
(1975) 05 DEL CK 0033

In the Delhi High Court

Case No : C.P. No. 70 of 1972; C.A. No. 27 of 1975

M/S. BHAGAT INDUSTRIAL CORPORATION LTD.

APPELLANT

Vs

M/S. EGO METAL WORKS PRIVATE LTD.

RESPONDENT

Date of Decision : 23-05-1975

Acts Referred:

Citation : (1976) 5 CTR 57

Hon'ble Judges : Rangarajan, J

Bench : Division Bench

Judgement

Rangarajan, J. - This is an application under Order 6, Rule 17 read with Section 151 of the CPC to amend C.P. 70 of 1972, which is a petition for winding up. Rules, 6 of the Companies Act, 1956 (hereinafter called the Act) which has not been specifically mentioned in the application has nonetheless to be considered.

2. A few facts leading to this application to amend the winding up petition have to be stated. The applicant is M/s. Bhagat Industrial Corporation Ltd. (hereinafter called the petitioning Company) which has sought as a creditor of M/s. Ego Metal Works Private Ltd. (hereinafter called the respondent Company) to wind it up. According to the winding up petition (C.P. 70 of 1972) the following two sums are due from the respondent company to the petitioning company. It was stated in paragraph 6 of the winding up petition that a sum of Rs. 49,600/- had been deposited with the respondent company on 1-8-1969 as per receipt No. 279. The same was renewed, the respondent company issuing receipt No. C. 305 dated 15-3-71 for Rs. 49,600/-. The still earlier deposit of Rs. 40,000/-, to start with as per receipt No. 214 dated 12-6-1967, was not mentioned. This amount is said to have been paid by cheque No. 474014, dated 12-6-1967 drawn by petitioning company in favor of the respondent company and on the New Bank of India Ltd. Janpath.

3. According to para 7 the petitioning company had also deposited Rs. 1,24,000/- with the respondent company as per deposit receipt No. C. 280 dated 30-11-1969, for a period of 12 months. The said deposit was renewed by the

petitioning company and the respondent company then issued No. C. 306 dated 15-3-1971 for the said amount of Rs. 1,24,000/- as being due and payable on 30-11-1971. The still earlier deposit of Rs. 1,00,000/- as per receipt No. 231 dated 30-11-1967 was not mentioned.

4. On both the said sums total amount of Rs. 1,73,600/- interest was due at the agreed rate of 1% per month all the fixed deposits were to carry interest at that rate.

5. The fixed Deposit Receipts, both dated 15-3-1971, for Rs. 49,600/- and Rs. 1,24,000/- had, however been filed along with the petition. It had also been endorsed on the former receipt by the Managing Director, Darshan Singh Chawla (hereinafter called Chawla) that the same was issued in lieu of Fixed Deposit Receipt No. 279 dated 1-8-69, that the interest was to run from 12-6-1970 and that the receipt was to mature on 12-6-1971. The latter Fixed Deposit Receipt also mentions that it was by way of renewal, it contains an endorsement in manuscript by the same person that the receipt was issued in lieu of Fixed Deposit Receipt No. 280 dated 30-11-1969 and that the receipt was to mature on 30-11-1971.

6. Photostat copies of FDR Nos. 279 and 280 bearing dates 1-8-1969 and 30-11-1969 respectively were also filed with this petition. The former, for Rupees 49,600/- bearing No. 279 and dated 12-6-1967, contains an endorsement on the top of it that the said receipt was issued in lieu of (the earlier) FDR No. 214 dated 12-6-1967 issued by the respondent company in favor of the Punjab Distilling Industries Ltd. for Rs. 40,000/- and that the interest which was to run for two years, from 12-6-1967 to 11-6-1969 at 12% per annum was Rs. 9,600/-. The latter (a similar FDR) for Rs. 1,24,000/-, also contains an endorsement in manuscript on top of it that the said receipt (C 280) was issued in lieu of F.D.R. 231 dated 30-11-1967 for Rs. 1,00,000/- and that the interest for two years from 30-11-1967 to 29-11-1969 was Rs. 24,000/- thus making a total of Rs. 1,24,000/-. The photostat copies bear what appears to be an endorsement of cancellation, obscuring from view the dates mentioned in both the receipts, it is yet possible to see that the former was in the month of August, 1969 and the latter in November, 1969. Certain Photostat copies of ledgers etc. have been filed to which it is needless to refer at this stage.

7. The petition for winding up was preceded by a statutory notice u/s 434 of the stating that the above said sums of Rs. 49,600/- and Rs. 1,24,000/- had been deposited; reference had been made to receipt Nos. C. 280 dated 30-11-1969 and C. 306 dated 15-3-1971 (in respect of the former) and receipt No. 279 dated 1-8-1969 and No. C. 305 dated 15-3-1971 (in respect of the latter). It was further noticed in the said notice that when the two deposits were (finally) renewed four post dated monthly cheques with regard to the interest due on the said deposit at the agreed rate of 12% interest were issued, making a total of Rs. 20,832/-, but they had all been dishonoured by the company's bankers. The notice, Therefore, demanded the total amounts to the petitioning company by

the respondent company due under the said receipts within 21 days on receipt of the said notice by the company failing which an application for compulsory winding up of the company would be made in this Court.

8. To the notice issued by this Court to show cause why the petition should not be admitted, the new Management of the Board of Directors of the respondent company which had been elected, as a result of the order to hold a meeting ordered u/s 186 of the Act, replied that with reference to the claim of Rs. 49,600/- the petition seemed to be "highly doubtful" and it appeared to be without any consideration. With reference to the sum of Rs. 1,24,000/- it was pleaded that the said sum of Rs. 1,24,000/-, or any part thereof was not received by the respondent company from the petitioning company. Having regard to the facts set out no part of advance of Rupees 49,000/- or even Rs. 1,24,000/- had been made at the time of the renewal of the two F.D.Rs. in question.

9. The new Board of Directors contend that the shares held by the Punjab Distilling Industries in the capital of the face value of Rs. 1,00,000/- were transferred by the Punjab Distilling Industries to the late Chawla in the year 1967 for such consideration was not actually paid by him but he issued instead various deposit receipts in favor of the petitioning company purporting to be receipts issued by the respondent company against receipt of money which amount had actually not been transferred in favor of Chawla on 29-10-1967 and a receipt was issued by Chawla purporting to show receipt of money by the respondent company on 13-11-1967. A sum of Rs. 1,00,000/- was seen to have been deposited in the account of Chawla in the books of account of the respondent company on 31-12-1967, the last date of the relevant accounting year of the respondent company. It was, Therefore, contended that no money had been received by the respondent company and that the receipt was without consideration. The new Board of Directors further state that they had not been able to find any resolution of the respondent company whereby the said Chawla was authorised to complete the transaction in the above manner. Chawla, it is stated, owing to personal financial difficulties, was amenable to "some undue influence" of R.D. Bhagat, who styled himself as Chairman and Managing Director of the petitioning Company. The Fixed Deposit Receipt issued in 1967, in the circumstances mentioned above, was got renewed by the petitioning company two years later under the hand and signatures of the late Chawla. The amount of renewed Fixed Deposit Receipt was Rs. 1,24,000/- which appeared to have been arrived at it by calculating two years interest on the FDR issued in 1967 for Rs. 1,00,000/-. An F.D.R. which had been renewed in 1969 for Rs. 1,24,000/- was again renewed for the very same amount by Chawla in 1971.

10. By the present application for amendment the petitioning company seeks to explain, by way of clarification, that on 12-6-1967 the petitioning company had deposited a sum of Rs. 40,000/- with the respondent company with respect to which an F.D.R. receipt bearing No. 214 and dated 12-6-1967 was issued, the

petitioning company had paid to the respondent company the said amount by cheque No. 474014 dated 12-6-1967 drawn by the petitioning company and payable at New Bank of India Ltd. Janpath New Delhi - the bankers of the petitioning company in favor of the respondent company M/s. Ego Metal Works Pvt. Ltd., the said cheque was only encashed. Since the respondent company did not pay the agreed interest at 1% per month on 1-8-1969 the respondent company issued a renewed FDR bearing No. 279 in favor of the respondent company in the sum of Rs. 49,600/- (Rs. 40,000/- being principal and Rs. 9,600/- as interest for a period of 2 years - from 21-6-1967 to 11-6-1969). This fact it may be recalled, was mentioned on the said FDR itself. Thereafter the respondent company issued another renewed F.D.R. 305 dated 15-3-1971 for Rs. 49,600/- in favor of the petitioning company and the fact of its being a renewal in the aforesaid manner was also endorsed on the said receipt. It is explained that the petitioning company was originally known as the Punjab Distilling Industries Ltd., and Therefore the original F.D.R. 214 dated 12-6-1967 had been issued in favor of the said Punjab Distilling Industries Ltd. Thereafter the name of the petitioning company was changed to M/s. Bhagat Industrial Corporation Ltd., and as such the said F.D.R.C. 279 dated 1-8-1969 and the said F.D.R. 305 dated 15-3-1971 were both issued in favor of M/s Bhagat Industrial Corporation Ltd. Khalsa. The last mentioned F.D.R. 305, on which interest at the agreed rate of interest at 12% per annum was payable from 12-6-1970, had not been redeemed by the respondent company no payment had been made towards the principal amount. Then details were mentioned concerning the cheques totaling Rs. 20,832/-, which were given towards interest, but which had been dishonoured. It was further stated that shares of the face value of Rs. 1,00,000/- in the capital of the respondent company which had been sold by the petitioning company to Chawla for Rs. 1,00,000/- were transferred in his favor in the records of the respondent company. Thereafter Chawla requested the petitioning company that the said amount of Rs. 1,00,000/- which was payable by Chawla to the petitioning company be got deposited by the petitioning company with the respondent company as a fixed deposit carrying interest at 1% per month. The petitioning company agreed to this proposal and Chawla got a sum Rs. 1,00,000/- deposited with the respondent company to the credit of the petitioning company on 30-11-1967 and for the same amount the respondent company issued its fixed deposit receipt 231 dated 30-11-1967 in the sum of Rs. 1,00,000/- carrying interest at 12% per annum in favor of the petitioning company. Successive renewals which were made, as noticed above details of which have been mentioned, are also sought to be incorporated in the winding up petition by way of amending the same.

11. With reference to the said sum of Rs. 49,600/- also the further renewals and the payments of interest are also sought to be incorporated explaining how the principal sum of Rs. 1,73,000/- (in respect of both) as well as interest due thereon at the rate of 1/- per annum together with future interest from 5-5-1972 are due. It is stated that the said amendment setting out these details have been

sought only for the purpose of "clarifying" the position and to bring out the real matters in issue between the parties.

12. The amendment is opposed on various grounds such as the following :-

There being no power to amend a winding up petition; if any amendment was necessary the petitioning company might withdraw the petition filed already and file a fresh petition containing the necessary particulars. Since a substantial part of the alleged claim made in the winding up petition is bona fide disputed no amendment shall be allowed especially when the respondent company could claim immunity from liability on the ground of lapse of time in respect of the transactions alleged. No claim with regard to the sum of Rs. 40,000/- or of Rs. 1,00,000/- was made in the notice of demand dated 18-1-1972. The contentions in the reply, filed in response to the show cause notice, are repeated : they bear on the merits of the winding up petition. The application for winding up itself is said to be mala fide because under a scheme of arrangement the petitioning company is seeking to take control over the respondent company.

13. Despite the long narration of relevant facts, to bring out clearly and fully the scope of the original petition, the respondent company's defense to it, and the nature of scope of the amendment which has been sought, it will be seen that the crux of the matter is shortly this : the petitioning creditor had, both in the notice of demand as well as in the winding up petition mentioned only the amounts due to the petitioning creditor at an intermediate stage and not what it was to start with, the petitioning company is only seeking to make it clear that the sums of Rs. 49,600/- and Rs. 1,24,000/- which had been mentioned in respect of the two F.D.Rs. the respective amounts were to start with only Rs. 40,000/- and Rs. 1,00,000/-. Some more details are also mentioned, which are evidentiary, in support of this position. The question is whether an amendment of this kind, which does not add any fresh claim or introduce a new cause of action but only explains the approach to the claims made already could be allowed.

14. Mr. Mahinder Narain, learned counsel for the respondent company, has drawn my attention to M/s. Cox & Kings (Agents) Ltd. vs. Phoenix Oil Co. (India) Ltd. AIR 1964 Punj 206 where Kapur, J. observed that the second amendment, which had been allowed by the lower court in that case, was unnecessary if it was only for clarifying what had already been said and should not have been allowed it was, he pointed out, an additional ground of attack introducing a case by taking away a legal right vested in the opponent which should not have been allowed at this stage. With due respect it seems to me that such an approach, putting the petitioner seeking amendment in the horns of dilemma, is much too restrictive and seems opposed to the more liberalised approach to such matters indicated by the Supreme Court in later decision. The present application for amendment seeks more to enlarge upon facts already stated by introducing an additional approach to the facts already pleaded, (though it is stated to be mere clarification) than to introduce any substantially new fact which cannot be gathered even from the petition and the documents filed with it.

15. Mr. Mahinder Narain relied upon A.K. Gupta and Sons Vs. Damodar Valley Corporation, where A. K. Sarkar, J., referred to the still earlier decision of the Supreme Court in L.J. Leach and Company Ltd. Vs. Jardine Skinner and Co., as well as some other cases and explained that as a general rule the party would not be allowed to set up a new case or a new cause of action, particularly when a suit on a new cause of action is barred, by way of amendment. But it is also well recognised that where the amendment does not add a new cause of action or set up any new case, but it amounts to no more than presenting a different or additional approach to the facts already on the record, the amendment will be allowed even after the expiry of the statutory period of limitation (vide observations made by A. N. Ray, C.J. When the proposed Court in P. H. Patil vs. K. S. Patil, AIR 957 SC 363 in a very recent decision of the Supreme Court in Shanti Kumar R. Canji Vs. The Home Insurance Co. of New York, upon which Mr. Mahinder Narain relied, the legal position was reiterated by A. N. Ray, C.J., when the proposed amendment takes away from the defendant the defense of immunity from any liability by reason of limitation it would not be allowed, but there could be exceptional cases where amendment could be allowed despite lapse of time. It seems to me that introducing an additional approach to facts already stated would be one such exceptional case to which no question of limitation would apply. Ray, C.J., has pointed out, that if an amendment merely allows the plaintiff to state a new cause of action, or ask a new relief, or to involve a new ground of relief it would not be a case of deciding whether the contentions are right and hence it would not be a judgment within Clause 15 of the Letters Patent. Only if the amendment took away from the defendant any defense of immunity from liability by means of limitation on would it become a judgment under Clause 15 of the Letters Patent. This may be a somewhat different aspect with which we are not concerned in the present case at the moment, but I fail to see how any immunity from any liability, by reason of limitation, arises in the present case on the facts noticed above. The petitioning company had already mentioned that two amounts were due to it; it had also made a demand for the entire amounts due to it explaining how the four posted cheque issued towards interest were dishonoured, how the petitioning company was not even paid the interest accruing on them and making a demand for payment on the said two amounts with interest coupled with a further statement that if they were not so paid within 21 days of the receipt of the said notice by the respondent company an application for winding up would be made. The antecedent facts pertaining to the execution of the latter F.D.R. in both cases, had no doubt not been fully stated either in the notice or even in the winding up petition, but the amounts claimed from the company had been set out with particularly the document from which such antecedent facts could be gathered, as noticed above, had not only been filed with the petition but the respondent company had dealt with them in the reply. The proposed amendment seeks to explain how the two amounts claimed became payable, tracing the entire history of the monetary transactions between the petitioning company. What has been stated, in both the cases, was not the amounts deposited to start with, but what

they were when the F.D.Rs. were renewed at a later stage. It is worth emphasising, by way of repetition, that the respondent company had set out in its reply its own version of the monetary transaction between the parties. Hence I am unable to visualise any possibility of prejudice to the respondent company by the amendment being allowed. The amendment, on the other hand, seems necessary for determining the real question in controversy between the parties. The question by the respondent company whether there is a bona fide dispute or not will have to be gone into later. No new cause of action is thus sought to be introduced : no new case is being sought to be made out. As pointed out by S. K. Das, J. in *Pirgonda Hongonda Patil Vs. Kalgonda Shidgonda Patil and Others*, all amendments ought to be allowed which satisfy the two conditions : (a) not working injustice to the other side, and (b) necessary for the purpose of determining the real questions in controversy between the parties.

16. Mr. Mahinder Narain relied upon the decisions in *Re Cuthbert Cooper & Sons Ltd.* (1973) 2 All ER 466, *Re Lundie Brothers, Ltd.*, (1965) 2 All ER 692 as well as *In Re: East Kajoria Collieries Private Ltd.*, for the proposition that if the petition for winding does not contain sufficient grounds fresh evidence could not be admitted to enable the petitioner to obtain an order of winding up. But these cases do not touch the question whether an amendment could be allowed or not even of a winding up application. It is well settled, as a matter of procedure in civil proceedings, that evidence will not be permitted on an aspect not pleaded and that even if there is any evidence without the necessary pleading in that respect the same could not even be looked into. But this does not even touch the question, which is distinct, whether the pleadings can be allowed to be amended.

17. Mr. Mahinder Narain next contended that a winding up petition must bear some analogy to the insolvency law and relied, in this connection, upon the decision of Abdur Rahman, J., in *P.L.S.P.L. Palaniappa Chettiar Vs. Y.P.R.Y.N.Y. Chidambaram Chettiar and Others*, where it was pointed out that an amendment of a petition to adjudge a debtor insolvent should not be allowed if a new cause of action was sought to be substituted thereby and the debtor would be prejudiced. Those are different considerations. The same learned Judge also observed that the court could liberally allow amendments in insolvency proceedings just as in the case of the other cases to which the CPC applies.

18. Mr. Mahinder Narain finally contended that winding up petitions could not be allowed to be amended at all and that he had been unable to come across even a single case of a winding up petition having been allowed from the reported decisions either in England or in India which he has been able to study. I am not aware of the practice, rules and directions of the English Courts in this respect; Mr. Mahinder Narain said that he had not investigated that aspect. It seems sufficient to refer to the specific rule which had been framed by the Supreme Court u/s 643 of the Act, after consulting the High Courts, as follows :

"Rule 6. Practice and procedure of the Court and provisions of the Code to apply.
- Save as provided by the Act or by these Rules, the practice and procedure of

the Court and the provisions of the Code so far as applicable, shall apply to all proceedings under the Act these Rules. The Register may decline to accept any document which is presented otherwise than in accordance with these Rules or the practice and procedure of the Court."

19. These rules came into force with effect from 1-10-1959 and were, as already noticed framed u/s 643 of the Act which reads as follows :

"643, (1) The Supreme Court, after consulting the High Court -

(a) shall make rules providing for all matters relating to the winding up of companies which, by this Act, are to be prescribed; and may make rules providing for all such matters as may be prescribed, except those reserved to the Central Government by sub-section (5) of Section 503, sub-section (3) of Section 550, Section 552 and sub-section (3) of Section 555; and

(b) may make rules consistent with the Code of Civil Procedure, 1908.

(i) as to the mode of proceedings to be had or winding up a company in High Courts and in Courts Subordinate there-to.

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20. The above rule (6) is wide enough to enable a court to order amendment even on a winding up petition if the circumstances of the case warrant the same.

21. After I had directed this judgment and set it down for being pronounced noticed from the Digest of cases prepared by the High Court that T. P. S. Chawla, J. had taken the same view as I have done on amending pleadings in proceedings under the Companies Act, relying on Rs. 6 which had made the Civil Procedure Code, including Order 6 R. 17 applicable to such proceedings (vide Inder Kumar Jain vs. M/s. Osra Bottling Co. (P) Ltd. C.A. No. 75 of 1975 in C.P. No. 46 of 1969, decided on 17-3-1975 (Delhi). My attention had not been drawn to the above said decision of Chawla, J., which I have since perused. He had referred to the decision in AIR 1955 78 (Nagpur) for coming to the conclusion that if the Court did not have the power to amend the pleadings in proceedings under the Companies Act it would lead to the "astonishing result" that such a pleading could never be amended. I am bound by the said decision : I respectfully concur in it. Since I was not aware of the said decision when I reached the conclusion I did in this case, the above decision fortifies me in the view I have taken. In the Nagpur case amendment of a winding up petition was allowed, relying on Section 141 C.P.C and even without Rule 6 which did not exist then.

22. Whether there is a bona fide dispute concerning the debts claimed by the petitioning company is one which can be gone into after admitting the petition

and recording the evidence. I find that such a course was adopted in *Re Welsh Brick Industries Ltd.* 1946) 2 All ER. 197 All that is being decided at this stage is the property of allowing the amendment sought for. It seems to me that the amendment has, in the interest of justice, to be allowed. The petitioner will file an amended petition on or before the 15th of July, 1975, with a copy of the same to the respondent company who will file further reply, if any, in addition to the one already filed within two weeks, thereafter. The application for amendment is allowed subject to the payment of costs of Rs. 250/-. Time for payment of costs till 15th July, 1975. The main petition to be listed on 18th July, 1975.