintiff took out Chamber Summons for amending the plaint. By order dated 07.12.2015, the learned trial Judge refused leave to register the Chamber Summons. Aggrieved by this decision, plaintiff instituted Writ Petition No.199 of 2016 in this Court. By order dated 07.01.2016, Petition was allowed and leave to register Chamber Summons was granted. It was further observed that as the Suit is of the year 1993, amended provisions of Order VI, Rule 17 of C.P.C. are not applicable. The learned trial Judge was directed to decide the Chamber Summons for amendment by recording a finding as to whether the proposed amendment is necessary and the learned trial Judge was expected not to reject the same on the ground of amendment of 2002 to C.P.C. In pursuance of that order, the

learned trial Judge decided the Chamber Summons afresh and by the impugned order, once again, rejected the Chamber Summons inter alia observing that no grounds are made out as to what prevented the plaintiff from making the amendment prior to commencement of trial. The facts were within the knowledge of the plaintiff, and therefore, they could have been incorporated prior to commencement of the trial. In view of the amended provisions of Order VI, Rule 17 of C.P.C., the plaintiff has to make out a strong case and assign reasons which had prevented him or which were beyond his control to make the amendment in the pleadings prior to commencement of trial. Although provisions of Order VI, Rule 17 of C.P.C. are diluted and are not mandatory, the plaintiff is now required to establish with a strong ground that the circumstances were beyond his control and that he was unable to make the amendment as sought prior to commencement of the trial. In the present case, the trial has already commenced. Evidence is filed. The learned trial Judge accordingly rejected the Chamber Summons.

5. Mr. Thorat submitted that having regard to the prayers made in the plaint, the proposed amendment is explanatory and giving more particulars in support of the prayers. He further submitted that the learned trial Judge committed serious error in proceeding on the premise that the Suit is instituted post amendment of C.P.C. in the year 2002, which is factually incorrect and contrary to record. The Suit is of the year 1993, and therefore, proviso to Order VI, Rule 17 of C.P.C. is not applicable.

6. On the other hand, Mr. Agarwal supported the impugned order. He submitted that apart from these reasons, the learned trial Judge rejected the Chamber Summons mainly on the ground that the entire

affidavit in support of Chamber Summons is silent as to on which date he came to know about the grant of bonus shares, right shares, split shares and amount of dividend paid by the defendant No.4 to defendants No.2 and 3. He further submitted that the matter was fixed on 20.11.2015 for cross-examination of the plaintiff. At that stage, the Chamber Summons is moved. In the entire affidavit in support of Chamber Summons, plaintiff has not given details as to on what date he came to know about these facts. He further submitted that for the relief of declaration, limitation prescribed is 3 years from the date of cause of action. Plaintiff has not deliberately given the date as to when he acquired knowledge about acquisition of bonus shares, right shares, etc. so as to overcome the defect of bar of limitation. He further submitted that except bear allegations that plaintiff is the owner of subsequent bonus shares, no material is produced on record to substantiate his case.

7. I have considered the rival submissions advanced by the learned Counsel appearing for the parties. I have also perused the material on record. As noted earlier, it is not in dispute and is rather matter of record that Suit is instituted in the year 1993. In other words, the Suit is governed by the provisions of Order VI, Rule 17 of C.P.C. prior to amendment of C.P.C. in the year 2002. Unamended provisions of Order VI, Rule 17 of C.P.C. read thus,

> "17. Amendment of pleadings.- The Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties."

8. As noted above, earlier, the learned trial Judge refused to register the Chamber Summons. The said order was set aside with specific direction to the learned trial Judge to consider the Chamber Summons

for amendment and not to reject the same on the ground of amendment of C.P.C. in the year 2002. Despite that, perusal of the impugned order shows that the learned trial Judge once against rejected the Chamber Summons principally on the ground that the proposed Chamber Summons was taken out after commencement of the trial.

9. Plaintiff has prayed for following reliefs:

> "a) It may be declared that plaintiff is owner of 300 shares of M/s. Himatsingka Seide Ltd. (200 shares bearing Distinctive Nos.2791101 to 2791200 and 1462801 to 1462900 plus 100 shares of right issues) and further shares if received through right issues, bonus on the aforesaid shares and total dividends on all the shares.
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> b) It may declared that the defendant No.1 negligently and wrongfully delivered 200 shares bearing nos.2791101 to 2791200 and 1462801 to 1462900 of M/s. Himatsingka Seide Ltd. in favour of defendant No.2 without any authority of whatever nature.
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> c) It may be declared that defendant No.2 illegally, wrongfully and deliberately taken delivery of the said shares bearing nos.2791101 to 2791200 and 1462801 to 1462900 of M/s. Himatsingka Seide Ltd. and with the collusion of defendant No.3 transferred the same in favour of defendant No.3 and defendant No.3 obtained wrongful gain from the fraudulent transfer of the said shares and the shares of right issues and further dividends thereon.
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> d) By an appropriate direction or order the defendants no.2 and 3 may be directed to handover the possession of certificate for 200 shares being distinctive nos.2791101 to 2791200 and 1462801 to 1462900 of M/s. Himatsingka Seide Ltd. and the further 100 shares certificate obtained through right issue and dividends thereon, forthwith to the plaintiff."

10. Perusal of prayer clauses (a), (c) and (d) clearly shows that plaintiff has claimed right issues, bonus issues on 300 shares of defendant No.4 as also total dividends on these shares. In the case of ***Abdul Rehman Vs. Mohd. Ruldu*****, (2012) 11 SCC 341**, the Apex Court has held that making clear and explicit what was already implicit in the plaint, nature of Suit is not changed. The Apex court has further held

that courts should allow all amendments that are necessary for determining the real question in controversy between the parties provided it does not cause injustice or prejudice to the other side.

11. Applying the test laid down by the Apex Court in the case of **Abdul Rehman** *(supra)* and having regard to the prayers (a), (c) and (d) extracted hereinabove and the proposed amendment, in my opinion, the learned trial Judge committed serious error in dismissing the Chamber Summons. After allowing the Chamber Summons, the learned trial Judge could have framed the issue as regards limitation. While considering the application for amendment, the learned trial Judge was also not justified in observing in paragraph 8 that no material is produced on record to substantiate the allegations made by the plaintiff that he is the owner of subsequent bonus shares. The learned trial Judge failed to appreciate that it was not the stage to lead evidence. In view thereof, impugned order cannot be sustained and the same is liable to be set aside.

12. It is unfortunate that though the earlier order passed by the same Judge was set aside with the specific direction to consider Chamber Summons for amendment prior to amendment of C.P.C. in 2002, the learned Judge has again considered Chamber Summons in the light of amended provisions of Order VI, Rule 17 of C.P.C. In view thereof, the impugned judgment and order dated 28.01.2016 is quashed and set aside. The learned Principal judge is requested to transfer the case from the file of the learned trial Judge, who passed the order, to some other Judge. Rule is made absolute in the aforesaid terms with no order as to cost.

13. Mr. Thorat states that plaintiff shall carry out the amendment to

the plaint within 14 days from today and serve amended plaint on defendants. Learned Counsel for defendants state that defendants shall file their written statement to the amended plaint within 4 weeks from the receipt of the amended plaint. Statements made by the learned Counsel for respective parties are recorded.

(R. G. KETKAR, J.)

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