

(2002) 11 CAL CK 0015
In the Calcutta High Court

Case No : G.A. No. 3040 of 2002 and W.P. No. 1804 of 1995

Eureka Forbs Ltd. and Others

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 15-11-2002

Acts Referred:

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

Citation : (2003) 2 BC 597 : (2003) 3 CALLT 107 : (2003) 114 CompCas 367

Hon'ble Judges : Amitava Lala, J

Bench : Single Bench

Advocate : Jayanta Kumar Mitra, Utpal Bose and D.K. Pal, for the Appellant; A.K. Routh, A. Dasgupta and S. Pal Chowdhury, for the Respondent

Final Decision : Dismissed

Judgement

Amitava Lala, J.—This is an application for amendment of the original writ petition. In the original writ petition there are twofold prayers. The first is writ of mandamus for the purpose of declaring the Recovery of Debts Due to Banks and Financial Institutions Act of 1993 and the Debt Recovery Tribunal (Procedure) Rules, 1993, as unconstitutional, ultra vires and null and void. The second is the determination of an issue in respect of a case pending before the Debt Recovery Tribunal. As regards the first point the Supreme Court has already held that the Act and Rules are intra vires, therefore the writ petition becomes infructuous to that extent. The writ petition was of the year, 1995 which was placed under the heading "old matters" before the court for expeditious disposal due to long pendency. During such period only on August 1, 2002, the present application was filed before the court. In the application for amendment I find there is no amendment of the prayers but amendment of pleading, cause title and the grounds. An elaborate discussion of the factual aspects as well as jurisdiction of the Tribunal to decide such issue have been urged. Order 6 Rule 17 of the CPC says that 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 of controversy between the parties. From the plain reading of the provision of amendment of pleading it appears that whenever the court feels it just, amendment may be allowed, similarly, if the court finds that it is unjust, it can be disallowed. The amendment is necessary for the purpose of determining the real question of controversy between the parties. Therefore, the amendments cannot be allowed by a fluke. It is deep rooted into the provisions which is also applicable in the case of writ petitions.

2. The case of the petitioner-company is that the petitioner is not a debtor to the bank. Therefore, Section 2(g) of the Act cannot be applied in respect of the petitioners who is not a debtor of the bank. Neither the petitioners are the constituent of the concerned bank nor availed of any credit facility or executed any document in favour of the bank to enable to file a suit or an application in the Tribunal. They have pointed out such facts by an application before such Tribunal. There is no nexus or privity of contract in between themselves and the bank. The decree or order which has been passed by the Tribunal is without jurisdiction and the recovery certificate is contrary to the principles of law and natural justice. Such order should be recalled and/or set aside.

3. Mr. Jayanta Kumar Mitra, learned senior counsel, appearing in support of the petitioners cited a judgment reported in Kiran Singh and Others Vs. Chaman Paswan and Others, and contended that the fundamental principle is that decree passed by a court without jurisdiction is a nullity and that its invalidity could be set up whenever and wherever it is sought to be enforced or relied upon even at the stage of execution or in a collateral proceeding. Defect of jurisdiction, whether pecuniary or territorial strikes at the very authority of the court to pass a decree, and such a defect cannot be cured even by the consent of the parties.

4. He further relied upon a judgment in Rameshwar and Others Vs. Jot Ram and Another, to establish that the impact or subsequent happenings may be spelt out. First is bearing of the right of action. Second is the nature of relief. Third is its importance to create or destroy the substantive right. Where the nature of the relief, as originally sought, has become obsolete or unserviceable or a new form of relief will be more efficacious on account of developments subsequent to the suit or even during the appellate stage, it is but fair that the relief is moulded, varied or reshaped in the light of updated facts.

5. Before going into the submissions of the respondents I have to clarify certain aspects of the matter. Amendment or no amendment is the discretionary power of the court of law. There is no dispute with regard to the ratio of the judgments. But the question is whether such ratio can be applied in the facts and circumstances or not. As against the settled principle of the first judgment I say that the petitioners have already taken the plea by making an application before the Tribunal and upon being failed invoked the jurisdiction of this High Court under Article 227 of the Constitution of India which is yet pending. The self-same issue was taken in a revisional application which was dismissed by the court. In

the revisional application justice Bhaskar Bhattacharya observed that the petitioner can successfully challenge lacking of jurisdiction of the Tribunal even in the execution proceeding and it has actually challenged. The order which has been passed in the execution proceeding was also challenged before this court by filing the application under Article 227 of the Constitution of India. His Lordship held that a strong case of merit cannot be a ground of setting aside ex parte decree. Summons has been served and the petitioners entered into appearance through a lawyer and also filed written statement in 1989. Therefore such case was available in the revisional application as well as application under Article 227 of the Constitution of India. Even thereafter when such case is wanted to make available in the writ petition I do not find any relief has been sought for of such nature but only averments are made. Therefore what is the purpose ? Mr. Mitra submitted that the amendment cannot change the cause of action because the same is already available in the writ petition. If I accept such submission in the light of second cited judgment no case will come out about any subsequent happening to construe that when the nature of the relief becomes obsolete then the relief can be moulded. This is not a case of subsequent happening. Happenings were there from the very beginning. Three proceedings were initiated for the self-same cause. If one is lost the other will survive. Therefore, there is no purpose of giving life to this writ petition when the Act and Rules are ultra vires or not has already been spelt out by the Supreme Court and no new case is available subsequent to filing of the writ petition to give life.

6. The petitioners have taken a plea that as against such order of revision a special leave application was moved before the Supreme Court of India but the same was dismissed as withdrawn with liberty to pursue the writ petition. According to me, such persuasion in respect of hearing of the pending writ petition is one part but persuasion for amendment of the writ petition is another part which was obviously unknown to the Supreme Court at the time of seeking such order. In other words it cannot be said as because the writ petition was dismissed as withdrawn on the basis of the submission that they want to pursue the writ petition before this court it will automatically give rise to a cause of action for the purpose of amendment of the original writ petition.

7. Learned counsel appearing for the respondents contended that the application cannot be entertained at all irrespective of filing of any affidavit. According to the respondents, whether the petitioners are debtors or not, the same will have to be determined by the Tribunal being appropriate forum. If the petitioners are not debtors u/s 2(e) of the Act then there is no liability of the petitioners, but that declaration has to be made by the appropriate forum made for it. He has brought my notice to the proposed amendment by saying that the same virtually speaks about disputed questions of facts. According to learned counsel, Section 17 speaks for jurisdiction of the Tribunal. Section 18 speaks for bar of jurisdiction. Section 19 speaks for making application. Section 20 speaks for appeal to the Appellate Tribunal. If all such rights are available what relief they obtain in the writ petition by way of amendment is best known to them. Tribunal itself has its

jurisdiction to decide this issue. When there is no change of the prayer what is the necessity of incorporation of the averments is not known. The subject matter is arising out of a contractual obligation. The disputed question has to be taken note of by the Tribunal which has jurisdiction.

8. According to Mr. Mitra, this is not the stage where such questions of merit can be jotted down. This is a stage where the amendments are to be incorporated. The question of lack of jurisdiction ultimately flows to the question of nullity, therefore, such question can only be taken up by the respondents at the time of hearing of the writ petition when amendments are allowed and carried out.

9. According to me, seeking amendment of the writ petition by incorporating the pleadings and grounds cannot be said to be an innocent approach before the court of law. It is not a just cause. This is a matter of great importance. The real question of controversy between the parties has already been resolved before the Supreme Court on the main issue and incidentally in the revisional application and further also pending in the application under Article 227 of the Constitution of India. Therefore the writ petition is dead excepting issuance of death certificate. The amendment of the pleading may hit the principles of res judicata and res sub-judice or principles analogous thereto. Any order of amendment, if passed, automatically affect the earlier order or the proceeding. The writ petition will get life not for the subsequent facts but for the prior facts. It is crystal clear that the basis of this writ petition was to make the Act and Rules ultra vires which has failed, The incidental payers have no leg to stand. It is an absurd proposition that in spite of observing such disqualifications in making amendment the court will allow the same and wait for the death at the time of hearing of the writ petition. This is not the true import of the amendment. If the amendment is allowed in this case it will definitely cause prejudice to the successful parties in the revisional application and will make the pending application under Article 227 infructuous.

10. Therefore, the amendment cannot be allowed. Thus, the application stands dismissed. No order is passed as to costs. However, this order will not prevent from taking any appropriate recourse to law or file any independent application in accordance with law.

11. Xeroxed certified copies of this judgment will be supplied to the parties within seven days from the date of putting requisites for drawing up and completion of the order and certified copy of this judgment.

12. All parties are to act on a signed copy minutes of the operative part of this judgment on the usual undertaking and subject to satisfaction of the officer of the court in respect as above.