

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

INTERIM APPLICATION NO.2498 OF 2020
AND
CHAMBER SUMMONS NO.1507 OF 2016
IN
SUIT NO.2932 OF 2011

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Darius Rutton Kavasmaneck	...Applicant
<i>In the matter of</i>	
Darius Rutton Kavasmaneck	...Plaintiff
vs.	
Gharda Chemicals Limited and Others	...Defendants

Mr. Mustafa Doctor, Senior Advocate a/w. Mr. Anirudh Hariyani, Mr. Mitesh Naik, Ms. Aastha Mehta i/b. Dhru & Co., for the Applicant/Ori. Plaintiff.

Mr. Venkatesh Dhond, Senior Advocate a/w. Mr. Rohan Kelkar and Mr. Chirag Dave i/b. Legasis Partners, for the Defendants.

CORAM : N. J. JAMADAR, J.
DATE : FEBRUARY 06, 2023

P.C.:

1. The plaintiff has preferred this application seeking permission to amend the plaint with a view to incorporate additional averments and prayers.

2. This is a derivative suit. The plaintiff is a share holder of Gharda Chemicals Limited, defendant No. 1, a company incorporated under the Companies Act, 1956. Defendant Nos. 2 to 4 are the Directors of defendant No. 1. Defendant No. 5 is a Chartered

Accountant by profession and also on Board of Directors of defendant No. 1.

3. The plaintiff avers the defendants, particularly defendant No. 2, have diverted valuable intellectual property of defendant No. 1 company for the personal benefit of defendant No. 2. It is, inter alia, asserted that the defendant No. 2, by abusing his position as the Chairman and Managing Director of defendant No. 1, was seeking to claim ownership of inventions that were made by the funds, resources and employees of defendant No. 1. The inventions which otherwise belong to defendant No. 1 were permitted to be claimed by defendant No. 2 as he was not only controlling the Board of defendant No. 1 but also the preponderant majority shareholder. Since the wrongdoer was himself in the control of the defendant No. 1 company, the suit was instituted as a derivative action for the benefit of defendant No. 1 company and its shareholders.

4. The plaintiff further asserts defendant No. 2 had caused defendant No. 1 to enter into an agreement dated 8th August, 2013 whereby the defendant No. 1 was made to acknowledge and permit defendant No. 2 to claim ownership of defendants' valuable know-how/ patents/ intellectual property. The plaintiff filed Chamber

Summons No. 1507 of 2016 to amend the plaint so as to assail the said agreement.

5. In the instant application, the plaintiff claims that whilst the suit and the Chamber Summons await adjudication, the defendant No. 2 has yet again applied for and/or secured several additional patents. Each of these patents/patent applications have been created by using resources, assets and know-how of the defendant No. 1 and belong absolutely to defendant No. 1. Defendant No. 2 is merely a trustee and holds the aforesaid patents in trust for the benefit of defendant No. 1 company. A list of additional patents/patent applications is furnished in paragraph 3 of the application.

6. It is further averred that the defendant No. 2 has yet again caused defendant No.1 to enter into a purported agreement dated 25th July, 2018 with defendant No. 2 incorporating the objectionable clauses which are the subject matter of amendment sought by the plaintiff in Chamber Summons No. 1507 of 2016. The said agreement dated 25th July, 2018 not only permits defendant No. 2 to compete with defendant No. 1 company but also to claim ownership in respect of the inventions that otherwise legitimately belong to defendant No. 1 company. Hence, this application to

amend the plaint so as to assail the claim of absolute ownership over the patents/ patents applications and the agreement dated 25th July, 2018.

7. An affidavit in reply is filed on behalf of defendant No.1 company. At the outset, defendant No.1 contends that the application has been preferred with a view to harass defendant Nos. 1 and 2 and constitutes an abuse of the process of law. It is actuated by an ill design of creating impediment in the smooth functioning of defendant No. 1 company. By the proposed amendment, according to the defendant No. 1, the plaintiff seeks to introduce a new and completely different cause of action. Since the plaintiff/applicant's attempts to obtain injunction have been repelled by this Court and Division Bench, the applicant has endeavoured to make a fresh attempt to put hindrances in the smooth operations of the affairs of the defendant No. 1 company. The application also suffers from delay and laches. In any event, the challenge to the patents/ patent applications is barred by limitation. Therefore, the application deserves to be dismissed.

8. I have heard Mr. Mustafa Doctor, learned senior counsel for the applicant/ original plaintiff and Mr. Venkatesh Dhond, learned

senior counsel, for the Defendants. With the assistance of the learned counsel for the parties, I have perused the original pleadings, averments in the instant application, affidavit in reply and rejoinder thereto.

9. Mr. Doctor submitted that by the proposed amendment the plaintiff simply seeks to assail the patents/ patent applications over which the defendant No. 2 unjustifiably claims ownership though they belong to defendant No. 1 company. Derivative nature of the suit does not change at all. Since the primary objection on behalf of defendant is that the plaintiff is raising a distinct cause of action which can form subject matter of a new suit, the amendment deserves to be allowed as it would avoid the multiplicity of the proceedings and promote the object of determining all the issues in controversy between the parties. To lend support to this submission Mr. Doctor placed reliance on the judgments of the Supreme Court in the cases of Sampath Kumar vs. Ayyakannu and Another¹ and Rajesh Kumar Aggarwal and Others vs. K.K.Modi and Others².

10. Per contra, Mr. Dhond submitted that by the proposed amendment the plaintiff is making an attempt to indirectly expand

1 (2002) 7 Supreme Court Cases 559.

2 (2006) 4 Supreme Court Cases 385.

the scope of the suit by including the patents which the Supreme Court, while upholding the order of the Division Bench rejecting the interim relief, expressly permitted the defendant No. 2 to claim and exploit. Mr. Dhond took the Court through the order passed by this Court in Notice of Motion No. 3567 of 2011 dated 12th December, 2014 rejecting the interim relief, the judgment of the appeal Bench in Appeal No. 54 of 2015 wherein the challenge to the order passed by this Court was negatived and the order of the Supreme Court in Special Leave to Appeal (C) No(s). 16779 of 2015 dated 3rd August, 2015 to buttress the submission that the plaintiff can not be permitted to expand the scope of challenge.

11. Mr. Dhond would further urge that the endeavour to assail the patents/ patent applications enumerated in paragraph 4 of the application cannot be countenanced as the challenge qua each of those patents/ patent applications is wholly barred by limitation. Therefore, the Court cannot permit the plaintiff to amend the plaint so as to seek relief which is barred by limitation. It was further submitted that in the event the Court is persuaded to allow the amendment, the aspect of the bar of limitation deserves to be clarified. To bolster up this submission, Mr. Dhond placed reliance on a judgment of the Supreme Court in the case of L.C.

Hanumanthappa (since dead) vs. H.B. Shivakumar³.

12. To start with, the observations of the Supreme Court in Special Leave to Appeal (C) No(s). 16779 of 2015 dated 3rd August, 2015 deserve to be noted. They read as under:-

“Having heard learned counsel for the rival parties, we are satisfied, that the proceedings before the High Court should be permitted to reach its logical end, without the rival parties in any way interfering with the on going business of respondent No. 1.

It is therefore directed that insofar as the patents depicted in annexure P-49 are concerned, respondent no. 2 will not charge any royalty in respect thereof, on account of the business activities of respondent No. 1. Respondent No. 2 shall also stand restrained, from transferring or creating any third party rights in the afore-stated patents, during the pendency of the proceedings, before the High Court. It is however imperative to clarify, that the above direction shall not be applicable to the patents depicted in annexure P-49, which relate to subjects, not contained in the prevailing objects of the company”.

13. Mr. Dhond urged that in the last sentence the Supreme Court has clarified that the directions in the preceding sentence shall not be applicable to the patents depicted in annexure P-49, which relate to subjects, not contained in the prevailing objects of the company. By the present amendment, according to Mr. Dhond, the plaintiff endeavors to mount a challenge to those patents over which the Supreme Court has declined to place any restraint.

3 (2016) 1 Supreme Court Cases 332.

14. Even if the interpretation sought to be put on the order of the Supreme Court by Mr. Dhond is taken at par, I am afraid it would preclude the plaintiff from seeking amendment to assail the said patents. It would be a matter for adjudication as to whether any of the patents over which the defendant No. 2 claims exclusive ownership do or do not relate to the subjects which fall within the objects of defendant No. 1 company.

15. In my view, what is of essence is whether the proposed amendment changes the nature of the suit inexorably. As stated above, the suit is stated to be a derivative action. Inclusion of the challenge to the patents/ patent applications as enumerated in paragraph 4 of the application, would not materially alter the nature of the suit as it would amount to bringing within the ambit of challenge more patents than originally assailed.

16. It is trite that all amendments which are necessary for the determination of real question in controversy deserve to be allowed. The Court ought to be alive to the consideration as to whether the proposed amendment has the potential to cause such prejudice to the opponent as cannot be compensated by costs or otherwise. In the case at hand, applying these overarching principles, I find it

difficult to accede to the submissions that the proposed amendment either changes the nature of the suit or causes irretrievable prejudice to the defendants. It is well nigh settled merits of the proposed amendment are not to be delved into at this stage.

17. Mr. Dhond strenuously submitted that the challenge qua each of the patents/ patent applications, included in paragraph 4 of the application, would be barred by limitation. Therefore, on this count alone, the application deserves to be dismissed.

18. It is imperative to note that in addition to the challenge to the patents/patent applications, by way of amendment the plaintiff proposes to also assail the legality and validity of the agreement dated 25th July, 2018 to the extent the said agreement permits defendant No. 2 to compete with the defendant No. 1 company and claim ownership in respect of inventions which allegedly belong to defendant No. 1 company. The proposed amendment, on the said count, falls within the category of amendments necessitated by subsequent events.

19. As enunciated in the judgment in the case of **L.C. Hanumanthappa** (supra), the Court is empowered to direct that

there will not be automatic relation-back of the amendment to the date of the institution of the suit and the amended averments shall be deemed to have been brought before the Court on the date on which the application seeking the amendment was filed.

20. It would, therefore, in my view be appropriate to keep open the issue of limitation. The defendants would thus have the liberty to assail the challenge to the patents/patent applications enumerated in paragraph 4 of the application as being barred by limitation. Subject to aforesaid clarification, the application deserves to be allowed.

Hence the following order.

ORDER

- 1] The application stands allowed in terms of prayer clause (a).
- 2] Necessary amendment in accordance with the Schedule of Amendment (Exhibit A) be carried out within a period of three weeks and amended copy of the plaint be served on the defendants within a period of three weeks thereafter.

3] The defendants are at liberty to file an additional written statement, post amendment of the plaint, within a period of 30 days of being served with the amended copy of the plaint.

4] It is clarified that the issue of limitation qua the averments to be incorporated by way of amendment is kept open for adjudication.

Application disposed.

(N. J. JAMADAR, J.)