

**Limited and ors. Vs. Popular Constructions and ors.**

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**Court :** Mumbai

**Decided On :** Jan-28-1994

**Reported in :** 1994(4)BomCR414

**Judge :** M.L. Pendse and ;R.M. Bapat, JJ.

**Acts :** [Code of Civil Procedure \(CPC\) , 1908](#) - Order 2, Rule 2(1), 2(2) and 2(3)

**Appeal No. :** Appeal No. 509 of 1992 in Suit No. 1334 of 1990 with Appeal No. 210 of 1993 in Chamber Summon No. 61

**Appellant :** Canning Miyra Phoenix Limited and ors.

**Respondent :** Popular Constructions and ors.

**Advocate for Def. :** P.K. Samadhani and ;B. Dalal, Advs. for respondent No. 1 in appeal No. 509 of 1992 and ;N.A. Shah, ;Sanjay Kothari and ;D.L. Amin, Advs. and ;Mulla & Mulla and Craigie Blunt & Carore for respo

**Advocate for Pet/Ap. :** Virag Tulzapurkar and ;Ketan Parikh, Advs. and ;Kanga & Company in appeal No. 509 of 1992 and ;R.M. Kadam, Adv. and ;S. Ashwinkumar and Company in appeal No. 210 of 1993

**Judgement :**

M.L. Pendse, J.:

1. Both these appeals can be conveniently disposed of by common judgment as the question which falls for determination in these appeals is identical. The question which requires determination is at what point of time leave of the Court to sue for relief which was omitted to be sought earlier is required to be obtained under sub-rule (3) of Rule 2 of Order II of Code of Civil Procedure, 1908. To appreciate the question which arises, only few facts are required to be stated.

2. In Appeal No. 509 of 1992, appellant instituted Suit No. 1334 of 1990 on the Original Side of this Court on April 21, 1990 for a declaration that the Bank guarantee dated January 27, 1989 in the sum of Rs. 10 lakhs furnished in favour of respondent No. 1 is null and void and of no legal effect. The appellant sought injunction restraining respondent No. 1 from invoking or recovering money under the Bank guarantee. The respondent No. 1 had submitted tender for grant of contract floated by Director General of Naval Project for setting up of workshop building for electroplating and battery repair facility at Naval Dockyard, Bombay. On August 3, 1988, the appellant and respondent No. 1 entered into an agreement providing for a sub-contract in favour of the appellant. The appellant furnished Bank guarantee in anticipation of entering into sub-contract. The contract was allotted to respondent No. 1 and the appellant claims that respondent No. 1 failed to enter into sub-contract but was threatening to enforce the Bank guarantee and that is why the suit for declaration and injunction. In paragraph 21A of the plaint, the appellant asserted that respondent No. 1 is also liable to pay damages but as the quantum is not determined, the appellant seeks leave under Order II, Rule 2 of the Code of Civil Procedure to file a separate suit claiming damages from respondent No. 1. The appellant did not seek leave of the Court on the date of the institution of the suit but a separate petition was filed on April 18, 1992.

The petition for grant of leave was resisted by respondent No. 1 on the ground that leave can be obtained only prior to the date of the institution of the suit and not at any time subsequently. The objection prevailed before the learned Single Judge and by impugned judgment dated April 28, 1992, leave sought by the appellant was refused.

3. In Appeal No. 210 of 1993, respondent No. 1 Central Bank of India instituted Suit No. 324 of 1977 on the Original Side of this Court on February 25, 1977 for recovery of sum of Rs. 3,71,382.45 in respect of cash credit facility granted by the Bank to M/s. Multi Block Private Limited, a Private Limited Company, which was joined as defendant No. 1. The appellants were joined as defendants Nos. 2, 3 and 7 being the Directors of the Company and who had furnished guarantee for return of the amounts due by a composite deed of guarantee dated December 16, 1974. The composite guarantee was in respect of cash credit facility as well as term loan facility which was sanctioned to defendant No. 1 on October 31, 1973. Suit No. 324 of 1977 was for recovery of amounts due only under cash credit facility. The Central Bank of India instituted Suit No. 975 of 1978 on the Original Side of this Court on March 30, 1978 for recovery of Rs. 1,21,245/- together with interest thereon in respect of amounts outstanding under the term loan facility. The appellants were joined as party defendants in view of the guarantee furnished by composite deed of guarantee. The appellants filed written statement in the second suit on December 9, 1978 and, inter-alia, claimed that the second suit was not maintainable in view of the provisions of Order II, Rule 2 of the Code of Civil Procedure. During the pendency of the second suit, on July 14, 1988, the Central Bank of India took out Chamber Summons No. 611 of 1988 for amendment of the plaint, in the first suit, i.e. Suit No. 324 of 1977. The amendment sought was that the Bank be granted leave under Order II, Rule 2 of the Code of Civil Procedure to omit to sue defendants Nos. 2, 4, 5, 7 and 8 in respect of the term loan facility for which seek certain relief's. The learned counsel urged that plain reading of Order II, Rule 2 of the Code of Civil Procedure does not indicate that leave is required to be secured before institution of the first suit. It was submitted that change of phraseology in Order II, Rule 2(3) of the Code of Civil Procedure of 1908 was not properly appreciated and it was overlooked that the object of the provisions was to avoid multiplicity of litigation. The learned Counsel urged that it is always open for the plaintiff to seek amendment of the plaint and seek relief which was omitted to be sought on the date of institution of the suit and, therefore, the finding of the trial Judge that leave cannot be sought to institute separate suit for the relief's omitted during the pendency of the first suit cannot be sustained. Shri Tulzapurkar submitted that the jurisdiction of the Court to grant leave under Sub-rule (3) of

Rule 2 of Order II of the Code of Civil Procedure can be exercised anytime during the pendency of the suit. Shri Kadam, learned Counsel appearing on behalf of the appellants in Appeal No. 210 of 1993, urged that leave can be granted under Order II, Rule 2 of the Code of Civil Procedure before institution of second suit and it is not permissible for the Court to grant leave after the institution of the second suit seeking relief's which were omitted to be sought in the first suit. Shri Samadhani, learned Counsel appearing on behalf of respondent No. 1 in Appeal No. 509 of 1992 and Shri Shah, learned Counsel appearing on behalf of respondent No. 1 Central Bank of India in Appeal No. 210 of 1993, supported the orders passed by the trial Court in the two appeals.

5. In view of the rival submissions, the question which requires determination is at what point of time, it is necessary for the plaintiff to obtain leave under Order II, Rule 2 of the Code of Civil Procedure for instituting suit to seek relief's which were omitted at the time of institution of the earlier suit. Three different points of time were suggested during the arguments and those are :

- (a) Before institution of first suit,
- (b) Before institution of second suit, and
- (c) Before the date of decree in first suit.

Before examining the submissions urged in support of the rival contentions, it would be appropriate to set out the provisions of Order II, Rule 2 of the Code of Civil Procedure :

'2.(1) Every suit shall include the whole if the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court.

(2) Where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished.

(3) A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such relief's; but if he omits, except with the leave of the Court, to sue for all such relief's, he shall not afterwards sue for any relief so omitted.

Explanation.--For the purposes of this rule an obligation and a collateral security for its performance and successive claims arising under the same obligation shall be deemed respectively to constitute but one cause of action.'

Section 43 of Code of Civil Procedure, 1882 dealt with the frame of suit and, inter-alia, provided:

'A person entitled to more than one remedy in respect of the same cause of action may sue for all or any of his remedies; but, if he omits (except with the leave of the Court obtained before the first hearing) to sue for any of such remedies he shall not afterwards sue for the remedies so omitted.'

The bracketed words 'except with the leave of the Court obtained before the first hearing' were deleted while enacting Code of Civil Procedure, 1908.

6. Order II of Code of Civil Procedure Code, 1908 deals with the subject of frame of suit and Rule 1 provides that every suit shall be framed so as to afford ground for final decision upon the subjects in dispute and to prevent further litigation concerning them. The object of the legislature reflected in this Rule is to avoid multiplicity of litigation. Sub-rule (1) of Rule 2 provides that every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action and sub-rule (2) of Rule 2 provides that where a plaintiff omits to sue or intentionally relinquishes, any portion of the claim, then the plaintiff shall not afterwards sue in respect of the portion so omitted or relinquished. The plain reading of sub-rule (1) and sub-rule (2) of Rule 2 of Order II of the Code of Civil Procedure makes it clear that it is necessary for the plaintiff to institute suit in respect of whole of the claim arising out of cause of action. The failure to sue in respect of part of the claim, whether intentional or by accident, shuts out the plaintiff from seeking the remainder of the claim by separate suit. It is, therefore, obvious that the failure to sue for the whole of the claim in respect of the cause of

action deprives the plaintiff to institute another suit for seeking that part of the claim which was omitted. Sub-rule (3) of Rule 2 provides for an entirely different omission. Sub-rule (3) provides that the plaintiff who is entitled to more than one relief may institute suit for all or any of such relief's, but in case the plaintiff omits to sue for relief's which could have been earlier sought, then the plaintiff shall not afterwards sue for relief's so omitted, unless with the leave of the Court. The perusal of sub-rules (1) and (2) on one hand and sub-rule (3) on the other makes it clear that sub-rules (1) and (2) deal with failure to seek whole of the claim in respect of cause of action and the consequences thereof, while sub-rule (3) deals with omission to sue for any of the relief's available to the plaintiff. The distinction between sub-rules (1) and (2) and sub-rule (3) is that in the first case, the legislature is dealing with the claim which the plaintiff is entitled to make, while in the second, the subject referred to is the relief which the plaintiff can seek and the Court can grant. It is necessary to bear in mind the distinction between the claim and the relief while ascertaining at what point of time leave is required to be obtained for instituting suit in respect of relief which was omitted to be sought in the first suit. The leave under sub-rule (3) cannot be granted in respect of omission, whether accidental or intentional to sue for a part of the claim in respect of cause of action and leave is permissible only if the plaintiff fails to sue for any of the relief's. Sub-rule (2) of Rule 2 refers to omission which could be accidental as well as intentional relinquishment, while sub-rule (3) refers only to the omission. Sub-rule (3) is attracted when the plaintiff omitted to sue for any relief which was possible at the time of the institution of the first suit. The relief which was omitted at the time of the institution of the first suit can be sought by filing second suit provided the Court in which the first suit was instituted grants leave under sub-rule (3) of Rule 2 of the Code of Civil Procedure.

The deletion of the words 'except with the leave of the Court obtained before the first hearing' at the time of enactment of sub-rule (3) of Rule 2 of the Code of Civil Procedure, 1908 are very significant. In Code of Civil Procedure, 1882, it was permissible for the Court in which the first suit was instituted to grant leave before the first hearing and the expression 'first hearing' means the date when the issues were framed in the suit. The limitation on the powers of the Court to grant leave beyond the date of framing of the issue was removed by the Legislature by

deletion of the words and, in our judgment, under sub-rule (3) of Rule 2, it is open to the Court to grant leave in respect of relief which was omitted to be sought in the first suit till the date of the pendency of the suit in the trial Court.

7. The submission urged by Shri Tulzapurkar that the jurisdiction of the Court to grant leave under sub-rule (3) of Rule 2 can be exercised till the date of decree in the first suit is of considerable merit and deserves acceptance. The object of Order II, Rule 2 being to avoid multiplicity of litigation and sub-rule (3) being a procedural one, the construction should be one which would advance the object of the legislature. The right to seek leave under sub-rule (3) till the disposal of the first suit in no manner affects any substantial right of the defendants and being the procedural rule, the construction should be one which advances the cause of justice. The plaintiff is entitled to more than one relief in respect of the same cause of action and merely because there is an omission to seek all available relief's at the time of the institution of the first suit, that need not deprive the plaintiff of seeking other relief's by institution of second suit, provided leave is obtained from the Court in which the first suit is pending. The plaintiff being entitled to more than one relief on the date of the institution of the first suit, the defendant cannot complain of any prejudice because of grant of leave during the pendency of the first suit. Indeed, the contention of Shri Tulzapurkar that it is always open for the plaintiff to seek amendment and claim relief which was omitted at the date of institution of the suit and, therefore, leave should not be denied by holding that leave should be obtained before the institution of the first suit deserves acceptance. The leave under Sub-Rule (3) is not in respect of a part of the claim which the plaintiff has failed to seek in the first suit, but in respect of the relief's which the plaintiff has omitted to claim in the first suit. In our judgment, as the plaintiff could seek an amendment of the plaint in the first suit at any time during the pendency of the suit and seek relief which was omitted at the time of the institution of the suit, the plaintiff cannot be shut out from seeking leave under sub-rule (3) to institute separate suit for the relief's omitted in the first suit by suggesting that such leave should be secured before institution of the first suit. The plaintiff may not be able to apply for amendment of the plaint in the first suit for numerous reasons and in case the Court is satisfied that the application for leave under sub-rule (3) is bona fide and causes no prejudice to the defendants,

then the jurisdiction of the Court cannot be ousted on the ground that leave should have been sought before the institution of the suit. The omission contemplated by sub-rule (3) in seeking the relief is obviously an accidental one and it is difficult to imagine how the plaintiff can be expected to seek leave prior to institution of suit when a particular relief was omitted due to an error or an accident. In our judgment, leave under sub-rule (3) can be sought any time during the pendency of the first suit but the Court will consider the grant of leave on facts and circumstances of each case.

8. Shri Shah submitted that not only leave can be granted under sub-rule (3) of Rule 2 at any time during the pendency of the first suit, but leave can be secured even after the institution of the second suit. Shri Kadam controverted the submission by pointing out that the wording of sub-rule (3) of Rule 2 makes it clear that leave must be obtained before institution of the second suit and post-facto of grant of leave is not permissible. In our judgment, the submission is correct and deserves acceptance. Sub-rule (3) of Rule 2 of Order II of the Code of Civil Procedure provides that the plaintiff shall not afterwards sue for any relief omitted at the time of institution of the first suit except with the leave of the Court. The expression shall not afterwards sue for any relief except with the leave of the Court' makes it clear that grant of leave under sub-rule (3) is a condition precedent for institution of the second suit. It is not open for the plaintiff to institute second suit without grant of leave and then apply for such leave merely because the first suit is not yet disposed of. In our judgment, though it is not necessary for the plaintiff to seek leave under sub-rule (3) of Rule 2 before institution of the first suit, such leave must be sought before institution of the second suit provided the first suit is pending hearing before the trial Court.

9. Mr. Justice Varadchariar examined the question in decision reported in A.I.R. 1938 Mad 979 Edara Venkayya v. Edara Venkata Rao, where identical objection was raised to the grant of leave on the ground that leave should have been sought before the institution of the first suit. The learned Judge did not accept the objection. The learned Judge observed :

'Where the objection under Order 2, Rule 2, Civil P.C., arises, the omission to ask for a particular relief is not a defect that goes to the maintainability of the very suit in which leave should have been asked for: it only entails a disability as regards subsequent proceedings. It therefore, seems to me that there is even less reason in this class of cases for insisting that the application for leave to omit must proceed or at least be contemporaneous with the plaint in the first suit. It may be that as a matter of prudence the plaintiff will do well to make the application for leave even before he files his plaint or at least along with his plaint, because he will otherwise be running the risk of the application being refused when it will be too late to set matters right. But that is different from saying that the Court has no power to grant leave unless the application is made before the institution of the suit or along with the presentation of the plaint. So far as I can see, the Court when called upon to deal with such an application will ordinarily have to consider whether the grant of leave to reserve certain remedies will in the circumstances be appropriate in the sense that it will not give an unfair advantage to the plaintiff or impose an unfair burden on the defendant. A question of this kind can as well be dealt with by the Court during the pendency of the suit as before its institution. I am therefore, unable to agree with Mr. Somaya's contention that the reason of thing requires that such an application must have been made prior to the institution of the suit in which the application is made. In this view, the omission in the new Code of the words found in parenthesis in Clause 3 of section 43 of the old Code justifies the inference that the Legislature did not wish to insist upon leave being obtained before the first hearing. Some of the Commentators on the new Code (including Sir Dinshaw Mulla) also take this view, and I am not satisfied that view does not correctly represent the intention of the Legislature.'

We are in respectful agreement with the view taken by the learned Judge. The observations of the Division Bench of the Calcutta High Court in the judgment reported in A.I.R. 1919 Cal 904 Upendra Narain Roy v. Janki Nath Roy and others, also supports the decision of Madras High Court. The amendment of plaint was sought in respect of certain relief's which the plaintiff had omitted to claim on the date of the institution of the suit. An objection was raised to the grant of amendment on the ground that the amendment was prohibited in view of the provisions of Order II, Rule 2 of the Code of Civil Procedure. The Division Bench

observed that the rule does not apply to the amendment where there has been only one suit. The Division Bench then observed :

'A case would fall within Order 2, Rule 2, only if a plaintiff fails to apply for amendment before decree, and then brings another suit.'

Before the learned Single Judge of this Court, in the judgment reported in : AIR1954 Bom125 Krishnaji Ramchandra v. Rathunath Shankar and another, it was contended that the bar of Order II, Rule 2 of the Code of Civil Procedure in respect of institution of the second suit can be raised only after the decree is passed in the first suit and not at the point of time when the suit was instituted. The learned Judge observed:

'In a case where the leave of the Court is to be sought, it may be possible to argue that the point of time is not the point of time of the institution of the suit, but the point of time is the point of time of the passing of the decree. But here again it is unnecessary to express any final opinion upon the question because that question does not strictly arise.'

The reliance on this decision by learned Single Judge while delivering judgment under challenge in Appeal No. 509 of 1992, therefore, is not accurate because the decision did not determine issue which falls for consideration in the present case. In our judgment, the view taken by Madras High Court is accurate and is in consonance with our conclusion.

Accordingly, we hold that the plaintiff can seek leave of the Court under sub-rule (3) of the Rule 2 of Order II of the Code of Civil Procedure at any time before the date of decree in the first suit and the jurisdiction of the Court is not ousted because the leave is not sought before the institution of the first suit. The leave to institute second suit can be sought at any time during the pendency of the first suit but such leave must be obtained prior to the date of institution of the second suit. The question as to whether leave should be granted under sub-rule (3) of Rule 2 will depend upon the facts and circumstances of each case and the Court will exercise jurisdiction after considering all the circumstances including whether the application is bona fide and whether it is likely to cause any prejudice to the

defendants. The Court would grant leave provided the plaintiff is seeking leave for any relief omitted and not in respect of any portion of the claim which was omitted or intentionally relinquished at the time of the institution of the first suit.

10. In view of the above conclusion, order dated April 28, 1992 passed by learned Single Judge in Suit No . 1334 of 1990 is required to be set aside and Appeal No. 509 of 1992 is allowed and the impugned order is set aside. The proceedings are required to be remitted back to the learned Single Judge to examine whether leave should be granted on the facts and circumstances of the case. Shri Tulzapurkar submitted that in fact leave was not necessary as the relief sought in the proposed suit was based on entirely different cause of action, than the one which was involved in the first suit. It is open for the appellant to make all permissible submissions in this respect before the learned Single Judge and we do not express any opinion in respect of this submission.

Appeal No. 210 of 1993 is also required to be allowed as the trial Judge has granted leave under sub-rule (3) of Rule 2 after the institution of second suit being Suit No. 795 of 1978 and plaintiff could not have sought such leave post facto. Shri Shah submitted that infact leave was not necessary as the claim made in the second suit was on a different cause of action than one involved in the first Suit being Suit No. 324 of 1977. It is open for Central Bank of India to raise such contention when Suit No. 975 of 1978 comes for hearing and we are not expressing any opinion on the question as to whether leave was at all required as sought by Central Bank of India.

11. Accordingly, Appeal No. 509 of 1992 is allowed and the impugned order dated April 28, 1992 is set aside and the petition dated April 18, 1992 filed by the appellants for grant of leave under Order II, Rule 2 of the Code of Civil Procedure is remitted back to the learned Single Judge for disposal on merits. In the circumstances of the case, there will be no order as to costs.

Appeal No. 210 of 1993 is allowed and the impugned order dated November 3, 1992 is set aside and Chamber Summons No. 611 of 1988 is Suit No. 324 of 1977 is dismissed. There will be no order as to costs. It is open for Central Bank of India to claim in Suit No. 975 of 1978 that leave under Order II, Rule 2 of the Code of

Civil Procedure was not necessary as the claim involved in the suit is entirely different and distinct from one involved in Suit No. 324 of 1977.

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