

(2006) 08 DEL CK 0162
In the Delhi High Court
Case No : CM (M) No. 217 of 1998

Capt. Jai Singh Jakhar

APPELLANT

Vs

The Director (Estate), NDMC

RESPONDENT

Date of Decision : 23-08-2006

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 10, Order 6 Rule 17, 151
Constitution of India, 1950 — Article 227
Public Premises (Eviction of Unauthorised Occupants) Act, 1971 — Section 4, 4(2), 5, 7

Citation : (2006) 132 DLT 184 : (2007) 1 RCR(Civil) 570 : (2007) 1 RCR(Rent) 95

Hon'ble Judges : Sanjay Kishan Kaul, J

Bench : Single Bench

Advocate : D.S. Dalal, for the Appellant; Arjun Pant, for the Respondent

Final Decision : Dismissed

Judgement

Sanjay Kishan Kaul, J.—The respondent NDMC filed an application under Sections 5 and 7 of the Public Premises (Eviction of Unauthorised Occupants) Act, 1971 (hereinafter referred to as the said Act) against the petitioner in respect of office unit No. 23, Palika Place, RK Ashram Marg, New Delhi. The application dated 19.12.1991 avers that a license was granted to the petitioner in respect of the office unit for a period of five years w.e.f. 23.10.1989 at a monthly license fee of Rs. 5,710/-. The petitioner is alleged not to have paid license fee w.e.f. 1.1.1990 despite demand notices and the license was cancelled on 6.7.1991. The possession of the office unit was thus sought as also the arrears of the license fee. A subsequent application was filed by the respondent on 22.7.1992 stating that the office unit was found lying abandoned/unlocked/vacant during the course of inspection on 26.6.1992 and the respondent had taken over vacant possession of the office unit. Thus the relief u/s 5 of the said Act was stated not to survive but damages were claimed for use and occupation along with interest for the period ending 26.6.1992.

2. The petitioner filed a reply and inter alias and took a preliminary objection that the application for allotment was made to M/s. Impex International on 19.9.1989 and even the letter for taking possession was issued to M/s. Impex International by the respondent on 23.10.1989. The reply is dated 9.10.1992 and is stated to have been filed on 15.1.1993. In the rejoinder, the respondent denied the aforesaid averments. The alleged License Deed as per petitioner was stated to be executed between the respondent and M/s. Impex International. Since no proceedings had been initiated against M/s. Impex International nor any notice sent to the other partners apart from the petitioner, the application was stated to suffer from the non-compliance of Section 4(2)(b) of the said Act. Section 4 reads as under:

4. Issue of notice to show cause against order of eviction. - (1) If the estate officer is of opinion that any persons are in unauthorised occupation of any public premises and that they should be evicted, the Estate Officer shall issue in the manner hereinafter provided a notice in writing calling upon all persons concerned to show cause why an order of eviction should not be made.

(2) The notice shall-

(a) specify the grounds on which the order of eviction is proposed to be made; and

[(b) require all persons concerned, that is to say, all persons who are, or may be in occupation of, or claim interest in, the public premises,-

(i) to show cause, if any, against the proposed order on or before such date as is specified in the notice, being a date not earlier than seven days from the date of issue thereof, and

(ii) to appear before the Estate Office on the date specified in the notice along with the evidence which they intend to produce in support of the cause shown, and also for personal hearing, if such hearing is desired.]

(3) The Estate Officer shall cause the notice to be served by having it affixed on the outer door or some other conspicuous part of the public premises, and in such other manner as may be prescribed, whereupon the notice shall be deemed to have been duly given to all persons concerned.

3. The matter apparently dragged on and it is only on 12.1.1998, after a lapse of about five years, that an application was filed by the respondent seeking to amend the original application to change the cause title to M/s. Impex International through its partner Shri Jai Singh Jakhar, the petitioner herein. It was stated in the amendment application that though the License Deed for the office unit was in the name of M/s. Impex International through its partner, the original application had been mistakenly filed against the partner by name. A reference was also made to an earlier application filed by the respondent on 20.10.1993 which purportedly sought to make all the partners as respondents in the application. It was stated that since the premises were licensed to M/s.

Impex International through Shri Jai Singh Jakhar as partner, there was no need to implead other partners.

4. The aforesaid application was opposed by the petitioner on various grounds including on account of the preliminary objection that the damages/license fee can be recovered only within the period of three years and since possession was taken back by the respondent on 26.6.1992 and the damages are for the period prior to that date, the limitation for recovery of damages expired on 26.6.1995. It was, thus, claimed that allowing the amendment application would amount to permitting the respondent to claim the amount, which was barred by limitation. The petitioner also pointed out that in the reply filed on 15.1.1993 itself the factum of M/s. Impex International being the licensee had been mentioned in the reply but in the rejoinder the same was denied.

5. The Estate Officer, however, allowed the amendment application in terms of the impugned order dated 27.3.1998, which is now sought to be set aside in the present proceedings under Article 227 of the Constitution of India.

6. It is seen from the aforesaid that the basic plea raised by the petitioner is in respect of the fact that any amendment now would be beyond the period of limitation prescribed to recover the amount and since the respondent has chosen to file the proceedings against a person who is only a partner of the firm and the firm was the licensee the claim is no more recoverable. In addition the plea is that the respondent cannot be said to have committed a typographical error especially when for a period of five years they failed to take any steps despite the aforesaid infirmity being pointed out by the petitioner in its reply.

7. The reason for allowing the application as set out in the impugned order of the Estate Office is only in the last paragraph. The reason is two fold:

(i) the parties are appearing and contesting the case during the past proceedings and Therefore time limitation would not be strictly applicable;

(ii) the only question to be decided in the proceedings is regarding the arrears of license fee, damages and interest for the specific period of user and occupation and no other rights of the petitioner are involved.

8. Learned Counsel for the petitioner referred to the judgment of the Apex Court in Radhika Devi Vs. Bajrangi Singh and others, , which dealt with a case where in a partition suit an amendment of plaint was sought under Order 6 Rule 17 read with Section 151 of the Code of Civil Procedure, 1908 (hereinafter referred to as the said Code). In the written statement, a defense was pleaded about the Gift Deed made in respect of the suit property. The amendment of the plaint seeking declaration stating that the Gift Deed was obtained illegally and fraudulently and was filed beyond the period of limitation and it was thus held that if the amendment was allowed the same would defeat the rights accrued in favor of the defendant.

9. Learned Counsel for the petitioner also referred to the Division Bench

judgment in *Bhawani Dass v. Kaushalya Rani* AIR 1981 P H 196. A suit for pre-emption had been filed where there were two vendees but only one vendee was impleaded as a defendant. Subsequently an application was filed under Order 6 Rule 17 read with Order 1 Rule 10 of the said Code for addition of the co-vendee as a co-defendant. However, on the date when the application was filed, the suit against the vendee to be added was barred by time and it was thus held that the amendment could not be allowed.

10. A reference was also made to the judgment of the learned Single Judge in *Kisan Co-operative Sugar Factory Ltd. Vs. Rajendra Paper Mills and Others*, . It was held that the amendment to add a new party against whom limitation had already run out should not be allowed unless there are special considerations. If the omission is not due to mistake and good faith the amendment is not permissible since the amendment takes away the defendant's legal right to plead bar of limitation.

11. The Supreme Court also had the occasion to consider the question about the power to recover the arrears of rent or damages u/s 7 of the said Act in *New Delhi Municipal Committee Vs. Kalu Ram and Another*, . In the present proceedings also it is under the said provision that the recovery is sought to be made. Section 7 reads as under:

7. Power to require payment of rent or damages in respect of public premises.

(1) Where any person is in arrears of rent payable in respect of any public premises, the estate officer may, by order, require that person to pay the same within such time and in such installments as may be specified in the order.

(2) Where any person is, or has at any time been, in unauthorised occupation of any public premises, the estate officer may, having regard to such principles of assessment of damages as may be prescribed, assess the damages on account of the use and occupation of such premises and may, by order, require that person to pay the damages within such time and in such installments as may be specified in the order.

[2(A) While making an order under Sub-section (1) or Sub-section (2), the estate officer may direct that the arrears of rent or, as the case may be, damages shall be payable together with simple interest at such rate as may be prescribed, not being a rate exceeding the current rate of interest within the meaning of Interest Act, 1978.]

(3) No order under Sub-section (1) or Sub-section (2) shall be made against any person until after the issue of a notice in writing to the person calling upon him to show cause within such time as may be specified in the notice, why such order should not be made, and until his objections, if any, and any evidence he may produce in support of the same, have been considered by the estate officer.

12. It was held that the word "payable" in Section 7 in the context in which it occurs, means "legally recoverable". Thus if the recovery of any amount is

barred by the law of limitation it would be difficult to hold that the Estate Officer could still insist that the said amount was payable. Since the duty is cast on the authority to determine the arrears of rent, the determination must be in accordance with law. Section 7 was held to only provide the special procedure for realisation of rent in arrears and would not constitute a source or foundation of a right to claim debt otherwise time barred.

13. Learned Counsel for the respondent on the other hand, referred to the judgment of the Supreme Court in *A.K. Gupta and Sons Vs. Damodar Valley Corporation*, . A suit had been filed only claiming a declaration in respect of proper interpretation of a clause contained in the contract between the parties for carrying out certain work. An issue about the maintainability of the suit was raised and in view thereof the plaintiff sought leave to amend the plaint by adding the extra relief for recovery of amount. It was not in dispute that on the date of the application for amendment a suit for money claim under the contract was barred. The majority view was that undoubtedly the general rule is that a party is not allowed by amendment to set up a new case or a new cause of action particularly when a suit on a new case or cause of action is barred. However, it was observed that it is also a well recognised fact that where the amendment does not constitute the addition of a new cause of action or raise a different case but amounts merely to a different or additional approach to the same facts the amendment will be allowed even after the expiry of statutory period of limitation. This was so since the object of Courts and rules of procedure is to decide the rights of the parties and not to punish them for their mistakes and a party is strictly not entitled to rely on the statute of limitation when what is sought to be brought in by the amendment can be said in substance to be already in the pleadings sought to be amended.

14. Learned Counsel for the respondent also referred to the judgment of the Division Bench in *Mathew Alexander Vs. Bhaskaran Pillai Sreedharan Pillai and Others*, . The amendment had been sought in respect of a claim petition filed under Motor Vehicle Act, 1939. It was held that the rejection of an application for amendment of the claim petition on the ground that it was barred by limitation on the date of the application could not be sustained as there was no change of cause of action or no new fact was sought to be incorporated. It was also observed that even otherwise MACT has got the power to condone the delay in filing the application for compensation under the Act, but an ordinary civil court has no such power in respect of an original suit. The principle that an amendment shall not ordinarily be allowed if the claim is barred cannot be extended to a proceeding before the MACT as specific power is conferred for condoning the delay.

15. I have given deep thought to the rival contentions advanced by learned Counsel for the parties. Insofar as the judgment in *Mathew Alexander* case (supra) is concerned, the same is of really no assistance since the matter pertained to proceedings under the MACT Act and the context in which the

observations made by the Division Bench have to be seen. In fact, the Division Bench itself clarified that the position would be different in respect of proceedings under the Motor Vehicle Act, 1939 as compared to a civil court since specific powers were conferred on MACT for extension of time.

16. It is appropriate to refer to a recent judgment of the Apex Court in *Rajesh Kumar Aggarwal and Ors. v. K.K. Modi and Ors.* AIR (2006) 4 SCC 385, which elucidates the approach to be taken by courts in considering where to permit amendment. It was held that the Court should allow all amendments that may be necessary for determining the real question in controversy between the parties provided it does not cause injustice or prejudice to the other side. The exception of course is where a court is satisfied that the party applying for amendment was acting mala fide. The courts should, thus, take notice of subsequent events in order to shorten litigation to preserve and safeguard the rights of both the parties and sub-serve the ends of justice. The result is that normally a liberal view ought to be taken insofar as amendments are concerned other than the exceptions carved out.

17. In *A.K. Gupta and Sons Ltd. case* (supra), the plaint had already specified the amount of the work done while claiming the relief of declaration. It is in these circumstances that the amendment for praying for a decree for recovery for the sum already specified in the plaint or such amount as may be determined after amounts was allowed.

18. In my considered view, there can be no doubt that the law of limitation would give a right in favor of the defendant in a suit and claims which are barred by time cannot ordinarily be incorporated through the process of amendment though there is no absolute bar. The observations made in *Radhika Devi case* (supra) are material since in that case also, despite a specific plea taken in the written statement about the Gift Deed in respect of the suit property, the amendment was not sought for declaration of the Gift Deed being illegal and fraudulent till such time that the period of limitation had lapsed. The amendment was held to be one, which would defeat the rights accrued in favor of the defendant. In the present case also even if it be assumed that the respondent was under some bona fide mistake while filing the original application, the true and correct facts were brought to the notice of the respondent at least when the reply was filed by the respondent on 15.1.1993. Despite this the application which forms subject matter of adjudication in terms of the impugned order was filed only five years later. This conduct can hardly be said to be bona fide and in the mean time vested rights accrued in favor of the party, which was now sought to be added.

19. It must be appreciated that the present case is one where undisputedly the application was not filed against the firm, which was the licensee. Even when the defect was pointed out no steps were taken to implead the firm despite the lapse of a period of five years. The application stated to be earlier filed seeking to implead the other partners on 20.10.1993 was withdrawn while the present

application was filed in 1998. Thus the respondent itself is to be blamed for the consequences which now accrue.

20. The respondent failed to implead the correct party. In Bhawani Dass case (supra), the Division Bench of Punjab and Haryana High Court has held that even where there were originally two vendees and only one vendee was impleaded the subsequent vendee could not be impleaded as a new defendant after the suit against the vendee to be added had become barred by time. Similarly in Kisan Co-operative Sugar Factory Ltd. case (supra), it was held that a new defendant could not be added when the claim against him was barred by limitation unless the omission was in good faith. In the present case the License Deed itself was in the name of the firm. There was no reason why the application should not have been filed against the firm. Be that as it may, even when the correct facts were brought to the notice of the respondent for five years no steps were taken to correct the mistake. This could hardly be called a mistake in good faith.

21. In my considered view, the impugned order suffers from patent error and erroneous exercise of jurisdiction by the Estate Officer. The only two reasons given to allow the application are unsustainable in law. The mere fact that a wrongly impleaded respondent (petitioner herein) was contesting the proceedings could be no ground to allow the amendment especially when the objection was taken at the very inception of the proceedings about the error in not filing the proceedings against the firm. Again one cannot appreciate the basis of allowing the amendment on the ground that only arrears of license fee, damages and interest had to be considered. If the same were not recoverable by lapse of time, the valuable right which had accrued in favor of the petitioner could not be defeated. The issue is really no more *res integra* in view of the judgment in NDMC v. Kalu Ram and Anr. case (supra) where in similar circumstances in a similar proceedings u/s 7 of the said Act by the same respondent entity it was held that only amount which could be realised in accordance with law could form subject matter of the claim and there was no foundation for a right to claim debt otherwise time barred.

22. It is not necessary to go into the merits of the controversy even though the stand of the petitioner is that the petitioner never used the premises nor took legal possession since the premises were not occupied from the very beginning. In fact the respondent took over possession since it was found that no one was occupying the office unit.

23. In view of the aforesaid position, I am of the considered view that the impugned order of the Estate Officer dated 27.3.1998 cannot be sustained and is hereby set aside and the application filed by the respondent seeking amendment of the original application is dismissed.

24. The parties are left to bear their own costs.