$~

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on: 16th July, 2019
Pronounced on: 02nd September, 2019

\+ **CM(M) 93/2018**

MOHINDER JEET SINGH ..... Petitioner
Through: Mr.Faheem Shah, Advocate.

versus

BMW INDIA PVT LTD & ORS ..... Respondents
Through: Mr.Aditya V.Singh, Advocate for R-1.

%

CORAM:
HON'BLE MR. JUSTICE PRATEEK JALAN

J U D G M E N T

1. This petition under Article 227 of the Constitution is filed by the plaintiff in CS No. 7860/2016, challenging an order dated 21.09.2017, passed by the ADJ-06 (South East), Saket Courts, New Delhi, whereby the Trial Court has deleted the defendants no. 4 and 5 (being the respondents no. 1 and 2 herein) from the array of parties in the suit.

2. The plaintiff filed the suit on 24.12.2014 with regard to allegation of certain defects in a second-hand car (BMW 320D, 2011 model, bearing registration number DL3C AM 7007) purchased by him on 12.03.2014. He sought recovery of a sum of ₹19,80,000/- and

interest thereupon. The plaintiff arrayed six parties as defendants in the suit: -

"1. Infinity Cars
Through its Partner
At A-14, Kailash Colony,
New Delhi-110048

2. M/s Look East Nirman Len
(through its Proprietor / Partner)
At E-49, Ground Floor, G.K.,
Part-I, New Delhi-1100048

3. ICICI Lombard General Insurance Company Ltd.
At Plot No-18, Block-K,
3 CS Cinema, Lajpat Nagar-II ,
New Delhi - 110024
Also at:
ICICI Bank Towers,
Bandra-Kurla Complex,
Mumbai-400051

4. BMW India Pvt. Ltd.
At Tower B, 7th Floor, Building No. 8
DLF Cyber City, Phase-II, Gurgaon,
Haryana-122002

5. M/s Deutsche MotorenPvt. Ltd.
At H5/B-1, Mohan Cooperative Indl. Estate,
Badarpur, Mathura Road,
New Delhi 110044

6. M/s. Bird Automotive Pvt. Ltd.
4 IDC M.G. Road,
Opp. Sector 14, Gurgaon – 122001"

3. It is discernible from the plaint that the plaintiff had purchased the car from defendant no. 1, which is a dealer in second-hand cars. Defendant no. 2 is the previous owner of the car purchased by the plaintiff. Defendant no. 3 is the insurance company with which the car was insured, which had repudiated the plaintiff's claim under the insurance policy. Defendant no. 4 is the manufacturer of the car, and defendant no. 5 is its authorised dealer. Defendant no. 6 is the agency which is alleged to have inspected the car prior to its purchase by the plaintiff.

4. The allegation of the plaintiff is that on 19.06.2014, within three months of purchase of the car by him, the car started emitting smoke and burnt down on starting the ignition. The plaintiff registered an FIR and claimed indemnity from defendant no. 4, the failure of which led to the institution of the suit.

5. The defendants no. 4 and 5 filed their written statements to the suit on 14.05.2015 and 16.04.2015 respectively, and also made applications for deletion of their names from the array of parties under Order I Rule 10 of the Code of Civil Procedure, 1908 ("CPC"). The defendant no. 4 has sought deletion of its name on the ground that the suit was one for a claim arising out of an insurance policy. Although the defendant no. 4 did not dispute its status as the manufacturer of the car in question, it contended that the warranty having expired even prior to the purchase of the car by the plaintiff, the plaintiff had failed to disclose a cause of action against it. The application of defendant no. 5 is predicated on the submission that the inspection alleged to have been carried out by it was not supported by evidence.

6. The plaintiff reiterated the relevant contents of the plaint in opposition to the applications filed by the defendants no. 4 and 5. As against defendant no. 4, the reply to the application reiterates that the cause of action arose out of a manufacturing defect in the car. As against defendant no. 5, the plaintiff has emphasised that the car was inspected by the said defendant prior to its purchase by the plaintiff, and has referred to an invoice raised by the defendant no. 5 in this regard.

7. By the impugned order, the Trial Court allowed the applications with the following reasoning: -

> *"Admittedly, vehicle was purchased by the defendant no. 1 on 12.03.2014. From the record it is also transpired that initially the vehicle was purchased by defendant no. 1 on 27.07.2011 which is the date mentioned on the RC of the Vehicle. During the course of argument, learned counsel for plaintiff has failed to point out any piece of evidence to show that the vehicle was got inspected from defendant no. 5 before its purchase from defendant no. 1. Except the averment in para 3 of the plaint there is no document on record to this effect. Even there is no date of alleged inspection mentioned in the plaint when the vehicle was got inspected. Admittedly, the fire took place on 19.06.2014. During the course of argument, learned counsel for plaintiff to substantiate his submissions drawn the attention to the court to the news paper cutting attached with the reply filed by plaintiff to both applications. This court is of view that news paper cutting is not a piece of evidence. Moreover, record speaks that there is no report of the expert to show the cause of fire in the vehicle. In these circumstances, it can not be presumed without any documentary evidence that fire took place due to mechanical/manufacture defect in the vehicle, since, there is no document to this effect. With*

> *these observations this court is of view that both applications are liable to be allowed. Hence, defendant no. 4 and 5 are deleted from the array of defendant. Both the applications are disposed off accordingly"*

8. While issuing notice in the present petition to respondents no. 1 and 2, this Court, by an order dated 22.01.2018, had stayed further proceedings in the suit.

9. I have heard learned counsel for the petitioner (plaintiff in the suit) and respondent no. 1 (defendant no. 4 in the suit). Although respondent no. 2 (defendant no. 5 in the suit) had entered appearance in the proceedings, it was not represented on the date of hearing. Respondent no. 2 has also not availed of the opportunity of filing written submissions granted by the order dated 16.07.2019, while reserving judgment in the petition.

10. Order I Rule 10 of the CPC deals with addition and deletion of parties to suit. It provides as follows:-

> *"10. Suit in name of wrong plaintiff*
>
> *(1) Where a suit has been instituted in the name of the wrong person as plaintiff or where it is doubtful whether it has been instituted in the name of the right plaintiff, the Court may at any stage of the suit, if satisfied that the suit has been instituted through a bona fide mistake, and that it is necessary for the determination of the real matter in dispute so to do, order any other person to be substituted or added as plaintiff upon such terms as the Court thinks just.*
>
> *(2) Court may strike out or add parties- The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court to be just, order that*

the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joinded, whether as plaintiff or defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added.

(3) No person shall be added as a plaintiff suing without a next friend or as the next friend of a plaintiff under any disability without his consent.

(4) Where defendant added, plaint to be amended- Where a defendant is added, the plaint shall, unless the Court otherwise directs, be amended in such manner as may be necessary, and amended copies of the summons and of the plaint shall be served on the new defendant and, if the Court thinks fit, on the original defendant.

(5) Subject to the provisions of the Indian Limitation Act, 1877 (15 of 1877), section 22, the proceedings as against any person added as defendant shall be deemed to have begun only on the service of the summons."

11. As far as defendants no. 4 and 5 are concerned, the following extracts of the plaint *inter alia* contain allegations against them:

"1. That the Plaintiff is the bonafide owner of a Vehicle of the Make BMW 320D 2011 Model, having registration number DL 3C AM 7007 Chasis No. WBA PP 17090NN33714, Engine No. 74707715. ***The Defendant No. 4 is manufacturer of the BMW cars and claims itself to be one of the luxurious brands of cars dealing in world's finest Automobiles*** *having a high repute in providing cars with extreme comfort, luxury and safety. The BMW cars are high end costly cars and it is expected that such cars are manufactured with state of*

art technologies whereby there is no scope of any kind of malfunctioning or even remote technical defect. ***It is represented by defendant No. 4 that the life of the engine and other technical parts of the car is minimum five years or 200000 kilometers, whichever is early.*** *It is stated that generally the dealers offer one year/two year/three year warranty/guaranty or any extended warranty/guaranty however, even in absence of any specific contract of warranty/guaranty, the said vehicles have inherent capability to run without any hassle or technical defect for the said period of five years / 200000 kilometers, as mentioned above.* ***It may be relevant to mention that existence or absence of any specific contract of warranty/guaranty does not make any difference as the liability of the manufacturer to supply a defect free vehicle is absolute for the minimum expected life of the vehicle which the defendant No. 4 represents in respect of BMW vehicles as five years / 200000 kilometers.***

xxxx xxxx xxxx

3. That the plaintiff was looking for a second hand car and approached defendant No. 1 for the said purpose. The defendant No. 1 projected a rosy picture about its dealings and induced the plaintiff to purchase the car of BMW make i.e. the car in question. The defendant No. 1 represented that it has duly inspected the car and the same is defect free and genuine vehicle. ***In order to prove its point, the defendant No. 1 sent his driver along with the plaintiff to the workshop of defendant No. 5 where the inspection of vehicle was carried out in presence of the plaintiff and a scanned report was provided to the plaintiff. It was represented by defendant No. 5 that the said car has no technical/manufacturing defect and the same was as good as new car and the plaintiff can purchase the same.***

xxxx xxxx xxxx

5. That ***based on the inducements and representations given by defendant No. 1, 2, 4 & 5, the plaintiff purchased the car in question****....*

xxxx xxxx xxxx

10. That thereafter the intimation of the aforesaid incident was given to the defendant. ***The defendant No. 4 appointed defendant No. 6 to examine the matter*** *and compensate the plaintiff. The plaintiff repeatedly requested the defendants to compensate for the damages suffered by him for reasons solely attributable to the defendants, however, they did not pay any heed to it and kept delaying it and later on clearly refused to compensate the Plaintiff and no such action was taken by them to indemnify the plaintiff for the* ***losses which had occurred only on account of serious manufacturing defects in the vehicle.***

11. ***That the vehicle manufactured by Defendant No. 4 had inherent defects due to which the plaintiff suffered extreme harassment and agony and his nephew and driver suffered trauma after having a narrow escape.*** *The hard earned money of the plaintiff in buying the aforesaid luxury car, believing the assurances given by the defendants that it did not have any defect in manufacturing have been wasted and the defendants are refusing to pay for the damages.*

xxxx xxxx xxxx

13. That the defendants have casually treated the entire incident. The plaintiff approached defendants No. 4 & 6 who did not take any step to indemnify the plaintiff. They casually shifted the liability by stating that the insurer will pay the claim. It is stated that the vehicle suffered such untoward incident only because it had manufacturing defect, else there was no reason that the vehicle would catch fire in normal running condition. The defendants No.4 & 6 ought to have admitted the liability

and indemnified the plaintiff independent of the insurance company.

xxxx xxxx xxxx

15. ***That the defendants are jointly and severally liable*** *to pay damages of Rs.18,30,000/- to the plaintiff plus interest at the rate of 18% per annum from the date of the aforesaid incident to the plaintiff till payment. The plaintiff hereby restricts the claim of interest from the date of the present suit. Besides, the defendants are also liable to compensate the plaintiff towards the mental agony and harassment which the plaintiff and his family faced due to the defendants. Although no amount of money can compensate for the trauma suffered by the plaintiff and his family however the plaintiff is restricting the claim to the tune of Rs.1,50,000/- to be paid by the defendants jointly and severally.*

16. ***That the car suffered fire due to a technical defect which could have been fatal.*** *The defendant No. l is liable as the car was purchased on his representation and the defendant No. 1 gave oral guaranty of one year that the car will remain defect free. The defendant No. 2 is also liable being the previous owner and having represented that the car was defect free. The defendant No. 3 is the insurer and is liable to indemnify the plaintiff. It is submitted that the defendant No. 3 has rejected the claim of the plaintiff on the flimsy grounds.* ***The defendant. No. 4 is the manufacturer and was duty bound to indemnify the plaintiff for the loss to the vehicle on account of manufacturing defect.*** *It is stated that the vehicle in normal running condition cannot catch fire unless there is inherent serious manufacturing defects.* ***The defendant No.5 is liable being the authorized dealer and also having given a certificate that the vehicle is defect free.*** *The defendant No. 6 is liable as it conducted necessary inspection and fraudulently avoided to give report regarding manufacturing defect in the vehicle. The car in question*

> *is still in possession of defendant No.6. The defendants are jointly and severally liable to indemnify the plaintiff for the losses, as mentioned above."*
>
> (Emphasis Supplied)

12. In general, it is for the plaintiff in a suit to decide against whom it wishes to proceed [See *Mumbai International Airport (P) Ltd*. vs. *Regency Convention Centre & Hotels (P) Ltd. & Ors.* (2010) 7 SCC 417, paragraph 13]. The impleadment of a party can be on the basis that it is a necessary or a proper party to the proceedings. A necessary party is one against whom the plaintiff seeks relief or in whose absence an effective decree cannot be passed. A proper party is one against whom relief may not be sought but whose presence is essential for the determination of the questions involved in the suit. In *Mumbai International Airport* (supra), the Supreme Court has explained the distinction, thus: -

> "*15. A "necessary party" is a person who ought to have been joined as a party and in whose absence no effective decree could be passed at all by the court. If a "necessary party" is not impleaded, the suit itself is liable to be dismissed. A "proper party" is a party who, though not a necessary party, is a person whose presence would enable the court to completely, effectively and adequately adjudicate upon all matters in dispute in the suit, though he need not be a person in favour of or against whom the decree is to be made. If a person is not found to be a proper or necessary party, the court has no jurisdiction to implead him, against the wishes of the plaintiff. The fact that a person is likely to secure a right/interest in a suit property, after the suit is decided against the plaintiff, will not make such person a necessary party or a proper party to the suit for specific performance.*"

13. The deletion of a party as a defendant in a suit is therefore possible only upon arriving at a determination that the party is neither a necessary nor a proper party to the suit.

14. The allegations contained in the plaint in the present case must be analysed in the context of these principles. The relief sought in the plaint is for a decree against "the defendants, jointly and severally". To this extent, it is clear that the plaintiff has sought relief against the defendants no. 4 and 5 as well. The question then is whether he has disclosed a cause of action against the said defendants, entitling him to proceed against them.

15. As far as the defendant no. 4 is concerned, the plaint makes out a case of a manufacturing defect which led to the fire in the car. The defendant no.4 does not deny the fact that it has manufactured the car, but disputes liability on the ground that the warranty had expired. There is a categorical assertion in the plaint that the car was inspected by defendant no.5, and a report was provided to the plaintiff. In its reply to the application filed by the defendant no.5, the plaintiff has also averred that the defendant no.5 had raised an invoice on him for this purpose. In this context, the analysis of the plaint in the impugned order is unsatisfactory. The Trial Court appears to have proceeded primarily on the basis that the plaintiff had failed to adduce any documentary evidence that the vehicle suffered from a manufacturing defect, and that there was no document in support of the plaintiff's case of an inspection by defendant no.5. The analysis of the evidence by the Trial Court was unwarranted at this stage of the suit, and is a matter which ought to have been reserved for trial. In the light of the

aforesaid allegations in the plaint, the present case was not one in which the plaintiff had failed to plead a cause of action against defendant no. 4 and 5

16. In the written submissions filed on behalf of respondent no.1, two judgments have been cited. In *Ramesh Hirachand Kundanmal* vs. *Municipal Corporation of Greater Bombay & Ors.* (1992) 2 SCC 524, the Supreme Court held that a person cannot be impleaded as a party only on the basis that it has relevant evidence. The Court has formulated the test, thus: -

> *" 14. It cannot be said that the main object of the rule is to prevent multiplicity of actions though it may incidentally have that effect. But that appears to be a desirable consequence of the rule rather than its main objective. The person to be joined must be one whose presence is necessary as a party. What makes a person a necessary party is not merely that he has relevant evidence to give on some of the questions involved; that would only make him a necessary witness. It is not merely that he has an interest in the correct solution of some question involved and has thought of relevant arguments to advance. The only reason which makes it necessary to make a person a party to an action is so that he should be bound by the result of the action and the question to be settled, therefore, must be a question in the action which cannot be effectually and completely settled unless he is a party. The line has been drawn on a wider construction of the rule between the direct interest or the legal interest and commercial interest. It is, therefore, necessary that the person must be directly or legally interested in the action in the answer, i.e., he can say that the litigation may lead to a result which will affect him legally that is by curtailing his legal rights. It is difficult to say that the rule contemplates joining as a defendant a person whose only object is to prosecute his own cause of action.*

> *Similar provision was considered in Amon v. Raphael Tuck & Sons Ltd. [(1956) 1 All ER 273 : (1956) 1 QB 357] , wherein after quoting the observations of Wynn-Parry, J. in Dollfus Mieg et Compagnie S.A. v. Bank of England [(1950) 2 All ER 605, 611] , that their true test lies not so much in an analysis of what are the constituents of the applicants' rights, but rather in what would be the result on the subject matter of the action if those rights could be established, Devlin, J. has stated:*
>
> > *"The test is 'May the order for which the plaintiff is asking directly affect the intervener in the enjoyment of his legal rights'."*"

It is clear from the facts of the said case that the plaintiff had not sought any relief against the party seeking deletion. In contrast, in the present case, the plaintiff had sought a decree against defendants no. 4 and 5 by virtue of which they are necessary parties to the suit, subject only to the disclosure of a cause of action against them. In *Mitsubishi Electric India Pvt. Ltd*. vs. *Anup Mittal & Ors*. 2015 (220) DLT 436, this Court reiterated the principles laid down by the Court of the Judicial Commissioner, Goa, Daman and Diu in *Gonsalo De Filomena Luis* vs. *Inacio Piedade Hildeberte Fernandes & Ors*. AIR 1977 GDD 4. The said judgment deals with a case where parties were sought to be added to the suit without any relief being claimed against them. Therefore, it is also not applicable to the present case when the plaintiff has sought relief against the defendants seeking deletion, in addition to the other defendants.

17. In the aforesaid circumstances, the petitioner has made out a case for interference with the impugned order, which is set aside. The

defendants no. 4 and 5 are restored to their original positions in the suit. However, it is made clear that in the event the said defendants are ultimately not found liable to the plaintiff, they will be entitled to seek an appropriate order of costs in their favour.

18. The petition is allowed in the terms aforesaid. There will be no order as to costs.

PRATEEK JALAN, J.

SEPTEMBER 02, 2019/s