
(2014) 08 DEL CK 0169

In the Delhi High Court

Case No : I.A. No. 3613/2012 in CS(OS) No. 1184/2007

Spread Info Tech Consultants Pvt. Ltd.

APPELLANT

Vs

ZTE Kangxun Telecom Co. India Pvt. Ltd.

RESPONDENT

Date of Decision : 14-08-2014

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 38 Rule 2, Order 38 Rule 5, Order 6 Rule 17, Order 7 Rule 11, 151

Citation : (2014) 08 DEL CK 0169

Hon'ble Judges : Manmohan Singh, J

Bench : Single Bench

Advocate : Gaurav Mitra, Mohit Chadha, Reha Mitra and Samreen, Advocate for the Appellant; Arun Kathpalia, Bishwajit Dubey and Gargi Jha, Advocate for the Respondent

Final Decision : Dismissed

Judgement

Manmohan Singh, J.—The plaintiff filed a suit for recovery against the defendant on the basis of a cooperation agreement dated 12th August, 2004 executed on 14th August, 2004 (hereinafter referred to as "the said agreement") between the parties as the fee for the co-operation services being rendered by the plaintiff to the defendants in view of said agreement.

2. The written statement was filed by the defendants on 18th January, 2008. The admission/denial was completed on 27th September, 2010. Issues are not framed for last about four years mainly on the reason that one or the other application is being filed in the matter. The present application was filed on 22nd February, 2012. I propose to decide the application which is under Order 6 Rule 17 read with Section 151 CPC for seeking amendment in the written statement.

3. It is stated in the application that the defendants few months back came to know that on the date of entering into cooperation agreement, the plaintiff was not an incorporated entity. The plaintiff was incorporated on 3rd September, 2004 i.e. almost 3 weeks after entering into the cooperation agreement with the

defendant No.1. The application for incorporation was made only on 1st September, 2004. Therefore, in the eyes of law, the plaintiff was not in existence on 12th August and 14th August, 2004 and could not claim any right on the basis of the cooperation agreement. As per written statement, already filed, the case of the defendant was that the plaintiff had never provide any service in terms of the said agreement which stood terminated by defendant No.1 vide letter dated 2nd December, 2004. The same was replaced by four new contracts. No amount is payable to the plaintiff as no purchase order was placed by M/s Atlas Interactive India Pvt. Ltd. (not a party to this suit) in terms of the Agreement of 16th August, 2004. In the written statement the execution of agreement between the parties has not been denied by the defendant No.1, rather it was admitted time and again in the written statement that the parties entered into a cooperation agreement dated 12th August, 2004 executed on 14th August, 2004 as a contract for supply of equipment as per the specification to be provided. Learned counsel for the plaintiff has referred the written statement already filed and stated that in view of the said agreement, parties have taken various steps for the implementation of terms of said agreement were taken by the plaintiff within the knowledge of the defendant No.1 who was also fully aware at the time of execution of agreement that the plaintiff was yet to be incorporated. There is an estoppel on the defendant No.1 to challenge the validity of the agreement. He referred various documents in support of his submission.

4. Leaned counsel appearing on behalf of the defendants has not denied the fact that the defendant's earlier application under Order VII Rule 11 CPC for rejection of the plaint on the same very grounds of non-disclosure of any cause of action and suppression of material facts was rejected by order dated 29th September, 2011. The appeal filed by the defendant was also dismissed as withdrawn by order dated 18th November, 2011. While dismissing the said application, it was observed by the Court that since the said agreement is non- existence/invalid in the eyes of law and the said agreement cannot be enforced.

5. By virtue of the present application, the defendants seek to amend their defense in the written statement in terms of Para 12 of the application, by incorporating the new facts discovered as per defendants. It has been stated that these new facts would affect the determination of the present dispute between the parties. No prejudice would be caused to the plaintiff if this application is allowed. The suit is not at the verge of conclusion. Irreparable prejudice and injury would be caused to the defendants if the same is not allowed.

6. In the reply to the said application, it has been stated by the plaintiff that the application has been filed solely to delay the adjudication of the suit. The averments made therein are false and frivolous. The defendants are guilty of suppresso vari and suggestion falsi. It is stated that defendants by means of the present application seek to withdraw an admission made by them in their written statement to the detriment of the plaintiff. It is further stated that in the application being I.A. No. 13244/2010 filed by the defendants under Order 7

Rule 11 for rejection of plaint, the defendants had raised questions as regards the validity of the said agreement. The said application was dismissed vide order dated 29th September, 2011 and the Court observed that the plaint did disclose a cause of action and did not deserve to be rejected. Aggrieved by the said order, the defendants preferred an appeal being FAO (OS) 554 of 2011 which was dismissed as withdrawn. Therefore, it is clear that the defendants by this application seek to again agitate the same issues.

7. It is also stated that at the time of entering the said agreement, it was well within the knowledge of the defendants that plaintiff company was not incorporated and it was for this reason only that in the said agreement, name of the plaintiff had been left blank. The other averments made in the application are denied and disputed by the plaintiff.

8. The main argument of the learned counsel for the defendants is that by virtue of amendment sought by the defendants in the present case, the defendants are not withdrawing any admission made in the written statement. The defendants are only placing additional facts which have come to the knowledge of the defendants subsequently and such amendment cannot be refused, particularly in the written statement as Courts are to take more liberal view while considering the application for amendment of the written statement than in the plaint.

9. It is settled law that the grant of permission for amendment would be subject to certain conditions, namely, (i) when the nature of suit is changed by permitting amendment; (ii) when the amendment would result introducing new cause of action and intends to prejudice the other party; (iii) when allowing amendment application defeats the law of limitation. If the proposed amendment would in effect result in any of the above said, the same should not be allowed. Under the said provision to amend the pleadings, the party cannot be permitted to use it as a lever to frustrate the due process of law nor can the provision for amendment be permitted to be utilized as an instrument to stall the entire process of the case which had already matured and is at the final stage. Even though, the law is quite liberal in allowing the amendment in the written statement. The additional or new ground of defence by taking the fresh pleas in the written statement is not permissible in law.

10. It is settled law that a categorical admission cannot be withdrawn from the case which may go into the root of the case, those can be explained or clarified subsequently by virtue of amendment but it would depend upon the nature of each case. At the same time defendant is entitled to take an alternative plea. However, it may not tantamount to withdrawal of the same by the device of amendment.

11. In the present case there have been categorical statements made by the defendants in the written statement wherein the cooperation agreement has been admitted by the defendants. The same are reproduced herein below:

"2.

(a)The present suit is not maintainable in view of the fact that the Plaintiff has sought the recovery of amount towards its fees for the alleged services provided by it in terms of the Cooperation Agreement dated 12.08.2006 signed on 14.08.2006. It is submitted that the services have never been provided by the Plaintiff and the Defendant is not liable to pay any amount whatsoever to the Plaintiff...

(iii) Pursuant to the negotiations and the discussions, the Defendants and the Plaintiff reached an understanding to enter into a contract for supply of the equipment as per the specifications to be provided by Atlas.

(iv) While the Defendant and Atlas had reached an understanding, the Plaintiff and the Defendant entered into a Co-operation Agreement dated 12.08.2004 and executed on 14.08.2004. The Co-operation Agreement was entered into to facilitate the placing of the Purchase Order since without the Purchase order the entering of the Agreement was meaningless.

(v) As is clear from the above clauses of the Cooperation Agreement that the Plaintiff was obliged to perform the following services:-

.....It is submitted that none of the above obligations were performed by the Plaintiff.

(vi) It is further submitted condition precedent for payment of fees was the placement of the Purchase Order as is clear from the following relevant clause of the Cooperation Agreement....

(vii) Admittedly, no Purchase Order was placed by Atlas in terms of the Agreement dated 16.08.2004 and as such no payment is due and payable by the Defendant to the Plaintiff.

(viii) It is submitted that the Contract dated 16.08.2004 was terminated by the Defendant No.1 by its letter dated 02.02.2004 and the same written statement replaced by the four new contracts, which were entered into between the Defendant No.1 and the Plaintiff.

3. a. b. At the same time, Mr.Ravi Chauhan, acting as the Director of the Plaintiff Company, has signed the Cooperation Agreement on behalf of the Plaintiff Company.

8.the Defendants seeks to refer to and rely on the contents of the Cooperation Agreement dated 12/14.08.2004 entered into between the Plaintiff and the Defendants for its true meaning and interpretation..."

12. The defendants have raised a defence in the written statement that obligation under the Cooperation Agreement have not been performed and have relied on the Cooperation Agreement as part of their defence. In addition to the above, the defendants have also admitted the Cooperation Agreement on 25th September, 2010 at the time of carrying out of the admission/denial in the suit.

13. The Apex Court and this Court time and again have discussed the issue as to whether a party is entitled to withdraw the admission already made in the pleading by filing of an application under the provisions of Order VI Rule 17 CPC, thus this Court has to examine that whether or not by the proposed amendment the defendant is seeking to withdraw an admission made by him in his written statement or the amendment sought by the defendant is merely an additional plea. The relevant case laws in this regard are as under:-

i) In the case of Gautam Sarup Vs. Leela Jetly and Others, , it was held as under :

"22. What, therefore, emerges from the discussions made hereinbefore is that a categorical admission cannot be resiled from but, in a given case, it may be explained or clarified. Offering explanation in regard to an admission or explaining away the same, however, would depend upon the nature and character thereof. It may be that a defendant is entitled to take an alternative plea. Such alternative pleas, however, cannot be mutually destructive of each other.

23. An explanation can be offered provided there is any scope therefor. A clarification may be made where the same is needed.

26. We are herein concerned with her right to maintain an application for an amendment of the written statement when her second written statement has not been accepted. Submission of Mr. Verma that in any event other respondents having denied and disputed the genuineness of the Will and an issue in that behalf having been framed, the appellant in no way shall be prejudiced if the amendment of the written statement be allowed, cannot be accepted.....

27. It may be true that even in this case, the Trial Court was bound to determine the issue in regard to the validity of the Will dated 23.9.1999, but such an issue has not been and cannot be raised at the instance of respondent No. 6."

ii) In the case of Muktaben Mohanjibhai Solanki and Another Vs. Jagdishbhai Devrajbhai Patel, , it was held as under :

"8. The question for determination by this Court lies in a narrow compass that is, whether the amendment in the written statement, which amounts to withdrawal of an admission made by the respondent in the original written statement, could have been permitted? There is no dispute regarding the fact that in the original written statement the respondent has categorically admitted that the petitioners are owners-in-possession of land comprised in Subplots Nos. 111 to 116 in Revenue Survey No. 310 and that the respondent is the owner in possession of 500 sq.mts. of land in Revenue Survey No. 311. In the original written statement, the respondent has not disputed the validity of the Sale Deeds vide which the petitioners have purchased the suit property. By making the amendment in the written statement, the respondent seeks to resile completely from the stand taken by him earlier. The respondent not only seeks to deny the ownership and possession of the petitioners regarding Sub-Plots Nos.111 to 116

of Revenue Survey No. 310, but also seeks to put up a case that the Sale Deeds vide which the petitioners have purchased the said land are null and void. Whereas the respondent had categorically admitted in the written statement that he is the owner in possession of 500 sq.mt. of land in Revenue Survey No. 311, he now says that he is the owner of the suit property which, as per his earlier admission, is owned by the petitioners. In short, the amendment in the written statement that has been granted by the impugned order, has the effect of permitting the respondent to resile from the admissions made by him earlier, which is not permissible in law. The legal position in this regard is no longer res Integra, and may be examined, at this stage.

9. In *Aslam @ Deewan Vs. State of Rajasthan*, , after discussing a catena of judgments, the Supreme Court has enunciated the following principles of law:

28. What, therefore, emerges from the discussions made hereinbefore is that a categorical admission cannot be resiled from but, in a given case, it may be explained or clarified. Offering explanation in regard to an admission or explaining away the same, however, would depend upon the nature and character thereof. It may be that a defendant is entitled to take an alternative plea. Such alternative pleas, however, cannot be mutually destructive of each other.

29. An explanation can be offered provided there is any scope therefor. A clarification may be made where the same is needed.

30. We will assume that despite the amendments made by the Code of Civil Procedure. (Amendment) Act, 1976, amendment of pleadings being procedural in nature, the same should be liberally granted but as in all other cases while exercising discretion by a court of law, the same shall be done judiciously.

10. Applying the above principles of law to the facts and circumstances of the present case, it is evident that the respondent is not seeking a clarification, or trying to explain the admissions made by him but, in a complete volte-face, is resiling from the categorical admissions made by him. Explaining or offering a clarification regarding an admission stands on one footing whereas resiling from the same, would stand on a totally different footing. In view of the law laid down by the Supreme Court, such a course is not permissible. In the case in hand, the Trial Court had granted a temporary injunction to the petitioners, on the basis of the admitted stand taken by the respondent in the written statement. After about two years from institution of the Suit, the said amendment has been granted by the Trial Court, which is clearly not in consonance with the settled legal position. In the view of this Court, in passing the impugned order, discretion has not been exercised judiciously, by the Trial Court."

iii) In the case of *Modi Spinning and Weaving Mills Co. Ltd. and Another Vs. Ladha Ram and Co.*, , it was held as under :

"7. The trial court rejected the application of the defendants for amendment. One

of the reasons given by the trial court is that the defendants wanted to resile from admissions made in paragraph 25 of the written statement. The trial court said that "the repudiation of the clear admission is motivated to deprive the plaintiff of the valuable right accrued to him and it is against law." The trial court held the application for amendment to be not bonafide.

8. The High Court on revision affirmed the judgment of the trial court and said that by means of amendment the defendants wanted to introduce an entirely different case and if such amendments were permitted it would prejudice the other side.

9. The decision of the trial court is correct. The defendants cannot be allowed to change completely the case made in paragraphs 25 and 26 of the written statement and substitute an entirely different and new case.

10. It is true that inconsistent pleas can be made in pleadings but the effect of substitution of paragraphs 25 and 26 is not making inconsistent and alternative pleadings but it is seeking to displace the plaintiff completely from the admissions made by the defendants in the written statement. If such amendments are allowed the plaintiff will be irretrievably prejudiced by being denied the opportunity of extracting the admission from the defendants. The High Court rightly rejected the application for amendment and agreed with the trial court."

iv) In the case of Heeralal Vs. Kalyan Mal and Others, , it was held as under :

"8. Our attention was also invited to another decision of a Bench of two learned judges of this Court in the case of Akshaya Restaurant Vs. P. Anjanappa and Another, . In that case the plaintiff had filed a suit on the basis of a agreement of sale entered into by the defendant with the plaintiff agreeing to sell the suit property for a sale consideration of Rs.29,87,000 on 25th January 1991. The defendant in the written statement had earlier stated that it was true that the defendant entered into such an agreement but by an amendment an averment was sought to be introduced in the written statement to the effect that it is incorrect to state that the defendant agreed to enter into agreement of sale. It is true that the defendant had entered into an agreement with the plaintiff on 25th January 1991 but it was for development of the suit schedule land for the mutual benefit of the parties. This amendment was held to be justified by this Court.

9. Now it is easy to visualize on the facts before this Court in the said case that the defendant did not seek to go behind his admission that there was an agreement of 25th January 1991 between the parties but the nature of agreement was sought to be explained by him by amending the written statement by submitting that it was not agreement of sale as such but it was an agreement for development of land. The facts of the present case are entirely different and consequently the said decision also cannot be of any help for the learned counsel for the respondent. Even that apart, the said decision of two learned judges of this Court runs counter to a decision of a Bench of three

learned Judges of this Court in the case of Modi Spinning and Weaving Mills Co. Ltd. and Another Vs. Ladha Ram and Co., . In that case Ray, C.J., speaking for the Bench had to consider the question whether the defendant can be allowed to amend his written statement by taking an inconsistent plea as compared to the earlier plea which contained an admission in favour of the plaintiff. It was held that such an inconsistent plea which would displace the plaintiff completely from the admissions made by the defendants in the written statement cannot be allowed. If such amendments are allowed in the written statement plaintiff will be irretrievably prejudiced by being denied the opportunity of extracting the admission from the defendants. In that case a suit was filed by the plaintiff for claiming a decree for Rs.1,30,000 against the defendants. The defendants in their written statement admitted that by virtue of an agreement dated 7th April 1967 the plaintiff worked as their stockist-cum-distributor. After three years the defendants by application under Order VI Rule 17 sought amendment of written statement by substituting paragraphs 25 and 26 with a new paragraph in which they took the fresh plea that plaintiff was mercantile agent- cum purchaser, meaning thereby they sought to go behind their earlier admission that plaintiff was stockist- cum-distributor. Such amendment was rejected by the Trial Court and the said rejection was affirmed by the High Court in revision. The said decision of the High Court was upheld by this Court by observing as aforesaid. This decision of a Bench of three learned Judges of this Court is a clear authority for the proposition that once the written statement contains an admission in favour of the plaintiff, by amendment such admission of the defendants cannot be allowed to be withdrawn if such withdrawal would amount to totally displacing the case of the plaintiff and which would cause him irretrievable prejudice. Unfortunately the aforesaid decision of three member Bench of this Court was not brought to the notice of the Bench of two learned judges that decided the case in Akshaya Restaurant (supra). In the latter case it was observed by the Bench of two learned Judges that it was settled law that even the admission can be explained and even inconsistent pleas could be taken in the pleadings. The aforesaid observations in the decision in Akshaya Restaurant (supra) proceed on an assumption that it was the settled law that even the admission can be explained and even inconsistent pleas could be taken in the pleadings. However the aforesaid decision of the three member Bench of this Court in Modi Spinning (supra) is to the effect that while granting such amendments to written statements no inconsistent or alternative plea can be allowed which would displace the plaintiffs case and cause him irretrievable prejudice.

10. Consequently it must be held that when the amendment sought in the written statement was of such a nature as to displace the plaintiffs case it could not be allowed as ruled by a three member Bench of this Court. This aspect was unfortunately not considered by latter Bench of two learned Judges and to the extent to which the latter decision look a contrary view qua such admission in written statement, it must be held that it was per incuriam being rendered without being given an opportunity to consider the binding decision of a three

member Bench of this Court taking a diametrically opposite view."

14. It is settled law that observations made at interim stage are not binding. The defendants are seeking to rely on the observations on merit made by this Court in order dated 29th September, 2011 while dismissing its application under Order VII Rule 11 CPC. It is settled by the Supreme Court in a catena of judgments wherein it has been held that the observations made at interim stage are not binding at subsequent stages of the same proceeding either before the learned Single Judge or the Appellate Court. The Supreme Court in the case of *Modi Entertainment Network and Another Vs. W.S.G. Cricket PTE. Ltd.*, has held as under:

"31. In the instant case, though the learned single judge proceeded on the prima facie finding that the proceedings in the English Courts would be oppressive and vexatious, in our view, those findings, recorded at the stage of passing an ad-interim order, would not bind the same learned judge much less they would bind the appellate court or the parties thereto at subsequent stage of the same proceeding because it cannot operate as issue estoppel....."

15. The following facts are necessary to be mentioned in order to show that the defendants are not entitled for the amendments as are being sought:

a) It is evident from the fact that Cooperation Agreement refers to the Plaintiff as Cooperator and the name was originally left blank. The defendant entered into a contract on 12th /14th August, 2004 as the Telecom Project was awarded on 16th August, 2004. So the parties did not wait for the company to formally come into existence on 3rd September, 2004 as per the case of the plaintiff.

b) After the plaintiff company came into existence on 3rd September, 2004, the Defendant has entered into an amendment dated 18th March, 2005 of the Cooperation Agreement dated 12th /14th August, 2004. This amendment is not denied rather they admitted in their reply to the application under Order 38 Rule 2 & 5 bearing I.A. No.16879/2009.

c) It is also the case of the plaintiff that after the plaintiff company came into existence on 3rd September, 2004, the defendant has sent emails that 26th December, 2004 and 27th December, 2004 admitting their liability. The written statement was filed by the defendants on 18th January, 2008 and the cooperation agreement was admitted and relied on.

d) The admission/denial was carried out on 25th September, 2010 and the cooperation agreement was admitted by the defendant.

e) The defendant on the same facts and on the basis of the very same documents filed an application under Order VII Rule 11 CPC on 10th September, 2010. An appeal filed by the defendant was dismissed. The said order attained finality.

16. The application under Order VII Rule 11 CPC was filed by the defendants on

13th September, 2010. The present application was filed on 22nd February, 2012, i.e. after the expiry of about 18 months. It is admitted position that the plaintiff company was incorporated after three weeks from the date of execution of the agreement. The legal effect of the same is otherwise to be argued by the parties at the time of final arguments of suit. In case the amendment in the written statement is allowed, it would cause irretrievable prejudice to the case of the plaintiff. In the present case, this Court finds that it is apparent that in the garb of an alternate plea, the defendants are trying to enlarge the scope of the suit as well as trying to challenge the validity of the said agreement which was not challenged in the written statement already filed in January, 2008. The defendants are trying to change their defence by challenging the agreement. This Court felt that it is being done by the defendants in order to delay the proceedings and the said step is an afterthought.

17. Therefore, the amendment sought is totally unnecessary. The present application is filed in order to delay the matter. It is not an alternative plea. It is filed deliberately to displace the case of the plaintiff.

18. Thus, the present application is devoid of any merit. The same is dismissed.

19. No costs.

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20. List before Court for framing of issues on 14th November, 2014.