

(2007) 05 DEL CK 0077

In the Delhi High Court

Case No : CM No. 1842 of 2006 in WP (C) No. 582 of 1998

Sabharwal Brothers Security Corporation

APPELLANT

Vs

The Workman Shri Munshi Ram, Steel Authority of India Ltd.,
Sabharwal Brothers Security Corporation and The
Management of Steel Authority of India Ltd.

RESPONDENT

Date of Decision : 31-05-2007

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 6 Rule 17, Order 9 Rule 13, 151
Constitution of India, 1950 — Article 136, 142, 226
Industrial Disputes Act, 1947 — Section 17, 17A
Specific Relief Act, 1963 — Section 16

Citation : (2007) 141 DLT 417 : (2007) 114 FLR 622 : (2007) 2 ILR Delhi 1125

Hon'ble Judges : Kailash Gambhir, J

Bench : Single Bench

Advocate : Raja Venkatappa Naik, for the Appellant; S.P. Gaira and Dhruv Mehta and Yashraj Singh, for the Respondent

Final Decision : Allowed

Judgement

Kailash Gambhir, J.—This is an application moved by the petitioner under Order 6 Rule 17 read with Section 151 CPC to amend the prayer paragraphs of the existing writ petition. The sole reason for seeking amendment in the present petition given in Para 4 of the application is that the present amendment is being sought by the petitioner after the incorrectness in the prayer paras was pointed out by the Court. The petitioner after having come to know about the infirmity in the prayer paras took decision to move the present application for amendment. It would be appropriate to give brief background of facts which led the petitioner to file the present application. The present petition is filed against the ex- parte award dated 4.4.1997 passed by the Labour Court against the petitioner on a dispute raised by respondent No. 1/workman against his termination by the management. The petitioner was proceeded ex-parte on account of non-appearance and the petitioner could come to know about the ex-parte award

only on 24.12.1997. Thereafter, the petitioner moved an application under Order 9 Rule 13 of the CPC seeking setting aside of the ex-parte award dated 4.4.1997. The petitioner in its application under Order 9 Rule 13 has stated that the petitioner could come to know about the award only on 24.12.1997 and had moved the said application within 30 days from the date of knowledge of the ex-parte award after carrying out the inspection of the Court file on 17.1.1998. The Labour Court had dismissed the application of the petitioner vide order dated 2.2.1998 mainly on the ground that the Labour Court became functus officio after the expiry of the period of 30 days from the date of publication of the award. Aggrieved with the said order of the Labour Court, the petitioner has filed the present writ petition challenging the said order dated 2.2.1998 and for setting aside the ex-parte award dated 4.4.1997. In the body of the writ petition besides challenging the award on merits, the main attack of the petitioner is on the decision of the Labour Court dated 2.2.1998 whereby the application of the petitioner was dismissed under Order 9 Rule 13 of CPC. Rule in this matter was issued vide order dated 25.5.2000 and the same was directed to be heard along with C.W. No. 6389/1998. Vide order dated 23.8.2005, this Court after placing reliance on the judgment of the Supreme Court reported in 2004 LLR 1095 entitled Sangham Tape Co. v. Hansraj held that C.W. No. 6389/1998 was disposed of after placing reliance on the earlier view of the Supreme Court Anil Sood Vs. Presiding Officer, Labour Court II, , Labour Court II. This Court, Therefore, vide order dated 15.09.2005, fixed the matter for final disposal in view of the settled legal position of the Tribunal/Labour Court becoming functus officio where the application for setting aside the ex- parte award is filed beyond the period of 30 days after publication of the award.

2. It is not in dispute that in the present case, ex-parte award has been passed by the Labour Court against the petitioner vide order dated 4.4.1997 and the petitioner had moved an application for setting aside the ex-parte award after the expiry of 30 days period from the date of publication of the award and as per Section 17-A of I.D. Act and in view of the settled legal position, the said application of the petitioner under Order 9 Rule 13 was not maintainable. The petitioner, thus, in the present case was aggrieved by two orders i.e., dated 4.4.1997 whereby the ex-parte award was passed by the Labour Court against the petitioner and secondly, by an order dated 2.2.1998 whereby the application of the petitioner under Order 9 Rule 13 was dismissed. Although the petitioner had filed the present petition in February 1998 without any loss of time but the petitioner in the prayer paragraphs confined its relief against the impugned order dated 2.2.1998 and not the ex-parte award dated 4.4.1997.

3. Counsel for the respondent has opposed the present amendment with all vehemence. Counsel for the respondent took serious objection to such an amendment being sought after such a long gap of time. Counsel for the respondent contended that the present case was filed in the year 1998 and after completion of the pleadings, the rule in this matter was issued vide order dated 25.5.2000 and the present application which has been moved by the petitioner

on 08.02.2006 cannot be entertained at such a belated stage. Counsel also submitted that serious prejudice will be caused to the right of the respondent if such amendment at this belated stage is allowed. Counsel also contended that no infirmity or illegality in the order passed by the Labour Court dated 2.2.1998 can be found as the award passed by the Labour Court became final u/s 17 of the Industrial Disputes Act and the Labour Court u/s 17-A became functus officio after expiry of 30 days period from the date of publication of the award. Counsel also contended that the petitioner cannot challenge the nature of the prayer or the relief sought by way of an amendment, more particularly, when prayers, now being sought to be incorporated by the petitioner cannot be sustained in the absence of any pleadings to support such prayers.

4. Counsel for the petitioner, on the other hand, contended that the amendment being sought by the petitioner is bona fide and no prejudice can be caused to the right of the respondent if such an amendment is allowed. Counsel further contends that in the body of the writ petition, challenge has also been made on merits to the ex-parte award dated 4.4.1997 and it is only the prayer paragraphs which are left to be incorporated in the existing writ petition. Counsel for the petitioner also contended that the petitioner has strong case on merits as the petitioner is disputing relationship of the employer and employee between the petitioner and the respondent/workman. Counsel for the petitioner also contended that the Writ Court has wide powers to entertain and to give any direction or order to do complete justice between the parties.

5. The petitioner in support of his arguments has placed reliance on the following judgments:

- (1) Gajanan Jaikishan Joshi Vs. Prabhakar Mohanlal Kalwar,
- (2) M/s. Estralla Rubber Vs. Dass Estate (Pvt.) Ltd.,
- (3) Ragu Thilak D. John v. S. Rayappan and Ors. JT 2001 (2) 11.
- (4) Dwarka Nath Vs. Income Tax Officer, Special Circle D-ward, Kanpur and Another,

6. In Gajanan Jaikishan Joshi Vs. Prabhakar Mohanlal Kalwar, , the Hon''ble Supreme Court while permitting the amendment in a suit for specific performance of contract where the plaintiff by way of an amendment had sought to incorporate an averment regarding his readiness and willingness to perform a part of the agreement held as follows:

4. In the leading case of Pirgonda Hongonda Patil v. Kalgonda Shidgonda Patil, a bench comprising three learned Judges of this Court laid down the principles which should govern the question of granting or disallowing amendments. It was held by this Court that all amendments ought to be allowed which satisfy the two conditions: (a) not working injustice to the other side, and (b) of being necessary for the purpose of determining the real questions in controversy between the parties. Amendments should be refused only where the other party cannot be

placed in the same position as if the pleading had been originally correct, but the amendment would cause him an injury which could not be compensated in costs. It is merely a particular case of this general rule that where a plaintiff seeks to amend by setting up a fresh claim in respect of a cause of action which since the institution of the suit had become barred by limitation, the amendment must be refused; to allow it would be to cause the defendant an injury which could not be compensated in costs by depriving him of a good defense to the claim.

5. In *L.J. Leach and Co. v. Jardine Skinner and Co. Ltd.*, another bench comprising three learned Judges of this Court held that it is no doubt true that courts would, as a rule, decline to allow amendments, if a fresh suit on the amended claim would be barred by limitation on the date of the application. But that is a factor to be taken into account in exercise of the discretion as to whether amendment should be ordered, and does not affect the power of the court to order it, if that is required in the interests of justice.

6. If these principles are to be followed, there is little doubt that the learned Judge was in error in rejecting the application for amendment made by the appellant. In the present case no fresh cause of action was sought to be introduced by the amendment applied for. All that the appellant sought to do was to complete the cause of action for specific performance for which relief he had already prayed. It was only that one averment required in law to be made in a plaint in a suit for specific performance in view of the provisions of Sub-section (c) of Section 16 of the Specific Relief Act was not made, probably on account of some oversight or mistake of the lawyer who drafted the plaint and that error was sought to be rectified by the amendment applied for. There was no fresh cause of action sought to be introduced by the amendment and hence, no question of causing any injustice to the respondent on that account arose.

7. In *M/s. Estralla Rubber Vs. Dass Estate (Pvt.) Ltd.*, , the Supreme Court has held that delay in itself shall not be a ground for rejection of the application unless serious prejudice would be caused to other party or if accrued rights are taken away by such an amendment. It would be worthwhile to reproduce the observations of the Supreme Court as under:

8. It is fairly settled in law that the amendment of pleadings under Order 6 Rule 17 is to be allowed if such an amendment is required for proper and effective adjudication of controversy between the parties and to avoid multiplicity of judicial proceedings, subject to certain conditions such as allowing the amendment should not result in injustice to the other side; normally a clear admission made conferring certain right on a plaintiff is not allowed to be withdrawn by way of amendment by a defendant resulting in prejudice to such a right of the plaintiff, depending on the facts and circumstances of a given case. In certain situations, a time-barred claim cannot be allowed to be raised by proposing an amendment to take away the valuable accrued right of a party. However, mere delay in making an amendment application itself is not enough to refuse amendment, as the delay can be compensated in terms of money.

Amendment is to be allowed when it does not cause serious prejudice to the opposite side. This Court in a recent judgment in *B.K. Narayana Pillai v. Parameswaran Pillai* after referring to a number of decisions, in para 3 has stated, thus:

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.

In para 4 of the same judgment this Court has quoted the following passage from the judgment in *A.K. Gupta and Sons Ltd. v. Damodar Valley Corporation*.

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*. But it is also well recognized 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 and L.J. Leach and Co. Ltd. v. Jardine Skinner and Co.*

This Court in the same judgment further observed that the principles applicable to the amendment of the plaint are equally applicable to the amendment of the written statement and that the courts are more generous in allowing amendment of the written statement as the question of prejudice is less likely to operate in that event. It is further stated that the defendant has a right to take alternative plea in defense which, however, is subject to an exception that by the proposed amendment the other side should not be subjected to serious injustice and that any admission made in favor of the plaintiff conferring right on him is not withdrawn.

8. In another Supreme Court judgment entitled *Ragu Thilak D. John v. S. Rayappan and Ors.* reported in JT 2001 (2) 11, the Court had held that the dominant purpose of allowing the amendment is to minimize the litigation and the plea of limitation being disputed, could be made a subject matter of the issue after allowing the amendment prayed for.

9. On the nature and the scope of jurisdiction of the High Court under Article 226 of the Constitution of India, the Hon'ble Supreme Court in *Dwarka Nath Vs.*

Income Tax Officer, Special Circle D-ward, Kanpur and Another, , has held as under:

4. We shall first take the preliminary objection, for if we maintain it, no other question will arise for consideration. Article 226 of the Constitution reads:

every High Court shall have power, throughout the territories in relation to which it exercises jurisdiction, to issue to any person or authority, including in appropriate cases any Government, within those territories directions, orders or writs, including writs in the nature of habeas corpus, mandamus , prohibition, quo warranto and certiorari , or any of them, for the enforcement of any of the rights conferred by Part III and for any other purpose.

This article is couched in comprehensive phraseology and it ex facie confers a wide power on the High Courts to reach injustice wherever it is found. The Constitution designedly used a wide language in describing the nature of the power, the purpose for which and the person or authority against whom it can be exercised. It can issue writs in the nature of prerogative writs as understood in England; but the scope of those writs also is widened by the use of the expression "nature", for the said expression does not equate the writs that can be issued in India with those in England, but only draws an analogy from them. That apart, High Courts can also issue directions, orders or writs other than the prerogative writs. It enables the High Courts to mould the reliefs to meet the peculiar and complicated requirements of this country. Any attempt to equate the scope of the power of the High Court under Article 226 of the Constitution with that of the English Courts to issue prerogative writs is to introduce the unnecessary procedural restrictions grown over the years in a comparatively small country like England with a unitary form of government to a vast country like India functioning under a federal structure. Such a construction defeats the purpose of the article itself. To say this is not to say that the High Courts can function arbitrarily under this Article. Some limitations are implicit in the article and others may be evolved to direct the article through defined channels. This interpretation has been accepted by this Court in *Basappa v. Nagappa* and *Irani v. State of Madras*.

10. I find force in the submissions of counsel for the petitioner. In the present case, the challenge to the ex-parte award implicitly has already been made by preferring the present writ petition although by impugning the order dated 2.2.1998 whereby the application of the petitioner moved under Order 9 Rule 13 was dismissed. The application under Order 9 Rule 13 was essentially moved by the petitioner so as to contest the case on merits. But since the Labour Court being not vested with the power to entertain such an application beyond 30 days period of publication of the award, the necessary consequence of dismissal of such an application was fait accompli. The petitioner has in Paras 3 and 4 made a challenge to the award on its merits. But in prayer paragraphs the petitioner did not specifically plead for setting aside the ex-parte award dated 4.4.1997. This Court has already directed rule in the present matter and ex-parte award dated

4.4.1997 was already on record. No prejudice can be caused to the right of the respondent if this Court, while exercising writ jurisdiction under Article 226 of the Constitution of India, examines the legality and validity of the award dated 4.4.1997 and also the circumstances which prevented the petitioner to appear before the Labour Court. The petitioner in the present application is seeking substitution of the prayer paragraphs without seeking any amendment in the body of the writ petition and I agree with the counsel for the petitioner that serious prejudice to the right of the petitioner shall be caused in case the petitioner is not permitted to add these prayer paragraphs in the writ petition. I also agree with the submissions of counsel for the petitioner that the Writ Court has wide powers to do complete justice between the parties. While exercising writ jurisdiction, this Court can mould reliefs and grant even those reliefs which have not even been claimed in a writ petition in the peculiar facts and circumstances of a given case. The Writ Court has very wide powers and no fetters can be placed in the way of the Writ Court to impart complete justice to the parties. It is a settled law that the procedural obstacles should not become stumbling blocks to come in the way of dispensation of justice. It is also settled law that all amendments which are necessary for the purpose of determining the real question or controversies between the parties should be allowed. The real controversy test is the basic or the cardinal test and, Therefore, it is a primary duty of the Court to examine and consider in a given case and see whether the amendment sought by the party is necessary for determining the real dispute between the parties. The Supreme Court in *Employees State Insurance Corporation and Others Vs. Jardine Henderson Staff Association and Others*, and *Madhya Pradesh Special Police Establishment Vs. State of Madhya Pradesh and Others*, has discussed the scope of Article 226 of the Constitution of India. In *ESI Corpn. (supra)* the Supreme Court observed as under:

63. The High Court under Article 226 and this Court under Article 136 read with Article 142 of the Constitution of India have the power to mould the relief in the facts of the case.

11. In *M.P. Special Police Establishment (supra)* the Supreme Court observed as under:

31. We have, on the premises aforementioned, no hesitation to hold that the decision of the Council of Ministers was *ex facie* irrational whereas the decision of the Governor was not. In a situation of this nature, the writ court while exercising its jurisdiction under Article 226 of the Constitution as also this Court under Articles 136 and 142 of the Constitution can pass an appropriate order which would do complete justice to the parties. The High Court unfortunately failed to consider this aspect of the matter.

12. In the present case, the real dispute is not the order passed by the Court under Order 9 Rule 13 CPC but the *ex-parte* award itself which if goes unchallenged, will certainly cause prejudice to the rights of the petitioner who could not contest the case on merits due to *ex-parte* award.

13. Based on the above discussion, the present application moved by the petitioner under Order 6 Rule 17 is allowed. The petitioner has already amended the writ petition. The same is taken on record.

14. However, there is a delay on the part of the petitioner in moving the application and justice will be met by allowing this application upon imposition of costs of Rs. 10,000/-. Cost of Rs. 10,000/- shall be apportioned between the respondent and Delhi High Court Mediation Cell.

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15. Counter affidavit to the amended writ petition be filed within a period of four weeks. Rejoinder, if any, be filed within a period of three weeks.

Renotify the matter on 16.08.2007.

CM No. 13237/2006 (17-B)

16. Renotify the matter on 16.08.2007.