

(1993) 01 SHI CK 0005
In the High Court Of Himachal Pradesh
Case No : L.P.A. No. 6 of 1992

J.S. Tins Fabricators and Others

APPELLANT

Vs

U. Co. Bank

RESPONDENT

Date of Decision : 05-01-1993

Acts Referred:

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

Citation : AIR 1994 HP 33

Hon'ble Judges : Lokeshwar Singh Panta, J;Devinder Gupta, J

Bench : Division Bench

Advocate : M.S. Sethi and Dharam Chand, for the Appellant; R.L. Sood, for the Respondent

Final Decision : Allowed

Judgement

Devinder Gupta, J.—The order passed on 30th April, 1992 by the learned single Judge of this Court in OMP No. 398/91 is under challenge in this appeal at the behest of defendants.

2. On 24th February, 1988 the plaintiff-bank filed suit for recovery of Rupees 2,46,116,25 paise against the defendants alleging that at the request of defendants certain loan facilities were provided to them, which they availed of and despite demands failed to liquidate their liability. A decree for the aforesaid amount along with future interest has been claimed in the suit.

3. The suit was resisted by the defendants, who filed their written statement on 17th May, 19.89. While admitting the fact that loan facility was availed of by them, it was averred that the rate of interest agreed to was to the tune of 15 1/2% per annum and not 17 1/2% per annum because as per the agreement the interest payable was to be as per the norms of the Reserve Bank of India issued regarding the Small Scale Industrial Units from time to time. The rate of interest as per the Reserve Bank of India guidelines was 15 1/2% per annum at that time. It was also averred that the defendants became irregular in repayment of

loan in view of the situation in Punjab and due to non-payment of the defendants dues by the parties to whom goods have been supplied by the defendants. Defendants also stated that they are still willing and ready to make the payments in case the plaintiff comes forward with clean hands with proper calculations of interest and with a demand of real amount due from the defendants. It was claimed that the suit was not within the period of limitation and to bring it within limitation the plaintiff-bank had used certain blank papers, which had been got signed in bulk.

4. OMP 441/89 was moved by the plaintiff on 6th November, 1989 under Order 12, Rule 6 of the CPC claiming immediate decree in part, on the basis of admissions alleged to have been made by the defendants. Reply to this application was filed by the defendants. This application was dismissed as infructuous on 5th June, 1990 since the suit on that day was dismissed in default.

5. On 30th July, 1990 it was observed by the Court that since the dispute between the parties appeared to be limited, only with respect to charging of interest at the rate of 2%, there was every possibility of suit being compromised. Consequently, defendant No. 2 was directed to remain present in Court.

6. On 14th March, 1991 OMP 63/91 was moved by the plaintiff under Order 12, Rule 6 of the CPC praying that decree on the basis of admissions made by the defendants in the written statement be passed. On 26-3-1991, three weeks' time was allowed to defendants to file reply to this application. Case was directed to be listed on 18th April, 1991 when defendants were to apprise the Court whether they were ready and willing to make the payment of loan amount in instalments.

7. Defendants thereafter sought adjournments on 17th July, 1991 the Court recorded the statements of counsel for parties that it has not been possible to settle the matter amicably outside the Court. Plaintiff-bank was directed to place on record the statement of account calculating the amount due from the defendants on the basis of 15 1/2% interest at quarterly rests. Such statement was placed on record and on 5th August, 1991 one week's time was allowed to defendants to verify the correctness of that statement.

8. On 12th August, 1991 an application under Order 6, Rule 17 of the Code was moved by the defendants seeking permission to amend the written statement. This OMP 398/91 has been dismissed by the learned single Judge. Amendment sought for has been refused. It is this order, which is under challenge in this appeal.

9. The reasons which prevailed with the learned single Judge declining to grant the requisite permission for amending the written statement were that it will have the effect of altering the defence already made and would also amount to allowing the defendants to take inconsistent pleas. The Court observed that by the proposed amendment altogether new and inconsistent pleas were sought to be taken. The defendants had already admitted the case of the plaintiff-bank

except that the agreed rate of interest was 15 1/2% per annum, instead of 17 1/2% per annum. The effect of proposed amendment would also completely displace the admissions made by the defendants in Bank's favour which would prejudice the plaintiff's case.

10. We have heard the learned Counsel for the parties and gone through the record of the case.

11. The preliminary objection taken by the learned Counsel for the plaintiff-respondent about the maintainability of the Letters Patent Appeal against an order disallowing amendment, in view of the judgment in *Shah Babulal Khimji Vs. Jayaben D. Kania and Another*, is without any merit. An order refusing to grant permission to amend the written statement is an interlocutory order which will affect the rights of the defendants. In refusing to allow amendment at least there is complete bar to defendants in agitating the pleas sought to be raised during the course of hearing of the proceedings. This order certainly has traits and trappings of finality. This type of order is necessarily an order which can be agitated by filing a Letters Patent Appeal.

12. Learned Counsel for the appellant contends that neither the proposed amendments amounts to changing the pleas of admission into plea of denial, nor it amounts to taking a contradictory plea. Without changing the entire body of the written statement, the plea sought to be raised is of a legal nature about the validity of the agreement. The order rejecting a prayer to allow such amendment is not in consonance with the settled principle of law that, however, negligent or careless may have been the first omission and, however, late the proposed amendment, the amendment should be allowed, if it can be made without injustice to the other side. There is no injustice if the other side can be compensated by costs. Reliance has been placed on *Jai Jai Ram Manohar Lal Vs. National Building Material Supply Gurgaon*. It is urged that suit is still at its initial stage and parties have yet to lead their evidence.

13. The learned Counsel for the respondent contended that the amendment sought for, if allowed, will have the effect of not only taking the admissions already made but also would amount to permitting the defendants to take inconsistent pleas, which is totally prohibitory. In support of his submissions reliance has been placed on *Modi Spinning and Weaving Mills Co. Ltd. and Another Vs. Ladha Ram and Co.*

14. There cannot be any dispute on the proposition that amendment proposed, setting up a new case, totally inconsistent with the original case set up, will not be allowed, if it is unjust to the opposite party. It is settled that the principles applicable to the amendment of plaint are equally applicable to amendment of written statement and leave to amend the written statement ought to be granted where the amendment sought is not inconsistent with the plea taken in the original written statement and where no right of the plaintiff is defeated by allowing the amendment. These principles are well known and have been

reiterated in Ganesh Trading Co. Vs. Moji Ram, and Haji Mohammed Ishaq Wd. S.K. Mohammed and Others Vs. Mohamad Iqbal and Mohamed Ali and Co.,

15. The question which requires consideration is as to whether the pleas which are sought to be taken would be totally inconsistent pleas to the one already taken or whether the same would have the effect of taking away of admissions already made. Inconsistent plea is that which is totally contradictory to the plea already taken or in other words a totally divergent plea, which; destroys the plea already raised.

16. As noticed above, the defendants in the written statement already filed, admitted the execution of various loan documents and further stated tht the loan facility was availed of by them. In reply to various paragraphs it was repeatedly pleaded that the rate of interest as agreed was 15 1/2% per annum and not 17 1/2% per annum because as per the agreement the interest payable was to be as per the norms of the Reserve Bank of India relating to the Small Scale Industrial Units from time to time and the rate of interest as per the Reserve Bank of India guidelines was 15 1/2% per annum at that time. The correctness of the amount claimed has also been challenged by urging that the bank has calculated the amount without adopting any proper procedure and the interest charged is excessive and is not in accordance with the agreement between the parties. The plaintiff-bank has arbitrarily debited various amounts against the defendants.

17. The pleas which the defendants now want to raise by way of amendment are that the contract on the basis of which the suit has been brought is void and illegal inasmuch as it runs counter to the requirement of Circulars issued by the Reserve Bank of India, such Circulars issued by the Reserve Bank of India are statutory in nature and are binding on all the Banks including the plaintiff. Any agreement or contract repugnant to the aforesaid statutory provisions is void and illegal. The other plea sought to be raised is that as per the Circular letter of the Reserve Bank of India the maximum rate of interest chargeable on Cash Credit Facility up to and inclusive of Rs. 2 lacs is 15% and maximum rate of interest chargeable on Term Loan was 12 1/2%.

18. The rate of interest was further reduced by 1% in case of Cash Credit Facility. The plaintiff-bank had been debiting the amount right from the beginning on the basis of calculations which were wholly contrary to the Circulars.

19. The other plea sought to be raised is that defendant No. 1 is a Sick Unit and this is so entered in the Bank's record and for sick units a moratorium is contemplated under the law. The bank could not add interest for the period during which the Unit remained a sick industry. The bank has been waiving and writing off loan and interest in cases of sick units, who suffered because of the reasons beyond their control. Bank is a State within the ambit of Article 12 of the Constitution and cannot act arbitrarily and discriminately between various units. In some cases loan had been written off and in some cases the interest had been

waived off. Defendant's case being similar, it cannot be discriminated by the Bank.

20. In the application under Order 6, Rule 17, C.P.C. and in the proposed amended written statement there is absolutely no change proposed in the entire body of the written statement except by seeking to add the aforesaid pleas as regards the contract being void and illegal and about the nature of Unit being sick.

21. The learned Counsel for the plaintiff-respondent contended that the pleas sought to be raised have no merit since Reserve Bank of India guidelines are not binding in view of the contract between the parties and the defendant-unit is not a sick industry. It has further been challenged that in the appeal no challenge has been made on the second plea sought to be raised. At this stage, we may point out that while considering the application for amendment courts cannot go into the truth or falsity of maintainability of case in amendment. While considering whether the amendment should or should not be allowed, the Court ought not to go into the alleged falsity of the case in the amendment. The court cannot go into and give a finding on the merit of the amendment sought for without first allowing the amendment and framing an issue thereon and allowing both sides to adduce evidence. Thus whether the plea is right or there is any force in it, we have to adjudge after the permission is granted to amend the pleas and not before that.

22. The other submission that in the grounds of appeal there is no challenge made about the second plea has also no force since the prayer in the appeal is for allowing the application for amendment of the written statement. It has nowhere been stated by the defendants-appellants that they have abandoned the plea or the same is withdrawn.

23. In case defendants, without seeking any amendment of the pleas already raised and without denying the facts that they have already admitted such as the execution of the loan documents or agreed to pay interest, are seeking to add a plea that such a contract by which they agreed to pay interest is void for the reasons that the same runs counter to the circulars issued by the Reserve Bank of India, which has statutory force and are binding on all banks including the plaintiff, it will not amount to taking up a totally inconsistent or different stand. This stand will not be contrary to the stand already taken. Defendants have already taken up a stand that they did execute certain documents and agreed to pay interest at the rate of 15 1/2% per annum as per the norms of the Reserve Bank of India. By saying that such a contract wherein the rate of interest is 17 1/2% p.a. with quarterly rests, is contrary to the circulars having statutory force and is void and do not amount to totally displacing the pleas already taken. The admissions which the defendants made in the written statement were that they were prepared to pay the suit amount provided the Bank comes forward with clean hands with proper calculations etc. and demand real amount due from the defendants. This plea has remained unchanged and is not sought to be amended.

The only paragraphs sought to be added are paragraphs 2 and 3 in the preliminary objections and paragraph 17 and 18 on merits.

24. The question that in the earlier written statement no plea was raised that defendant was a sick unit and the plaintiff cannot recover the amount and by seeking amendment a plea sought to be raised that the defendant is a sick unit and for the period during which the defendant remained sick unit interest cannot and ought not to be . charged is also not such a plea which will have the effect of totally displacing the plaintiff's case or causing any prejudice. Evidence has not yet been led. Issues have also not been framed. Whether the defendant was a sick unit or not will have to be adjudged only when plea is permitted to be raised and at this stage by allowing this plea to be raised, it will not amount to displacing the plaintiffs case. The defendant is seeking amendment at this stage by raising a plea that defendant remained a sick unit for some time and factory had to be closed and it is not that the defendant is seeking total writing off the loan amount. But is seeking only the benefit, for some period during which the unit remained a sick industry, if permissible under law. We have also observed that in the grounds of appeal in this Court in paragraph 7, the defendants-appellants have clearly agitated the impugned order by which the amendment has not been allowed. While allowing this plea to be raised, the merits or demerits thereof cannot be looked into at this stage and we are of the opinion that it will have no prejudicial effect on the plaintiffs rights and will not amount to displacing the plaintiffs case. It also cannot be said that by not taking up this plea initially defendant had impliedly admitted that it was not a sick unit since no such plea was raised by the plaintiff in the plaint and there was no Occasion for the defendants to have met the same. The object of Order 6, Rule 17 of the code is that the courts should get at and try the merits of the case that comes before them and should consequently allow ail amendments that may be necessary for determining the real question in controversy between the parties without causing injustice to the other side. As a general rule courts are always more liberal in allowing amendment to the written statement than in the case of an amendment of the plaint, as question of prejudice are less likely to operate with the same rigour in the former than in the later case. Of course this is subject to the limitation that the amendment sought for should not be inconsistent with the plea taken in original written statement and the right of the plaintiff should not get defeated.

25. In this view of the matter, we find that learned single Judge did not correctly apply the law and erred in dismissing the appli- cation. The impugned order as such is liable to be quashed and set aside.

26. Consequently, we allow the appeal, set aside the impugned order and allow the application moved by the defendants-appellants and permit them to amend the written statement, subject, however, to the payment of Rs. 1000/- as costs. Proposed written statement is directed to be taken on record.

27. Costs of appeal are made easy.