

Embee Software Pvt. Ltd. Vs. Samir Kumar Shaw and ors.

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Court : Kolkata

Decided On : Aug-19-2014

Judge : Soumen Sen

Appellant : Embee Software Pvt. Ltd.

Respondent : Samir Kumar Shaw and ors.

Judgement :

ORDER

SHEET GA No.2171 of 2012 CS No.77 of 2012 IN THE HIGH COURT AT CALCUTTA Ordinary Original Civil Jurisdiction ORIGINAL SIDE EMBEE SOFTWARE PVT.LTD.Versus SAMIR KUMAR SHAW & ORS.BEFORE: The Hon'ble JUSTICE SOUMEN SEN Date: 19th August, 2014 Mr.Abhrajit Mitra, Sr.Adv.with Mr.Jishnu Chowdhury, Adv.Mr.Suddhasatva Banerjee, Adv.Mr.Sarvapriya Mukherjee, Adv.Ms.Radhika Singh, Adv.Mr.Soumabho Ghose, Adv.Ms.S.Nandy, Adv..for the petitioner Mr.Ratnanko Banerjee, Sr.Adv.with Mr.Rajat Dutta, Adv.Mr.Sangita Roy, Adv..for the respondents This is an application for amendment of the plaint.

The plaintiff while seeking amendment of the existing pleadings has also sought to add the defendant no.5.

The petitioner states that after filing of the suit, the plaintiff could ascertain further acts of misdeeds of the defendants.

This act of misdeeds has necessitated incorporation of further facts and to make further claim from the same transaction and/or series of transactions against the defendant nos.1 to 3 apart from claim for recovery of loans advanced to the defendant nos.2 and 3 already made in the plaint.

In so far as the addition of defendant no.5 is concerned, it is stated that one Zulfikar Ahmed, the proposed defendant no.5, resigned on 4th November, 2011.

In or about February, 2012, the petitioner came to learn that Zulfikar Ahmed has joined R.P.Info Systems Limited.R.P.

Info Systems Limited is a part of a group where some companies are in direct competition with the petitioner.

At the time of institution of the suit on the basis of the available materials, the petitioner did not implead Zulfikar Ahmed because of lack of evidence of his carrying on competing business and his misusing the petitioners trade secret and copyright in computer programmes has subsequently surfaced.

The petitioner further states that Zulfikar Ahmed has also acted in collusion with the defendant nos.1 to 3 and responsible for various financial irregularities.

The petitioner subsequently also came to learn that the Zulfikar Ahmed has joined in one Ontrack Systems Limited, which is carrying on the same business as that of the petitioner.

Zulfikar Ahmed has also approached some regular customers of the petitioner to induce the said concern to disassociate themselves from the petitioner and obtain service from Ontrack Systems Limited.

The petitioner states that the petitioner has been able to obtain particulars which would go to establish the nexus between Zulfikar Ahmed and the defendant nos.1 to 3 and specially close connection with Zulfikar Ahmed and defendant no.4.

The petitioner wants to bring on record such particulars by way of amendment.

It is stated that the cause of action of the petitioner against Zulfikar Ahmed arises out of the same transaction and/or series transaction as that of the other defendants.

Mr. Abhrajit Mitra, learned Senior Advocate for the plaintiff has referred to the various paragraph of the original plaint as also the proposed amendment and submitted that by reason of discovery of subsequent facts, it has now become necessary to add Zulfikar Ahmed inasmuch as Zulfikar Ahmed is also parting with confidential information that he had obtained during his courses of employment.

Mr. Ratnanko Banerjee, learned Senior Advocate for the defendants submits that the cause of action as alleged in the proposed amendment is distinct and separate and the said proposed added defendant should not be allowed to be impleaded in the suit.

Mr. Banerjee has referred to the original plaint as well as the proposed amendment and submitted that it had not been the case of the plaintiff that the proposed defendant has formed the defendant no. 4 and was involved in any business which is in competition with the plaintiff.

It is submitted that the addition of defendant at this stage would result in mis-joinder of parties and there would be impediment in having a fair trial.

The proposed amendment is also challenged on the ground that this application is frivolous since.

According to the learned Senior Advocate, such facts, which are sought to be introduced now by way of an amendment, were known to the plaintiff but the plaintiff realized that Zulfikar Ahmed could not be added and brought within the frame of the original suit having a distinct and separate cause of action and, accordingly, Zulfikar Ahmed was left out.

Zulfikar Ahmed was brought in in view of notice of winding up served upon the plaintiff.

Ordinarily the Court would allow an amendment of the pleadings on such terms as may be just and all such amendments are allowed that are necessary for the purpose of determining the real question of controversy between the parties.

At the stage of deciding the amendment, the Court is not required to decide the merits of the claim.

The Court would see as to whether there has been a substitution of the original cause of action or the amendment, if allowed, would cause embarrassment to the other party.

The Court would not permit the change of the nature and character of the suit.

The original suit was against the defendant nos.1 to 4.

The cause of action appears to be that the defendant nos.1 to 3 have committed various irregularities and are seeking to use the confidential information and trade secrets of the plaintiff.

In so far as the said defendant nos.1 to 4 are concerned, the plaintiff by way of amendment is seeking to give further particulars. Such amendment cannot be said to result in changing the nature and character of the suit.

In so far as the proposed defendant No.5 is concerned, it appears that the plaintiff has stated that the defendant no.5 has colluded with the defendant nos.1 to 3 and had been instrumental in forming the defendant no.4.

The plaintiff has also alleged that the defendant no.5 has caused various financial irregularities.

The plaintiff by way of amendment sought to establish nexus between the said defendant nos.1 to 3 and 5.

Whether at the ultimate trial the plaintiff would be able to establish any nexus between the defendant nos.1 to 3 and 5 and cannot be a matter, which should be pondered at this stage.

Mr.Banerjee has argued that at the time of trial, it may appear to the Court that the claim against the defendant no.5 is required to be heard separately.

On the basis of the averments made in the application for amendment and after considering the proposed amendment, it appears to me that there is a common thread mainly parting away with the trade secrets and, accordingly, at this stage it is not possible to form any opinion as to whether at the time of hearing of the suit, there would be a requirement of separate trial.

That issue need not be decided at this stage.

In view of the aforesaid, there shall be an order in terms of prayers (a).(b).(c) and (d) of the Masters Summons.

Department is directed to carry out the necessary amendment and do all other formalities for amendment of the plaintiff after impleading Zulfikar Ahmed within two weeks from the date of communication of this order.

The application is allowed.

Certified website copies of this order, if applied for, be urgently supplied to the parties subject to compliance with all requisite formalities.

(SOUMEN SEN, J.) AKGoswami

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