

(2008) 03 BOM CK 0005
In the Bombay High Court
Case No : Writ Petition No. 79 of 2008

Mrs. Sharad Govind Ghode

APPELLANT

Vs

M/s. Sellwell Foods and Beverages Pvt. Ltd.

RESPONDENT

Date of Decision : 19-03-2008

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 115

Citation : (2008) 03 BOM CK 0005

Hon'ble Judges : R.M.S. Khandeparkar, J

Bench : Single Bench

Advocate : S.S. Kakodkar, for the Appellant;

Final Decision : Dismissed

Judgement

1. The petitioner challenges order dated 15.11.2007 passed in Special Civil Suit no. 12/2005, by the Civil Judge, Senior Division, Margao. By the impugned order, the application for amendment to the written statement has been partly rejected. After framing of issues in the suit, the petitioner-defendant filed an application for amendment of written statement whereby the petitioner sought to introduce the below quoted sentence in Para 8 of the written statement, while seeking to substitute year "2000" by the year "2002" in Para 2. The Trial Court allowed the amendment to the extent it related to the correction of the year in Para 2 while rejected the request for introduction of the following sentence in Para 8, "that bottles and crates is not the property of the plaintiff and are not entitled for the relief". The said amendment was rejected on the ground that the same is totally contrary to the plea raised in defense in the written statement, inasmuch as that the defense of the petitioner is that the defendant was appointed as the distributor vide Agency Agreement dated 11.09.2000 by the plaintiff-respondent whereas the proposed amendment seeks to deny such relationship between the parties.

2. The pleadings in the plaint and particularly in Para 3 and 4, thereof reads thus:

3. The defendant is the sole Proprietress of the Proprietary Concern, Ms. Prasad Enterprises and the same business was mostly managed by the husband of the Defendant, Mr. Govind Ghode.

4. The plaintiffs submit that they appointed the defendant as their distributors for the abovesaid products for Margao City, Gandhi Market, Station road, Comba, Old Market, Pajifond, Metropole areas.

3. In answer to the said pleadings in Para 3 and 4 of the plaint, the petitioner-defendant has stated in Para 4 of the Written Statement as under :

With reference to Para 3 and 4 of the plaint, the contents thereof are denied except that the defendant is the sole proprietress and that the defendant was appointed as Distributor vide Agency Agreement dated 11.09.2000.

4. The pleadings in the written statement with reference to the plea of the plaintiff in Para 3 and 4 is clear to the effect that the petitioner had admitted the existence of Agency Distributorship Agreement with the plaintiff and that the same was in the name of the proprietary concern of the petitioner, namely Prasad Enterprises.

5. In Para 8 of the plaint, the respondents have stated that they are entitled to receive from the petitioner the total outstanding amount under the various credit invoices in respect of supplies made by them to the extent of Rs.2,18,076,77 and that the same is as per the statement of account for the period from 01.04.2001 till 23.01.2002. It has also been stated that the plaintiffs are entitled to receive from the defendant 3924 crates inclusive of empty bottles. Further statement is to the effect that it being commercial transaction and plaintiffs had to pay its employees and debtors and also had to raise loan from financial institutions for which the plaintiffs had to pay higher rate of interest, the defendant should be made liable to pay interest at the rate of 18% p.a. on the outstanding balance.

6. The said pleadings are sought to be answered by the petitioner in Para 8 of the written statement stating thus:

With reference to para 8 of the plaint the contents thereof are denied. The plaintiff is not entitled for any sum from the Defendant or any crates or bottles from the Defendant. The Defendant does not owe to the Plaintiff any sum nor there are any bottles or any crates of the plaintiffs with the Defendant. The Plaintiff is not entitled to recover any sum or the interest from the Defendant.

7. Based on the pleadings, the Trial Court framed the following issues :

ISSUES

1. Whether the Plaintiffs prove that they are entitled to recover a sum of Rs.2,18,076.77 (Rupees Two lakhs eighteen thousand Seventy seven six and paise seventy seven only) together with interest @ 18% per annum from the date of filing of this suit until payment/till realisation from defendant?

2. Whether the Plaintiffs prove that the defendant is liable to return the crates numbering 3959 inclusive of empty bottles to the Plaintiffs or in the alternative the cost of the suit material?

3. Whether the defendant proves that the claim raised is barred of law of limitation ?

What relief ? What order ?

8. Apparently, in the written statement, there was no issue raised as regards the ownership of the bottles and crates. At the same time, the pleadings of the petitioner disclose a clear admission of Distributorship Agency Agreement between the petitioner and the respondents. Being so, any statement which virtually amounts to denial of such relationship which is already admitted, would amount to withdrawal of the said admission. It is settled law that though inconsistent pleas can be raised, it is not permissible for the party to withdraw the admission by way of amendment to the pleadings unless such withdrawal is justified while seeking such amendment.

9. The learned Advocate appearing for the petitioner has sought to rely upon the decision of the Apex Court in the matter of Akshaya Restaurant Vs. P. Anjanappa and Another, , M/s. Estralla Rubber Vs. Dass Estate (Pvt.) Ltd., , Baldev Singh and Others Etc. Vs. Manohar Singh and Another Etc., and Usha Balashaheb Swami and Others Vs. Kiran Appaso Swami and Others, .

10. In Akshaya Restaurant's case, it was held that the amendment to the pleadings to modify the original plea to the effect that the defendant had entered into agreement for sale of suit land to the plea that the defendant had entered into agreement for development of suit land was held permissible. It was ruled that :

It is settled law that even the admission can be explained and even inconsistent pleas could be taken in the pleadings. It is seen that in paragraph 6 of the written statement definite stand was taken but subsequently in the application for amendment, it was sought to be modified as indicated in the petition. In that view of the matter, we find that there is no material irregularity committed by the High Court in exercising its power u/s 115 C.P.C. In permitting amendment of the written statement.

11. In the case in hand, apart from contending that the petitioner defendant desire to amend the written statement and that amendment is only to remove typographical error and to elucidate the case of the parties, no other justification was disclosed in the application for the amendment. The decision of the Supreme Court in Akshaya Restaurant's case perhaps could have been of some help to the petitioner if the petitioner was able to make out a case for the proposed amendment provided she was to explain the modification in the stand taken in the original written statement and had given justification for the same. In the absence of any such materials on the part of the petitioner, the decision of

Akshaya Restaurant's case is of no help.

12. In Estralla Rubber's case, the Apex Court had held that there was no admission as such by the defendant which was sought to be withdrawn by the proposed amendment and, therefore, there was no justification for the rejection of the proposed amendment. It was also held that it is open to defendant to take alternative or additional defense. The relevant observation in the Judgment read thus :

We have perused the relevant records including the original application and the proposed amendment. We are not able to see any admission made by the defendant as such, which was sought to be withdrawn. By the proposed amendment the defendant wanted to say that Ala Mohan Dass was a permissive occupier instead of owner. The further amendment sought was based on the entries made in the revenue records.

The narration of the facts in para 2 of the said decision disclose that the appellant before the Apex Court was the original defendant and the respondent was the original plaintiff. The said plaintiff had filed the suit against the defendant for eviction on the ground of reasonable requirement of the building for personal use or rebuilding and on the ground of default in payment of rent. The defendant had filed an application under Sections 17(2) and 17(2-A) of the West Bengal Premises Tenancy Act, 1956, raising certain contentions including the denial of relationship of landlord and tenant between the parties and thereafter the defendant had filed an application for amendment. The said application was allowed by the Trial Court, however, the High Court set aside the order on the ground that it would have effect of displacing the plaintiff from the admission made by the defendant in this petition u/s 17(2) and 17(2-A) of the said Act. It was thereafter on perusal of the records, the Apex Court held that there was no admission of any withdrawal as such. Considering the fact that there was no admission of withdrawal as such, the observation made in that regard by the Apex Court cannot be applied to the case in hand. Hence, the decision of Estralla Rubber's case is of no help to the petitioner.

13. In Baldev Singh's case, the Apex Court had held that :

An amendment of written statement are not necessarily governed by exactly the same principle though some general principles are certainly common to both, but the rules that the plaintiff cannot be allowed to amend his pleadings so as to amend his pleadings so as to alter materially or substitute his cause of action or the nature of his claim has necessarily no counterpart in the law relating to amendment of the written statement. Adding a new ground of defense or substituting or altering a defense does not raise the same problem as adding, altering or substituting a new cause of action and accordingly, in the case of amendment of written statement, the courts are inclined to be more liberal.

The said ruling was given after having found that there were no inconsistent pleas raised by the amendment to the written statement. Besides, in the

application for amendment, the defendant had explained as to how the proposed amendment was in fact an elaboration of the case made out in the written statement. In those circumstances, the Apex Court had clearly found in the facts of the case that the proposed amendment was not even inconsistent with the plea already raised in the written statement.

14. In Usha Balashaheb Swami's case, the Apex Court had held that :

a prayer for amendment of the plaint and a prayer for amendment of the written statement stand on different footings. The general principle that amendment of pleadings cannot be allowed so as to alter materially or substitute cause of action or the nature of claim applies to amendments to plaint. It has no counterpart in the principles relating to amendment of the written statement. Therefore, addition of a new ground of defense or substituting or altering a defense or taking inconsistent pleas in the written statement would not be objectionable.

That was not a case of withdrawal of admission by the defendant and there is clear observation to that effect in the said decision of the Apex Court. The facts of the said case as described in Para 24 disclose that the defendant in the original written statement had stated that Plaintiff and defendant nos. 1 to 7 had 1/2 share and defendant nos. 8 to 14 had 1/2 share in all the family properties and that the maternal aunts too had share therein. By the proposed amendment to the written statement, the appellants had maintained the admissions made by them in the written statement but had sought to add a proviso or condition to the admission. In that regard, it was held by the Apex Court that "therefore, it was not a case of withdrawal of the admission by the appellants by making the application for the amendment of the written statement but in fact such admission was kept in tact and only a proviso had been added." That being the case, there was neither inconsistency nor withdrawal of any admission. Hence, the decision in Usha Balashaheb Swami's case is also of no help.

15. Since the proposed amendment seeks to introduce a plea which is totally contrary to the clear admission of the relationship between the parties arising out of the agreement between the parties, the same cannot be allowed as it would result in withdrawal of the admission made earlier and, therefore, I do not find any irregularity committed by the Trial Court in rejecting the proposed amendment and hence there is no case for interference in writ jurisdiction in the impugned order. The petition, therefore, stands dismissed accordingly.