

(1979) 09 OHC CK 0009

In the Orissa High Court

Case No : Civil Revision No. 431 of 1979

Indian Metals and Ferro Alloys Ltd.

APPELLANT

Vs

The Orissa State Electricity Board and Another

RESPONDENT

Date of Decision : 03-09-1979

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 6 Rule 17

Citation : AIR 1980 Ori 113

Hon'ble Judges : S. Acharya, J

Bench : Single Bench

Advocate : Sidhartha Shankar Ray and R.C. Patnaik, for the Appellant; G. Rath, for Opposite Party No. 1, for the Respondent

Judgement

S. Acharya, J.—This revision is filed against the order of the learned Subordinate Judge. Bhubaneswar dated 17-8-79 rejecting the plaintiffs prayer for leave to amend the plaint as prayed for by them in their petition dated 16-8-79.

2. The only question which arises for consideration in this revision is whether the petitioner's prayer to amend the plaint should be allowed or refused.

3. It is stated in the petition for amendment and has been urged by Mr. S.S. Ray, the learned counsel appearing for the petitioner, that the proposed amendment indicates the plaintiffs' further approaches from various other standpoints to the reliefs sought for in the plaint; the same is by way of amplification of the stand already taken in the plaint and is necessary for the purpose of determining the real questions in controversy between the parties. Mr. Ray submits that the facts in respect of all that are sought to be brought in by the said amendment are, in substance and effect, already there in the pleadings either directly, indirectly or in a concise manner, and the proposed amendment does not amount to addition of any new cause of action or raise a different case other than what is already there in the plaint.

On the other hand, it has been urged by Mr. Rath, the learned counsel appearing

for opposite party No. 1, that the petition for amendment has been filed at a belated stage, and that except for some portions of the proposed amendment the averments contained in the rest of the same constitute addition of a new case and/or new cause of action, which cannot be allowed to be agitated at this point of time as the same are barred by limitation.

4. The averments in the original plaint and the prayer portion thereof are not sought to be altered, modified, deleted or substituted in any manner. Certain additions to the plaint are only prayed for as shall be mentioned later.

5. Order 6, Rule 17 which provides for amendment of the pleadings is as follows :--

"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."

The power of the court to allow amendments is discretionary and it is to be used judicially on a consideration of the facts and circumstances of each case. Amendments which are necessary for the purpose of determining the real questions in controversy between the parties and do not work out injustice to the other side can be allowed at any stage on such terms as may be deemed just by the court. No doubt, amendments which set up a "new case" or a "new cause of action" by the addition of fresh allegations, averments or reliefs are not allowed, particularly when the suit on the said new case or new cause of action is barred, or introduction of the said materials works out to the prejudice of any right acquired by any party by lapse of time due to the late filing of the amendment petition.

6. It is now well settled that the expression "cause of action" in all cases does not mean every fact which it is material to be proved to entitle the plaintiff to succeed, for if that was so, no material fact ever could be amended or added by way of amendment. The expression "new cause of action" generally means "a new claim made on a new basis constituted by new facts". "New case" implies "new set of ideas" which were not at all present in the old case and cannot be construed or envisaged from the facts and averments presented at the earlier stage. In this connection the majority decision on this point in the case of A.K. Gupta and Sons Vs. Damodar Valley Corporation, should be profitably quoted :--

"The general rule, no doubt, 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 new case or cause of action is barred. *Weldon v. Neal* (1887) 19 QBD 394 But it is also well recognised that where the amendment does not constitute the addition of a new cause of action or raise a different case but amounts to no more than a different or additional approach to the same facts, the amendment will be allowed even after the expiry of the statutory period of limitation. See *Charan Das v. Amir Khan* 47 Ind App 255 AIR 1921 PC 50 and *L.J. Leach and Company Ltd. Vs.*

Jardine Skinner and Co., ."

"9. The expression "cause of action" in the present context does not mean "every fact which it is material to be proved to entitle the plaintiff to "succeed" as was said in *Cooke v. Gill* (1873) 8 CP 107 (116), in a different context, for if it were so, no material fact could ever be amended or added and, of course, no one would want to change or add an immaterial allegation by amendment. That expression of the present purpose only means a new claim made on a new basis constituted by new facts. Such a view was taken in *Robinson v. Unicos Property Corporation Ltd.*, (1962) 2 All ER 24 and it seems to us to be the only possible view to take. Any other view would make the rule futile. The words "new case" have been understood to mean "new set of ideas". *Dornan v. J.W. Ellis and Co. Ltd.* (1962) 1 All ER 303 This also seems to us to be a reasonable view to take. No amendment will be allowed to introduce a new set of ideas to the prejudice of any right acquired by any party by lapse of time."

In *Ganesh Trading Company's* case AIR 1978 SC 484 their Lordships have said that a cause of action is constituted by the whole or bundle of essential facts which the plaintiff must prove before he can succeed in his suit.

In the case of *Ganesh Trading Co. Vs. Moji Ram*, at p. 17) it has been observed:--

"xx xx x leave to amend under Order 6, Rule 17 of the Code will ordinarily be refused when the effect of the amendment would be to take away from a party a legal right which had accrued to him by lapse of time. But this rule can apply only when either fresh allegations are added or fresh reliefs sought by way of amendment. Where, for instance, an amendment is sought which merely clarifies an existing pleading and does not in substance add to or alter it, it has never been held that the question of a bar of limitation is one of the questions to be considered in allowing such clarification of a matter already contained in the original pleading. xx xx x"

In *Ganesh Trading Company's* case (supra) the Supreme Court has gone to the extent of saying that by amendment even a new cause of action can be permitted to be added under certain circumstances and conditions. Their Lordships say:--

"Defective pleadings are generally curable if the cause of action sought to be brought out was not ab initio completely absent. Even very defective pleadings may be permitted to be cured so as to constitute a cause of action where there was none, provided necessary conditions, such as payment of either any additional court-fees which may be payable, or of costs of the other side, are complied with. It is only if lapse of time has barred the remedy on a newly constituted cause of action that the courts should ordinarily refuse prayers for amendment of pleadings." It has also been held in that case that:--

"It is true that if a plaintiff seeks to alter the cause of action itself and to introduce indirectly, through an amendment of his pleadings, an entirely new or

inconsistent cause of action, amounting virtually to the substitution of a new plaint or a new cause of action in place of what was originally there, the court will refuse to permit it if it amounts to depriving the party against which a suit is pending of any right which may have accrued in its favour due to lapse of time. But, mere failure to set out even an essential fact does not by itself constitute a new cause of action."

In Iswardas's case AIR 1979 SC 551 it has been held that:--

"If the necessary material on which the plea arising from the amendment may be decided is already there, the amendment may be more readily granted than otherwise."

In view of the above position of law regarding amendment of pleadings, it is now to be seen whether amendment of the plaint prayed for by the plaintiffs can be allowed or not at this stage.

7. The prayers in the suit are (i) for a decree declaring and directing the deletion and expunction of Clause 14 from the agreement dated 2-1-1974, which purports to authorise the Board to make unilateral revision of tariff; (ii) for a decree of injunction restraining the opposite party No. 1 from charging higher tariff than the contracted rate and (iii) for granting other consequential reliefs and costs as may be deemed proper in the facts and circumstances of the case, Apart from the frills and outfit, the main theme in the plaintiffs' case, as gathered from the whole bundle of essential facts stated in the plaint, is that Clause 14 of the agreement is not binding on the plaintiffs: it does not entitle the defendant to charge higher tariff; and that the defendant cannot charge tariff higher than the contracted rate at which electric power had been agreed to be supplied to the plaintiffs-Variou grounds, basis, pleas and materials are pleaded and averred in support or in respect of the said subject matter and main topic of the suit, and the plaint runs into 36 paras.

8. In Para. 2 of the amendment petition it has been specifically averred :--

"That the plaintiffs have made all necessary and relevant averments in the plaint on the basis whereof they seek the reliefs." In Para. 3 thereof it is stated -

"The averments and facts mentioned in the plaint do also entitle them to approach the matter from various standpoints. That the stand already taken by them also needs amplification. That the plaintiffs therefore state and indicate their further approaches from various other stand-points and amplification of the stand already taken by way of incorporation, xx xx x by way of amendment."

9. Mr. Rath, the learned counsel for opposite party No. 1, has very fairly conceded at the hearing of this revision that the plaintiffs' prayer so far as it relates to the addition of the expression "or otherwise" at the end of para. 18 and the following portion out of the long paragraph sought to be incorporated in the plaint at the end of Para. 35, may be allowed:--

"xx xx x In still further alternative and without prejudice in view of the agreement entered into by and between the parties hereto on 1-1-74, Clause 14 was accepted only on the condition that the plaintiff would separately write to the Government to examine the validity of this clause from legal and other points of view. Pursuant thereto the plaintiff wrote to the Government by its memorandum dated 8th Jan. 1974 and the Government having taken a decision and/or expressed its views thereupon as per the letter and/or order dated 22-2-1974, it is not possible or permissible or lawful for the defendant to rely on Clause 14 of the said agreement any further. The matter was left to the Government and once the Government intimated its views and/or decision as indicated in the said letter/or order dated 22nd Feb. 1974 the matter was at an end could not be reopened in any way whatsoever. In still further alternative and without prejudice the acceptance of the said Clause 14 in the said agreement was neither final nor absolute but was subject to the condition as agreed to by and between the parties hereto on 1-1-74 that the Government would examine the validity of the said clause from the legal and other points of view and give its decision. The Government after duly examining all aspects of the matter, however, decided to delete Clause 14 from the said agreement. In the premises, Clause 14 stands deleted and/or expunged." But the prayer for incorporation of the other portion of the said para, in the plaint is opposed by Mr. Rath. The other portion is as follows :--

The plaintiff in any event states that in view of the several promises made by the defendant the latter is estopped from enforcing the said Clause 14. In the alternative and without prejudice the said Clause 14 is uncertain, vague and as such void. In the further alternative and without prejudice the said d. 14 is contrary to the main intention of the parties hereto as gathered from the surrounding circumstances and the said agreement dated 2nd Jan. 1974 and particularly Clause 18 thereof. When there is an inconsistency between the manifest intention of the parties as envisaged in Clause 18 of the said agreement and the effect of Clause 14 thereof, then the said manifest intention in Clause 18 has to and must prevail. As such Clause 14 should be deleted and/or expunged. In still further alternative and without prejudice Clause 14 of the said agreement dated 2-1-74 being in the standard printed form which was put forward for the plaintiff's signature it cannot override the main object and intention of the transaction as disclosed by the terms specially agreed in Clause 13 thereof. In the premises. Clause 14 of the said agreement has to and must be rejected so as to ensure that the main object of the transaction is achieved. In still further alternative and without prejudice. Clause 14 of the said agreement lacks mutuality and as such void.

XX XX XX XX XX (The portion not objected to is quoted above).

Alternatively and without prejudice if it be held that Clause 14 is not deleted or expunged then there is no decision nor examination of Clause 14 as aforesaid by the Government yet; as a result whereof Clause 14 has not come into effect or

operation. In other words, there was an escrow according to which Clause 14 was not to take effect until the fulfilment of a condition namely examination by the Government as aforesaid and its decision thereafter. The said condition not having been fulfilled, Clause 14 cannot and must not take effect. In any event and without prejudice, the purported power of revision of rate has been exercised by the defendant arbitrarily or unreasonably or on extraneous or irrelevant grounds and as such the purported revision of rates by the defendant is bad and illegal. The nature of the arbitrariness or unreasonableness will appear from the fact that by the purported revision the rates have been increased by 4 times from 3 paise to 12 paise although the agreement dated 2-1-1974 had a special clause, being Clause 13 thereof reducing rates which was the manifest intention of the parties. In still further alternative and without prejudice if Clause 14 of the said agreement is to remain at all it must be confined to a period other than the one covered by Clause 13 thereof that is to say the power under Clause 14 can be exercised only after the initial period of 15 years has elapsed."

10. It is at first to be seen whether by the addition of the above portion to the plaint a new case or a new cause of action is presented or whether the same amounts virtually to substitution of a new plaint or a new or inconsistent cause of action, thereby materially or substantially changing the character or identity of the suit. On a careful perusal of the said portion along with the averments in the plaint it is seen that, except the last sentence therein, the prayer for incorporation of the rest has been made for clarifying or amplifying all that has been stated in the original plaint, and/or to meet exact situations arising out of the cause of action pleaded in the suit and/or to buttress or strengthen the attack made against Clause 14 in the contract, which is the main theme and refrain of the suit. The same also does not in substance or in effect alter in any manner the cause of action or introduce any new or inconsistent cause of action amounting to the substitution of a new cause of action in place of what was originally there or cause any addition thereto. No fresh claims or reliefs are sought for by the same. The averments therein are not more than a different, additional or fresh approach to the main and essential subject matter pleaded in the original plaint. The incorporation of the said portions in the plaint would be necessary for the purpose of determining all real questions in controversy between the Parties. That being so, merely because the above averments were not made in the original plaint, may be due to mistake, negligence or inadvertence of the plaintiffs or their counsel, the amendment prayed for cannot be refused unless the defendant is able to show that the plaintiffs' present move is mala fide or that it will cause irreparable damage or injury to the defendant which cannot be compensated by costs. The power to grant amendment of the pleadings is intended to serve the ends of justice and it is not governed by any narrow or technical limitations. In *Manoharlal's case* AIR 1969 SC 1267 it has been held in Para. 5 that-

"5. xx xx xx xx Rules of procedure are intended to be a handmaid to the administration of justice. A party cannot be refused just relief merely because of

some mistake, negligence, inadvertence or even infraction of the rules of procedure. The Court always gives leave to amend the pleading of a party, unless it is satisfied that the party applying was acting mala fide, or that by his blunder he had caused injury to his opponent which may not be compensated for by an order of costs. However, negligent or careless may have been the first omission, and, however late the proposed amendment, the amendment may be allowed if it can be made without injustice to the other side."

As no new case or fresh cause of action is made out by the proposed amendment barring the last sentence, no cause for affecting any right acquired by lapse of time or of irreparable damage or injustice can be pleaded against the same.

11. My decision reported in *Jai Jai Ram Manohar Lal Vs. National Building Material Supply Gurgaon*, and the decision of Mohanti, J. in *Bhubaneswar Patel Vs. Janak Patel and Others*, referred to by the court below in the impugned judgment are not at all applicable to the facts of this case. In the first case the effect of the proposed amendment was to alter the cause of action and gave rise to an entirely new or inconsistent cause of action amounting virtually to the substitution of a new plaint on a new cause of action in place of what was there in the original plaint. In the second case, the proposed amendment had the effect of altering the very foundation of the claim and thereby introducing a distinct and separate cause of action converting the suit into another of a totally different character necessitating a fresh trial from the beginning. As the facts and premises on which the said decisions were given are entirely different from those in the present case, those decisions are of no avail or effect for this case.

12. On a careful perusal of the petition for amendment and the original plaint, I am satisfied that except the last sentence in the above-quoted long paragraph the rest of the proposed amendment cannot be rejected.

13. The last sentence in the said para. as quoted above, is absolutely new to the original plaint in purport, stance, context and content. The idea contained in the said sentence is not contained in the original plaint. There is nothing in the plaint on which the particular plea as taken in the said sentence can be agitated, supported or pleaded. That being so, the inclusion of this sentence in the plaint at this stage may be viewed as equivalent to an introduction of a new case or a new cause of action. On the above consideration I am not inclined to allow incorporation of this sentence in the plaint.

14. The proposed amendment in its entirety is also opposed by Mr. Rath on the ground of delay. The suit was filed in Aug., 1976 and the application for amendment of the plaint was filed in the trial court for the first time on 16-8-79. The Supreme Court by its order dated 19-4-79 has directed the suit to be disposed of within six months, i. e. by 19-10-79. Considering the above facts, there is no doubt that the amendment petition has been filed at a very belated stage. But in view of the nature and valuation of the suit (rupees one lakh), the financial and other implications involved on the decision thereof; the stance

taken by the parties in the suit and the connected proceedings; the nature of the amendment proposed to be allowed, and the facts that the hearing of the suit has not started yet and there is still 1 1/2 months" time to dispose of the suit, I am not inclined to disallow the amendment to the above effect on the sole ground of delay, since such a course of action, in the facts and circumstances of the case, will not be, in my view, in the best interest of justice. Of course, for the inconvenience and expense caused to the defendant due to the delayed filing of the amendment petition, the plaintiffs must pay compensatory cost to the defendant as ordered below.

15. On the above considerations, the impugned order is set aside; the proposed amendment, except the last sentence thereof, is allowed and be incorporated in the plaint as prayed for on condition that the plaintiffs pay Rs. 1000/- (one thousand) to the defendant as compensatory costs within the 6th of this month, failing which this Revision shall stand dismissed without further reference to the Bench, and the impugned order rejecting the prayer for amendment shall stand unaffected.

16. As the Supreme Court has directed the final disposal of the suit by the trial court by 19-10-79, the plaintiffs shall file the con soli dated plaint in the trial court by the 6th Sept., 1979 after serving an advance copy thereof on the defendant or its counsel. The defendant must file its written statement by the 17th Sept., 1979 at the latest on serving an advance copy of the same on the plaintiffs or their counsel. Both the parties are hereby directed to appear before the trial court on 6-9-79, and the court, on that day, shall fix the dates for framing of the issues and hearing of the suit, and it shall strictly adhere to the said dates. While fixing the above date, the court must keep in view the direction of the Supreme Court that it has to dispose of the suit by 19-10-1979. The counsel appearing for both the parties have stated before me that they would co-operate with the trial court in all respects and in all possible manner to enable it to dispose of the suit within the time fixed by the Supreme Court. This case shall take precedence over all other matters in the court below.

17. The Revision is partly allowed on the above mentioned conditions.

The L. C. R. be sent back immediately.