
(2012) 04 BOM CK 0069
In the Bombay High Court
Case No : Writ Petition No. 73 of 2011

M/s. Machado Computer Services

APPELLANT

Vs

Diginerve Networks Pvt. Ltd., Bank of Maharashtra and State
Bank of Mysore

RESPONDENT

Date of Decision : 27-04-2012

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 6 Rule 17
Constitution of India, 1950 — Article 227
Specific Relief Act, 1963 — Section 38, 39, 40, 40(2)

Citation : (2012) 04 BOM CK 0069

Hon'ble Judges : F.M. Reis, J

Bench : Single Bench

Advocate : D. Shirodkar, for the Appellant;

Judgement

F.M. Reis, J.—Heard Shri D. Shirodkar, the learned Counsel appearing for the petitioner. None for the respondents though served. The above petition challenges an order passed by the learned Civil Judge, Senior Division at Panaji whereby an application for amendment under Order 6 Rule 17 of the CPC to incorporate an amendment to the plaint, inter alia, to include a claim for damage, came to be rejected.

2. The suit came to be filed by the petitioner against the respondents for the following reliefs :

(a) Grant permanent injunction restraining the Defendant Nos.1 and 2 from encashing said LC dated 17/02/2003 for an amount of Rs. 45 lakhs;

(b) Grant permanent injunction restraining the Defendant No. 2 from transferring money based on LC dated 17/02/2003 for Rs. 45 lakhs to the account of the Defendant No. 1 in the bank of the Defendant No. 3.

(c) Grant temporary injunction restraining the Defendant Nos.1 and 3 from encashing LC dated 17/02/2003 for Rs. 45 lakhs in the alternative the Defendant

No. 2 may be directed to not to encash the said LC to the Defendant No. 1.

(d) Ex-parte ad-interim relief in terms of prayer clause (a) and (b) above,

(e) Such other and further reliefs as this Honourable Court deems fit and proper.

3. The respondents have filed their written statement disputing the claim put forward by the petitioner. The application for temporary injunction filed by the petitioner came to be allowed by the learned Civil Judge but however the said order came to be set aside by this Court by order dated 30/04/2009. Thereafter, the petitioner filed the application for amendment praying inter alia that they are entitled for damages and sought to incorporate such facts in the plaint and seek a relief for recovery of such damages.

4. The respondents opposed the said application filed by the petitioner. The learned Judge, by the impugned order dated 23/12/2010 dismissed the application filed by the petitioner on the ground that the petitioner had already entered the witness box and in view of the amendment in the year 2002 to the CPC such post trial amendment cannot be allowed as there was no averment which prevented to the petitioner to file such application.

5. I have heard the learned Counsel appearing for the petitioner and perused the impugned order as well as the pleadings of the parties and considered the submissions advanced by the learned Counsel. The learned Counsel appearing for the petitioner has pointed out that the learned Judge has lost site that the suit filed was for permanent injunction and that the petitioner was entitled to seek claim of damages at any stage of the proceedings. The learned Counsel further pointed out that in any event the application for amendment was filed in view of the fact that the injunction granted by the learned trial Judge was vacated by this Court by order dated 21/04/2009 in Appeal From Order No. 47 of 2005. The learned Counsel, as such, submits that the learned Judge has acted with material irregularity in passing the impugned order which calls for interference of this Court under Article 227 of the Constitution of India.

6. Upon hearing the learned Counsel appearing for the petitioner, I find justification in the contention of Shri D. Shirodkar, the learned Counsel appearing for the petitioner. Section 40 of the Specific Relief Act provides as under:

40. Damages in lieu of, or in addition to, injunction.-

(1) The plaintiff in a suit for perpetual injunction u/s 38, or mandatory injunction u/s 39, may claim damages either in addition to, or in substitution for, such injunction and the court may, if it thinks fit, award such damages.

(2) No relief for damages shall be granted under this section unless the plaintiff has claimed such relief in his plaint: Provided that where no such damages have been claimed in the plaint, the court shall, at any stage of the proceedings, allow the plaintiff to amend the plaint on such terms as may be just for including such claim.

(3) The dismissal of a suit to prevent the breach of an obligation existing in favour of the plaintiff shall bar his right to sue for damages for such breach.

Subsection (2) of Section 40 clearly stipulates that the plaintiff is entitled to incorporate a prayer for damage at any stage of the proceedings. In the above case after the disposal of the Appeal From Order preferred by the petitioner by this Court the petitioner filed the application to claim such damages.

7. Considering that the earlier reliefs sought were for permanent injunction there was no reason to refuse the application for amendment in view of Section 40(2) of the Specific Relief Act. The Apex Court in the judgment reported in 2001 (2) SCC 472 in the case of Ragu Thilak B. John v. S. Rayappan has held at paras 5 & 6 thus:

5. After referring to the judgments in Charan Das v. Amir Khan, L.J. Leach & Co. Ltd. v. Jardine Skinner & Co., Ganga Bai v. Vijay Kumar, Ganesh Trading Co. v. Moji Ram and various other authorities, this Court in B.K. Narayana Pillai v. Parameswaran Pillai held: (SCC p. 715, para 3)

3. The purpose and object of Order 6 Rule 17 CPC is to allow either party to alter or amend his pleadings in such manner and on such terms as may be just. The power to allow the amendment is wide and can be exercised at any stage of the proceedings in the interests of justice on the basis of guidelines laid down by various High Courts and this Court. It is true that the amendment cannot be claimed as a matter of right and under all circumstances. But it is equally true that the courts while deciding such prayers should not adopt a hypertechnical approach. Liberal approach should be the general rule particularly in cases where the other side can be compensated with the costs. Technicalities of law should not be permitted to hamper the courts in the administration of justice between the parties. Amendments are allowed in the pleadings to avoid uncalled-for multiplicity of litigation.

6. If the aforesaid test is applied in the instant case, the amendment sought could not be declined. The dominant purpose of allowing the amendment is to minimise the litigation. The plea that the relief sought by way of amendment was barred by time is arguable in the circumstances of the case, as is evident from the perusal of averments made in paras 8(a) to 8(f) of the plaint which were sought to be incorporated by way of amendment. We feel that in the circumstances of the case the plea of limitation being disputed could be made a subject-matter of the issue after allowing the amendment prayed for.

8. Considering the said judgment of the Apex Court, the learned Judge was not justified to refuse the application for amendment. The learned Judge has failed to exercise jurisdiction vested in him whilst passing the impugned order which calls for interference of this Court in exercise of jurisdiction under Article 227 of the Constitution of India. The learned Judge erred in dismissing the application for amendment on the ground that the petitioner was in the witness box. The claim for damages according to petitioner was on the ground of subsequent events.

9. In view of the above, I find that the impugned order dated 23/12/2010 cannot be sustained and deserves to be quashed and set aside. The merit of the claim of the petitioner by the proposed amendment can always be disputed by the respondent by filing additional written statement, and raise the defences available in law, even the issue of limitation, if any. In view of the above, I pass the following order:

ORDER

- (i) Rule is made absolute in terms of para (a) of the petition.
- (ii) Interim order stands vacated accordingly.
- (iii) The above petition stands disposed of accordingly with no order as to costs.