
(2014) 07 AHC CK 0202
In the Allahabad High Court
Case No : C.M.W.P. No. 7032 of 2013

B.J. Nagrath

APPELLANT

Vs

Chairperson, Debt Recovery Appellate Tribunal

RESPONDENT

Date of Decision : 16-07-2014

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 6 Rule 17, Order 6 Rule 18, Order 7 Rule 11
Constitution of India, 1950 — Article 226, 227

Citation : (2014) 8 ADJ 276 : (2014) 106 ALR 113 : (2014) 6 AWC 5885 :
(2015) 1 BC 63 : (2014) 125 RD 418

Hon'ble Judges : Sudhir Agarwal, J

Bench : Single Bench

Advocate : Dhruv Mehta, Anjani Kumar Mishra, Rajeev Trivedi, Kartikeya Saran and Jivesh, Advocate for the Appellant; Siddharth and K.M. Asthana, Advocate for the Respondent

Final Decision : Allowed

Judgement

Sudhir Agarwal, J.—Heard Sri Dhruv Mehta, Senior Advocate, assisted by Sri Jivesh, Advocate and Sri Kartikeya Saran, learned Counsel for the petitioners and Sri Siddharth, learned Counsel for the contesting respondent-Bank. In an extra bulky paper book, running in more than 600 pages, issue raised in this writ petition filed u/s 226/227 of the Constitution is really a short one, whether orders dated 3.4.2012, 27.11.2012 passed by Debt Recovery Tribunal, Allahabad (hereinafter referred to as "DRT") and dated 8.1.2013 passed by Debt Recovery Appellate Tribunal, Allahabad (hereinafter referred to as "DRAT") which have the effect of allowing amendment application dated 16.1.2012 preferred by original applicant i.e., Bank of India are correct and justified. The question of law raised is "whether prerequisites before allowing a belated amendment application are satisfied in the case in hand? "amendment application are satisfied in the case in hand?"

2. The brief factual matrix, to understand the dispute reads as under:

3. M/s. Nagrath Paints Pvt. Ltd. engaged in the business of manufacture of Paint, Enamel and other related allied products, having factory at Premises No. 46, Fazalganj, Industrial Area, Kanpur, was advanced financial assistance by the Bank, sometime in the year 1986, in the form of Cash Credit (Hypothecation of Stocks), Working Capital Terms Loan and Bill Purchase Limit. There were eight guarantors, which included petitioners also. The documentary formalities were completed whereafter principal borrowers i.e., M/s. Nagrath Paints Pvt. Ltd. availed financial assistance from the Bank. There being some default in repayment, the Bank issued demand notice to petitioners on 15.11.1996.

4. On 17.1.2000, Bank filed Original Application No. 50 of 2000 before DRT at Jabalpur impleading Principal borrowers and eight guarantors as defendants, with the prayer for issuance of recovery certificate of Rs. 11,79,02,310.24 against defendants, jointly and severally together with pendente lite and future interest thereon @17.25% per annum, with quarterly rests, in respect of Cash Credit (Hypothecation of stock) A/c and Inland Bills Purchase Account, and @10.50% per annum with quarterly rests in respect of WCTL-I and WCTL-II, charging the amount of certificate with interest aforesaid on the mortgaged properties, detailed hereinabove, for realisation thereon.

5. Contesting Original Application, the present petitioners filed an application under Order VII, Rule 11, C.P.C. requesting for rejection of Original Application being barred by limitation.

6. The issue of limitation being a mixed question of fact and law, DRT vide order dated 1.3.2006 declined to reject original application on the ground of limitation and held that objection of limitation would be taken up while deciding the matter on merits. It directed the petitioners to file written statement raising all the grounds including grounds taken in application filed under Order VII, Rule 11, C.P.C.

7. The petitioners, it appears, preferred appeal thereagainst, which was dismissed. Thereafter they filed writ petition, which was dismissed and ultimately the order dated 1.3.2006 attained finality after dismissal of SLP before Supreme Court.

8. On 3.1.2008, when the matter was in the process of hearing, Bank filed a replication to the written statement alongwith certain documents. The petitioners objected to such replication vide objection dated 24.7.2009. DRT vide order dated 14.10.2009 permitted the Bank and accepted on record replication alongwith documents. The petitioners came in appeal No. R-1148/09 before DRAT which was allowed on 6.9.2011 and DRT's order dated 14.10.2009 was set aside. DRAT held that Bank cannot introduce a new cause of action by way of replication though it is at liberty to make an amendment in accordance with law.

9. The Bank then came in Writ Petition No. 75492 of 2011. This Court, vide judgment dated 2.1.2012, upheld order of DRAT but said, if an amendment application is filed, the other side may have a right to file objection and DRT may

decide amendment application in accordance with law. Thereafter, the Bank filed amendment application in January, 2012 seeking amendment as under:

8. That the following amendments may be made in paragraph No. 5.29, after serial No. 11:

This may be exhibited as Exhibit A - 60-A, A - 60-B, A-60-C and A-60-D as Letters of Acknowledgement of Debts executed by the defendants No. 2,3 and 4.

9. That similarly in Paragraph No. 5.33 after 14.2.1997 in sixth line on top 24.2.1997 may be permitted to be added.

10. The petitioners filed objection but DRT allowed amendment application vide order dated 3.4.2012 whereagainst petitioners preferred review, which was rejected on 16.4.2012 and thereagainst petitioner's appeal has also been rejected by DRAT vide order dated 8.1.2013.

11. Sri Dhruv Mehta, learned Senior Advocate assisted by Sri Kartikeya Saran contended that amendment application of Bank could have been considered by DRT strictly in the light of principles under Order VI, Rule 17, C.P.C. and not beyond that. This Court did not authorise DRT to allow amendment in Original Application, if sought by Bank, even if it would not have been permissible under the statute since conditions precedent and prerequisites are not satisfied. The assumption on the part of DRT that amendment itself has been allowed by this Court is clearly erroneous.

12. Per contra, Sri Siddharth, learned Counsel appearing for respondent-Bank contended that documents, which are referred to in para 8 of amendment application, were already part of record and nothing new was sought to be added by the Bank, therefore, it cannot be said that DRT has committed any error in allowing amendment and in any case, petitioners are not prejudiced.

The amendment can be allowed at any stage of proceedings and with due leniency and therefore, it is not a fit case where this Court must interfere.

13. There are three issues, which this Court finds, need be considered:

(i) Whether the order dated 2.1.2012 of this Court passed in Writ Petition No. 75492 of 2011 has left no option with DRT but to allow amendment and the manner in which DRT has read the said order is correct?

(ii) Whether DRT was bound to consider amendment application in the light of the Order VI, Rule 17, C.P.C.

(iii) Whether amendment in the case in hand satisfy requirement of statute.

14. While going through the first question, formulated above, I find it appropriate to reproduce the entire order of this Court, passed on 2.1.2012 in Writ Petition No. 75492 of 2011:

After the matter was argued at some length, this Court feels that interest of

substantial justice would be served by disposing of the present writ petition at this stage without calling for any further affidavits specifically in view of the order proposed to be passed today.

By means of the order impugned the Debt Recovery Appellate Tribunal has partly allowed the appeal and the order of the Debt Recovery Tribunal dated 14.10.2009 has been set aside. The Appellate Tribunal has recorded that no amendment by way of replica can be permitted on the issue of limitation and the plaintiff must make an appropriate application for amending the plaint itself. Such liberty has been granted. The review application filed against the said order has also been dismissed. Hence the present writ petition.

There appears to be some substance in the contention raised on behalf of the plaintiff petitioner that the plea that the suit being barred by limitation was raised by the defendant in his written statement. In reply to the same facts were stated in the replica to establish that the suit is not barred by limitation. No amendment in the plaint is required for the same. The order of the Appellate Tribunal prima facie appears to be uncalled for.

However, this Court feels that entertaining the present writ petition will unnecessarily prolong the proceedings before the Debt Recovery Tribunal which cannot be in the interest of the Bank, the plaintiff. Therefore the writ petition is disposed of by issuing following directions:

(a) The Bank may file an amendment application for bringing on" record all relevant facts for establishing that the suit is within time, within two weeks from today alongwith a certified copy of this order, after service of the same upon the Counsel for the respondent.

(b) Objections to the application may be filed within two weeks thereafter.

(c) The application shall be considered and decided by the Tribunal by means of a reasoned speaking order preferably within four weeks thereafter.

(d) The Tribunal is further directed to proceed with the suit on day to basis without granting any unnecessary adjournment to either of the parties and to conclude the proceedings within four months thereafter. With the aforesaid directions, the present writ petition is disposed of.

15. A bare perusal of aforesaid order makes it clear that this Court gave a discretion to the Bank to file an amendment application for bringing on record relevant facts so as to establish that the suit is within time. The defendants were permitted to file objection to such an amendment application. The DRT was further directed to decide amendment application by a reasoned speaking order and thereafter to proceed to decide suit expeditiously so as to conclude the proceedings within four months after disposal of amendment application, if any.

16. Apparently, there was no mandate issued by this Court so as to authorize DRT to admit an amendment as soon as it :s made by the Bank, without looking

into prerequisites of statutes, in the facts and circumstances of the case, whether such an amendment would be permissible in law or not. DRT, in the penultimate paragraph 18 of its order dated 3.4.2012 has allowed amendment by giving reference to this Court's order as if it has been mandated by this Court, but it is not correct. The application seeking amendment had to be considered in the light of statutory provisions i.e., whether amendment sought, can be permitted or not.

17. Now questions No. 2 and 3 can be dealt with together. It is no doubt true that initially, amendment applications, used to be allowed with due indulgence granted liberally except of a few exceptions like introduction of a new cause of action, bringing a time barred cause, change of nature of the suit etc. This is evident from a receipt decision. Construing a matter prior to 2002, in *Lakha Ram Sharma Vs. Balar Marketing Pvt. Ltd.*, the Court held that amendment of pleadings at any stage is permissible and should be allowed liberally subject to certain inbuilt restriction like where it changes the nature of proceedings or may revive a time barred relief or result in an irreparable loss or prejudice to other side.

18. Time and again, Apex Court had given a very wide scope to amendment of pleadings. However, there is an intervention of Legislature with an object for preventing dilatory tactics to delay disposal of cases. In that view of the matter, first intervention came by virtue of C.P.C. Amendment Act, 1999 whereby, in Order VI, Rules 17 and 18 were omitted. However, this complete omission of Rules 17 and 18 did not found favour with litigating people and realizing their hardship, Legislature again intervened vide Amendment Act, 2002 whereby Rule 17, Order VI, C.P.C. was incorporated but with a restricted scope. A proviso was added therein. Order VI, Rule 17 came to be inserted by Amendment Act, 2002 reads as under:

"17. Amendment of pleadings.--The Court may at any stage of 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."

(Emphasis added)

19. A bare perusal of above Rule 17 would show that an amendment is permissible by Court at any stage of proceedings, of course, in such manner and in such terms as the Court may find just, but, such an amendment is required to be necessary for the purpose of determining real question in controversy between the parties. It gives very wide power to Court for allowing amendment but the proviso added therein restricts such wide power of the Court,

simultaneously, by observing that no application for amendment shall be allowed after Trial has commenced unless the Court comes to the conclusion that in spite of due diligence, party could not have raised the matter before commencement of Trial.

20. Now there is an embargo on an application for amendment to be allowed once the Trial has commenced. The embargo is complete. The only scope, thereafter is that the Court must come to the conclusion that despite due diligence, such matter could not have been raised by the party (ies) concerned before commencement of Trial. Therefore the party seeking amendment, after commencement of Trial, is bound to first plead and then prove that amendment it has sought, could not have been pleaded by it, before commencement of Trial, despite its due diligence. After the Trial has commenced, an amendment cannot be sought and allowed as a matter of course unless conditions of due diligence is found to have existed therein, since it is prohibited by proviso to Order VI, Rule 17, C.P.C.

21. Before this Court it is not disputed by learned Counsel for parties that the Trial has commenced and at the state of hearing. The Apex Court in *Kailash Vs. Nanhku and Others*, had held that a Trial is deemed to have commenced when the issue are settled and the case is set down for recording of evidence. This view has been followed in *Baldev Singh and Others, etc. Vs. Manohar Singh and Another, etc.*, : *Baldev Singh and Others Etc. Vs. Manohar Singh and Another Etc.*, and *Ajendraprasadji N. Pande and Another Vs. Swami Keshavprakeshdasji N. and Others*,

22. The Apex Court has held in *Ajendraprasadji N. Pande (supra)* that Order VI, Rule 17, C.P.C. as amended by Amendment Act, 2002 does not permit an amendment once the Trial has commenced unless despite due diligence, matter could not be raised before the commencement of Trial. The Court held that provision is "mandatory" and precludes a party to seek amendment of his pleadings once the Trial has commenced unless requirement of proviso itself is satisfied. In taking this view, the Apex Court also referred to and relied on its earlier decision in *Salem Advocate Bar Association, Tamil Nadu Vs. Union of India (UOI)*,

23. To the same extent, is the view taken by this Court in *Rajkumar Gurawara (Dead) thr. L.Rs. Vs. S.K. Sarwagi and Co. Pvt. Ltd. and Another*, and *Revajeetu Builders and Developers Vs. Narayanaswamy and Sons and Others*, This Court has also followed the above exposition of law by referring to *Revajeetu Builders (supra)* in *Sri Krishan Mittal v. Upper District judge C.N. 10 Bijnor and others*, Writ A No. 46709 of 2012, decided on 13.9.2012.

24. In *J. Samuel and Others Vs. Gattu Mahesh and Others*, the Court observed that, on a proper interpretation of proviso to Rule 17, Order VI, C.P.C. the party has to satisfy the Court that he could not discover that ground which was pleaded by proposed amendment of the plaint, despite due diligence. No doubt,

Rule 17 confers power on the Court to amend pleading at any stage of the proceedings. However, the proviso restricts that power, once the trial has commenced. Unless the Court is satisfied that there is a reasonable cause for allowing amendment, normally the Court has to reject such requests. Due diligence is the idea behind such restriction, that is, a reasonable investigation is necessary before certain kinds of relief are requested. Undoubtedly, diligent efforts are a requirement for a party seeking to use adjudicatory mechanism to attain an undisputed relief. An Advocate representing someone has to engage himself in due diligence to determine that the representations made by him are factually correct and sufficient. The term due diligence is specifically used in the Court so as to provide a test for determining whether to exercise a distinction in a situation of requested amendment after the commencement of trial. A party requesting a relief stemming out of a claim is required to exercise due diligence. It is a requirement which cannot be dispensed with. The term "due diligence" determines the scope of parties' constructive knowledge, and is critical to the outcome of the suit. The Court also observed that decisions given before insertion of proviso to Order VI, Rule 17, C.P.C. may not help the parties to decide cases after such amendment has been inserted in C.P.C. The entire object of amendment to order VI, Rule 17, as introduced in the year 2002, is to stifle filing of application for amendment of a pleading, subsequent to the commencement of Trial Court, to avoid surprises and that the parties had sufficient knowledge of other's case. It also helps checking delays in filing applications. The Court in making the aforesaid observation relied on its earlier decisions in *Aniglase Yohannan Vs. Ramlatha and Others*, *Chander Kanta Bansal Vs. Rajinder Singh Anand, Rajkumar Gurawara (Dead) thr. L.Rs. Vs. S.K. Sarwagi and Co. Pvt. Ltd. and Another*, *Vidyabai and Others Vs. Padmalatha and Another*, and *Man Kaur (dead) by LRS. Vs. Hartar Singh Sangha*,

25. The view, I have taken above, has also been reiterated by this Court in *Suraj Prakash Vs. Waqf Khudaband Tala Mausooma*, and *Shanti Swaroop v. Smt. Rama Sharma*, Civil Misc. Writ Petition No. 61790 of 2012, decided on 29.11.2012.

26. In the present case, the amendment has been sought not only after the trial has commenced but at the stage of conclusion of trial i.e., at the stage of hearing, without satisfying the Court as to why assertion of such facts could not be made with due diligence before commencement of trial when initial pleadings were filed before Trial Court. On this aspect virtually there is no averment. It cannot be said that there is a proper justification stated to do away the rider imposed by proviso to Order VI, Rule 17, C.P.C. Therefore, I have no hesitation in holding that the Court below has illegally allowed amendment sought by the Bank.

27. Counsel for the Bank at this stage submitted that documents referred to in the amendment application are already part of record.

28. Be that as it may, I am not going into this aspect of the matter. So far as this Court is concerned, suffice it for me to see whether amendment in question has

been allowed correctly, validly, justly and in accordance with law or not. I find no hesitation in observing that statutory prerequisites, before allowing amendment, have not been taken care of by Tribunal. It has got itself influenced from the fact as to whether defendants would be prejudiced or not and that they would be getting opportunity to represent the claim sought to be set up by the Bank, by bringing on new facts by way of amendment. The approach of DRT and DRAT in this regard is inconsistent with the requirement of law. They had to look strictly into amendment in the light of requirement under Order VI, Rule 17 and ought to have first find out whether justification for bringing a highly belated amendment has been provided by applicant in the amendment application or not, which inquiry unfortunately both the authorities below have not been made and have committed manifest error in proceeding otherwise. In the result, the writ petition succeeds and is allowed. The impugned orders dated 3.4.2012, 27.11.2012 and 8.1.2013 are hereby set aside. The Tribunal is directed to reconsider amendment application of the Bank, in the light of observations made above, and pass appropriate order in accordance with law, expeditiously, in any case, within six weeks from the date of production of a certified copy of this order.