

(2017) 09 BOM CK 0175

BOMBAY HIGH COURT

Case No: 6 of 2015

Export Credit
Guarantee Corpn. of
India Ltd.

APPELLANT

Vs

Mrs. Annamma Philip,
the Trustee of
Idichandy Family Trust,
a Private Family Trust,
& Ors.

RESPONDENT

Date of Decision: Sept. 19, 2017

Acts Referred:

- Code of Civil Procedure, 1908, Order 22Rule 10, Order 22Rule 3, Order 6Rule 17, Order 22Rule 4, <a href=3

Citation: (2017) 09 BOM CK 0175

Hon'ble Judges: K.R.Shriram

Bench: SINGLE BENCH

Advocate: Shyam Mehta, Aditya Bapat, Faisal Sayyed, Perna Gandhi, Manilal Kher Ambalal, Pradeep Sancheti, Pranav Desai, Vishal Mehta, Vidhi Patel

Judgement

1. Plaintiffs have taken out this chamber summons for leave to amend the plaint as per the Schedule annexed to the chamber summons.
2. Plaintiffs have filed this suit for specific performance. Plaintiffs, as set out in the plaint have dealt with the then Trustees of the Trust, viz., Idichandy Family Trust and PTM Family Trust as defendant nos.8 and 9. There are reliefs also sought against the Trusts for recovering certain amounts.
3. The present chamber summons is taken out to bring on record the new Trustees of the

Idichandy Family Trust and PTM Family Trust as defendant nos.8 and 9. The chamber summons is also taken out to bring on record the demise of defendant nos.5 and 6, who were the erstwhile settler and trustee of PTM Family Trust. Plaintiffs also seek to bring on record the new name of plaintiffs, which has changed from "Export Credit Guarantee Corporation of India Limited" to "ECGC Limited".

4. Mr. Sancheti, senior counsel submitted that respondents have no objection to the amendment as mentioned in I (i), (ii), (iii) and III of the Schedule but strongly opposed the rest of the proposed amendments prayed for.

5. It is averred in the affidavit in support that plaintiffs were intimated about the demise of defendant no.5 vide letter dated 17th June, 2003 by the Advocate for defendants, wherein it was stated that defendant no.5 has expired on 30th October, 2002. Plaintiffs were also informed of the demise of defendant no.6 by the Advocates for defendants vide letter dated 28th August, 2003. It is the case of plaintiffs that in order to ascertain the names of the present Trustees of the said Trusts, plaintiffs through their Advocate addressed a letter dated 13th March, 2014 to the Advocate for defendants to furnish the details of the present Trustees of the respective Trusts and the Advocate received a letter dated 1st April, 2014 from the Advocate for defendants furnishing the names of the present Trustees of Idichandy Family Trust, i.e., respondent nos.1 and 2. It is also stated that by the said letter, they were also informed that respondents were also the Trustees of PTM Family Trust. Therefore, plaintiffs are seeking to delete the name of defendant nos.5 and 6 who have since expired and to bring on record respondents as defendant nos.8 and 9 as Trustees of the two Trusts.

6. It was submitted by Mr. Sancheti that (a) there has been an inordinate delay on the part of plaintiffs of more than 8 years and 2 months and (b) there is no explanation whatsoever in the affidavit in support as to why plaintiffs did not file this present chamber summons earlier. It was also submitted that the averments of plaintiffs in paragraphs 8 and 11 of the affidavit in support indicate that only in 2014 they were informed about the change is misleading because by letters of 17th June, 2003 and 28th August, 2003 plaintiffs were informed about the demise of defendant nos.5 and 6 and that respondents are the only Trustees of both the Trusts. It was also submitted that plaintiffs have also vide letter dated 11th October, 2003 responded to the letter dated 28th August, 2003 and sought inspection of the Trust Deeds. It was also submitted that even in the written statement on behalf of defendants filed in the year 2005 it was stated that defendant no.5 expired on 30th October, 2002 and defendant no.6 expired long ago and that these facts were brought to plaintiffs notice by defendants' Advocates letter dated 28th August, 2003. It was also submitted that the written statement indicates that defendant nos.1 and 2 ceased to be Trustees of Idichandy Family Trust long ago and presently respondents are the only Trustees of Idichandy Family Trust.

7. Mr. Sancheti submitted that even the affidavit in reply in notice of motion no.1487 of

2001 and further affidavit gave the same facts but still plaintiffs did not move with alacrity. Mr. Sancheti further submitted that plaintiffs have also provided photocopies of the minutes of the meeting of the Trustees of Idichandy Family Trust.

Therefore, as the affidavit in support contained misleading statements, the chamber summons has to be dismissed.

8. Mr. Sancheti further submitted that the law requires that the Trustees can be brought on record only with leave of the Court and it is not a mechanical process and for obtaining leave, plaintiffs have to explain the reason for the delay and as there is no explanation whatsoever in the affidavit in support, the Court should not grant leave.

9. As correctly submitted by Mr. Mehta, senior counsel for plaintiffs, Order 22 Rule 10 of the Code of Civil Procedure, 1908 does not prescribe any time as compared to Order 22 Rule 3 and Rule 4. Order 22 Rule 3 and Rule 4 and Order 22 Rule 10 read as under :

22. Death, Marriage and Insolvency of Parties

3. Procedure in case of death of one of several plaintiffs or of sole plaintiff.(1)

Where one of two or more plaintiffs dies and the right to sue does not survive to the surviving plaintiff or plaintiffs alone, or a sole plaintiff or sole surviving plaintiff dies and the right to sue survives, the court, on an application made in that behalf, shall cause the legal representative of the deceased plaintiff to be made a party and shall proceed with the suit.

(2) Where within the time limited by law no application is made under subrule (1), the suit shall abate so far as the deceased plaintiff is concerned, and, the court may award to him the costs which he may have incurred in defending the suit, to be recovered from the estate of the deceased plaintiff.

4. Procedure in case of death of one of several defendants or of sole defendant.(

1) Where one of the two or more defendants dies and the right to sue does not survive against the surviving defendant or defendants alone, or a sole defendant or sole surviving defendant dies and the right to sue survives, the court, on an application made in that behalf, shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit.

(2) Any person so made a party may make any defence appropriate to his character as legal representative of the deceased defendant.

(3) Where within the time limited by law no application is made under subrule (1), the suit shall abate as against the deceased defendant.

(4) The court whenever it thinks fit, may exempt the plaintiff from the necessity of substituting the legal representatives of any such defendant who has failed to file a written statement or who, having filed it, has failed to appear and contest the suit at the hearing; and judgment may, in such case, be pronounced against the said defendant notwithstanding the death of such defendant and shall have the same force and effect as if it has been pronounced before death took place.

(5) Where,-

(a) the plaintiff was ignorant of the death of a defendant, and could not, for that reason, make an application for the substitution of the legal representative of the defendant under this rule within the period specified in the Limitation Act, 1963 (36 of 1963), and the suit has, in consequence, abated, and

(b) the plaintiff applies after the expiry of the period specified there for in the Limitation Act, 1963 (36 of 1963), for setting aside the abatement and also for the admission of that application under section 5 of that Act on the ground that he had, by reason of such ignorance, sufficient cause for not making the application within the period specified in the said Act, the court shall, in considering the application under the said section 5, have due regard to the fact of such ignorance, if proved.

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10. Procedure in case of assignment before final order in suit.(1) In other cases of an assignment, creation or devolution of any interest during the pendency of a Suit, the suit may, by leave of the court, be continued by or against the person to or upon whom such interest has come or devolved.

(2) The attachment of a decree pending an appeal there from shall be deemed to be an interest entitling the person who procured such attachment to the benefit of subrule (1).

10. Order 22 Rule 3 sub Rule 2 provides "where within the time limited by law no application is made under subrule (1)". Similarly, Order 22 Rule 4 sub Rule 3 provides "where within the time limited by law no application is made under subrule (1)". In Rule 10 it does not state anywhere about the application being made within the time limited by law. There is no time limited by law for an application to be made. Mr. Sancheti also in fairness agreed that the Limitation Act does not also prescribe any time for devolution of interest under Order 22 Rule 10.

11. This is not a case where a person has died and the legal heirs are being brought on record to pursue the claim against the estate of the deceased. Here the suit is against the Trustees and the Trustees may come and Trustees may go. They do not have personal liability. The interest is only purged by devolution. The interest, which is the subject matter of the suit, devolved upon respondents, upon respondents being made Trustees of the two Trusts. Rule 10 under Order 22 is based on the principle that trial of a suit cannot be brought to an end merely because the interest of a party in the subject matter of the suit has devolved upon another during the pendency of the suit but that suit may be continued against the person acquiring the interest with the leave of the Court.

12. In *Shri Rikhu Dev, Chela Bawa Harjug Dass vs. Som Dass (Deceased) Through His Chela Shiam Dass*, 1976 (1) SCC 103, the Apex Court has held that when a suit is brought by or against a person in a representative capacity and there is a devolution of the interest of the representative, the rule that has to be applied is Order 22, Rule 10 and not Order 22, Rule 3 or Rule 4, whether the devolution takes place as a consequence of death or for any other reason. The Apex Court also held that Order 22, Rule 10, is not confined to devolution of interest of a party by death, it also applies if the head of the mutt or manager of the temple resigns his office or is removed from office. In such a case, the successor to the head of the mutt or to the manager of the temple may be substituted as a party under this rule. The Apex Court held that the word "interest" which is mentioned in this rule means interest in the property, i.e., the subject matter of the suit and the interest is the interest of the person who was the party to the suit.

13. In this case also the suit has been brought against defendant nos.1,2,5 and 6 in their respective capacity as Trustees of Idichandy Family Trust and PTM Family Trust, respectively and on their ceasing to be Trustees as a consequence of death or resignation results in devolution of the interest of defendant nos.1,2,5 and 6 as representative of those Trusts and the new Trustees who are the successors shall be substituted as a party under this rule. The Apex Court in *Rikhu Dev (Supra)* also relied upon *Thirumalai vs. Arunachella*, AIR 1926 Mad 540 where the Court held that a succeeding trustee of a trustee who filed a suit and thereafter died during its pendency was not legal representative of the predecessor in office. The Court said that where some of the trustees die or retire during the pendency of a suit and new persons are elected to

fill their place, it is a case of devolution of interest during the pendency of a suit and the elected persons can be added as parties under Order 22, rule 10 notwithstanding that the period of limitation for impleading them had expired.

14. The Apex Court in *Rikhu Dev (Supra)* also relied upon *Roshan Lal vs. Kapur Chand*, AIR 1960 Punj 382 where the Punjab High Court took a view that newly appointed trustees are not legal representatives of the trustees who had filed the suit and thereafter died during the pendency of the suit, that they can be added as parties under Order 22, Rule 10 notwithstanding the fact that the period of limitation for an application to be impleaded them under Order 22, Rule 3 had elapsed. The Court said "such an application is obviously not an application under Order 22 Rule 3 of the Civil Procedure Code".

15. Similarly, in *Chandra Bai (Dead) Through Legal Representatives vs. Khandalwal Vipra Vidyalaya Samiti and Ors.*, (2016) 12 SCC 534 the only question raised was whether the High Court had correctly upheld the order of the learned Single Judge allowing the application filed under Order 22 Rule 10 of the Code of Civil Procedure by respondent no.1 society. Paragraph 8 of the said judgment reads as under :

8. We have further notices that in *Bajinath Ram vs. Tunkowati Kuer* the Full Bench of the Patna High Court has held :

15. Another thing to notice in connection with this rule is that a party on whom the interest of the deceased plaintiff or defendant devolves is not entitled to continue the suit or appeal as a matter of right, it is essential to obtain the leave of the Court. The granting of leave is within the discretion of the Court. The Court, however, is to exercise its discretion judicially and according to well established principles. "Further, unlike Rules 3 and 4, no limitation is prescribed for presentation of an application under this rule and no penalty is laid down for failure to substitute the person on whom the interest of the deceased plaintiff or defendant has devolved. Therefore, the right to make an application under this rule is a right which accrues from day to day and can be made at any time during the pendency of a suit. There is no abatement under this rule."

16. Mr. Sancheti relying upon Order 31 Rule 2 of the Code of Civil Procedure read with Sections 47 and 48 of the Indian Trusts Act, 1882 submitted that all the Trustees have to be made a party and because plaintiffs did not make all the Trustees a party to the suit, the suit itself cannot survive. Mr. Sancheti also relied upon *Duli Chand vs. M/s. Mahabir Pershad Trilok Chand Charitable Trust*, 1948 (6) Delhi Reported Judgments 153 and

17. At this stage, we are only considering the application to bring on record the Trustees of the two Trusts. Therefore, the point raised by Mr. Sancheti that the suit has to be dismissed because all the Trustees have not been brought on record will only arise if the chamber summons is not allowed. Since I am inclined to allow the chamber summons, these questions do not arise.

18. Mr. Sancheti submitted that plaintiffs have not given any explanation in the affidavit in support for the reason why for more than 8 years they did not take steps to file the present chamber summons. Mr. Sancheti also submitted that inordinate delay caused by inaction or negligence lacking bonafides would disentitle plaintiff from being shown any leniency by this Court in condoning the delay. Mr. Sancheti also submitted that wherein no explanation much less a reasonable or satisfactory explanation for condonation of delay has been given, the Court has to refuse condoning the delay. Mr. Sancheti relied upon the judgment of the Apex Court in Brijesh Kumar and Ors. vs. State of Maharashtra and Ors., (2014) 11 SCC 351 and Balwant Singh (Dead) vs. Jagdish Singh and Ors., (2010) 8 SCC 685 to buttress this submission.

19. In my view, these two judgments, Brijesh Kumar (Supra) and Balwant Singh (Supra), do not really apply to the facts and circumstances of the present case because in both these judgments there was time limit prescribed for making the application with power to condone the delay. In our case, there is no time limit prescribed and infact in Chandra Bai (Supra) the Apex Court while relying upon Baijnath Ram vs. Tunkowati Kuer has emphasised that the right to make an application under this rule is a right which accrues "from day to day" and can be made at any time during the pendency of a suit. It is also emphasised that unlike Rules 3 and 4, no limitation is prescribed for presentation of an application under Rule 10 and no penalty is laid down for failure to substitute the person on whom the interest of the deceased plaintiff or defendant has devolved.

20. At the same time, would that mean the applicant can, whenever they please, even after 10 years, take out an application to bring on record the Trustees, who are coming in the place of the earlier Trustees during the pendency of the suit?

From the emphasis supplied by the Court in paragraph 8 of Chandra Bai (Supra), I would say yes.

21. At the same time, we should also keep in mind the provisions of Order 6 Rule 17 of the Code of Civil Procedure which reads as under :

17. Amendment of Pleadings. the Court may at any stage at 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.

22. This is a pretrial amendment. Even issues are yet to be framed. The question of nature or character of the suit being changed does not arise. Bringing the Trustees on record is necessary for effective consideration and disposal of the suit. When one balances prejudice, greater prejudice will be caused to plaintiffs because if all the Trustees are not joined as parties to the suit, the maintainability of the suit itself will be an issue. At the same time, if the Trustees are brought on record albeit with some delay, the Trustees can still defend the suit and contest the suit on merits.

23. In the circumstances, in my view, the chamber summons has to be allowed and is hereby allowed in terms of prayer clause - (a) and accordingly disposed.

24. Ofcourse, if plaintiffs had made this application promptly upon receiving the letter dated 28th August, 2003, respondents may not have opposed and the other applications mentioned below would not have been filed. In my view, this is a fit case where plaintiffs/applicants should be put to terms. Keeping all these factors in mind, for both the suits together plaintiffs are directed to pay a sum of Rs.1 lakh as costs to respondents. This amount to be paid by way of cheque drawn in favour of the Advocate on record for respondents within four weeks from today.

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CHAMBER SUMMONS NO.544 OF 2016

IN

SUIT NO.2178 OF 2001

This chamber summons is taken out by plaintiffs for leave to amend the plaint as per the Schedule annexed thereto.

Mr. Sancheti, counsel for respondents submitted that if the Court was inclined to allow chamber summons no.6 of 2015, then this chamber summons may be allowed; Otherwise this chamber summons should be dismissed.

Since I have allowed chamber summons no.6 of 2015, this chamber summons also is allowed in terms of prayer clause - (a) and accordingly disposed keeping open the rights and contentions of defendants to be raised in the additional written statement.

NOTICE OF MOTION NO.2250 OF 2016

IN

SUIT NO.2178 OF 2001

In view of the order passed in chamber summons no.6 of 2015, nothing survives in this notice of motion and the notice of motion accordingly stands disposed.

CHAMBER SUMMONS NO.8 OF 2015

IN

SUIT NO.2177 OF 2001

The counsel submitted that the subject matter herein is almost identical to chamber summons no.6 of 2015 in suit no.2178 of 2001 and if the Court was inclined to allow chamber summons no.6 of 2015, this chamber summons may also be allowed and if the Court was inclined to dismiss chamber summons no.6 of 2015, then this chamber summons also should get dismissed.

Since I have allowed chamber summons no.6 of 2015 in suit no.2178 of 2001, this chamber summons also is allowed and accordingly disposed in terms of prayer clause -

(a).

CHAMBER SUMMONS NO.546 OF 2016

IN

SUIT NO.2177 OF 2001

In view of the order passed in chamber summons no.8 of 2015 read with order dated 19th September, 2017 in chamber summons no.6 of 2015 and chamber summons no.544 of 2016 in suit no.2178 of 2001, this chamber summons also is allowed in terms of prayer clause - (a) and accordingly disposed.

NOTICE OF MOTION NO.2227 OF 2016

IN

SUIT NO.2177 OF 2001

In view of the order passed in chamber summons no.8 of 2015 in suit no.2177 of 2001, nothing survives in this notice of motion and the notice of motion accordingly stands disposed.

GENERAL

Amendments as per the Schedule annexed to the chamber summons no.6 of 2015 and chamber summons no.544 of 2016 in suit no.2178 of 2001 and chamber summons no.8 of 2015 and chamber summons no.546 of 2016 in suit no.2177 of 2001 to be carried out and amended complaints to be served within two weeks from today.

Additional written statement to be filed and copy served within three weeks of receiving copy of the amended complaints.

Suits be listed for issues on 31st October, 2017 at 3.00 p.m. on which date both parties to come with agreed draft issues and a separate list of issues on which they are unable to agree.