

Mr.Vijay Agarwal & Ors vs Harinarayan G.Bajaj & Ors on 27 February, 2013

Author: D.Y.Chandrachud

Bench: D.Y.Chandrachud, A.A. Sayed

VBC

1/14

app200.12-27.2

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
O. O. C. J.

APPEAL NO.200 OF 2012
IN

CHAMBER SUMMONS NO.106 OF 2010
IN
SUIT NO.2256 OF 1998
WITH
CROL NO.4 OF 2012

Mr.Vijay Agarwal & Ors.	...Appellants.
Vs.	
Harinarayan G.Bajaj & Ors.	...Respondents.
....	

Mr.Dinyar D.Madon, Senior Advocate with Mr.Mayur Khandeparkar, Mr.Girish Kedia and Mr.M.Agre for the Appellants.

.....

Ms.Sonal i/b. Goenka Law Associates for the Respondents.

CORAM : DR.D.Y.CHANDRACHUD AND
A.A. SAYED, JJ.

February 27, 2013.

ORAL JUDGMENT (PER DR.D.Y.CHANDRACHUD, J.) :

Admit. By consent of Counsel, taken up for hearing and final disposal.

2. A Chamber Summons was moved before the Learned Single Judge for amending a written statement. The Learned Single Judge held by an order dated 7 December 2011 that an application for amendment of a written statement under Order 6 Rule 17 of the Code of Civil Procedure, 1908 is governed by the Limitation Act, 1963 and Article 137 of the Schedule which applies to all applications made to a civil court would include an application for amendment of pleadings. The Learned Single Judge held that the right to apply for amendment of the written statement in this case arose on the day following the day on which the written statement was filed, on the ground VBC 2/14 app200.12-27.2 that the amendment did not seek to bring on record new facts, but only an explanation regarding existing facts. Since the Chamber Summons was filed beyond a period of three years of the day on which the right to apply was held to have arisen, it was dismissed as being barred by limitation. However, the Learned Single Judge noted that but for the bar of limitation, he would have allowed the Chamber Summons for amendment. The Defendants are in appeal against the order rejecting the Chamber Summons. The Plaintiffs have filed Cross-objections against that part of the order by which the Learned Single Judge held that but for the bar of limitation, he would have allowed the amendment.

3. The First and Second Respondents have instituted a suit seeking

(i) A declaration that the Appellants and the Third Respondent are only pledgees and not owners in respect of 3,07,650 shares of Sesa Goa Ltd.(the Fourteenth Defendant and Respondent); (ii) A direction for delivery and handing over of the shares; (iii) A declaration of ownership in respect of certain immovable property and a direction to deliver up for cancellation an agreement for sale dated 26 September 1997. In the suit which was instituted before this Court in 1998, an amendment of the plaint was allowed on 31 January 2006. The written statement has been filed by the Appellants on 20 November 2006. The Chamber Summons for amendment of the written statement was filed on or about 19 January 2010. The Learned Single Judge framed the following points for consideration on the Chamber Summons:

"(i) Whether Article 137 of the Limitation Act applies to an application for amendment of pleadings?

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(ii) If yes, whether the present application (chamber summons) is barred by Limitation?

(iii) Whether in the facts and circumstances of the case, the amendment should or should not be allowed?"

In the view of the Learned Single Judge, Article 137 of the Schedule to the Limitation Act applies to an application for amendment of pleadings. The Learned Single Judge held that though Order 6 Rule 17 of the Code of Civil Procedure, 1908 contemplates an amendment at any stage of the proceedings, the words "any stage" only denote that an application for amendment can be filed before or after the framing of issues and before or after the commencement of the trial or even after conclusion of the trial. The Court took the view that every application to a civil court would be governed by Article 137 and an application for amendment would, therefore, have to meet the requirement of being filed within a period of three years from when the right to apply accrues. Since in the present case, the amendment was clarificatory, the Learned Single Judge held that the right to apply accrued on 21 November 2006 which was the day after the Written Statement was filed and the Chamber Summons which was taken out on 19 January 2010 was after a lapse of three years and was therefore barred by limitation. However, the Learned Single Judge on the third point which was framed, held that but for the bar of limitation, the Court would have allowed the amendment.

4. Counsel appearing on behalf of the Appellants submits that : (i) The power which is vested in the court to allow an amendment of pleadings is recognized in Section 153 of the Code of Civil Procedure, 1908 while Order 6 VBC 4/14 app200.12-27.2 Rule 17 prescribes the procedure that would govern; (ii) Limitation extinguishes the remedy, but not the right and no limitation as such would apply to a defence or an amended defence which is sought to be raised to the suit; (iii) In any event, it is well settled that an interlocutory application is not subject to limitation unless a period of limitation is incorporated in legislation providing for such an application; and (iv) It is well settled that in view of the provisions of Order 6 Rule 17, an amendment of pleadings can be allowed at any stage of the proceedings and these words would be rendered redundant if the view of the Learned Single Judge were to be accepted.

5. On the other hand, it has been urged on behalf of the First and Second Respondents that : (i) The order of the Learned Single Judge rejecting the application for amendment does not constitute a judgment under Clause 15 of the Letters Patent since going by the case of the Appellants, the proposed amendment only sought to adduce additional particulars in respect of pleas already contained in the written statement. Hence, a denial of the application for amendment would not cause any prejudice to the Appellant so as to constitute a judgment within the meaning of Clause 15; (ii) An application for the purposes of Article 137 of the Limitation Act includes any application to a civil court for which no period of limitation is provided and an application for amendment of a written statement made before the civil court would, therefore, be governed by Article 137; (iii) The words "any stage" in Order 6 Rule 17 refer to the stage, whether before or after the trial, and since there is no provision in the Code of Civil Procedure, 1908 to specifically exclude Article 137, the provisions of the Limitation Act would necessarily VBC 5/14 app200.12-27.2 apply; (iv) In the present case, in support of the cross-objections, it is asserted that the Chamber Summons for amendment was moved only on the day before the date on which issues were to be framed and the effect was only to delay or protract the trial of the suit. The Chamber Summons, it was therefore, urged, should not be allowed on merits even if the Court were to come to the conclusion that the

application was not barred by limitation.

6. The preliminary objection to the maintainability of the appeal is that in the affidavit in support of the Chamber Summons, the Appellants stated that the Chamber Summons seeks to provide detailed particulars in respect of the defence already taken in the Written Statement and that by the proposed amendment, no change was sought in the defence already taken.

Relying on these averments, it was submitted that the refusal of the amendment by the Learned Single Judge would not result in any prejudice to the Petitioner and, therefore, would not constitute a judgment within the meaning of Clause 15 of the Letters Patent. In *Shah Babulal Khimji vs. Jayaben*,¹ the Supreme Court held that :

..only those orders would be judgments which decide matters of moment or affect vital and valuable rights of the parties and which work serious injustice to the party concerned."

As and by way of an illustration, the Supreme Court observed that if the Trial Judge allows the Plaintiff to amend the Plaint by adding a particular relief or taking an additional ground, which may be inconsistent with the pleas taken by him, but is not barred by limitation that does not work serious injustice to ¹ AIR 1981 SC 1786 VBC 6/14 app200.12-27.2 the Defendant who would have ample opportunity to disprove the amended plea taken by the Plaintiff at the trial. Such an order would not amount to a judgment within the meaning of Clause 15 of the Letters Patent. On the other hand, an order granting leave to amend the Plaint by introducing a new cause of action which completely alters the nature of the suit and takes away the vested right of limitation or any other valuable right which has accrued to the Defendant was held to constitute a judgment within the meaning of Clause 15.

The judgment in *Shah Babulal Khimji* was subsequently followed in a judgment of the Supreme Court in *Jugal Kishore Paliwal vs. S.Sat Jit Singh*,² a case where the High Court had held that an appeal would not be maintainable against an order allowing amendment of the Written Statement.

The Supreme Court, while allowing the appeal, held that the amendment of the Written Statement which was sought at the time of framing issues, vitally affected the right of the parties and sought to work injustice to the Defendant and hence, merited serious consideration by the Appellate Court on the question of whether or not the amendment should be allowed. Accordingly, the order of the High Court was set aside and the proceedings were restored to the Division Bench for consideration of the appeal.

7. In the present case, the Learned Single Judge has held that the provisions of the Limitation Act, 1963 would apply to an application for amendment of a Written Statement. This judgment of the Learned Single Judge has all the trappings of finality since it precludes the Appellants from amending the Written Statement on the ground that the application was ² (1984) 1 SCC 358 VBC 7/14 app200.12-27.2 barred by time. Such an order vitally affects the claim of the Appellants to

amend the Written Statement and would be a judgment for the purpose of Clause 15 of the Letters Patent. This also assumes significance because as narrated earlier, the Learned Single Judge also held that but for the bar of limitation, the Court would have been inclined to allow the amendment. We are, therefore, of the view that there is no merit in the preliminary objection to the maintainability of the appeal.

8. Section 153 of the Code of Civil Procedure, 1908 contains a substantive provision by which the Court is empowered at any time on such terms as it may think fit to amend any defect or error in any proceeding in a suit. The provision also stipulates that "all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on such proceeding. Order 6 Rule 17 as amended by the Code of Civil Procedure (Amendment) Act, 2002 with effect from 1 July 2002 reads as follows :

"17. Amendment of pleadings.- The Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties;

Provided that no application for amendment shall be allowed after the trial has commenced, unless the Court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial."

By the amendment, a proviso has been introduced, by which the power of the Court to allow an amendment after the trial has commenced has been VBC 8/14 app200.12-27.2 restricted. An amendment after the trial has commenced can be allowed only if the Court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial. In the present case, admittedly, the trial has not commenced since issues are yet to be framed. In any event the amended provisions would not apply, having regard to the fact that the suit has been instituted prior to 1 July 2002. (State Bank of Hyderabad vs. Town Municipal Council 3 and Sumesh Singh vs. Phoolan Devi.4

9. The core question which falls for consideration is whether an application for amendment under Order 6 Rule 17 is subject to the provisions of Article 137 of the Limitation Act, 1963. The first aspect which merits emphasis is that Order 6 Rule 17 contemplates that an amendment can be made at any stage of the proceedings. Undoubtedly, that would mean any stage whether before or during or after the trial. An application for amendment of pleadings is an interlocutory application. An interlocutory application, it is well settled, is not subject to any period of limitation unless otherwise specifically provided by law. In Harihar Nath vs. State Bank of India,⁵ the Supreme Court held that an application seeking leave to continue a proceeding in a pending suit under Section 446(1) of the Companies Act, 1956 may not be filed as an interlocutory application in the Court in which the suit or proceeding is pending. But in a broad sense, such an application which is filed before the Company Court under Section 446(1) is an interlocutory 3 (2007) 1 SCC 765 4 (2009) 12 SCC 689 5 (2006) 4 SCC 457 VBC 9/14 app200.12-27.2 application filed with reference to a pending suit or proceeding. To such an interlocutory application, it was held that a provision of limitation would not

apply unless a specific provision is made in that regard in law. An application under Section 446(1) of the Companies' Act, 1956 was consequently held not to be governed by Article 137 of the Schedule to the Limitation Act. The Supreme Court observed as follows:

"An interlocutory application is not subject to any period of limitation, unless otherwise specifically provided by law. ... In a broad sense, the application under Section 446(1) filed before the Company Court seeking leave to proceed with a pending suit or proceeding, is an "interlocutory application" with reference to the pending suit/proceeding. Article 137 is intended to apply to applications for enforcement of a claim or adjudication of a right or liability in a court. An application for leave to proceed with a pending suit or proceeding not being such an application for any relief, will not attract Article 137."

In the earlier judgment of a Bench of three Learned Judges of the Supreme Court in S.K.Sahgal vs. Maharaj Kishore Khanna,⁶ it was held that an application made before a judge in the district judiciary for the execution of the same decree, while execution proceedings were pending before the Collector must be regarded as a continuation of the execution before the Collector and no question of limitation would arise in regard to such an application. In that context, the Supreme Court held as follows:

"It has long been recognised by the courts in our country that a right to continue a proceeding which is pending is a right which arises from day to day and no question of any bar of limitation with regard to the enforcement of such a right arises: see Kedar Nath Dutt v. Hara Chand Dutt,⁷ Subba Chariar v. Mathuveeran Pillai."⁸

6 AIR 1959 SC 809 7 (1882) ILR 8 Cal 420 8 (1912) ILR 36 Mad 553 VBC 10/14 app200.12-27.2 The judgment of the Supreme Court in Kerala State Electricity Board vs. T.P. Kunhaliumma,⁹ (upon which the Learned Single Judge placed reliance) dealt with the question as to whether an application for enhancement of compensation under Section 16(3) of the Indian Telegraphs Act, 1885 would be governed by the provisions of Article 137 of the Limitation Act, 1963. The District Judge in that case held that it would be so governed and the petition which was filed beyond a period of three years was barred by limitation. The High Court in revision had come to a contrary conclusion. The Supreme Court held that Article 137 of the Limitation Act will apply to any petition or application filed under any Act to a Civil Court and in coming to the conclusion, the Bench of three Learned Judges overruled an earlier judgment of two Learned Judges in Town Municipal Council, Athani vs. Presiding Officer, Labour Court, Hubli¹⁰ to the effect that the Limitation Act would govern only applications filed under the Code of Civil Procedure, 1908. In a decision in Nityananada M.Joshi vs. LIC,¹¹ a Bench of three Learned Judges had held that it would require serious consideration as to whether applications preferred under other provisions apart from the Code of Civil Procedure, 1908 were included in Article 137 of the Limitation Act, 1963. That issue was resolved in the judgment of the Supreme Court in Kerala State Electricity Board (supra) which held that a petition presented to the District Judge or the Court for enhancement of compensation under the Indian Telegraphs Act, 1885 was an application which fell within the scope of Article 137 of the Limitation Act.

9 (1976) 4 SCC 634
10 (1969) 1 SCC 873
11 (1969) 2 SCC 199

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10. The application which came up for consideration in Kerala State Electricity Board (supra), it must be noted, was a substantive application for enhancement of compensation. On the other hand, in regard to an interlocutory application, the clear position in law is that the provisions of the Limitation Act would not apply unless a specific provision to that effect is contained in the law.

11. There is no specific provision under which a period of limitation is prescribed for an interlocutory application for amendment of pleadings under Order 6 Rule 17. Article 137 can have no application to such an application.

In Laxmidas Dayabhai Kabrawala vs. Nanabhai Chunilal Kabrawala,¹² the issue before the Supreme Court related to the propriety of an order of the Single Judge of the High Court directing that the counter claim filed by the Respondent be treated as a plaint in a cross suit and remanding the case for trial on that basis. For the purposes of the issue which is involved in the present case, it would be material to advert to the following observations of the Supreme Court:

"It is, no doubt, true that, save in exceptional cases, leave to amend under O.6 R. 17 of the code will ordinarily be refused when the effect of the amendment would be to take away from a party a legal right which had accrued to him by lapse of time. But this rule can apply only when either fresh allegations are added or fresh reliefs sought by way of amendment. Where for instance, an amendment is sought which merely clarifies an existing pleading and does not in substance add to or alter it, has never been held that the question of a bar of limitation is one of the questions to be considered in allowing such clarification of a matter already contained in the original pleading."

¹² AIR 1964 SC 11 VBC 12/14 app200.12-27.² These observations have been referred to in a subsequent decision of the Supreme Court in Revajeetu Builders and Developers vs. Narayanswami and Sons.¹³

12. In this view of the matter, we are of the view that the Learned Single Judge was in error in coming to the conclusion that the application that was filed by the Appellants for amendment of the Written Statement attracted the provisions of Article 137 of the Limitation Act, 1963. Article 137 of the Limitation Act, 1963 does not apply to an interlocutory application made during the pendency of the suit for amendment of the Written Statement.

13. That leaves the Court with the Cross-objections that have been filed by the First and Second Respondents, the original Plaintiffs, against the order of the Learned Single Judge. The contention of the First and Second Respondents is that the Chamber Summons for amendment was filed on 19 January 2010 when the suit was to come up for framing of issues on 20 January 2010 and the purpose thereof was to delay the hearing of the suit.

In view of the provisions of Section 153 of the Code of Civil Procedure, 1908, the issue which the Court has to determine where an application for amendment is filed is whether the amendment is necessary for the purposes of determining the real question in controversy. The other important consideration which has to govern the discretion of the Court is the potentiality of injustice to the other side. If the inconvenience or prejudice to the other 13 (2009) 10 SCC 84 at para 51 pages 98-99 VBC 13/14 app200.12-27.2 side could be compensated by an order of costs that would constitute a relevant consideration in determining as to whether the amendment should be allowed. In determining what costs should be awarded, the Court would inter alia have regard to the amendment which was sought, the financial benefit, if any, derived by one party at the cost of the other, the delay and inconvenience caused by protraction of the hearing and in the event of an appeal to the higher courts that the victim of the amendment is compelled to bear additional costs. These circumstances have been elucidated in the judgment of the Supreme Court in Ravajeetu Builders and Developers Vs.Narayanaswamy (supra). That was a case, where the High Court had declined to allow an amendment to the Plaint since the proposed amendment sought to introduce a new case which was not the foundation of the original action and the effect thereof would be to allow the Plaintiffs to withdraw certain admissions made in the Plaint. This order of the High Court was affirmed by the Supreme Court.

14. An amendment of the Written Statement is subject to a more liberal dispensation than an amendment of a plaint. Courts, as a matter of principle, are more liberal in allowing an amendment to a Written Statement since the question of prejudice would ordinarily be far less. A defendant may be permitted to amend the Written Statement even to alter the defence or to take an inconsistent plea. (Usha Balashaheb Swami vs. Kiran Appaso Swami).¹⁴ Applying these principles, we are of the considered view that the Learned Single Judge was correct in holding that the amendment ought to be 14 (2007) 5 SCC 602 at para 22 page 609 VBC 14/14 app200.12-27.2 allowed. The Learned Single Judge considered himself to be disabled in doing so by of the finding of the Court that the application for amendment was barred by limitation. Since we have come to the conclusion that such an application was not governed by the provisions of Article 137 of the Limitation Act, 1963, we would in consequence affirm the view of the Learned Single Judge that the amendment should be allowed. At the same time, we must bear in mind the fact that the application for amendment was moved shortly before issues were to be framed and that as a result of the Chamber Summons which has been taken out by the Appellant, the First and Second Respondents have been left to pursue

even proceedings in appeal. In the circumstances while we allow the amendment as sought in the Chamber Summons, we do so subject to the payment of costs quantified at Rs.20,000/-

which shall be a condition precedent. Costs shall be paid within a period of two weeks from today.

15. The appeal shall accordingly stand allowed in these terms. The Cross-objections shall be dismissed. Amendment to be carried out within two weeks from today.

16. The suit shall now appear on Board before the Learned Single Judge for directions on 15 March 2013.

(Dr.D.Y.Chandrachud, J.) (A.A. Sayed, J.)