

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

**CHAMBER SUMMONS NO.922 OF 2014
IN
SUIT NO.148 OF 2013**

New India Assurance Co. Ltd. & Anr.Applicants

IN THE MATTER BETWEEN :

New India Assurance Co. Ltd. & Anr.Plaintiffs

V/s.

Amlin Underwriting Ltd. & Ors.Defendants

And

Aon UK LimitedProposed defendants

Mr.Venkatesh Dhond, Senior Advocate a/w Mr.Shyam Kapadia, Mr.Keanan Nagporiwala and Ms.Shivani Rawat i/by Tuli & Co. for plaintiffs.

Mr.Rahul Narichania, Senior Advocate a/w Mr.Ashish Kamat and Mr.Siddharth Thacker and Ms.Aarti Shah i/by Mulla & Mulla & CBC for defendant nos.1 to 8.

Mr.Rohan Rajadhyaksha a/w Ms.Swati Singh and Ms.Sonali Mathur i/by AZB Partners for the defendant no.9.

Mr.Sarosh Bharucha a/w Mr.Sairam Subramniam, Mr.Anshuman Bharadwaj, Mr.Pulkitesh Dutt i/by M/s.Khaitan & Co. for defendant nos.10, 11 and for proposed defendant no.12.

**CORAM : K.R.SHRIRAM,J
DATE : 19.10.2016**

P.C.:-

1 This Chamber summons has been taken out by the plaintiffs to add the respondent Aon UK Limited, as defendant no.12.

2 The plaintiffs have filed this Suit seeking specific

performance of two contracts dated 20.11.2009 between the plaintiff no.1 and defendant nos.1 to 8. Defendant no.9 is impleaded in its capacity as the insurance broker. Defendant nos.10 & 11 are impleaded as associated entities of defendant no.9 on the basis that they were also involved in the placing of the reinsurance contract by defendant no.9 and for reasons set out in the plaint owed duties to the plaintiffs as defendant no.9 did. Defendant no.10 is a company incorporated in United Kingdom and defendant no.11 is a Hong Kong based company.

3 It is the case of the plaintiffs that at the relevant time the plaintiffs dealt with an entity called Aon Limited incorporated in the United Kingdom. It is stated in the affidavit in support that sometime in March-April 2012 Aon Limited and/or its business and/or undertaking was the subject matter of a restructuring exercise and the inquiries made by the plaintiffs, however, indicated/seemed to suggest and/or indicate that the entity Aon Limited had ceased to exist. It is stated that the references to the United Kingdom Corporate entity/arm of the Aon group pointed to a new entity called Aon PLC, i.e., defendant no.10 which had been incorporated around the same time after restructuring exercise. The respondent has not denied the restructuring exercise. The plaintiffs state that in good faith and genuine mistake they concluded that Aon PLC had

succeeded and/or substituted Aon Limited and hence joined Aon PLC as defendant to this suit.

4 It is the case of the plaintiffs that the written statement filed by the defendant no.11 states that the placing broker in the subject reinsurance transaction was one Aon U.K. Limited who had been instructed by defendant no.9 to approach and seek quotations from participants in the London re-insurance market with respect to the subject reinsurance policies. On or about 14.10.2013, defendant no.9 took out a third party notice against defendant no.11 and the respondent, Aon U.K. Limited which was served on the plaintiffs on 27.1.2014. Even in this third party notice, defendant no.9 alleged that the placing broker was Aon Limited which had changed its name to Aon U.K. Limited. For this reason the plaintiffs have taken out this application to join the respondent Aon U.K. Limited as a proper and necessary party.

5 The counsel for the respondent strongly opposed the Chamber summons on two grounds viz. (a) had the plaintiffs made inquiries earlier they could have found out all the details ; (b) cause of action as alleged in the plaint and also in the proposed amendment states that it arose in 2010, and therefore, any claim against respondent would also be grossly time barred.

6 Mr.Bharucha also submitted that the plaintiffs had obtained leave under clause-12 of the Letters Patent while instituting the Suit and in view thereof, relying upon a judgment of the Division Bench of this Court in ¹***Quadricon Pvt. Ltd. Vs. Shri Bajrang Alloys Ltd.***, once leave has been granted by this Court under clause-12, such suits cannot be amended because granting of an amendment would mean an entertainment of this amended suit for which leave under clause-12 has not been granted by the Court and therefore, such amended suit will be incompetent.

7 On the submissions of the applicants that they were genuinely under mistake and belief, I have considered a Certificate of registration issued by the concerned authority in United Kingdom, copy whereof is annexed to the affidavit in support. The respondent was originally incorporated on 29.12.1925 as Alexander Howden & Swann Limited. It underwent various name changes and on 29.12.2000 became Aon Limited. On 30.3.2012 the name was changed to Aon Risk Management Services UK Limited and on 3.4.2012 changed to Aon U.K.Limited. The applicants have also annexed a certificate of registration for another company Aon PLC, which is defendant no.12. This company was originally incorporated on 8.12.2011 as Achai Limited and on 23.12.2011 (15 days later) became Aon Limited and on 30.3.2012 (a little over 3 months later)

1 (2009) 3 AIR Bom R 211

the name was changed to Aon Global Limited and on the same day, i.e., on 30.3.2012 became Aon PLC. From these two certificates it appears that between 23.12.2011 and 30.3.2012, there were two companies by the same name Aon Limited. All this makes me also wonder, was there any motive in making these frequent name changes and having two entities by the same name for some time. Therefore, I am accepting the explanation given by the plaintiffs that there was a confusion as to which was the correct entity.

8 Moreover, the respondent is already a party to the proceedings by virtue of the 3rd party notice taken out by the defendant no.9. The respondent has also entered appearance through their advocates. The case of the plaintiffs is defendant no.9 is liable and defendant no.9 says it is not but the respondent is liable. In my view, the claim, questions and issues that will arise in the plaint as well as in the 3rd party notice would also be overlapping and the rights and liabilities of the parties can be conveniently determined and enforced if respondent is also made a party defendant.

9 Mr.Bharucha submitted that the proviso to section 21 of the Limitation Act will get triggered only if the applicant was to establish that it was due to a mistake made in good faith and the applicant has not stated anywhere that the applicant was not added

earlier due to mistake made in good faith. The affidavit in support has to be read in toto and the respondent has explained the confusion and the mistake in good faith. Moreover, just because the applicant has not used the expression that respondent was not added by mistake or it was under the bonafide belief that it need not be joined as a defendant in the suit makes no difference because this point will come up for consideration only when the issue of limitation vis-a-vis the respondent comes up for consideration at later stage and for that to be considered, the respondent certainly has to be added as a 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. (respondent) in the matter between ²***Nevada Properties Pvt. Ltd. Vs. Alice Infrastructure Pvt. Ltd. & Ors.*** the reason for having provisions like Order 1 Rule 10 is to minimise litigation and determine the real controversy in a suit. It is also to be noted that by adding the respondent to the suit as a party defendant, no prejudice is going to be caused to the respondent because they are anyway added as 3rd party to the proceeding.

10 Moreover, 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 respondent as a party defendant to the present suit. I find support from the judgment

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

of this court in Chamber Summons No.717/2014 in Summary Suit No.2468/2012 pronounced on 10.8.2015 in which paragraph-20 reads as under :-

“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”.

11 As regards the submissions of Shri Bharucha, relying upon *Quadricon Pvt. Ltd. (supra)* that no amendment can be allowed in a suit where leave under clause-12 has been obtained, first of all, I would consider paragraph-36 of the *Quadricon Pvt. Ltd. (supra)* as obiter. The reason being the appeal that was before the Division Bench was not to consider whether an amendment can be allowed or not in a suit where leave under clause-12 of the Letters Patent has been obtained. In *Quadricon (supra)* the plaint was presented on 29.9.2004 and was admitted on 10.12.2004. At that time leave application under clause-12 of the Letters Patent was not filed by the appellant but when the defendant raised an exception to the jurisdiction of the Court by filing a Notice of Motion, the appellant filed

an affidavit in reply on 27.3.2006 wherein the appellant stated that the appellant intended to apply for leave under clause-12 and accordingly the appellant filed a leave application under clause-12 on 27.3.2006. The said application was considered and rejected by the learned single Judge and as leave was rejected, the plaint automatically stood rejected. The appeal court was only called upon to consider the validity and legality of the order so far as it rejected the appellants' application dated 27.3.2006 seeking leave to file suit under clause-12 of the Letters Patent in those facts and circumstances. Paragraph-6 of the said judgment reads as under :-

"6. There is no dispute amongst the counsel for both sides that the present suit requires leave under clause 12 of the Letters Patent. However, in the present matter, though the suit was presented on 29th September, 2004 and it was admitted on 10th December, 2004, leave under clause 12 of the Letters Patent was not prayed for and/or applied for by the appellant and the suit was admitted on 10th December, 2004 without such a leave being obtained and/or granted. The application for obtaining leave under clause 12 of the Letters Patent was, for the first time, applied for on 27th March, 2006 i.e. at the time of filing a reply to the Notice of Motion No.745 of 2005 filed by the respondent. These factual aspects of the matter are also not in dispute. Under these circumstances, the application for leave under section 12 of the Letters Patent was argued and the learned single Judge, after having considered the various judgments which were placed before the learned single Judge, has rejected the application of the appellant seeking leave under clause 12 of the Letters Patent to file a suit. Therefore, this court has been called upon to consider the validity and legality of the order so far as it rejects the appellant's application dated 27th March, 2006 seeking leave to file suit under

clause 12 of the Letters Patent under the above referred facts and circumstances”.

12 Therefore, the subject matter of the appeal was not an application for amending a plaint where leave has been obtained. Hence, in my view, paragraph-36 should be considered as obiter.

13 Mr.Bharucha relied heavily on one sentence from paragraph-36 which reads as under :-

“.....We also find that once leave has been granted by this Court under Clause 12 then such suits cannot be amended because granting of an amendment would mean an entertainment of this amended suit for which the leave under Clause 12 has not been granted by the Court and, therefore, such amended suit will be incompetent.....”

14 In my view, this sentence only means that amendment of a suit cannot be granted where fresh leave under clause-12 for the amendment has not been granted by the Court. It does not say that no leave under clause-12 can be asked for again by the plaintiffs when he wants to amend the plaint. That would lead to an absurd situation. If a party to suit where clause-12 leave has been obtained, dies, then the plaint cannot be amended to bring the legal heirs on record. In my view, if an additional defendant was sought to be added after obtaining leave under clause-12 of the Letters Patent, the Court can grant such leave afresh in the case of the defendant

sought to be newly added. The fact that the suit as originally instituted, was instituted after obtaining leave would not be a bar to the Court granting leave under clause-12 of the Letters Patent afresh when a new defendant is sought to be added and when the suit in respect of that defendant can only be instituted after obtaining leave under clause-12 in view of the fact that the defendant is not residing or carrying on business within the jurisdiction of the Court. I find support for this view in para-19 of the judgment of the Division Bench of the Calcutta High Court in ³***Daulatram Agarwalla Vs. Champalal Ingraj*** and in paragraphs-17 to 21 of the judgment of the Division Bench of the Madras High Court in the matter of ⁴***The Clan Line Steamers Ltd. Vs. Gordon Woodroffe and Co. (Madras) (Pte.) Ltd. & Ors.*** They read as under :-

Paragraph-19 of ***Daulatram Agarwalla*** (supra) reads as under :-

"This very point also came up for consideration in an unreported decision of A.N.Ray, J. in Suit No.1457 of 1955 (Ramballav Rameswar v. Shi-barai Narayandas (10) judgment dated 6th September, 1961). The learned Judge placed strong reliance on a Bench decision of this Court reported in 84 C.L.J. 200 (Benoy Shan-kar Dhandhanian v. Choteylal Dhandhanian (11) in which S.B.Sinha, J observed that -

"It is now established that leave originally obtained at the time of the filing of a suit does not cover an amendment of the plaint. Where a defendant is added fresh leave must be obtained even if leave had been obtained when the suit was originally filed. It is contended that there was no change in the cause of action. Even so if new parties are joined against whom it is intended to proceed in the suit and to obtain a decree, the obtaining of the leave is imperative because it is the foundation of the jurisdiction of the Court. The Court gets jurisdiction to decide the suit against

3 AIR 1963 Cal 337

4 1992 Law Weekly 541

parties only if it grants leave which is a condition precedent. No leave was obtained to proceed against the only added defendants and it follows that the Court never got any jurisdiction to make any decree or order against them in the suit."

Paragraph Nos.17 to 21 of **The Clan Line Steamers Ltd.** (supra)

read as under :-

17. *In Biswanath Agarwalla v. Sm. Dhapu Debi Jejodia*, it was held that in a suit for land partly situate within and partly outside jurisdiction, instituted after obtaining leave under Cl. 12 no fresh leave for amendment is necessary if the plaint is subsequently amended, by introducing a new cause of action relating to land situate wholly within the jurisdiction of the court. It was observed that, by the amendment a new suit, as it were, is being instituted and since it relates to a land situate wholly within the jurisdiction of that court, no leave under Cl. 12, Letters Patent is necessary. We are of the view that if a suit had been instituted against the defendant in respect of whom leave to sue under Cl. 12 need not be obtained is residing or carrying on business within the jurisdiction of the court, but subsequently a new party is sought to be added, against whom, under Cl. 12, Letters Patent, leave to sue would be required, inasmuch as he does not reside or carry 'on business within the jurisdiction of the court, there could be no objection to the court granting such leave, for in effect a new suit is being instituted against the new party.

18. Clause 12, Letters Patent says that the High Court of Judicature at Madras, in exercise of its ordinary original civil jurisdiction shall be empowered to receive, try and determine suits of every description if, in the case of suits for land or other immoveable property, such land or property shall be situated, or, in all other cases, if the cause of action shall have arisen, either wholly or In case the leave of the court shall have been first obtained, in part within the local limits of the ordinary original jurisdiction of the said High Court, or if the defendant at the time of the commencement of the suit shall dwell or carry on business or personally work for gain, within such limits. On the ground that the first defendant is carrying on business through his agent within the jurisdiction of the court, the plaintiff did not obtain leave under Cl. 12, Letters Patent, for such leave under Cl. 12, Letters Patent, would not be necessary if the first defendant at the time of the commencement of the suit was dwelling or carrying on business or was personally working for gain within the limits of the jurisdiction of this court. But the proposed 4th defendant is not dwelling or carrying on business or -personally working for gain within the jurisdiction of this court and as such leave should be obtained under Cl. 12 only against the proposed 4th

defendant. The suit against the proposed 4th defendant would be a new suit and even if the suit against the 1st defendant is held to be not maintainable eventually, on the ground that leave under Cl. 12 of the Letters Patent had not been obtained, the suit against the other defendants, including the proposed 4th defendant, would still remain unaffected. Such being the case, we do not think that the question of grant of leave under Cl. 12 as against the proposed 4th defendant in any way hinges upon the question as to whether the suit against the 1st defendant had been properly received by obtaining leave under Cl. 12, Letters Patent. We are unable to accept the contention of Mr. Govind Swaminathan on behalf of the appellant that inasmuch as in most of the decisions referred to by us above the suits had been originally instituted after obtaining leave under Cl. 12, Letters Patent and when an additional defendant was sought to be added after obtaining leave under CL 12, Letters Patent the court granted such leave afresh in the case of the defendant sought to be newly added, this court cannot grant leave under Cl. 12, Letters Patent, and allow the proposed 4th defendant to be impleaded since originally the suit was instituted against the 1st defendant without obtaining leave under Cl. 12, Letters Patent.

19. Mr. Chellaswami on behalf of the first respondent-plaintiff raises also the question of waiver and submission to the jurisdiction of this Court; but we do not think that there is any submission to the jurisdiction of this court- or any waiver, for at the earlier opportunity the objection had been taken.

20. It should be noted that the application for impleading the proposed 4th defendant had to be filed because of the contention raised by the other defendants, that the proposed 4th defendant is a necessary party to the suit and the suit is bad for non-joinder of necessary parties. It should also be noted that on behalf of the plaintiff-company it is contended that when the suit was originally filed there was no necessity to obtain leave of court, because according to the assertions made in the plaint, the first defendant is carrying on business through its agent in Madras. But since the 4th defendant is carrying on business in London leave has to be necessarily obtained before he is added as a party.. Such being the case, the fact that the suit as originally instituted was instituted without obtaining leave under Cl. 12, would not be a bar to the court granting leave under Cl. 12, Letters Patent, when a new defendant is sought to be added, and when the suit in respect of that defendant can only be instituted after obtaining leave under Cl. 12 in view of the fact that that defendant is not residing or carrying on business within the jurisdiction of the court.

21. In *Muthusamy v. Krishnaswamy*, , the suit as originally filed was for specific performance of a contract for the sale of certain lands in Salem District, entered into at Madras and for an

injunction restraining the 2nd defendant from bringing about a breach of the said contract and leave was obtained under Cl. 12, Letters Patent. But subsequently on the plaintiff coming to know that the 2nd defendant claimed to be a purchaser of, the same property under a sale deed, filed an application for amendment of the plaint Contending that the sale in favour of the 2nd defendant was sham and nominal and the 2nd defendant was not a bona fide purchaser for value without notice and added the relief of directing the execution of the sale deed by the 2nd defendant also and along with the application for amendment an application for leave to sue- on the basis of the plaint sought to be amended was also filed. The question that arose for consideration was 'does the circumstance that previous leave to institute had been obtained in a suit disentitle the plaintiff from asking for an amendment of the plaint in the suit so instituted. While considering the question, the decisions in Rampurtab v. Premsookh, (1891) 15 Bore 93, Motilal v. Sankarlal AIR 1939 Bore 345 and Barasat Basirhat Light Railway Co. v. Dist. Board, 24 Parganas, ILR (1944) Cal 101, were considered; and the learned Judge held as follows-

"I am of the opinion that in cases where the court, on an application of the plaintiff, considers that the plaint has to be amended so as to include a cause of action, which was not originally in the plaint, on the ground that such an amendment is necessary, it does not prevent the court from granting such an amendment merely for the reason that it was a suit instituted after obtaining previous leave to sue under Cl. 12, Letters patent. It does not also preclude the plaintiff from giving effect to such an order by carrying out the amendment or presenting an amended plaint, before which, however, he should apply for and obtain leave to sue on the cause of action described in the amendment under Cl. 12 Letters Patent. Such, an application for leave can be filed and leave can be granted, if it comes within the scope of Cl. 12 Letters Patent."

These observations indicate that even when a plaint is amended by introducing a new cause of action a court can grant leave under Cl. 12 Letters Patent and that there is nothing in Cl. 12 Letters Patent to show that the plaint instituted under Cl. 12 would not include an amended plaint and if an amended plaint after obtaining the leave to amend is to be received and the cause of action arising therein is to be tried and determined which cannot be done without previous leave being obtained, there is no reason why such leave to present an amended plaint should not be granted under Cl. 12 on a fresh application stating the cause of action on which the amendment has been applied for and the reasons for grant of leave under Cl. 12. This decision, of course, is in conflict with the view of the Calcutta High Court [In Kshitish Kumar Sen v. State of Bihar](#), , in so far as amendments of plaints, introducing a new cause of action is concerned. In the case now before us, no new cause of action is sought to be introduced. The reason for adding in Clan Line Steamers Ltd., as the 4th defendant and for amending the plaint is to claim the same reliefs against the Clan Line Steamers Ltd.,

in respect of the same cause of action.”

15 The applicants have also tendered a fresh application under clause-12 of the Letters Patent stating the cause of action on which the amendment has been applied for and the reasons for grant of leave under clause-12. Having considered the application, leave under clause-12 has been granted and the Leave Petition is signed separately.

16 In view of the above, Chamber summons is allowed in terms of prayer clauses-(a) and (b). The issue of limitation so far as respondent is concerned is kept open to be decided at the stage of trial. Amendment to be carried out and the amended plaint to be served on or before 11.11.2016. Within four weeks of receiving the amended plaint, all those defendants who have not filed written statement, including the respondent who is being added as defendant no.12 shall file written statement.

Suit be listed for directions on 16.12.2016.

17 The counsel for defendant nos.10 & 11 seeks stay for a period of four weeks. Stay refused.

(K.R.SHRIRAM,J)