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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
CHAMBER SUMMONS NO. 1020 OF 2017
IN
SUIT NO. 3942 OF 1993

Nusli Neville Wadia & Ors	...Plaintiffs
<i>Versus</i>	
Phiroze J Dastur & Ors	...Defendants

Mr Navroz Seervai, Senior Advocate, with Akash Rebello, Abhay Jadeja & Varun Satiya, i/b Crawford Bayley & Co., for the Plaintiffs/Applicants.

Mr Mangesh Bhole, i/b M/s. Mulla & Mulla & CB & C., for Defendant No. 1.

Mr Rahul Narichania, Senior Advocate, with Murtaza Kachawalla, Aashdin Chivalwala & Shreya Mathur, i/b HSA Advocates, for proposed Defendants Nos. 5 & 6.

Mr Sanjay Balakrishnan, for proposed Defendant No. 8.

CORAM: G.S. PATEL, J
DATED: 23rd January 2019

PC:-

1. This is an amendment application by the Plaintiffs in a suit for damages and defamation. The suit was originally filed against four Defendants and is in respect of four articles alleged to be defamatory, all published on a single day, 17th August 1993 in a now-defunct newspaper known as “*The Daily*”. The suit itself was

instituted within time on 15th October 1993, a few weeks after the publication of the articles in question.

2. There are three prayers, all for damages jointly and severally against all four Defendants. Each of the three Plaintiffs claims a different amount in damages jointly and severally from the Defendants as damages.

3. What the amendment application now proposes is the addition of certain individuals as Defendants Nos. 5, 6, 7 and 8. Of these, the Chamber Summons will not survive against proposed Defendant No. 7 since he has passed away.

4. There is no separate prayer added against these Defendants and Mr Seervai for the Plaintiffs says that the existing prayer is sufficient to cover even the proposed Defendants should they be permitted to be added to the suit. The question is whether in a suit that has been pending hearing for roughly a quarter of a century, these three persons should now be added to a civil action in damages and asked to defend themselves. At one level there is a question of limitation, most strenuously urged by Mr Narichania for the answering Respondents to the Chamber Summons. At another, there is a question of whether it is in the interest of justice to even permit such an application at this stage.

5. I am not on the merits of the suit itself. For the present purposes, it is enough to note that while issues have been framed, nothing further has happened in the suit. The trial has not begun.

While this may be in itself an indictment of our judicial system, I do not see how this can be used to the advantage or disadvantage of any party already before this Court or proposed to be brought before the Court. This is entirely distinct from the question of delay on the part of the Plaintiffs, and any issue of limitation that arises from that formulation. The arguments from Mr Narichania have centred around the question of precisely such a delay on the part of the Plaintiffs. The question of limitation is more narrowly focused on reckoning the starting point of limitation as either the institution of the suit or the date of publication in question.

6. What seems to have happened is this. Defendant No. 2, one Rajiv Bajaj, joined as the then editor of *The Daily*, filed a Notice of Motion No. 1463 of 2015 claiming that the suit was bad for non-joinder of a necessary party. replies and rejoinders were filed. The 1st Plaintiff also instituted a criminal complaint under Section 500 of the Indian Penal Code 1860 (“IPC”) read with Sections 34, 114 and 501 of the IPC for criminal prosecution. On 30th September 2015, the 2nd Defendant’s lawyer wrote to the Plaintiffs tendering an unconditional apology, and now saying that the 2nd Defendant had to his knowledge various facts necessary to ascertain the truth in respect of these four allegedly defamatory articles. This date is important. It is 30th November 2015 (there is a typographical error in the schedule to the Chamber Summons), and I will immediately juxtapose this against the date of the Chamber Summons which is a good two years thereafter on 14th September 2017. Mr Narichania also points out that the date might be much earlier because in his Affidavit in Rejoinder dated 9th October 2015 in the Notice of

Motion he filed, the 2nd Defendant named the present four Respondents as the persons behind the suit articles.

7. However, at this stage, perhaps it would be correct to say that the communication dated 30th November 2015 was merely an offer to make a revelation but not a complete revelation in itself. On 15th December 2015, the Plaintiffs moved the learned Magistrate to withdraw the complaint against the 2nd Defendant. This was permitted. The Plaintiffs then filed a list of witnesses and sought to examine the present Defendant No. 2, earlier an accused in that very complaint. The 1st Defendant, quite understandably, objected to this and said that the 2nd Defendant, once an accused could not now enter as a prosecution witness. The learned Magistrate seems to have allowed the Plaintiff No. 1 to examine Defendant No. 2 as a prosecution witness. It was during this examination-in-chief of the present 2nd Defendant that it further came to be revealed, now not in a letter or an affidavit but in testimony before a court, that others not previously named in that criminal complaint (the four Respondents in this Chamber Summons) were actively involved, or so the Plaintiffs say, in the publication of the articles. These examinations-in-chief are of 25th January 2016, 27th January 2016 and 5th May 2016 and they named the present four Respondents and made allegations against them.

8. What followed, briefly stated, is this: On 5th May 2016 the present Plaintiffs moved an application under Section 319 of the Criminal Procedure Code 1973 to name the four persons whose identities were revealed by the Defendant No. 2 as four proposed accused. The Schedule to the present Chamber Summons sets out

some of the material and then says that the Magistrate on 14th June 2016 directed that notices be issued to these four persons. The Plaintiffs filed a Criminal Writ Petition assailing this order of issuance of notice. This Court on 4th August 2016 set aside that order and directed the Magistrate to proceed in accordance with law. The matter was then re-argued before the Magistrate, i.e. for the joinder in the criminal application as accused of these four persons whose identities were revealed by Defendant No. 2. On 3rd September 2016, the Magistrate passed an order arraigning the four persons as accused and issued process against them. Mr Seervai for the Plaintiffs says that the order of 3rd September 2016 was made available on 14th September 2016. The Respondents challenged the order of the Magistrate dated 3rd September 2016 in a Criminal Writ Petition but later withdrew it on 3rd November 2017. The present Chamber Summons was filed on 14th September 2017.

9. The principal opposition from Mr Narichania is that Article 75 of the Schedule to the Limitation Act 1963 prescribes a period of one year within which a suit for compensation for libel must be brought, and the starting point is the date of publication of the libel and not the date of knowledge. This branch of law in this respect is settled, and applications for subsequent additions of parties on this basis have been consistently rejected.¹ He also places reliance on the decision of the Supreme Court in *Revajeetu Builders & Developers v Narayanaswamy & Sons & Ors*² and in particular paragraphs 63 and 64 of the decision.

1 *Mohan Singh v Radhey Sham Jain & Ors.*, 2016 SCC OnLine P&H 3453; *Dinkar Rajaram Pole v Ramrao Nandanwankar*, 1986 Mh.L.J. 691.

2 (2009) 10 SCC 84.

10. Mr Narichania submits that viewed from any perspective not only is the amendment out of time but it is one that would cause immense prejudice to the Respondents, and no part of this prejudice could be compensated in monetary terms (assuming that his clients need such compensation in the first place). More importantly, he submits that the amendment would cause incalculable injustice. In fact, on this, his submission is placed as the reverse of what is stated in paragraph 63(4) of *Revajeetu Builders*. That principle enunciated by the Supreme Court says that a Court must consider whether *refusing* the amendment would lead to injustice or multiple litigations. It is Mr Narichania's submission that there is no reason why his clients should be subjected at this very late stage to a civil action. The fact that they are facing criminal prosecution is entirely irrelevant since the two remedies are distinct in law.

11. Mr Seervai in response places great emphasis on Section 21 of the Limitation Act 1963 and the introduction of the proviso. The Section in its entirety reads thus:

"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.

(2) Nothing in sub-section (1) shall apply to a case where a party is added or substituted owing to assignment or devolution of any interest during the pendency of a suit or where a plaintiff is made a defendant or a defendant is made a plaintiff."

12. Mr Seervai draws my attention to the decision of the Supreme Court in *Munshi Ram v Narsi Ram & Anr*³ and *Karuppaswamy & Ors v C Ramamurthy*⁴ on the interpretation of Section 21 and its proviso. There can be no dispute about these principles or the applicability of the proviso. I have to view this, I think, from a different perspective. I must proceed on the basis that at the time when the suit was instituted the Plaintiffs did not know of the alleged involvement of the four Respondents. At this stage, nobody knows whether what the 2nd Defendant says about these four persons is true or not. That is yet to be decided.⁵ I am not convinced that Mr Seervai's formulation can be accepted, viz., that until the four persons were joined as accused the Plaintiffs had to wait to file this Chamber Summons. The 2nd Defendant revealed their names in his first Evidence Affidavit that goes back to January 2016. Mr Narichania would have it that the correct starting point is even earlier, in October 2015, when the 2nd Defendant filed his Affidavit in Rejoinder in his Notice of Motion. Obviously, as I have said, the Respondents could not have been joined in 1993, after the date of publication of the articles, but there is no explanation at all as to why when, after learning of their names from the 2nd Defendant, and knowing that the two remedies in civil and criminal law are

3 (1983) 2 SCC 8.

4 (1993) 4 SCC 41.

5 The 2nd Defendant's cross-examination is complete, or so I am told.

entirely distinct, the Plaintiffs could not have filed this Chamber Summons very shortly thereafter or at least after the last of those three Evidence Affidavits, i.e., 5th May 2016. That is the latest possible date the Plaintiffs can take, and Mr Narichania may well be correct in saying that just because the same thing is repeated again and again, one does not look to the last repetition. One looks to the first mention, not the last, for the purposes of both delay and limitation. The 2nd Defendant's 'big reveal', he says, came in early October 2015, not several months thereafter. The manner in which this revelation is made, or the proceeding in which it is filed, are both entirely irrelevant. What is of consequence is the disclosure, not the mode of its making.

13. I believe Mr Narichania to be entirely correct. Neither the evidence affidavits or the passing of an order by the Magistrate could have furnished the Plaintiffs a hitherto unavailable cause of action for the impleadment of these parties. The entire case today is based not on what the Plaintiffs knew but on what the 2nd Defendant told them in the criminal proceedings and, therefore, time must be reckoned from the date when the 2nd Defendant made his disclosure, not from when the Plaintiffs succeeded in joining the persons he named as fellow accused in the criminal proceedings, nor from some evidence the 2nd Defendant may later have filed.

14. In this view of the matter, I do not believe that the proviso to Section 21 can have any application. I will take it that the expressions 'omission' and 'good faith' used in the proviso must apply to the delay between the revelation by the 2nd Defendant and

the date of filing of the Chamber Summons. On this, Mr Narichania rightly draws support from Section 2(h) of the Limitation Act:

"2.Definitions.— (h) "good faith" — nothing shall be deemed to be done in good faith which is not done with due care and attention;"

The 'due care and attention' necessary, therefore, to bring the Plaintiffs within the protection of Section 21 — assuming it affords any protection at all in such a case — is thus altogether missing.

15. What is that Section 21 really does? All that the sub-section 21(1) does is to say that the impleadment of a party is to take effect from the date of his impleadment and this is the meaning of the words "*the suit shall, as regards him, be deemed to have been instituted when he was so made a party*". The proviso merely gives the Court a discretion where it finds evidence of an omission in good faith to direct that the impleadment will relate back to the date of the institution of the suit. This in itself is an insufficient answer to the questions of delay and limitation. The better test to be applied is this: that even assuming that the Plaintiffs knew of the alleged involvement of the four Respondents on 5th May 2016, could they have filed a suit that was within time on 14th September 2017? If not, then this brings us squarely within the frame of what the Supreme Court says in *Revajetu Builders* cannot be done, i.e. that a Court cannot permit an amendment that is on its face out of time.

16. I do not believe that such an application should be allowed. Of course, the criminal proceedings will continue unaffected by this order, and this is not to be construed as an assessment of the merits

of the case either on the present civil suit or in the criminal prosecution.

17. The Chamber Summons is dismissed. There will be no order as to costs.

(G. S. PATEL, J)