# M/S. South Konkan Distilleries & Anr vs Prabhakar Gajanan Naik & Ors on 9 September, 2008

## Equivalent citations: AIR 2009 SUPREME COURT 1177, 2009 AIR SCW 422, 2009 (2) AIR BOM R 117, 2009 (2) AIR JHAR R 888, (2008) 4 CIVILCOURTC 395, (2009) 106 REVDEC 134, (2008) 4 ICC 358, (2008) 12 SCALE 481, (2009) 1 CGLJ 350, (2009) 1 JCR 33 (SC), (2009) 3 MAD LJ 1137, (2009) 1 MAD LW 510, (2008) 2 RENCR 360, (2009) 1 UC 11, (2008) 3 ALL RENTCAS 710, (2009) 1 CIVLJ 347, (2009) 1 ORISSA LR 608, (2008) 4 PUN LR 703, 2008 (14) SCC 632, (2009) 1 ANDHLD 1, (2008) 4 RECCIVR 513, (2009) 1 WLC(SC)CVL 27, (2008) 71 ALLINDCAS 216 (SC), (2008) 2 CLR 700 (SC), (2008) 73 ALL LR 638, (2008) 4 ALL WC 4214, (2008) 6 BOM CR 582

## Author: Tarun Chatterjee

## Bench: Tarun Chatterjee, Harjit Singh Bedi

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO.5567 OF 2008
(Arising out of SLP(C) No.1822 of 2007)

South Konkan Distilleries
& Anr. ...Appellants

VERSUS

Prabhakar Gajanan Naik
& Ors. ...Respondents

JUDGMENT

TARUN CHATTERJEE,J.

1. Leave granted.

2. This appeal is directed against the judgment and order dated 20th of October, 2006 passed by the High Court of Bombay at Goa in Writ Petition No.463 of 2003 whereby the High Court had affirmed the order of the trial court dated 5th of February, 2001 by which the trial court had rejected the

application for amendment of written statement and the counter claim of the defendants/appellants.

3. The facts leading to the filing of this appeal are stated in a nutshell :-

> Prabhakar Gajanan Naik has filed a suit for dissolution of partnership firm wherein the appellant No.1, being defendant No.1 in the suit, was the partnership firm and the appellant No.2, who is defendant No. 4, was a partner of the said firm. In the said suit for dissolution of partnership, the appellants by their written statement disputed the existence of such partnership and had taken a plea that by way of a family arrangement, the defendants/appellants were allowed to carry on the business of setting up South Konkan Distilleries. In their written statement, the appellants also claimed that in view of various letters addressed to various Banks,the said distillery could not be commenced as scheduled in May, 1986 and as a result thereof, the appellants suffered heavy loss. Accordingly, in the written statement, a counter claim of Rs.52 lakhs was made against the original plaintiff/respondent. The said written statement was, however, filed on 17th of June, 1987. The counter claim of the appellants was based on a notice of the learned counsel dated 23rd of October, 1986. In 2000, i.e., after thirteen and a half years, the appellants filed an application for amendment of the written statement and the counter claim seeking enhanced amount. In the application for amendment, the appellants had alleged that as they were suffering loss of Rs. 20,000/- per day from the month of June, 1987, when the original written statement was filed, the counter claim was made only upto to the date of filing of the written statement and by seeking an amendment of the same, they were only claiming a sum of Rs.20,000/- per day from June, 1986 till November, 2000 which would be less than Rs.25 lakhs. This application for amendment of the written statement and the counter claim, filed by the appellants, was opposed by the original plaintiff/respondent on the ground that the prayer for amendment of the written statement and the counter claim was clearly barred by the law of limitation. The trial court by its order dated 5th of February, 2001 came to the conclusion that as the cause of action arose in 1986, the prayer for amendment of the written statement and the counter claim for enhanced damages, as noted herein earlier, was clearly ex facie barred by the law of limitation. Accordingly, the trial court rejected the application for amendment of the written statement and the counter claim filed by the appellants and aggrieved by the aforesaid order of rejection, a writ petition being W.P.No.463/2003 was filed at the instance of the appellants which was also rejected by the impugned order of the learned Judge of the High Court against which a special leave petition was filed and on grant of leave, the same was heard in presence of the learned counsel for the parties.

4. We have heard the learned counsel for the parties and examined the application for amendment of the written statement, the counter claim and also the original written statement including the plaint filed by the respondents in the present suit. At this stage, we may record that this Court while issuing notice on 12.2.2007 passed the following order:

> "Issue notice limited to the question as to whether the amendment could have been allowed with some modification so as to grant relief to the petitioner only to the extent of amount not barred by limitation as on the date of the application."

5. The learned counsel for the parties appearing before us, however, submitted that in the fittest of things, this appeal may be decided whether the amendment of the written statement and the counter claim would at all be allowed as the law of limitation would stand in the way. Such being the stand taken by the learned counsel for the parties, we had taken up the question at issue raised before us. The question is whether an amendment of the written statement and the counter claim could be allowed, which was filed after thirteen and a half years of filing of the written statement and the counter claim, if the claim was already barred by the law of limitation.

6. As noted herein earlier, the High Court as well as the trial Court rejected the application for amendment of the written statement and the counter claim on the ground that as the cause of action had arisen in 1986, the claim of the appellants sought to be amended by filing the application for amendment of the written statement and the counter claim was clearly ex-facie barred by the law of limitation.

7. Having heard the learned counsel for the parties and considering the nature of amendment and the length of time after which the prayer for amendment was made by the appellants in the written statement and the counter claim, we are of the view that the High Court as well as the trial court had exercised their jurisdiction in a proper manner in rejecting the application for amendment of the written statement and the counter claim.

8. Before we deal with the orders of the courts below, as to whether the application for amendment of the written statement and the counter claim was rightly rejected or not, let us consider the laws on the question of allowing or rejecting a prayer for amendment of the pleadings when the plea of limitation was taken by one of the parties in the suit. It is well settled that the court must be extremely liberal in granting the prayer for amendment, if the court is of the view that if such amendment is not allowed, a party, who has prayed for such an amendment, shall suffer irreparable loss and injury. It is also equally well settled that there is no absolute rule that in every case where a relief is barred because of limitation, amendment should not be allowed. It is always open to the court to allow an amendment if it is of the view that allowing of an amendment shall really sub-serve the ultimate cause of justice and avoid further litigation. In L.J.Leach & Co. Ltd. & Anr. Vs. M/s. Jardine Skinner & Co. [AIR 1957 SC 357], this Court at paragraph 16 of the said decision observed as follows :-

> "It is no doubt true that courts would, as a rule, decline to allow amendments, if a fresh suit on the amended claim would be barred by limitation on the date of the application. But that is a factor to be taken into account in exercise of the discretion as to whether amendment should be ordered, and does not affect the power of the court to order it, if that is required in the interest of justice."

9. Again in T.N. Alloy Foundry Co. Ltd. Vs. T.N. Electricity Board and Ors. [(2004) 3 SCC 392 this Court observed as follows:

> "The law as regards permitting amendment to the plaint, is well settled in L.J. Leach and Co. Ltd. v. Jardine Skinner and Co., it was held that the Court would as a rule decline to allow amendments, if a fresh suit on the amended claim would be barred by limitation on the date of the application. But this is a factor to be taken into account in exercise of the discretion as to whether amendment should be ordered, and does not affect the power of the court to order it.
>
> It is not disputed that the appellate court has a coextensive power to the trial court. We find that the discretion exercised by the High Court in rejecting the plaint was in conformity with law."

10. From the above, therefore, one of the cardinal principles of law allowing or rejecting an application for amendment of the pleading is that the courts generally, as a rule, decline to allow amendments, if a fresh suit on the amended claim would be barred by limitation on the date of filing of the application. But that would be a factor to be taken into account in the exercise of the discretion as to whether the amendment should be ordered, and does not affect the power of the Court to order it, if that is required in the interest of justice. In Ragu Thilak D.John vs. S. Rayappan & Ors. [2001 (2) SCC 472], this Court also observed that where the amendment was barred by time or not, was a disputed question of fact and, therefore, that prayer for amendment could not be rejected and in that circumstances the issue of limitation can be made an issue in the suit itself. In a decision in Vishwambhar & Ors. vs. Laxminarayan (Dead) through Lrs. & Anr. [(2001) 6 SCC 163], this Court held that the amendment though properly made cannot relate back to the date of filing of the suit, but to the date of filing of the application. Again in Vineet Kumar vs. Mangal Sain Wadhera [AIR 1985 SC 817] this Court held that if a prayer for amendment merely adds to facts already on record, the amendment would be allowed even after statutory period of limitation.

11. Keeping the principles laid down by various decisions of this Court, as noted herein earlier, we now proceed to take up the facts leading to the refusal of the prayer for amendment by the courts below.

12. A plain reading of the original written statement would show that the case pleaded by the appellants in their written statement was to the effect that the appellant No. 2 had undertaken an expansion project, which, due to certain alleged acts of the answering respondents, ran into delays, however, at the time of filing of the written statement, the expansion project was in full swing and the appellants were making continuous investments and that, there was no interference by the respondents. It would also be clear from the written statement that the appellants had invested Rs. 20 lakhs in the project when the alleged acts of omission and commission were undertaken by the respondents and in fact, paragraph 26 of the same gives an impression that the said project was under

> completion and that the appellants, till then, had invested Rs. 40-45 lakhs. It was for the aforesaid reasons, that the appellants claimed damages for a sum of Rs. 52 lakhs by way of a counter claim and made a conscious decision not to claim for any damages arising in the future. It was, therefore, stated in the written statement that the expansion was in progress and the appellants had claimed damages only for the alleged delay, which was allegedly pleaded. From a reading of paragraph 55 of the original written statement, it is also evident that the appellants have limited their counter claim to Rs. 52 lakhs only towards damages and made conscious choice to compute the sum only upto a particular period and not beyond that. It is only after thirteen and a half years of filing the original written statement and the counter claim, for which no explanation was given in the application for amendment of the written statement and the counter claim, the appellants have now by way of an amendment of the written statement and the counter claim, sought to increase the amount of damages from Rs.52 lakhs, as originally claimed, to Rs.

8,53,50,000/- by claiming damages allegedly incurred for the subsequent period from the year 1986.

13. Therefore, it is clear from the above that by way of an amendment, the appellants are now completely making out a new case by alleging that the appellants were incurring damages on continuous basis, which is contrary to the pleadings made in the written statement and the counter claim which has already been stated hereinabove.

14. An argument was advanced at the instance of the learned counsel for the appellants that by way of an amendment, the appellants only sought to introduce certain subsequent events after filing of the original written statement. This submission of the learned counsel for the appellants cannot be supported. The issue of alleged damages cannot be said to be a subsequent event as the appellants are now trying to plead. Even assuming for the sake of arguments that certain losses were being caused but such losses were within the knowledge of the appellants all along even at the time of filing of the original written statement i.e. since 1987. In any case, in the original written statement and the counter claim, there is no averment regarding the continuous nature of losses on daily basis which has been claimed after thirteen and a half years of filing the written statement, when in the original written statement, the appellants consciously claimed damages only till a particular period.

15. It was next argued by the learned counsel for the appellants that since it is well settled that the Court should be extremely liberal in granting amendment, provided the same was within the period of limitation or there would be an arguable issue with regard to the point of limitation, the courts below ought to have allowed the amendment of the written statement and the counter claim and thereby raised an issue on the question whether the amended claim of the appellants was barred by the law of limitation. In support of this submission, reliance was placed in the case of Pankaja and Anr. Vs. Yellappa [Dead] By LRs and Ors. [ (2004) 6 SCC 415]. There is no quarrel about the proposition of law that was submitted by the learned counsel for the appellants. In any view of the matter in that decision, namely, Pankaja and Anr., the question of limitation was found to be arguable issue and on that ground this Court allowed the amendment and the trial court was

directed to frame necessary issue on the question of limitation and decide the same keeping in view the law laid down in L.J. Leach's case [supra]. But in the present case, we are in full agreement with the courts below that there was no dispute on the question of limitation. Therefore, it cannot be said that the point of limitation was an arguable one and the same should be decided by raising an issue at the time of disposal of the suit.

16. In view of our discussions made hereinabove that there was no dispute on the question of limitation, it would not be fit and proper to hold that the Courts below had acted illegally and with material irregularity in the exercise of their jurisdiction in rejecting the application for amendment of the written statement and the counter claim. The learned counsel for the appellants, however, relied on a decision of this Court reported in AIR 1967 SC 96 [A.K.Gupta & Sons Ltd. vs. Damodar Valley Corporation] in order to satisfy us that the prayer for amendment for a sum already specified in the plaint or such other amount as was to be determined after accounts, ought to be allowed though the suit for recovery of money was barred when the amendment was sought. In our view, that decision of this Court stands on a different footing altogether and will not be of any help to the appellants. In that decision, it was made clear that the amendment of pleadings introducing new case cannot be allowed, if suit on such case is barred. In that decision also, it was made clear that in the matter of allowing amendment of pleadings, the general rule is that a party is not allowed by amendment to set up a new case or a new cause of action, particularly when a suit on the new cause of action is barred. However, an exception was given in that decision saying where the amendment does not constitute the addition of a new cause of action or raise a different case, but amounts merely to a different or additional approach to the same facts, the amendment is to be allowed even after expiry of the statutory period of limitation. We have already observed that there is no quarrel on the proposition enunciated by this Court in the aforesaid decision. As held hereinabove, the date on which the application for amendment of the written statement and the counter claim was filed, the claim was already barred by limitation. Therefore, if a fresh suit was filed on the amended claim, there cannot be any dispute that the same could also be barred by the law of limitation. Under these circumstances and applying also the principles laid down in the aforesaid decision in the case of A.K.Gupta (supra), in the facts of this case, we are of the view that since even on the date of filing of the application for amendment of the written statement and the counter claim, the claim was barred and no fresh suit could be filed on such amended claim and, therefore, the two courts below had acted within their jurisdiction in rejecting the prayer for amendment of the written statement and the counter claim. It may not be out of place to mention that following the principle laid down in A.K.Gupta's case (supra), this Court again in Vineet Kumar vs. Mangal Sain Wadhera [1984 (3) SCC 352] expressed the same view to which we have already adhered to.

17. Considering the facts of the case and the nature of amendment claimed and the principles laid down by this Court in L.J.Leach's case (supra) and other decisions of this Court, as referred to herein earlier, we are of the view that if a suit was filed on the amended claim, it was an admitted position that the said claim was barred by limitation, the question of allowing the amendment of the written statement and the counter claim, in the facts and circumstances of the case, could not arise at all. Accordingly, the courts below were fully justified in rejecting the application for amendment of the written statement and the counter claim.

18. The learned counsel appearing on behalf of the appellants again relied on a decision of this Court in Gajanan Jaikishan Joshi vs. Prabhakar Mohanlal Kalwar [1990 (1) SCC 166] and sought to argue that the courts below were in error in rejecting the application for amendment of the written statement and the counter claim. In our view, that decision of this Court is distinguishable on facts. In that decision, no fresh cause of action was sought to be introduced by the amendment applied for. All that the appellant sought to do in that case was to complete the cause of action for specific performance for which relief he had already prayed for. It was only that one averment required in law to be made in a plaint in a suit for specific performance was not made in that case as the provisions of sub-section (c) of Section 16 of the Specific Relief Act was mandatory in nature, probably on account of some oversight or mistake of the lawyer who drafted the plaint and that error was sought to be rectified by the amendment applied for. This is not the position in the present case. Admittedly the claim of 1986 was sought to be made by way of the amendment of the written statement and the counter claim in the year 2000, when that claim had already become barred by the law of limitation. Such being the position and in view of the principle laid down, as noted herein above, that if a suit was filed for the amended claim which could have become barred by the law of limitation, the application for amendment was rightly rejected.

19. Keeping the aforesaid findings made by us and also the findings arrived at by the courts below in the matter of exercise of discretion to reject the application for amendment of the written statement and the counter claim in mind, the delay and latches on the part of the appellants to apply for amendment of the written statement and the counter claim would be the relevant factor for rejecting the application for amendment of the pleadings. As noted herein earlier, there has been thirteen and a half years delay in filing the application for amendment of the pleadings. Further more, in the application for amendment, the appellants had not given any explanation whatsoever for such delay. Under these circumstances, we do not find any reason to interfere with the orders of the courts below. In our view, in the facts and circumstances of the case, the courts below were perfectly justified in rejecting the prayer for amendment of the written statement and the counter claim.

20. In view of our findings made hereinabove, that on the date of filing of the amendment petition, the claim as made by the appellants in their amendment petition was already barred, no purpose would be achieved by allowing the amendment which has already stood barred by the law of limitation.

21. For the reasons aforesaid, we are of the view that the courts below had exercised their discretion in a proper manner in the matter of rejecting the amendment of the pleadings. We, therefore, do not find any merit in this appeal Accordingly, the appeal is dismissed. However, the trial court is directed to dispose of the suit as early as possible preferably within a year from the date of supply of a copy of this order to it. There will be no order as to costs.

.....J .

[Tarun Chatterjee]

New Delhi .....
....J.
September 09, 2008. [Harjit Singh
Bedi]