

(2013) 03 CAL CK 0011

Calcutta High Court**Case No:** A.P.O. No's. 353 and 354 of 2011 and C.S. No. 313 of 2009

Ramesh Kumar Kejriwal

APPELLANT

Vs

Mahesh Kumar Kejriwal

RESPONDENT

Date of Decision: March 12, 2013**Citation:** (2013) 4 CHN 203**Hon'ble Judges:** Mrinal Kanti Chaudhuri, J; Ashim Kumar Banerjee, J**Bench:** Division Bench**Advocate:** Abhrajit Mitra, Jishnu Choudhury, Sarbapriya Mookherjee and S.R. Kakrania, for the Appellant; Jayanta Mitra, Sabyasachi Choudhury and Asim Kumar Kundu, for the Respondent

Judgement

Ashim Kumar Banerjee, J.

Kejriwal family had principally two business, Foundry and Machine business. The disputes and differences arose between the members that were resolved through a family settlement recorded in writing through a document dated September 29, 2002 appearing at page 23 of the paper book (APO 353 of 2011). As per the agreement, Ramesh was to look after the family business together with all liabilities attached to the same whereas Mahesh would run the other business taking the liabilities attached thereto. Mahesh filed a suit in this Court in 2009 after about seven years inter alia making a grievance, his other brother Ramesh did not discharge his liability attached to the Foundry business. As a result, he suffered immense prejudice as ING Vysya Bank, the secured creditor would be enforcing the personal guarantee given by Mahesh. There were other two parties in the settlement being two brothers of the former generation. Father was residing with Mahesh whereas uncle was with Ramesh. Mahesh would contend, his personal shares and shares of Sabitri Devi in various companies as well as securities in their name that were pledged with the bank were sold in repayment of the dues of the bank. He made a money claim of Rs. 29.9 crores on that account. Ramesh filed an application under Order 7 Rule 11 of the Code of Civil Procedure. The main plunk of

the argument was, the plaint did not disclose any cause of action and even if it was so, the laws of limitation would bar the claim. Hence, the suit was liable to be dismissed. Similar suits were filed by the other members of the branch of Mahesh. Altogether three suits were filed being C.S. No. 313 of 2009 by Mahesh, C.S. No. 312 by Alka and C.S. No. 222/09 by Murari Mohan, all belonged to one group led by Mahesh. Mahesh filed an application for amendment that would clarify the cause of action, that would give rise to the filing of the suit including an explanation as to why the suit would not be barred by the law of limitation. The learned Single Judge dismissed the application for dismissal of the suit and allowed the application for amendment. Hence, the above four appeals that were heard and are being disposed of by the foregoing judgment and order.

2. The learned Single Judge vide judgment and order dated July 20, 2011 rendered in C.S. No. 312 of 2009 observed, there was considerable substance in what the plaintiff would say in his plaint. The thrust of the claim was against the first defendant and the final settlement would give an impression that he would clear off the dues of the second defendant. Pertinent to note, the second defendant was before the Board of Industrial and Financial Re-construction (hereinafter referred to as BIFR) for a considerable time. The plaintiff filed the suit within three years of the date when the company had come out of the mischief of the Sick Industrial Companies (special provisions) the Act of 1985. His Lordship observed, the plea of limitation would involve assessment of fact and the question of limitation being a mixed question of fact and law, such assessment could not be made in the application of the like nature. On the amendment application, the learned Judge observed, since the plaint sustained the challenge and proposed amendment would only add to buttress the original claim it would not change the nature and character and as such should be allowed.

3. Mr. Jishnu Choudhury, learned counsel appearing for the appellant placed the plaint before us. Taking it over from him, Mr. Abhrajit Mitra, learned counsel also appearing for the appellant contended, the plaintiff did have the independent right to sue the first defendant to the exclusion of the others even if section 22 of the said Act of 1985 would have a meaningful resistance for the second defendant. The suit would thus be barred as against defendant No. 1. He would further contend, the so-called guarantee given by Ramesh and Mahesh would be an independent contract that would have no nexus with the company being the second defendant. He relied on the following decisions:-

1. CLT 1988 I 247 (Chemopulp Tissues Ltd. vs. Electro Steel Castings Ltd. & Ors.).
2. [M/S Patheja Bros. Forgings and Stamping and Another Vs. I.C.I.C.I. Ltd. and Others,](#)
3. [Garden Finance Ltd. Vs. Prakash Inds. Ltd. and Another,](#)

4. [Mula Sahakari Sakhar Karkhana Ltd. Vs. State Bank of India \(Dombivli Industrial Estate Branch\) and The State Bank of India,](#)

5. [N.V. Srinivasa Murthy and Others Vs. Mariyamma \(dead\) by Proposed LR's. and Others,](#)

4. Opposing the appeals, Mr. Jayanta Kumar Mitra, learned senior counsel also placed the plaint in his own way. According to him, the family settlement fixed the liability in 2002 that would have correlation with the company, The company was before the BIFR. In terms of section 22 of the said Act of 1985, no suit or proceeding could be initiated and/or proceeded as against a sick company whose chance of revival was under consideration before the BIFR. Hence, the suit could not have been filed before 2007 as the second defendant was admittedly before BIFR being a sick company within the meaning of section 3(1)(O) of the said Act of 1995. The plaintiff filed the suit within three years from the date of the second defendant coming out of the mischief of the said Act of 1985. Hence, the suit could not be said to be barred by law of limitation.

5. On the cause of action, Mr. Mitra would contend, the parties entered into an agreement to resolve their dispute. The parties signed the agreement. Hence, they would be precluded from contending otherwise. The agreement would give right to Mahesh to have his liability as a guarantor discharged. The first defendant not acting upon the same, would automatically give rise to a cause of action for the plaintiff. He would cite two Apex Court decisions reported in [Ramesh B. Desai and Others Vs. Bipin Vadilal Mehta and Others,](#) and [Ram Prakash Gupta Vs. Rajiv Kumar Gupta and Others,](#)

6. Mr. Sarbapriya Mookherjee, learned counsel also appearing for the appellants would contend, even if the Court would give full credence as to what the respondents would contend, the very fact that the shares had been sold by the bank in 1999 would make the claim of the plaintiff barred by the laws of limitation.

7. In the case of Chemopulp Tissues Ltd. (Supra), the plaintiff filed a suit against the bank on the basis of the guarantee only. The Division Bench held, plaintiff was perfectly competent to do so on the basis of the guarantee.

8. Mr. Jayanta Kumar Mitra relied on paragraph 19 of the decision in the case of Ramesh B. Desai & Ors. (Supra), wherein the Apex Court observed, "a plea of limitation cannot be decided as an abstract principle of law divorced from facts as in every case the starting point of limitation has to be ascertained which is entirely a question of fact. A plea of limitation is a mixed question of law and fact." The Apex Court observed so in a case where the defendant came up with an application under Order 7 Rule 11(d). It was observed, the entire plaint has to be taken as sacrosanct and then to find out whether it would disclose any cause of action. Few lines or passages should not be read in isolation.

9. In the decision in the case of Garden Finance Ltd. (Supra), the learned Single Judge of the Bombay High Court allowed the finance company to press their claim against the guarantor when the company itself was under BIFR. We respectfully differ.

10. In the case of N.V. Srinivasa Murthy & Ors. (Supra), the Apex Court, considering the facts involved therein held, the High Court was not right in rejecting the plaint that it would not disclose any cause of action. The Apex Court was of the view, the claim was prima facie, barred by limitation. The facts in this case would depict otherwise.

11. Coming back to the present case, we would find the claim based on the family settlement. The family settlement being a part of the plaint being Annexure-A thereof would clearly show, Ramesh was to discharge the liabilities of the foundry. The plaintiffs alleged in the plaint, he did not do so that would definitely give rise to a cause of action. Whether plaintiff would be able to prove it or not, would depend upon the nature of evidence that he would lead to support his case. Stage has not come to say, it had no cause of action.

12. Plea of limitation is a mixed question of fact and law. The plaintiffs alleged, the second defendant was in BIFR upto 2007 whereas the suit was filed in 2009. Test is whether the plaintiff could sue the first defendant to the exclusion of the company. We have given a thought to the issue. In our view, the nature of claim as pleaded in the plaint being based upon the family settlement would predominantly suggest, the cause of action as against the defendant No. 1 had a relevant nexus with that of defendant No. 2. Hence, in absence of defendant No. 2 it would be difficult to say, the suit would be maintainable. Had it been not so, the suit was well within the period of limitation being filed within three years from the date when the company had come out of the mischief of the said Act of 1985.

13. On the amendment, we fully agree with the view expressed by His Lordship. His Lordship found the amendments an attempt to buttress the original claim of the plaintiff as contained in the plaint. His Lordship observed, it would not change the nature and character. We do not find any scope to differ.

14. The appeals fail and are, hereby, dismissed without any order as to costs. Urgent certified copy of this judgment, if applied for, be given to the parties on their usual undertaking.

Mrinal Kanti Chaudhuri, J.

I agree.