
(2017) 01 CAL CK 0078
In the Calcutta High Court
Case No : W. P. No. 8266 (W) of 2011

Sinclairs Hotels Ltd.

APPELLANT

Vs

State of West Bengal

RESPONDENT

Date of Decision : 17-01-2017

Acts Referred:

Constitution of India, 1950 — Article 226
Industrial Disputes Act, 1947 — Section 33C(2)

Citation : (2017) 1 CalLJ 372 : (2017) 2 CalLT 284 : (2017) 1 CLR 1029 :
(2017) 2 LLN 126

Hon'ble Judges : Sambuddha Chakrabarti, J.

Bench : Single Bench

Advocate : Mr. Soumya Majumder, Advocate Mr. Bhaskar Mukherjee, Advocate Ms. Debjani Ghosh, Advocate and Ms. Paulomi Bose, Advocate, for the Petitioner; Mr. Madhusudan Datta, Advocate, for the Respondents No. 3

Final Decision : Dismissed

Judgement

Sambuddha Chakrabarti, J.—The petitioner has primarily sought to raise a few points of law in the present writ petition, viz., whether the respondent no. 3 who was a workman of the company could invoke the jurisdiction of the Labour Court under Section 33C (2) of the Industrial Disputes Act for claiming the benefit under the Pension Scheme whose members are only the managerial staff, whether the said application was barred by non-joinder of the necessary parties and whether the application was maintainable against the petitioner company after the respondent no. 3's admission that the Trust is a separate entity. It has further taken a point about the maintainability of the said application before the Labour Court against the present employer since such claim applies only in respect of money dues against the employer when there is admittedly no due of any sum which the respondent no. 3 could claim from the petitioner company.

2. Adjudication of these points and their ultimate maintainability require a close examination of the case and counter case of both the parties.

3. The petitioner is a company incorporated under the Companies Act. The case of the petitioner, inter alia, is that the respondent no. 3 at one point of time was an employee of Sinclairs & Company, a partnership firm which was completely a distinct and different legal entity from the petitioner and had an independent management. After resigning from the service of the said firm, the respondent no. 3 joined the service of the petitioner company as a Junior Executive and designated as Senior Administration Officer with effect from January 1, 1984.

4. As per the terms and conditions of employment of the respondent no. 3 in the petitioner company, the letter of appointment clearly specified that his membership with the Employees' Provident Fund Scheme through the said firm would be transferred to the petitioner company with effect from January 1, 1984. The respondent no. 3 submitted his resignation on June 1, 1990 and sought to get released.

5. It is the contention of the petitioner that the Pension Scheme of which the petitioner no. 1 became a member applies only to the management staff of the company. Such a Pension Scheme is really in the nature of an annuity scheme having a tie-up with the LIC which the management had arranged by way of social security arrangement for the eligible employees under the Scheme. The said Scheme requires the employer to deposit certain premium to the LIC in respect of the eligible members and the member who will get the mature sum from the LIC. Thus the amount receivable by the members from the LIC is not money due from the petitioner company.

6. The petitioner company informed the respondent no. 3 that the relation between the employer and employee stood terminated on and from June 25, 1990 and he was asked to collect his salary for the notice period and for realization for other dues. The respondent no. 3 was further informed that since he had not completed 15 years of minimum service with the company he was not entitled to any pensionary benefit in accordance with the Pension Scheme.

7. The respondent no. 3, thereafter, raised an industrial dispute claiming his resignation as a forced one. Against an award that was passed by the 7th Industrial Tribunal the company challenged the same in the High Court. The said writ petition was disposed of by the High Court observing that the respondent no. 3 was an employee since January 1, 1984 and confirmed the award passed by the Tribunal.

8. Subsequently, the respondent no. 3 filed an application before the First Labour Court under Section 33C (2) of the Industrial Disputes Act, 1947 (the Act, for short) seeking computation of his alleged money due on account of pension. The petitioner company filed a written statement and challenged the maintainability of the computation case and jurisdiction of the labour court on the issue reiterating the stand mentioned before.

9. After the exchange of documents, the parties adduced their respective evidence.

10. The learned Judge of the Labour Court, First Court, Kolkata, by an order dated February 28, 2011 held respondent no. 3 to be entitled to a sum of Rs. 5,56,094/- from the company. The petitioner was directed to make payment within a period of two months from the date of passing the order, failing which the respondent no. 3 has been given the liberty to put the decree in execution as per law after the stipulated period. This order is the subject of challenge in the present writ petition.

11. The writ petition has been contested by the respondent no. 3 by filing an affidavit-in-opposition. He denied the contentions of the petitioner company and submitted that the writ petition was not maintainable as by the same finding of fact reached by the labour court as well labour court upon proper appreciation of evidence have been sought to be reopened for suppression of material fact. In particular, he denied that Sinclairs & Company is completely distinct and different legal entity from the petitioner. According to him, his service since his initial date of appointment till his date of retirement with effect from June 17, 1997 was a continuous one. He had taken a point that the Division Bench of this Court had earlier held that the company had never accepted the so called resignation but illegally terminated his service. Thus, he had been under employment of the company from 1971 till June 17, 1997. Since the petitioner company did not challenge the said judgment, the same has attained finality. So far as the point of non-impleading LIC is concerned, the respondent no. 3's response to it is that it is a fabricated story trying to bring the LIC into the picture when no such case was ever made out before the Labour Court. The company had contested the case before the Labour Court on the only point that he was not entitled to pension as he had not allegedly completed 15 years of service.

12. There is also an allegation of suppression of fact against the petitioner that it had preferred an appeal against the order dated March 10, 2003 passed by this Court in WP No. 612 (W) of 2002. The said appeal was dismissed by the Division Bench by a judgment and order dated January 10, 2008. With regard to the depositions made by the parties, the respondent no. 3 alleges that those have been distorted and only a part of the whole deposition had been mentioned.

13. During the pendency of the case before the labour court, the petitioner company had amended the written statement earlier filed by it. In the application for amendment there was no whisper of the LIC or any other authority being liable to pay pension which has been raised before this court for the first time. The respondent no. 3 prayed for dismissal of the writ petition.

14. It appears from the order impugned in the writ petition that the points taken by the petitioner company before this court were substantially taken in argument before the labour court but in the written statement the only point taken by the petitioner herein was with regard to the length of service of the respondent no. 3. All other points as raised by the petitioner company at the time of argument were all beyond pleading. The learned judge relied on the case of Shankar Chakravarti v. Britannia Biscuit Company, reported in 1979 (2) LLJ 194 where it

has been very specifically held that allegations which are not pleaded, even if there is evidence in support of it, cannot be examined, because the other side has no notice of it and, if entertained, it would amount to granting an unfair advantage to the first mentioned party. Reiterating the very well-settled principle about the maintainability of an application of a retired employee the labour court held that the respondent no. 3 herein had claimed the benefit regarding which premium had been paid and commitment had been made during the tenure of his service. The exhibited document further revealed that the applicant had been mentioned in the list of employees in whose favour running account of statement of the management staff pension fund master policy had been issued. Therefore, the labour court held, the claim of the respondent no. 3 herein arose while he was in service and this was his condition of service as per the information given by the petitioner herein.

15. About the next point taken by the petitioner that the respondent no. 3 was a member of the management staff and as such the application under Section 33C (2) of the Act was not maintainable, the Labour Court held that it was not taken by the company in their written statement and, therefore, they are not entitled to raise this objection at the time of argument. No such document or evidence was placed by the petitioner herein to substantiate that the respondent no. 3 was a managerial staff in its true sense. The company also did not make any such cross-examination in this regard.

16. About the next objection taken by the writ petitioner regarding non-joinder of the LIC as a necessary party to the proceeding also the Labour Court held the same view regarding non-mentioning of it in the written statement.

17. After going through the documentary and oral evidence, the labour court held that the petitioner was liable to make payment of the amount claimed by the applicant as per the Pension Fund Scheme. There is a very specific finding of the Labour Court that the respondent no. 3 had not left the service of the parent company. But he had to join the petitioner company as the two companies had merged and as per the condition of amalgamation the continuity of the service has been given to the applicant since 1971. The petitioner company did not recommend the name of the respondent no. 3 before the trustees so that he could be able to get the pension amount. Based on these findings, the learned Judge of the Labour Court allowed the proceeding under Section 33C (2) of the Act on contest without any costs and held that the respondent no. 3 was entitled to Rs. 5,56,094/- from the writ petitioner.

18. Appearing for the petitioner Mr. Majumder submitted that the claim of the petitioner related to a pension scheme created by the trustees of the petitioner's Management Staff Pension Fund tie-up with the LIC. This is applicable only to the managerial staff of the company and a member who completed 15 years of service with the petitioner. Mr. Majumder laid great stress on Clause III of the said policy and submitted that obligation to pay the premium for payment of pension was entirely upon the grantees meaning thereby the trustees of the

Sinclairs Management Staff Pension Fund. Since the word "member" has been defined in the policy as a member of the management staff the employees are not included in it. Clause 5 of the said policy says that subject to payment of premium as specified in the policy, the LIC shall pay to the grantee the appropriate benefits in respect of the person or persons specified in the schedule to the policy as and when the same should become due for payment in accordance with the terms and provisions of the schedule the conditions set out in the policy.

19. Based on this, the case of the petitioner is that the petitioner is a contributor to the grantee, i.e., the trustees of this fund and the grantees pay the premium to the LIC. Thus, the entire responsibility for making payment of premium is on the grantee. It is the grantee which takes all the steps including taking a decision about the manner of paying the contributions to the LIC. The role of the petitioner is only recommendatory and contributory depending on the determination made by the Trustees.

20. Under Section 33C(2) of the Industrial Disputes Act, a workman can approach the Labour Court for computation of his money due or any benefit which is capable of being computed in terms of money when he is entitled to receive the money from the employer. The claim of the respondent no. 3 is certainly not a money due to him from the employer. On the contrary, he has made a claim to a wrong person who does not have any legal responsibility to make the payment to the petitioner. Mr. Majumder submits that in the written statement filed before the labour court the maintainability of the application under Section 33C(2) of the Act was challenged and evidence was led on the same.

21. The petitioner criticized the labour court that after holding that the point of non-joinder of necessary party was not taken at the first instance recorded that the claim was against LIC, and the company was not a party to the master policy. The contribution of the company was to the Trustees while the company's role was only to recommend as per the policy. According to the petitioner, the claim under Section 33C (2) of the Act applies only in respect of a claim against an employer but here the claim was against the Trustees and the LIC. Therefore, the claim against the company was not maintainable and the basic ingredient of Section 33C (2) of the Act has not been satisfied. As such, the Labour Court had no jurisdiction over the subject matter as the claim should have been against the Trust and the LIC. Moreover, the claim had been lodged at a grossly belated stage of ten years rendering it liable to be rejected.

22. About the observations made by the Labour Court regarding not taking the points of objection in the written statement the petitioner submitted that it is not a case of any objection being raised at the first instance as regards non-joinder of necessary parties. On the contrary, it is a case of a claim against a wrong party. LIC not being the employer of the respondent no. 3, he could not have claimed any relief under the said Corporation. Therefore, the claim of the

petitioner should have been made in some other forum. It was open to the Labour Court to add the LIC at any stage of the proceeding following the principle of Order 1, Rule 10 (2)(4) of Code of Civil Procedure. In any event, the parties having gone on trial on issue as regards the liability of the LIC to pay, if at all, the rejection of company's objection with regard to the jurisdiction was bad in law.

23. The petitioner also maintained that since the respondent no. 3 joined the company on January 1, 1984 he had not completed 15 years of his service with the company to be entitled to the benefit of pension under the Master Policy. There is no finding returned by the Labour Court as regards the applicant's eligibility on this score.

24. In support of his contentions, Mr. Majumder relied on the case of Bhagwati Prasad v. Chandramaul, reported in AIR 1966 SC 735, for a proposition that if a plea is not specifically made and yet it is covered by an issue by implication and the parties knew that the said plea was involved in the trial, the mere fact that the plea was not taken in the pleadings would not disentitle a party from relying upon it if it is satisfactorily proved by evidence.

25. The petitioner has also relied on the case of Bachhaj Nahar v. Nilima Mandal and Others, reported in AIR 2009 SC 1103, wherein it has, inter alia, been held that a case not specifically pleaded can be considered by the Court only where the pleadings in substance, though not in specific terms contains the necessary averments to make out a particular case and the issues framed generally cover the question involved and the parties proceed on the basis that such case was at issue and had led evidence thereon.

26. Mr. Dutta, the learned Advocate for the respondent no. 3, on the other hand submitted that the entire argument advanced by the petitioner is based on the points which were never pleaded before the Labour Court about the purported liability of the LIC. On the contrary, the petitioner in the written statement filed before the Labour Court had taken the only point about the dis-entitlement of the respondent no. 3 for pension with effect from March 24, 1994 as, according to the Pension Rules, one is to complete 15 years of service. In the application for amendment, the petitioner had taken the same point that "the applicant was also included in the Sinclairs Management Staff Pension Fund Scheme with a precondition that he should complete 15 years of service to be entitled to pension." Therefore, the alleged liability of the LIC was and is an afterthought and beyond the scope of pleadings.

27. Mr. Dutta has also taken a point that if on the materials on record any view other than the one taken by the Labour Court is possible, the High Court must not disturb the view or should not try to substitute the view of the subordinate court by its own view. He prayed for the writ petition to be dismissed with costs.

28. It appears from the order impugned and not rebutted in the writ petition that the petitioner herein had raised only the issue regarding the span of service of

the respondent no. 3 in its written statement before the Labour Court. All other points raised by the petitioner both at the time of the argument as well as in this court are beyond their pleadings. There is an obvious difficulty in allowing a litigant to take points at the stage of argument or before a superior forum unless there is a foundation of the same in the pleadings of the party. Absence of such point or points means absence of opportunity to the other side to controvert the same at the appropriate stage.

29. The judgments relied on by Mr. Majumder does not help him tide over the very fundamental principle of law as mentioned in the preceding paragraph and are factually distinguishable from the present case. In the case of Bhagwati Prasad (Supra) both the parties to the proceeding were alive to the issues they had to address and filed their pleadings accordingly. On these pleadings the learned Trial Judge had framed as many as seven issues. On a point being raised whether the High Court in that case had made a new case for the plaintiff the Supreme Court reiterated the very well-settled principle that if a party asks for a relief on a clear and specific ground and in the issues or at the trial no other ground is covered either directly or by necessary implication, it would not be open to the said party to attempt to sustain the same claim on a ground which is entirely new. If a plea is not specifically taken and yet it is covered by an issue by implication and the parties knew that the said plea was involved in the said trial the mere fact that the plea was not expressly taken in the pleadings would not necessarily disentitle the party from relying upon it if it is satisfactorily proved by evidence. The Supreme Court held that in circumstances such as these what the court is to consider whether the parties know that the matter in question was involved in the trial and they did lead evidence about it.

30. Therefore, the whole thing is all about framing of issues. If the parties know from the pleadings the issues they have to address or the issues which are likely to crop up for adjudication, non-framing of issues may not stand in the way of a party succeeding on certain points. But this is a case where the writ petitioner had never raised the points in its written statement. The issues sought to be raised by it at the stage of argument and before this court could not be said to follow as a necessary corollary of the point taken by the writ petitioner about the span of service of the respondent no. 3 as its employee. The question of maintainability of the proceeding, non-joinder of necessary party, lack of liability of the petitioner regarding payment, liability of Trustees, so on and so forth are points which have nothing to do with the point taken by the petitioner about whether the respondent no. 3 had completed 15 years of service. Neither can they be said to be even remotely connected with the point taken by the petitioner in the written statement. Therefore, it could not be said that the respondent no. 3 was alive or ought to have been to these issue which have been argued with force and in details by the company.

31. A party who has not taken a specific point in his pleading cannot also lead evidence. If a party cannot lead evidence the opposite party cannot controvert

him and, therefore, logically an unpleaded argument must be held to be impermissible. In the case of *Trojan and Co. Ltd v. Rm. N. N. Nagappa Chettiar*, reported in AIR 1953 SC 235, the Supreme Court observed that the decision of a case cannot be based on grounds outside the pleadings of the parties and it is the case pleaded that has to be found.

32. Going by the guidelines formulated in the *Bhagwati Prasad's* case (Supra) it cannot be said that the respondent no. 3 was at all aware about the issues sought to be raised subsequently by the petitioner. To allow a party to relief upon a matter in respect of which the other party did not lead evidence and had no opportunity to lead evidence would introduce considerations of prejudice. The court cannot do injustice to another.

33. *Bachhaj Nahar* (Supra) is not only distinguishable from the facts of the present case but to a large extent goes against itself. The petitioner tried to cull out the proposition of law that a case not specifically pleaded can be considered by the court only where the pleadings in substance, though not in specific terms, contains the necessary averments to make out a case and the issues framed also generally cover the question involved and the parties proceed on the basis that such case was at issue and had led evidence thereon. This should be, the Supreme Court cautioned, only in exceptional cases where the court is fully satisfied that the pleadings and issues generally cover the case subsequently put forward and that the parties being conscious of the issue had led evidence on them. As mentioned before, in the present case it can never be said that the points sought to be raised by the petitioner contained the necessary averments to make out a particular case. This is not a case of which it can be said that the points have not been specifically pleaded. The words "specifically pleaded" give an impression that the point involved is broadly pleaded but lacks in specificity. This is a case where the points specifically taken by the petitioner herein were never taken even after amending the written statement before the Labour Court. An indefinite and non-specific objection to the maintainability of an application that the court has no jurisdiction without anything more, cannot make the points subsequently raised permissible. In the case relied on by Mr. Majumder the Supreme Court had laid down that the object and purpose of pleadings and issues is to ensure that the litigants come to trial with all issues clearly defined and to prevent a case being expanded or grounds being shifted during trial. Its object is also to ensure that each side is fully alive to the questions likely to be raised or considered so that they may have an opportunity of placing the relevant evidence appropriate to the issues before the court for its consideration. If on the basis of the pleadings of the parties an issue is not specifically framed that may not be fatal under in certain circumstances if it cannot be shown and proved that the parties were alive to the issues involved in the case. But the same cannot be said in respect of a point which has not been taken at all. If there is no pleading there cannot be any issue and it cannot be said that the parties were alive to the points which they have to meet in the proceeding to follow.

34. On the contrary the judgment relied on by Mr. Dutta in the case of *Shankar Chakravarti v. Britannia Biscuit Company*, reported in 1979 (2) LLJ 194, seems to be quite applicable to the facts of the present case. There a three-Judge Bench of the Supreme Court had held that any party appearing before an Industrial Tribunal or a labour court must make a claim or demur the claim of the other side and when there is burden upon it to prove or establish the fact so as to invite a decision in its favour it has to lead evidence. It is well-settled that allegations which are not pleaded, even if there is evidence in support of it, cannot be examined because the other side has no notice of it and if entertained it would tantamount to granting an unfair advantage to the first mentioned party. Even if the rules of pleadings are not to be read strictly it must be such as to give sufficient notice to the other party of the case it is called upon to meet. The Supreme Court observed "the rules of fair play demand where a party seeks to establish a contention which if proved would be sufficient to deny relief to the opposite side, such a contention is to be specifically pleaded and then proved. But if there is no pleading there is no question of proving something which is not pleaded. This is very elementary."

35. Mr. Majumder tried to distinguish the case of the *Shankar Chakravarti* (Supra) on the ground that the company had pleaded lack of jurisdiction in the case and the decision is not an authority for a point relating to jurisdiction.

36. The petitioner in the process has overlooked that the issue involved related not to jurisdiction but to the entertainability of any objection by a party who has not said anything about it in his pleadings.

37. The importance of pleadings either to seek a relief or by way of a defence cannot be overstated. Requirement of technicalities of pleadings may vary from proceeding to proceeding; for some proceeding such technicalities may not be strictly insisted upon. But in an adversarial litigation when parties approach a judicial forum or defend the same by way of pleadings the basic and unalterable rules of pleading have to be conformed to. In *Narmoda Bachao Andolan v. State of Madhya Pradesh and Another*, reported in AIR 2011 SC 1989, a three-Judge Bench of the Supreme Court had occasion to reiterate the importance of pleadings even in a case of public interest litigation. Recognizing the very well-settled principle that strict rules of pleadings may not apply to such litigations the Supreme Court reiterated that pleadings of particulars are required to enable the court to decide the rights of the parties in the trial. Pleadings are more to help the court in narrowing the controversy involved and to inform the parties concerned to the questions in issue, so that the parties may adduce appropriate evidence on the said issue. A decision of a case cannot be based on grounds outside the pleadings of the parties. The Supreme Court went to add: "the object and purpose of pleadings and issues is to ensure that the litigants come to trial with all issues clearly defined and to prevent cases being expanded or grounds being shifted during trial. If any factual or legal issue, despite having merit, has not been raised by the parties the court should not decide the same as the

opposite counsel does not have fair opportunity to answer the line of reasoning adopted in that regard. Such a judgment may be violative of the principle of natural justice."

38. Therefore, a point not taken in defence to a claim by a litigant cannot render the claim bad, for, to allow the same unuttered defence to frustrate the case of the plaintiff or the petitioner or the applicant, as the case may be, would amount to violating the principle of natural justice.

39. Again, in *Rajasthan State Road Transport Corporation and Another v. Bajrang Lal*, reported in (2014) 4 SCC 693, the Supreme Court reiterated the settled proposition of law that a party is to plead the case and produce or adduce sufficient evidence to substantiate his submissions made in the plaint and in case the pleadings are not completed, the court is under no obligation to entertain the pleas. The Supreme Court relied on the case of *Atul Castings Limited v. Bawa Gurbachan Singh*, reported in (2001) 5 SCC 133, for a proposition that findings in the absence of necessary pleadings and supporting evidence cannot be sustained in law.

40. The effort taken by the petitioner to overcome this obvious hurdle is to take resort to the genre of exceptional cases where non-framing of issues may not violate the finding if the parties are alive to the issues they have to address. Such cases are clearly distinguishable from the present fact situation or the fact situation of any case where the pleading itself is silent on particular points. When the court considers the lapse of non-framing of issues as not fatal to an adjudication there is pleading to that effect on the basis of which issues are framed. That is why in some cases it has been held that if the parties are aware from the pleadings about the cases they have to meet failure to frame an issue may not be a factor for overruling a judgment or for prejudicing a litigant. But where the pleading itself is absent on any point it cannot still be claimed that the opponent party is still aware of the case that he has to meet. He has no way of knowing the case that his opponent may have in his sleeves. Therefore, and quite naturally, he does not adduce any evidence on them. Thus, non-framing of issues is very different from omission to take a point in the pleading. I, thus, find sufficient substance in the finding of the Labour Court that the points not taken by the writ petitioner herein should not be allowed to be agitated and considered at the stage of hearing.

41. I also find substance in the process of ratiocination of the Labour Court in similarly disallowing the subsequently raised contentions of the petitioner herein that the respondent no.3 being a managerial staff the application under Section 33C (2) of the Industrial Disputes Act was not maintainable in law or not maintainable because of non-joinder of necessary parties or the LIC was a necessary party to this proceeding.

42. The learned Judge was very right in holding that the issue regarding non-joinder of necessary party had to be taken at the earliest opportunity when the

company filed its written statement to enable the respondent no. 3 to take appropriate and corrective measures, if necessary. That takes us to consideration of the objection of the company in the Labour Court as well as before this Court that the claim of the respondent no. 3 should be against the Trust and the LIC. The Trusts being a separate legal entity, the company does not have any role to play in it. As mentioned before, the claim of the private respondent relates to a Pension Scheme created by the Trustees of the Company's Management Staff Pension Fund with a tie-up with LIC and in order to be entitled to the pension under the scheme a member has to complete 15 years of service with the petitioner company. Mr. Majumder has taken me through various clauses of the Master Policy Scheme to substantiate his point that LIC was to grant the benefits under the Master Policy. Points urged in the writ petition have already been mentioned above and need not be reiterated.

43. The Labour Court considered both the oral as well as documentary evidence. As per Ext. 1 the respondent no. 3 entered into the service of Sinclair Freight and Chartering Consultants Pvt. Ltd. in the year 1971 and subsequently his service was transferred in the year 1978 to the present company. As a matter of fact, the business and undertaking of the earlier company stood transferred to and vested in the present petitioner company. By Ext. 3 the respondent no. 3 was assured that after transfer of service there will be no break or interruption in his service as a result of such transfer of service. The labour court has considered various exhibited documents which go to show that with effect from March 24, 1984 the petitioner had been included in the concerned Pension Fund Scheme of the company and as on March 31, 1987, the petitioner figured as serial no. 26. Ext. 7 which is the note prepared by the company showed that the petitioner was from the parent company who had joined his service in the year 1971. Therefore, the continuity of his service has been admitted by the company itself.

44. The Labour Court appears to have made one departure from the stand of not considering the defence of the company taken at the stage of argument which was not taken in the written statement. This is with regard to the point of objection regarding the liability of the company to make the payment to the private respondent. The only reason for considering the aspect is perhaps the evidence of the company itself that they used to pay premium of the said claim which was for the benefit of the employees and without the direction and advice of the company the Pension Fund Scheme could not be released in favour of the respondent no. 3. The Labour Court referred to Ext. D whereby the company had advised the Trustees of the Provident Fund and Gratuity Fund to settle the legitimate dues of the private respondent immediately. But there is no document to show that the company had directed to Trustees of the Pension Funds as well to settle the legitimate dues of the applicant. On the contrary, it has been stated that the petitioner was not entitled to any pensionary benefit in accordance with the rules and regulations of the Pension Scheme. The contention as reflected in the said document has been negated by the Labour Court holding that the respondent no. 3 did not leave the service of the parent company, but he had to

join the petitioner company as the two companies had merged. As per the condition of amalgamation, the respondent no. 3 is entitled to continuity of service.

45. From a strict legal point of view, the introduction of LIC as a necessary party not having been taken in the written statement should not have been a subject of consideration by the Labour Court. Even if there is evidence about the payment of premium by the company, for the very reasons followed in respect of other points, the Labour Court could as well have not considered this point at all. However, it is not necessary to dwell any further on this point as even after considering the contention of the company it has held against the company. Moreover, since the Labour Court concluded that the company had not directed the Trustees of the Pension Fund Scheme to settle the dues of the applicant which has been done in respect of the other funds, it cannot pass on the buck to the LIC or the Trustees of the fund. The distinction sought to be made between the company and the Trustees of the Pension Fund, cannot really be used by the company as a counter-defence to the claim of the private respondent.

46. Mr. Majumder has referred to the deposition of the respondent no. 3 that he had based his claim on the Master Policy and from that he argued under Section 33C (2) of the Industrial Disputes Act, a workman can approach a Labour Court for computation of his money due or any benefit which is capable of being computed in terms of money when he is entitled to receive the same from the employer. Thus, according to the petitioner, the amount claimed by him is not the money due from the employer. Therefore, he has lodged the claim with a wrong person who does not owe any legal responsibility to pay the money to him.

47. The company cannot pick up a solitary sentence from the deposition of the private respondent, find a flaw and build an argument on that basis. The private respondent has also specifically deposed that the Trust was constituted and funded by the company. He totally negated the suggestion in cross-examination that he had no claim against the company or his claim was with the Trustees.

48. The evidence taken as a whole does nowhere prove any admission on the part of the private respondent about the want of liability of the company to make the payment. Far from it. That has never been the case of the private respondent. Rather it is against his persistent case throughout the proceeding. That apart, the cross-examination made by the company in this regard is without any pleading to that effect by the company and, therefore, is clearly impermissible.

49. It is always the duty of a person seeking to either get a relief from a court of law or to demolish the case of the opponent to set out the facts upon which he relies and not on the legal inferences which may be drawn from them, as held by the Privy Council in *Gouri v. Madho*, reported in AIR 1943 PC 147. On this principle, the contention of the company that since the respondent no. 3 had deposed that he had based his claim on Ext. 4, the company's liability is washed

off can never be accepted as a statement made on the sound principle of law. That because of the existence of Ext. 4 he was not entitled to get the relief had never been the case in the pleadings, including the amendment of the written statement. No plea to that effect was ever raised and in *D M Deshpande v. Janardhan Kashinath Kadam*, reported in (1998) 8 SCC 315, the Supreme Court had held that even mere raising of a plea without factual basis is not sufficient for the purpose of raising an issue.

50. The effort on the part of the company to disentitle the respondent no. 3 of the reliefs sought by him on the inference attempted to be drawn from his statement in cross-examination that his claim was based on the Master Policy is too farfetched to be accepted. To entertain such a plea will amount to a total destruction of a principle of law which is not only well-settled but has grown over the ages in an adversarial litigation. Many decades ago, the Privy Council in *Siddik Mahomed Shah v. M. T. Saran*, reported in AIR 1930 PC 57, held that no amount of evidence can be looked into upon a plea which was never put forward. The same view has also been expressed by the Supreme Court in *Ranade v. Union of India*, reported in AIR 1964 SC 24. In *Bondar Singh and Others v. Nihal Singh and Others*, reported in AIR 2003 SC 1905, the question that cropped up for consideration was whether the plea of sub-tenancy taken by the defendants could at all be entertained when this was not taken in the written statement in the manner which was taken later. The Supreme Court had held that there was nothing to support this plea and reiterated the settled law that in the absence of a plea no amount of evidence led in relation thereto can be looked into. Therefore, in the absence of a clear plea regarding sub-tenancy, the defendants cannot be allowed to build up a case of sub-tenancy.

51. The facts and the principles decided in these cases squarely apply to those in the present one. Here also the company not having taken the point at all in the pleading wanted to build up a case on the basis of an evidence which, because of the company's failure to take up the issue, cannot be relied on. Since the company had failed to raise the issue as a plea in the written statement and despite the opportunity it got, it did not amend the same, it cannot be said that this issue formed part of the lis between the parties. Such has been the view of Supreme Court in the case of *Raj Gopal (Dead) by L.R.s v. Kishan Gopal and Another*, reported in AIR 2003 SC 4319. The Supreme Court observed that in the absence of any pleadings whatsoever on the question as to whether a certain person was given in adoption there was no lis between the parties on this question as such and court could not go into the same even if some evidence was adduced. The Supreme Court placed reliance, inter alia, in the case of *Siddik Mahomed Shah v. M. T. Saran* (Supra) and found error in the finding recorded by the appellate court on this point. The principle of variance between pleading and proof is based on the very fundamentals of the principle of justice as any departure from it would likely to have the effect of springing a surprise and prejudice to the opponent by the change in the case introduced. Thus, where, as here, a party fails to set up a cause cannot be allowed to succeed on it. As a

result of the same, there cannot be any doubt that the company's contention must fail on the unpleaded plea of lack of liability of the company because of the existence of the Master Policy.

52. The Labour Court had rightly observed that since the company used to pay the premium, it must be for the benefit of the employees. On the contrary, the labour court had also rightly held against the company's firm stand that the respondent no. 3 was not entitled to any pensionary benefit in accordance with the rules and regulations of the Pension Scheme. If the company wanted to maintain the stand that the respondent no. 3 had asked for the relief from the wrong person it ought not to have denied his right. In that case it should have taken a detached stand equidistant from both the private respondent as well as the Trust. After considering everything the Labour Court had rightly held that the company cannot deny its liability at this stage.

53. Thus, I find nothing to interfere with the judgment and order of the Labour Court.

54. The writ petition is devoid of merits and is dismissed.

55. The writ petitioner is directed to make the payment to the respondent no. 3 of the amount which the Labour Court had found him to be entitled to, within a period of four weeks from the date of passing of this order. In default, the respondent no. 3 shall be entitled to recover the same from the petitioner company in accordance with law.

56. There shall be no order as to costs.

57. Urgent Photostat certified copy of this order, if applied for, be supplied to the parties on priority basis upon compliance of all requisite formalities.