

A.No.4709 of 2019
in
C.S.(Comm.Div.) No.263 of 2019

C.V.KARTHIKEYAN J.

This application, which has been pending for atleast more than one year has been filed by the plaintiff in the suit, seeking amendment by inserting paragraph Nos.6(A), 6(B) and also paragraph Nos.13(A), 13(B) and 13(C) to the plaint.

2.The suit had been filed taking advantage of Sections 55 and 62 of the Indian Copyright Act, 1957 read with the relevant provision of the Original Side Rules and the Code of Civil Procedure, primarily seeking a judgment and decree of permanent injunction restraining the defendant from using or infringing the computer software and database of the plaintiff and for consequential reliefs of mandatory injunction and for costs.

3.Written statement has been filed.

4.The averments in the plaint in brief are that Mr.K.Muralidhar Rao, who had a career in the shipping industry conceptualized a novel database for compiling shipping statistics from shipping companies, steamer agents and also from Non Vessel Owning Common Carriers. With the help of this database, a firm M/s.Khambadkones was formed on 04.12.1995 and the original partners were Mr.K.Muralidhar Rao and Mr.A.Aiyaswami. It is claimed in the plaint, that the said database was the only such database to exist at that particular point of time. The data regarding imports and exports were provided by the clients which were then incorporated in a software which was later purchased for a fee.

5.I am not dwelling deeply into the contentions of the plaint, since the written statement has been filed and issues raised are subject matter of evidence and analysis of evidence.

6.However in paragraph 21 of the plaint, the daughter of K.Muralidhar Rao who has verified the plaint as the Power Agent of her mother Ms.Khambadkone Meera Rao, who is shown as the plaintiff, had stated that a software was used to generate the database and a report was developed for the business of K.Muralidhar Rao and that K.Muralidhar

Rao was the exclusive owner of the copyright of the software and at the time of institution of the suit, the plaintiff was the owner of the copyright. No further details had been given as to how Muralidhar Rao claimed ownership.

7. By this amendment, this statement of ownership is qualified.

8. Even before examining the nature of amendment sought, it would be fruitful to examine the defence in the suit. The written statement has been filed. The defendant has claimed that he originally started his career as an employee in the year 1995. Soon after his college and had become a partner of the firm in the year 2005. Thereafter, he was also extended the benefit of a Franchise Agreement and continued to run the business under the name RITASS. The defendant claimed independent rights over the software. He also claimed that he further developed the software. Further defences have been taken and I am not again dwelling deeply into the same, since these are issues which have to be tested during the course of trial.

9.By this amendment in paragraph 6(A), the plaintiff has now introduced a new individual Mr.Arvind Vyas a Computer Programmer, and has stated that K.Muralidhar Rao engaged the services of the said Arvind Vyas to develop the software to achieve what K.Muralidhar Rao visualized as an useful statistics for the Shipping lines, Feeder operators and also Non Vessel Owning Common Carriers.

10.Thereafter, in paragraph 6(B), it has been stated that K.Muralidhar Rao engaged the services of the said Arvind Vyas for a fee.

11.In paragraph 13(A), it has been stated that though the defendant claimed that the had returned the software after receiving the notice of intention to terminate the franchise agreement, he had retained copy and was continuing to use the software, which belonged to K.Muralidhar Rao originally and now to the plaintiff. It was stated that this software was updated in the year 2016 by Arvind Vyas, during the period of franchise.

12.In paragraph 13(B), it had been stated that a comparison of the reports would indicate that the defendant is actually exploiting the database created by K.Muralidhar Rao.

13. Mr.V.Prakash, learned Senior Counsel for the plaintiff, stated that there is no shift in the cause of action by this amendment. The learned Senior Counsel pointed out the definition of “Literary Work” in Section 2(o) of the Copyright Act, 1957, wherein, by amendment in the year 2015, the words “computer database” more specifically the word “database” was incorporated. It was therefore stated that a copyright to software can be claimed.

14.The provisions under Section 17 of the Copyright Act, 1957 was also relied upon by the learned Senior Counsel who stated that K.Muralidhar Rao was the first owner of the copyright and stated that the manner in which he claims ownership has been explained by way of amendment namely, that he had engaged the services of the said individual Arvind Vyas for a fee and who prepared the software on behalf of K.Muralidhar Rao. In paragraph 13(A) as stated above, it is stated that the defendant had used the software which had been updated by the Arvind Vyas in the year 2016.

15.A counter had been filed in the said application in which the defendant had stated that by this application there is a shift in the cause of action and this point is strongly urged by Mr.Rahul Balaji and by Mr.B.Harshavardhan Ganesan, learned counsels who argued on behalf of the defendant. They stated that no explanation has been given as to why this fact, which was to the knowledge of the plaintiff even at the time of institution of the suit was not pleaded in the plaint and they also stated that a new fact is being pleaded to establish ownership and it is pointed out in unison by both the learned counsels that ownership being the fulcrum of the case of the plaintiff these facts should have been pleaded even at the time of institution of the plaint and cannot be qualified by a later amendment.

16.Mr.V.Prakash learned counsel primarily relied on three judgments.

17. In *(1969) 1 SCC 869, Jai Jai Ram Manohar Lal V. National Building Material Supply, Gurgaon*, at paragraph No.5, the Hon'ble Supreme Court had stated that the rules of procedure are intended to be a

handmaid to the administration of justice. It was also stated that a party cannot be refused amendment merely because of some mistake, negligence, inadvertance or even infraction of the rules of procedure.

18.The Hon'ble Supreme Court had relied on an earlier judgment of the Bombay High Court in ***Amulakchand Mewaram V. Babulal Kanlal Taliwala***, which was reported in **35 Bom LR 569**, wherein, the Hon'ble Chief Justice Beaumont, had stated as follows:

“.....the question whether there should be an amendment or not really turns upon whether the name in which the suit is brought in the name of a non-existent person or whether it is merely a misdescription of existing persons. If the former is the case, the suit is a nullity and no amendment can cure it. If the latter is the case, prima facie, there ought to be an amendment because the general rule, subject no doubt to certain exceptions, is that the Court should always allow an amendment where any loss to the opposing party can be compensated for by costs.”

19.The learned Senior Counsel then placed reliance in **(1981) 3 SCC 652, Suraj Prakash Bhasin V. Smt Raj Rani Bhasin and Others**, wherein, in paragraph Nos.5 and 6, the Hon'ble Supreme Court had once again stated that the principles guiding discretion should be quite liberal. It was stated that multiplicity of proceedings can be avoided, if an amendment is permitted and care should be taken that injustice and prejudice of irretrievable character are not inflicted on the opposite party under the pretence of amendment of pleadings.

20.The learned counsel also placed reliance in **(2009) 10 SCC 84, Revajeetu Builders and Developers V. Narayanaswamy and Sons and Others**, wherein at paragraph No.63, the basic principles which should be taken into consideration while allowing or rejecting an application for amendment had been given. They are as follows:

“63.On critically analysing 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 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 6 Rule 17. These are

only illustrative and not exhaustive.”

21.The learned counsel stated that by the present amendment, none of the said conditions are violated and therefore stated that since it is only an explanation of a fact which had already been pleaded, namely that K.Muralidhar Rao was the owner and by implication, the plaintiff is the owner. The said ownership had now been qualified as to how the software was developed by the engagement of Arvind Vyas for a fee by K.Muralidhar Rao.

22.Both the learned counsels Mr. Rahul Balaji and Mr. Harishavardhan Ganesan, expressed their deep reservations regarding the amendment and stated that by this, there was a shift in the cause of action. It was stated that from the plaintiff are now declaring themselves to be the owner of the software. There has been an introduction of a new individual and a new plea and it is stated that even if Arvind Vyas has been engaged, the nature of such engagement, the terms of such engagement, the fees paid and whether Arvind Vyas was the owner of the copyright and had subsequently assigned the same to K.Muralidhar Rao are all issues still not explained by the plaintiff. They therefore

stated that the plaintiff has not established the ownership to the software, and hence cannot maintain the suit for infringement.

23.It was very specifically also stated by both the learned counsels that by this amendment, the defendant would be prejudiced, since written statement has already been filed, wherein, he had contested every allegation raised in the plaint in each paragraph by way of a tabular column and had also specifically denied the averments in paragraph 21 of the plaint which are being now qualified by this amendment.

24. I have given careful consideration for the arguments advanced.

25.In ***(2009) 10 SCC 84, Revajeetu Builders and Developers V. Narayanaswamy and Sons and Others***, in paragraph No.63, the Hon'ble Supreme Court has given the fundamental basic principles which should be taken into consideration while allowing or rejecting the application for amendment.

26.The first condition is whether the amendment sought is imperative for proper and effective adjudication of the case.

27.In the instant suit, to maintain a suit for infringement, the plaintiff should establish ownership. There are issues which are still open so far as ownership is concerned, but the burden is heavily on the plaintiff to first establish ownership of the copyright in question. That is a matter to be decided on analysis of the evidence let in by the plaintiff. But the plaintiff has claimed ownership. That is a fact stated in the plaint. That is the fact in issue. Introduction of Arvind Vyas can be termed as a relevant fact to that particular fact in issue. These are issues which can be determined again only during the course of trial. I am confident that during the trial, the defendant would be afforded every opportunity to question the every fulcrum of this aspect of ownership during cross-examination.

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28.The second condition is whether the said application for amendment is bonafide or malafide.

29. In the instant case, the plaintiff has come to the Court on the basis that she is the owner of the copyright of the software, which had been initially conceptualized by K.Muralidhar Rao, her late husband. By the present amendment she further qualifies that statement, by stating that K.Muralidhar Rao had engaged the services of Arvind Vyas who prepared the software for a fee. I hold that this cannot be termed as a malafide amendment. However, to term it as a bonafide statement, it should stand the test of cross-examination.

30. The third condition is that by this amendment there should not be any prejudice cause to the other side, who cannot be compensated adequately in terms of money.

31. Since the plaintiff will have to establish ownership, the plaintiff will necessarily fall or stand on the basis of their pleadings. Initially in the plaint, it had been stated that the plaintiff is the owner. Now it is stated that the plaintiff became the owner, because K.Muralidhar Rao had engaged the services of Arvind Vyas for a fee to prepare the software and who handed it over to K.Muralidhar Rao. The defendant who claims to be a franchise holder and who has also

developed the software during the course of his own business will have every right to question the initial conceptualization of the software. But the defendant primarily contests the case on the basis of further improvements and the right of independent exploitation of the software. The present amendment goes to a much prior stage to the initial conceptualization and I hold that prejudice would not be caused, but the defendant should be afforded an opportunity of contesting and disputing this statement by way of raising the same in their additional written statement for which, opportunity will certainly be given.

32.The fourth condition is whether by refusing amendment, it will lead to injustice or to multiple litigation.

33.Again, the very same aspects are to be stressed. If during evidence the plaintiff has to plead about an individual called Arvind Vyas who had been engaged and if such evidence is not backed by sufficient pleadings, then the plaintiff would be put to much prejudice. Needless to point out, the present amendment only states that Arvind Vyas was engaged and was paid a fee. No further qualification had been mentioned in the amendment. Therefore, I hold that by refusing this

amendment, the plaintiff would be prejudiced as there would be no opportunity of tracing the ownership.

34.The fifth condition in the said judgment is whether the proposed amendment fundamentally changes the nature and character of the case. To repeat, the onus is on the plaintiff to establish the statement pleaded in the plaint and also by way of the amendment and I hold it does not change the basic nature or character since the plaintiff will have to prove ownership to claim there has been infringement.

35.The sixth and the final condition stated in the said judgment is that the amendment should be declined, if a fresh suit on the amended claims would be barred by limitation. This condition would not apply as a suit for copyright is instituted when there is knowledge of infringement. The plaintiff will have to establish ownership and the plaintiff by way of this amendment only seeks to explain how the ownership devolved.

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36.In view of all these facts, I hold that by introducing this amendment, the defendant would not be seriously prejudiced. However, the defendant is afforded an opportunity to file additional written statement and also additional counters if any, in the pending applications for injunction which are now not been taken up for consideration. With these observations, the application is allowed. No order as to costs.

23.09.2020

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