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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
LEAVE PETITION NO. 5 OF 2016
IN
SUIT NO. 3079 OF 2006**

Hindustan Organic Chemicals Ltd	...Plaintiffs
~ <i>versus</i> ~	
ICI India Ltd	...Defendants

Mr Nikhil Mehta, i/b KMC Legal Venture, for the Plaintiffs.
Mr Murtuza Kachwala, i/b Mr AV Joshi, for the Defendants.

CORAM: G.S. PATEL, J
DATED: 27th January 2017

PC:-

1. The Suit was filed without leave under Clause XII of the Letters Patent. The Defendants filed Notice of Motion No. 2208 of 2009 under Order 7 Rule 11 of the Code of Civil Procedure 1908 (“CPC”) saying that this Court had no jurisdiction and the plaint had to be rejected. On 19th October 2015, the parties took an order before a learned Single Judge on the Defendants’ Notice of Motion ‘returning the plaint’ to the Plaintiffs for filing in an appropriate Court. The order makes it clear that the Defendants themselves submitted before the learned Single Judge that the Defendants’ submissions were for return of a plaint. The Plaintiffs, for their part,

seem to have agreed to this; the order seems to have received the accord of both sides. Consequently the plaint came to be 'returned; for filing in an appropriate Court.

2. The relevant parts of the order read thus:

1. **Though the relief in this notice of motion is for dismissal of the suit for want of jurisdiction under Order VII Rule 11 of the Code of Civil Procedure, the counsel for the applicants at the outset submitted that the submissions that he would make is basically for return of the plaint to the plaintiffs due to the plaintiffs not having obtained Leave under clause XII of the Letters Patent before lodging the plaint** and second point assuming for the sake of argument, the court holds that this court has jurisdiction or no leave was necessary then for dismissal of the suit on the ground of limitation.

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4. ... [C]ounsel for the defendants did concede that part of cause of action indeed arose within the ordinary original civil jurisdiction of this court though in the affidavit in support the applicants have stated no part of cause of action arose within Mumbai. As only part of the cause of action arose within the jurisdiction of this court, Leave of this court under Clause XII of Letters Patent was necessary which the plaintiffs had not taken.

5. After going through the documents and considering the submissions made by the defendants' counsel ... **counsel for the plaintiffs in fairness stated that the**

plaintiffs should have obtained Leave under clause XII of the Letters Patent before the suit was lodged.

6. In view thereof, **the plaint is returned** to the plaintiffs for filing in the appropriate court.

(Emphasis added)

3. This could never have been done. Order 7 Rule 10 of the CPC, which deals with return of plaint, has no application at all to a Chartered High Court in exercise of its ordinary or extraordinary original civil jurisdiction. Order 49 Rule 3 of the CPC says in terms that Rule 10 and Rules 11(b) and 11(c) of Order 7 shall not apply to any Chartered High Court in the exercise of its ordinary or extraordinary original civil jurisdiction.

4. The only provision for a ‘return of a plaint’ is contained in Order 7 Rule 10 of the CPC:

10. Return of plaint

- (1) Subject to the provisions of rule 10A, the plaint shall at any stage of the suit be returned to be presented to the Court in which the suit should have been instituted.

Explanation.—For the removal of doubts, it is hereby declared that a Court of appeal or revision may direct, after setting aside the decree passed in a suit, the return of the plaint under this sub-rule.

- (2) *Procedure on returning plaint.*—On returning a plaint, the Judge shall endorse thereon the date of its presentation and return, the name of the party

presenting it, and a brief statement of the reasons for returning it.

5. Now this provision is specifically *excluded* from application to a Chartered High Court by Order 49, Rule 3:

Order 49 — Chartered high courts

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3. Application of rules

The following rules shall not apply to any Chartered High Court in the exercise of its ordinary or extraordinary original civil jurisdiction, namely:—

- (1) **rule 10 and rule 11, clauses (b) and (c), of Order VII;**
- (2) rule 3 of Order X;
- (3) rule 2 of Order XVI;
- (4) rules 5, 6, 8, 9, 10,11,13, 14, 15 and 16 (so far as relates to the manner of taking evidence) of Order XVIII;
- (5) rules 1 and 8 of Order XX; and
- (6) rule 7 of Order XXXIII (so far as relates to the making of a memorandum);

and rule 35 of Order XLI shall not apply to any such High Court in the exercise of its appellate jurisdiction.

(Emphasis added)

6. Clause XII itself contains no provision for return of the plaint nor is there any corresponding provision in our High Court (Original Side) Rules which would prevail over the CPC. The choice before a Chartered High Court is therefore limited to either rejecting the plaint under Order 7 Rules 11(a) or 11(d) or to allow the Suit to be withdrawn with or without liberty to file a fresh Suit on the same cause of action. Returning a plaint is not an option available to this Court, a Chartered High Court.

7. Consequently, this Leave Petition is also not maintainable, as it is predicated on the foregoing ‘return of the Plaint’ being legally correct. In other words, the Plaintiff has in its hands a ‘returned’ plaint for presentation to this Court — actually, to present it again — and now seeks leave under Clause XII of the Letters Patent. To allow this would, in my view, be to perpetuate a situation contrary to law, for that plaint could never have been returned.

8. Logically, this would mean that the order returning the plaint should be recalled and set aside. It is an order *per incuriam*, having been passed without reference to or noticing a statutory provision that forbids the exercise of any such power. That would result in the suit continuing on file, but without leave sought or obtained before admission of the plaint.

9. The following three situations might then result: first, taking up the Defendants’ Notice of Motion for rejection of the plaint under Order 7 Rule 11(d); or, second, permitting a withdrawal of the suit with liberty if sought and thought fit; or, third, an examination

of whether the present petition for grant of Clause XII leave, filed *after* the application for rejection, could at all be considered to be maintainable, that is to say, whether such leave can be granted *post-facto*.

10. I will return to the last of these questions, of *ex post facto* sanction, momentarily. There is one more issue that I must address, and it arises from the citing before me by the applicant in this Leave Petition, the Plaintiff, of the decision of H Suresh J in *Rhoda Jal Mehta & Ors v Home Framroze Mehta*.¹ It is cited as though it is a binding precedent on the point. There the Court ‘returned’ the plaint invoking Clause XII itself, as including some inherent power. Before me, it is submitted that there is, therefore, an inherent power in the Court to return a plaint embedded in Clause XII, and the prohibition in Order 49 Rule 3 is therefore either irrelevant or, in any case, overcome by an implicit power in Clause XII itself. *Rhoda Jal Mehta* proceeded on the footing that Clause XII leave had to be obtained even before the plaint was presented to the authorised officer.

11. *Rhoda Jal Mehta* is not good law. It has been held to be *per incuriam* by the Division Bench decision (AP Shah and SJ Vazifdar JJ as they then were) in *Caribjet Inc v Air India Ltd*.² This was an appeal from an order of Khanwilkar J (as he then was) dismissing a defendant’s Notice of Motion for revocation of leave.³ The

1 AIR 1989 Bombay 359.

2 2005 (3) BomCR 94.

3 *Air India Ltd v Caribjet Inc*, [2004] 271 ITR 370 (Bom).

submission in support of that Notice of Motion was that the plaintiff lodged the suit without obtaining prior leave, and that leave was granted only a few months later. The Motion having been dismissed, the defendant appealed. Before the Appeal Court, *Rhoda Jal Mehta* was also cited (among other decisions). Dismissing the appeal, the Division Bench said:

11. ... The Code itself, therefore, envisages two stages — first, of the presentation of the plaint, and the next, of the admission of the plaint. The suit is not admitted to the register of suits and number is given to it, merely on the presentation of the plaint. After the presentation, the plaint is scrutinized. If there are any defects in the same, the plaintiff is required to remove them. The removal of defects is a matter of procedure. It is only after the defects are removed that it becomes eligible for an entry and a number, in the register of suits. One of the defects can be the absence of leave of the Court to institute the suit where it is necessary, including leave under Clause 12 of the Letters Patent. So long, therefore, as the plaint is not admitted and entered in the register of suits, all defects including that of the absence of leave under the said clause, can be removed without returning the plaint. It was pointed out that it is the confusion between the two stages, namely presentation of the plaint and of its admission to the register of suits after the removal of the defects, if any, which is responsible for the faulty procedure adopted by the office. Sawant J directed the office not to return the plaint for want of leave under Clause 12 of the Letters Patent but only require the plaintiff to obtain the leave and admit it to the register when leave is obtained. The office followed and implemented the directions of Sawant J. **However, it appears that after the decision of Suresh J in *Rhoda Mehta's case* (supra) which has taken a contrary view, the office again**

changed the practice. Incidentally, neither in *Rhoda Mehta's* case nor in the other decisions rendered by the learned single Judge the decision of Divisional Bench in *Ramgopal Chunilal's* case was noted. Those decisions are clearly *per incuriam*. We are informed that following an unreported decision of Kochar J dated 11th March, 1977 in *Nat Steel Equipment Pvt Ltd v Bangalore Heart Hospital and Research Centre* (Summary Suit (Ld) No. 213 of 1999) the old practice of not returning the plaint for want of leave has been restored by the office. In the circumstances, the fact that the suit was accepted by the authorised officer of this Court prior to obtaining leave under Clause 12 will make no difference inasmuch as it is only upon numbering of the suit the suit can be said to have been “accepted” by this Court. It is, therefore, not possible to accept the submission that the plaint as lodged on 20th July, 2001 was improper presentation. **In the present case, admittedly, leave under Clause 12 was granted on 8th September, 2001 and only thereafter the suit came to be numbered on 13th September, 2001.** There is thus no reason to interfere with the order granting leave under Clause 12. Appeal is accordingly dismissed.

(Emphasis added)

12. This is the second time in as many months that I have found counsel at the Bar citing decisions that are not good law. On 9th December 2016, I had occasion to comment on a very similar situation when at least two decisions reversed in appeal were cited before me as still being good law.⁴ I said there that the availability of online research databases does not absolve lawyers of their duties as

4 *Heena Nikhil Dharja v Kokilaben Kirtikumar Nayak & Ors*, Order dated 9th December 2016 in Notice of Motion (L) No 3117 of 2016 in Suit (L) No 1000 of 2016.

officers of the Court. Those duties include an obligation not to mislead a Court, even accidentally. That in turn casts on each lawyer to carefully check whether a decision sought to be cited is or is not good law. The performance of that duty may be more onerous with the proliferation of online research tools, but that is a burden that lawyers are required to shoulder, not abandon. Every one of the decisions noted in this order is available in standard online databases. This pattern of slipshod research is inexcusable.

13. The pronouncement of the Division Bench in *Caribjet* is completely unambiguous — *Rhoda Jal Mehta* is no longer good law. It has been declared *per incuriam*.

14. This brings me to the question of *ex post facto* grant of leave under Clause XII of the Letters Patent. Even this is no longer *res integra*. It is settled by a decision of a Division Bench of this Court in *Quadricon Pvt Ltd v Bajrang Alloys Ltd*.⁵ This was an appeal from an order and judgment of Vazifdar J⁶ rejecting an petition for *post facto* leave under Clause XII. Dismissing the appeal, the *Quadricon* Division Bench said:

31. Therefore, what we find is that the cases which have been relied upon by the appellant-plaintiff are not applicable and they do not support the case of the appellant. However, from the above referred cases, the law which emerges is as follows. **The act of grant of leave under Clause 12 in a suit where part of cause of action has arisen outside Mumbai is a judicial act on the part of the**

5 2009 (5) BomCR 345.

6 *Quadricon Pvt Ltd v Bajrang Alloys Ltd*, AIR 2008 Bom 88.

Judge before whom the suit is presented for grant of leave under Clause 12 of the Letters Patent. Since it is a judicial act as has been observed in the judgments referred to above, the said judicial act cannot be parted by the Judge and cannot be delegated to any officer of the court and/or to the Prothonotary & Senior Master. 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. Therefore, the suit has to proceed as it has been instituted and for which leave under Clause 12 has been granted by the court and the amendment to the suit will not be permissible. The suit which requires leave under Clause 12 must be presented as provided under Rule 45 of the Original Side Rules and any objection including the objection in respect of non compliance of leave under Clause 12 of the Letters Patent shall be complied with before the suit is admitted under Rule 47 of the Original Side Rules. **The objection in respect of the non-compliance of the leave under Clause 12 can be raised at any stage of the proceedings and Section 21 of the CPC will not be attracted in respect of such objections to the jurisdiction.** Order IV, Rule 1 and more specifically Sub-rule (3) has no application when the suit has been instituted without obtaining leave of the court and thereby claiming a *post facto* leave, since the court, while granting leave under Clause 12, is doing a judicial function since the court was not called upon to carry on the said judicial function by filing an appropriate application to grant leave under Clause 12 Sub-rule (3) of Rule 1 Order IV CPC is not attracted.

32. **Thus what we find is that the appeal is without any merit. The application made for *post facto* leave**

under Clause 12 of the Letters Patent is misconceived and, therefore, the decision taken by the learned single Judge to reject the said application of the plaintiff-appellant stands justified and well supported in law. We agree with the learned single Judge and dismiss the appeal filed by the appellant.

(Emphasis added)

15. I should only note that in the *Quadricon* cases, the decisions in *Rhoda Jal Mehta* and *Caribjet* (both before the learned single Judge, Khanwilkar J, and before the Division Bench in appeal), were duly cited. Vazifdar J himself noted that following the decision of the Division Bench in *Quadricon*, the decision in *Rhoda Jal Mehta* was no longer good law, having been declared *per incuriam* in so far as it said that leave was required even prior to presentation of the plaint to the authorised officer. Both courts in *Quadricon* also noted that in *Caribjet*, the application for leave was filed along with the plaint; it just happened to have been granted later, though in *Quadricon*, it was sought only *post facto*. In paragraph 24 of his decision in *Quadricon*, Vazifdar J said:

24. ... **I am afraid however that in view of the judgments of this Court holding that the leave cannot be granted afterwards, it is not open to me to consider this submission.** I am bound by the judgments of this Court that no *post facto* leave can be granted. The judgment of the learned single Judge in *Rampurtab's* case expressly held **that leave cannot be granted afterwards. This judgment was cited with approval by the Division Bench in *Devidatt's* case where it was also held that leave under Clause 12 of the Letters Patent is a condition precedent.** Khanwilkar J in *Air India Ltd v Caribjet Inc* 2004 AIHC

2512 also held that the proposition that there can be no question of granting post facto leave has prevailed since long. In *Noorjahan's* case, also it was held that leave cannot be granted after the suit had been instituted. This observation has not been over-ruled by the Division Bench in *Caribjet Inc v Air India Ltd*. In fact the judgment of the learned single Judge which was affirmed by the Division Bench in *Caribjet Inc v Air India Ltd* also held that **no post-facto leave can be granted.**

(Emphasis added)

16. The consistent view is that *ex post facto* leave under Clause XII cannot be sought. It must be sought before the plaint is numbered (but not before the plaint is presented to the authorized officer).

17. Thus, the present Leave Petition must be dismissed. It is not maintainable. It seeks an order contrary to established and binding precedent.

18. At the same time, the order for 'return of the plaint' also cannot be sustained, being *per incuriam*. It is irrelevant that none have before me applied for a recall of the order returning the plaint.

19. The result only is that suit would continue on the register and, with it, the Defendant's Notice of Motion for rejection of the Plaint under Order 7, Rule 11 of the CPC.

20. It is at this stage that Mr Mehta for the Plaintiffs seeks leave to withdraw the Suit with liberty to file a fresh Suit on the same cause of action. The Defendant has not filed any written statement.

The suit stands transferred to the list of undefended causes. There is however the question of limitation.

21. I will grant the Plaintiffs leave to withdraw the Suit with liberty as prayed, but keeping open all questions of limitation on both sides. These are the terms on which I will allow the application for withdrawal and the liberty sought. Consequently, it will be for the Court that takes up the fresh suit to consider the question of limitation and all questions under Section 14 of the Limitation Act, 1963. I am not to be understood by this order as having granted the exemption or saving of limitation under the Limitation Act.

22. The Leave Petition and the Suit are dismissed as withdrawn with liberty as prayed on the terms and conditions mentioned earlier as to limitation.

23. Refund of court fee, if any, in accordance with the Rules.

24. All concerned to act on an authenticated copy of this order.

(G. S. PATEL, J.)