
(1995) 10 DEL CK 0008

In the Delhi High Court

Case No : Interim Application No. 2286 of 1992 and Suit No. 46 of 1985

Satish Kumar Mittal

APPELLANT

Vs

State Bank of India and Another

RESPONDENT

Date of Decision : 01-10-1995

Acts Referred:

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

Citation : (1995) 4 AD 354 : (1995) 60 DLT 626

Hon'ble Judges : S.K. Mahajan, J

Bench : Single Bench

Advocate : A.K. Singla, Sanjay Dhar, S. Ghosh and Kum Kum Sen, for the Appellant;

Judgement

S.K. Mahajan, J.

(1) This order will dispose of the application under order 6 Rule 17 CPC for amendment of the written statement filed by the defendant. The facts of the case in short are that the plaintiff had made a term deposit in the total sum of Rs. 6,00,000.00 with defendant No.1 and three term deposit receipts each for the value of Rs. 2,00,000.00 were issued by the defendant-Bank. The said receipts became due for payment on 8/12/1984. When the plaintiff on maturity of the said receipts went to the office of the defendant on 10th December, 1984, he was informed that payment cannot be made to the plaintiff on account of certain instructions received from the head office/regional office. The plaintiff, Therefore, filed the present suit under Order 37 of the CPC for the grant of a decree for Rs. 6,27,270.00. Leave to defend the suit was granted to the defendants by order dated 15/01/1987 and the defendants filed the written statement. The case as set up in the written statement by the defendants was that the plaintiff Along with Mr. Rajender Bhanot, Managing Director of M/s. Indo Travels Services Private Limited approached the defendant-Bank with a request to furnish a bank guarantee to members of IATA for payment to the said members of monies that might become due to them from the said M/s. Indo

Travels Services Private Limited. It is the case of the defendant that it gave a guarantee for Rs. 16,59,000.00 dated 3/02/1984 unconditionally guaranteeing the payment to all and each member of Iata of all amount that may become due and payable by M/s. Indo Travels Services Private Limited from time to time. In consideration of the bank giving the said guarantee dated 3/02/1984, the plaintiff Along with the said M/s. Indo Travels Services Private Limited and one Lamba Foreign Travels Private Limited executed a counter guarantee dated 3/02/1984 whereby the plaintiff undertook and agreed to pay on demand to the State Bank of India any amount which the bank may be called upon to pay under the said guarantee dated 3rd February, 1984. It is further stated that the plaintiff deposited its three term deposit receipts with defendant No. 1 on 8/06/1984 and 9/06/1984 each in the sum of Rs. 2,00,000.00 and the said deposits were to mature on 8/12/1984 and 9/12/1984. Iata by a letter dated 4/09/1984 invoked the bank guarantee executed by the defendant-Bank and demanded payment of Rs. 16,59,000.00. On such demand having been made, the defendant duly made payment of the aforesaid amount of Rs. 16,59,000.00 to IATA on 30/11/1984 and called upon the plaintiff as well as M/s. Indo Travel Services Private Limited to pay the said amount. On the failure of the plaintiff and/or either guarantors to pay the said amount or any part thereof, the bank filed Suit No. 441/84 in this Court for recovery of the aforesaid amount and it was stated therein that the bank had already adjusted the amount of the fixed deposit receipts as well as five other term deposit receipts of the plaintiff as well as one term deposit receipt of M/s. Indo Travel Services Private Limited against the amount which was due to the bank from these persons. In the alternative it was prayed in the said suit that a joint and several decree be passed against the present plaintiff and M/s. IndoTravel Services Private Limited and the other guarantor for the sum of Rs.15,25,359.70 paise.

(2) The present application was filed by the defendant on 3/03/1992 for amendment of paragraph 4 of the written statement. Originally in paragraph 4 of the written statement, the defendant had stated that the defendant as banker of the plaintiff had general lien on the term deposit receipts and it was entitled to retain the proceeds of the said term deposit receipts or securities as goods bailed to it as security for payment due from the plaintiff to the State Bank of India and/or as a security for a general balance of account. It is also stated that the bank had already filed a suit against the plaintiff and other guarantors for the balance amount after adjustment of the amount of the aforesaid term deposit receipts. By the proposed amendment, the defendant wants to add the following paragraph after the existing paragraph 4 of the plaint.

"THE State Bank of India was entitled to claim such lien and /or right of set off and/or adjustment against all the said terms deposited receipts and was entitled to retain and /or adjust and /or set off the proceeds of all the said term deposits referred to above or the said securities or goods bailed as security for payment of all monies due from the plaintiff to the State Bank of India on the general balance of account of the plaintiff with the State Bank of India. The State Bank of

India has already duly set off and/or adjusted or retained the said sum of Rs. 16,59,000.00 due from the plaintiff to the State Bank of India Along with interest thereon under in terms of the said counter guarantee against the sums payable to the plaintiff under the said term deposit."

(3) Objection of the plaintiff to the proposed amendment is that the defendant cannot take the plea of set off as the plea of adjustment and set off are self contradictory and cannot be allowed to be taken by way of amendment and secondly, the amendment is not only malafide but is also vague. It is also the case of the plaintiff that the plea of set off is barred by limitation and cannot be allowed to be taken by way of the proposed amendment. The plaintiff has relied upon a Full Bench Judgment of the Travancore Cochin High Court in Government of the United State of Travancore and Cochin v. Bank of Cochin Limited, reported as Air 1954 TC 243 in support of the plea that the plea of adjustment and set off being contradictory cannot be allowed to be taken by way of amendment. Judgment reported as Khushi Ram Vs. Ram Chand, has also been relied upon by the plaintiff to support his plea that if the defendant has not put in his claim of set off on the first hearing in the written statement, he must make out a very strong case for condensation of delay and satisfy that there was very valid ground for not doing so and while deciding an application under Order 6 Rule 17CPC, the Court should take into consideration the provisions of Order 8 Rule 6

(4) In Government of United States of Travancore Cochin v. Bank of Cochin Limited (Supra), the Court had in execution of a decree that had been passed in favor of the bank of Cochin, issued an order of attachment attaching a sum of Rs.36,260.00 allegedly belonging to the judgment debtor and available with the Excise Commissioner. When a notice was issued to the Excise Commissioner directing him to send the aforesaid amount, attached earlier, to the Court, the Excise Commissioner filed objections contending that no amount was available with the State, as the amount deposited by the judgment debtor had been adjusted against the amount that was due from him to the State. On these contentions of the garnishee (State), the decree holder maintained that claim of the State against the judgment debtor was only an outstanding claim even on the date of attachment and the State must satisfy its claim by way of a set off in appropriate legal proceedings. The argument was that a set off could be effective only in the manner contemplated by Rule 6 of Order 8 CPC and as such the State could not adjust the said amount against its outstanding dues. It was in these circumstances that the Court held that there was nothing in Rule 6 of Order 8 to indicate that there could be no set off independent of the conditions laid down and the procedure prescribed by that Rule. The said Rule was not intended to cover all categories of set off and the provisions of the rule would apply where the set off is admissible under Rule 6 of Order 8 or otherwise. It was held that there can be no doubt that a plea of set off can be entertained and given effect even independent of Order 8 Rule 6. It was further held that any question of set off could arise only in respect of dues which were outstanding and which had not already been adjusted. A plea of satisfaction or adjustment was essentially

different from a plea or claim of set off.

(5) I fail to understand as to how this judgment can be of any help to the plaintiff. It was a case where the garnishee had taken a plea of adjustment and the decree holder was saying that the garnishee can claim only a set off and this set off can be only in terms of the provisions of Order 8 Rule 6 and the Court held that when the amount has already been adjusted by the garnishee, there was no question of any set off. The said judgment is, in my opinion, not applicable to the facts of the present case.

(6) In *Khushi Ram Vs. Ram Chand*, , the Court had held that in case the defendant had not put in his claim of set off on the first hearing in the written statement, he must make out a very strong case for condensation of delay and satisfy the Court that there was very valid ground for not doing so earlier and even under Order 6 Rule 17 Cpc, the delay must be explained by the defendant. In my opinion, the said judgment will not be of any help to the plaintiff because in the present case the plea of adjustment has already been taken in the written statement and in the alternative the plea of set off is now sought to be taken. In the Punjab case, the application was made at the time of final arguments of the case and it was in these circumstances that the Court held that the defendant must explain the delay satisfactorily so as to make out a case for allowing the application for amendment. I, Therefore, do not feel that there is any unexplained delay in filing the present application.

(7) The contention of Mr. Singia that plea of set off is barred by limitation is also, in my opinion, not sustainable. u/s 3 of the Limitation Act, any claim by way of a set off or a counter claim shall be treated as a separate suit and shall be deemed to have been instituted, (1) in case of a set off, on the same date as the suit in which the set off is pleaded, and (2) in case of a counter claim, on the date on which the counter claim was made in Court. Present is not a case of counterclaim. All that the defendant wants now to set up in the written statement is that bank had a lien on the amount lying with it and had, accordingly, right of set off and/or adjustment. The right of set off is a right in defense whereas the plea of counter claim is a weapon of offence. Where a plea of set off is pleaded the plaintiff in order to establish his plea of limitation must prove that set off was barred when the plaintiff commenced his action. In my opinion, there is no question of the plea being barred by limitation.

(8) The last contention of the plaintiff is that the amendment sought by the defendant is only malafide inasmuch as the plaintiff was only a guarantor and as such his fixed deposit receipts could not have been encased and there could not have been any lien thereon and according to him it was for this reason that in IssueNo.1 the plaintiff has been described only as a principal debtor and not as a guarantor. In my opinion, at the stage of deciding application for amendment, this Court cannot go into this question. These are the questions to be decided on merits.

(9) Though the application is not very happily worded, however, the intention of the defendant is very clear. What the defendant wants to add in the "written statement by way of proposed amendment is that the defendant was entitled to the adjustment of the proceeds of the fixed deposit receipts against the amount which had been paid by the bank under the bank guarantee issued by it to Iata and in the alternative, in case, it is held that the defendant was not entitled to adjustment, the defendant is still entitled to set off the amount of the proceeds of the fixed deposit receipts on which the bank has a lien u/s 171 of the Contract Act. The plea of set off is only an alternative plea to the adjustment. There cannot be any other interpretation of the words "and/or" mentioned in the proposed amendment. The words "and/or" mean that the plea taken by the defendants in the written statement is either adjustment or set off. The only meaning, Therefore, which can be given to the words "and/or" is that one of the two pleas is an alternative plea.

(10) In Pirgonda Hongonda Patil Vs. Kalgonda Shidgonda Patil and Others, where at the appellate stage the plaintiff had applied for amendment of the plaint by raising, in the alternative, a claim for damages for breach of contract, it was held as under:-

"THEY contend that the amendment introduces a new cause of action, that a suit on that cause of action would now be barred by limitation, that the plaintiffs had ample opportunity to amend their plaint but that they failed to do so, and that owing to lapse of time the defendants would be seriously prejudiced if this new claim were allowed to be raised. There is considerable force in the objections. But after giving due weight to them, we are of opinion that this is a fit case in which the amendment ought to be allowed. The plaintiffs do not claim any damages for wrongful termination of the agreement, Ex.A, by the notice dated 13.6.1945. What they claim is only damages for non-delivery of goods in respect of orders placed by them and accepted by the defendants prior to the termination of the agreement by that notice. Clause 14 of the agreement expressly reserves that right to the plaintiffs. The suit being founded on Ex.A, a claim based on Clause 14 thereof cannot be said to be foreign to the scope of the suit. Schedule E to the plaint mentions the several indents in respect of which the defendants had committed default by refusing to deliver the goods, and the damages claimed are also stated therein. The plaintiffs seek by their amendment only to claim damages in respect of those consignments. The prayer in the plaint is itself general and merely claims damages. Thus, all the allegations which are necessary for sustaining a claim for damages for breach of contract are already in the plaint. What is lacking is only the allegation that the plaintiffs are, in the alternative, entitled to claim damages for breach of contract by the defendants in not delivering the goods.

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. In AIR 1921 50 (Privy Council) the Privy Council observed: That there was full power to make the amendment cannot be disputed, and though such a power should not as a rule be exercised where the effect is to take away from a defendant a legal right which has accrued to him by lapse of time, yet there are cases where such considerations are out-weighted by the special circumstances of the case. Vide also *Kisan Das v. Rachappa*, 2nd 33 Bom 644 (B). In the present case, apart from the contents of the plaint already set out, there is the fact that the defendants cancelled the contract without strictly complying with the terms of Clause 14. The ground on which they repudiated the contract was that the second plaintiff had assigned his interests to the first plaintiff; but the record shows that subsequent to the assignment the defendants had business transactions with both the plaintiffs and Therefore the ground for cancellation appears to have been a mere device to which they had placed. We are of opinion that the justice of the case requires that the amendment should be granted. The plaintiffs will accordingly be allowed to amend the plaint as follows:-In the alternative and without prejudice to the claim on the footing of conversion, the plaintiffs say that by reason of the facts aforesaid, the plaintiffs say that by reason of the facts aforesaid, there was a contract between the parties whereby the defendants undertook to supply and deliver to the plaintiffs (or either of them) the goods ordered out by Government on their (the plaintiffs) account and included in the quotas PL.1004-PL. 1007. The said goods arrived in Bombay, but the defendants failed and neglected to deliver the same though demanded and in fact repudiated their obligation to deliver. The plaintiffs say that they were always ready and willing to pay for and take delivery of the same. The defendants at all material times well knew that the plaintiffs had purchased the same for resale and for fulfillment of contracts of sale and supply. The plaintiffs claim damages as we particulars. This appeal must accordingly be allowed, the decree under appeal set aside, and the suit remanded for rehearing to the trial Court. The amended claimant the suit will be tried and disposed of in accordance with law."

(11) Similarly in *Pirgonda Hongonda Patil Vs. Kalgonda Shidgonda Patil and Others*, it was held 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. The

ultimate test Therefore still remains the same; can the amendment be allowed without injustice to other side, or can it not?"

(12) In my opinion, the amendment sought by the defendant is material and necessary for deciding the matter in controversy between the parties. The bank had a lien u/s 171 upon the proceeds of the fixed deposit receipts which were being deposited with the bank and in case the bank had such a lien u/s 171, in my opinion, the defendant can show to the Court that the amount which was due to the plaintiff under the aforesaid fixed deposit receipt was liable to be adjusted and /or set off against the amount which the plaintiff owed to the bank. There is no doubt a delay in filing the application, however, the law on amendment is very clear. The amendment can be allowed at any stage of the proceedings and the ultimate test is that can such amendment be allowed without injustice to the other side. Injustice means that a right which has already accrued to the other party, should not be taken away by the proposed amendment.

(13) The object of the Courts is to decide the rights of the parties and not to punish them for mistakes they make in the conduct of their cases. An error or mistake, in case it is not fraudulent or is not intended to overreach the Court, should not be refused to be corrected, in case the same can be done without causing injustice to the other party.

(14) In my opinion, no right had accrued to the plaintiff which will be taken away by the proposed amendment and the plaintiff can well be compensated with costs for the delay which has been caused in the disposal of the suit on account of the defendant having made the application for amendment at the later stage. Mere delay in applying for an amendment cannot be a ground for refusing the application for leave to amend.

(15) I, Therefore, in view of the above discussions, allow the defendant to amend the written statement, as proposed in the application for amendment, subject to payment of Rs. 2,000.00 as cost. Application is, accordingly, disposed of.