

(2013) 12 BOM CK 0083

In the Bombay High Court

Case No : Writ Petition No. 1769 of 2013

The General Manager, Bharat Sanchar Nigam Ltd.

APPELLANT

Vs

Rakshak Industrial Security Agency Pvt. Ltd., Lt. Col. Selvan Adik Thiruwarul (Rtd.), The Chairman and Managing Director, Bharat Sanchar Nigam Ltd. and The Chief General Manager, Bharat Sanchar Nigam Ltd.

RESPONDENT

Date of Decision : 03-12-2013

Acts Referred:

Citation : (2014) 1 ABR 515 : (2014) 1 ALLMR 666 : (2014) 1 BomCR 268 : (2014) 2 MhLj 715

Hon'ble Judges : S.S. Shinde, J

Bench : Single Bench

Advocate : Manjusha A. Deshpande, for the Appellant; M.D. Joshi, Advocate, for the Respondent

Final Decision : Disposed Off

Judgement

S.S. Shinde, J.—Rule. Rule made returnable forthwith. With consent of the parties, heard finally. This writ petition takes exception to the judgment and order dated 15/02/2013 below Exhibit-56 in Regular Civil Suit No. 251 of 2012 passed by 3rd Joint Civil Judge, Senior Division, Ahmednagar thereby refusing permission to amend written statement.

2. Brief facts, leading to file present writ petition, as disclosed in this petition, are as under:-

? It is the case of the petitioner that, the petitioner herein, entered into contract with the respondent wherein, the respondent agreed to provide Security Guards to the petitioner on the terms and conditions mentioned in the contract. The period of contract was extended from time to time upto 31-01-2010. It is further case of the petitioner that, as per the terms of contract, the petitioner was to deduct 10% of the amount raised by the petitioner towards the bill raised for payment of wages to the Security Guards as security deposit. Accordingly, the

petitioner had deducted 10% each month. On completion of tender period, the respondent demanded the security amount.

? It is further case of the petitioner that, the petitioner informed the respondent that, unless the accounts are settled Security Deposit cannot be refunded. Aggrieved thereby, respondent filed a suit bearing R.C.S. No. 251 of 2012 for recovery of Rs. 3,97,640/-. It is the case of the petitioner that, since there was a stipulation in the contract that, the contractor shall make good the losses occurred on account of theft committed in the premises of petitioner and 2 to 3 times thefts had occurred in the premises of petitioner. Therefore, unless the loss occurred could be accounted for the petitioner, they could not refund the said amount.

? It is further case of the petitioner that, the petitioner herein filed written statement in the suit as aforesaid. After filing of the written statement when the petitioner solicited certain information from one of its department, it transpired that, there was another litigation pending between the petitioner and the respondent and the said documents were not available with the petitioner at the time of filing written statement. Those documents revealed that, the respondent failed to make payment of minimum wages to the security guards, therefore, the Labour Enforcement Officer directed the petitioner to make the payment of the differential amount. The petitioner in compliance of the said order made payment to the Labour which amounted to Rs. 1,92,554/-. The said amount was to be recovered from the respondent by making adjustment from the security deposit, however, this fact could not be brought on record while filing the written statement as the documents were not available with the department instructing the petitioner at the time of filing the written statement. Hence, in spite of due diligence it was not possible for the petitioner to bring the said fact on record which was very much relevant and decisive for deciding the suit, learned Judge of the Court below has been pleased to dismiss the application Exhibit-56 seeking amendment of written statement on the ground that, the application does not consist the words due diligence, therefore, the said application has been rejected. Hence, this writ petition.

3. Learned Counsel appearing for the petitioner submits that, the Court below has taken a hyper technical approach while rejecting the application seeking amendment in written statement. It is further submitted that, rejection of permission to amend would entail in multiplying the litigation, in stead of minimizing the same. The said amendment is necessary to be incorporated for effective adjudication of point of controversy between parties to the suit. It is further submitted that, petitioner is trying to bring on record earlier facts which are well within the knowledge of the respondent, therefore, in no way it would cause any prejudice to the plaintiff. It is further submitted that, portion to be added in written statement is consistent with the written statement on record, it does not set up a new case. He further submitted that, though the trial has commenced it is not at a belated stage, only affidavit in support of examination-

in-chief by the plaintiff witness has been filed, therefore, no prejudice would be caused to the plaintiff. It is further submitted that, the Court below has wrongly interpreted the proviso to Order VI Rule 17, which grants discretionary powers to the Court to allow amendment even after the commencement of trial, if the Judge is satisfied that in spite of due diligence party could not have raised the matter before the commencement of trial. The said proviso does not contemplate a statement to be made to that effect in the application. It is further submitted that, the ground on which the application is rejected being contrary to the provisions of law, is unsustainable.

4. In support of his contention that, prayer for amendment of the written statement is required to be entertained liberally and further prayer for amendment of the written statement stand on different footing, learned Counsel appearing for the petitioner pressed into service exposition of Supreme Court in the case of Usha Balashaheb Swami and Others Vs. Kiran Appaso Swami and Others, . Learned Counsel for the petitioner also invited my attention to the judgment of the Supreme Court in the case of Abdul Rehman and Another Vs. Mohd. Ruldu and Others, and submitted that, power of amendment should be exercised in the larger interests of doing full and complete justice between the parties. Relying upon the pleadings in the petition, grounds taken therein, annexures thereto, contentions raised in the application for amendment of written statement and judgments cited supra, the Counsel appearing for the petitioner submits that, the writ petition deserves to be allowed.

5. On the other hand, learned Counsel appearing for respondent No. 1 vehemently opposed the prayer for amendment in written statement. He invited my attention to the reasons recorded by the trial Court and submits that, no due diligence has been disclosed in the application for amendment of the written statement. It is submitted that, provisions of Order 6 Rule 17 proviso, of CPC mandates that, the application filed for amendment of the plaint/written statement can be considered only in case due diligence is disclosed in such application. It is submitted that, unless mandate of proviso to Rule 17 Order 6 of CPC is complied, the Court has no discretion to allow the amendment. It is submitted that, the trial Court has rightly observed that, no due diligence was disclosed in the application praying for amendment in the written statement and therefore, the trial Court has declined to entertain the prayer for amendment. Therefore, this Court may not interfere in the impugned judgment and order.

6. Learned Counsel appearing for respondent No. 1 pressed into service exposition of this Court in the case of M/s. Sai Shradha Developers Vs. Ravindra Ganpatrao Bharitkar and Others, and submitted that, while considering the prayer for amendment of the plaint/written statement, Court must come to the conclusion that, in spite of due diligence the parties could not have raised the matter before the commencement of the trial. Unless such conclusion is recorded, Court has no discretion to allow the prayer for amendment. Learned Counsel further pressed into service exposition of the Supreme Court in the case

of J. Samuel and Others Vs. Gattu Mahesh and Others, and submitted that, unless Court satisfies itself that there is a reasonable cause for allowing the amendment, normally the Court has to reject such a request. Therefore, the Counsel appearing for respondent No. 1 submits that, the writ petition may be rejected.

7. I have given careful consideration to the submissions of the Counsel appearing for the petitioner and the Counsel for the respondent No. 1. With their able assistance perused the pleadings, grounds taken therein, annexures thereto, impugned order passed by the trial Court, other documents placed on record and the judgments of this Court and the Supreme Court cited supra and provisions of Order 6 Rule 17 proviso of Code of Civil Procedure.

8. Upon careful perusal of the contents of the application which was filed for amendment in the written statement, it is stated that, the defendant is Union Govt. Public Enterprises company registered under Companies Act which is wholly and solely controlled by the Union Ministry communication New Delhi. That the defendant is having certain divisions under the control of General Manager, B.S.N.L. i.e. account division, administration, legal, tender etc. At the time of drafting the W.S. to the suit the necessary documents were not available in the custody of legal Section. The floating tender and billing Section are separate and do the work separately. After filing of W.S. to the said suit the Legal Section inquired about account Section and administration Section regarding plaintiff's dues. At that time the defendant knows about certain proceeding was initiated by the Labour Commissioner against the plaintiff and the plaintiff has not paid minimum wages to the guard. Hence, the labour Commissioner directed to the defendants to pay the minimum wages to the guard which was appointed by the plaintiff to the security of the defendants property in Ahmednagar SSA. At that time the labour Commissioner also sent the letter to the plaintiff and directed plaintiff to pay differential amount to the guard as per the Minimum Wages Act but the plaintiff did not pay any heed and not obeyed the order of the Labour Commissioner. That the plaintiff has demanded the amount of claim from the defendant as 10% of billing amount of security deposit from each monthly bill i.e. April 2008 to December, 2009. That the defendant has already paid the minimum wages as per the Minimum Wages Act and as per the direction of the Labour Commissioner, Pune. It is necessary to bring this fact before the Court that the plaintiff has suppressed the fact from the Court. If the amendment of the defendant was allowed the plaintiff will not cause any hardship. That the plaintiff has received the said information recently from the concerned Department. That the plaintiff is having knowledge about the proceedings initiated by the Labour Commissioner against him and in that proceeding plaintiff intentionally did not appeared before Labour Commissioner. That the Labour Commissioner, Pune has time to time sent letters and intimated each and every proceeding and orders to the plaintiff but the plaintiff intentionally suppressed the facts from the Court. That the defendants have specifically contended in the W.S. that the plaintiffs have suppressed fact about complaints to police station

and same was under enquiry. Yet the enquiry was not finalized in so many cases which is sub-judice before the respective authority. That the plaintiff's claim is exorbitant and excessive. The proposed amendment sought by the defendant is specific and to bring clear position before the Court is necessary. The defendants have narrated the facts relating to the amendment application indirectly and not specifically. Therefore, it is necessary to amend the W.S. of the defendants for full and final settlement of dispute in between the plaintiff and defendants.

9. Upon careful perusal of the above mentioned contents of the application which was filed for amendment of the written statement, by way of amendment the petitioner wish to bring on record the fact that, minimum wages are paid by the petitioner to the guards who are appointed by the plaintiff to the security of the defendants. It appears that, Labour Commissioner sent letter to the plaintiff and directed the plaintiff to pay differential amount to the guards as per Minimum Wages Act. However, the plaintiff did not pay any heed and not obeyed the order of the Labour Commissioner. It appears that, it is the case of the original defendant i.e., petitioner herein that, the defendant has already paid minimum wages as per Minimum Wages Act and as per directions of the Labour Commissioner, Pune. However, the plaintiff has suppressed this fact from the Court. These are the relevant and important facts which would assist the Court in reaching to the proper conclusion and also would set at rest the controversy involved in the suit. If the defendants are allowed to amend written statement, certainly plaintiff will have opportunity to reply amended portion in the written statement and no prejudice would be caused to the plaintiff.

10. The Supreme Court in the case of Usha Balasaheb Swami and others (supra), while considering the scope of provisions of Order 6 Rule 17 proviso, of CPC in relation to prayer for amendment in the written statement, in paragraphs-18 to 22 held thus:

18. From a bare perusal of Order 6 Rule 17 of the Code of Civil Procedure, it is clear that the court is conferred with power, at any stage of the proceedings, to allow alteration and amendments of the pleadings if it is of the view that such amendments may be necessary for determining the real question in controversy between the parties. The proviso to Order 6 Rule 17 of the Code, however, provides that no application for amendment shall be allowed after the trial has commenced unless the court comes to a conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial. However, proviso to Order 6 Rule 17 of the Code would not be applicable in the present case, as the trial of the suit has not yet commenced.

19. It is now well-settled by various decisions of this Court as well as those by High Courts that the courts should be liberal in granting the prayer for amendment of pleadings unless serious injustice or irreparable loss is caused to the other side or on the ground that the prayer for amendment was not a bonafide one. In this connection, the observation of the Privy Council in the case of AIR 1922 249 (Privy Council) may be taken note of. The Privy Council

observed:

All rules of courts are nothing but provisions intended to secure the proper administration of justice and it is, therefore, essential that they should be made to serve and be subordinate to that purpose, so that full powers of amendment must be enjoyed and should always be liberally exercised, but nonetheless no power has yet been given to enable one distinct cause of action to be substituted for another, nor to change by means of amendment, the subject-matter of the suit.

(Underlining is ours)

20. It is equally well settled principle that a prayer for amendment of the plaint and a prayer for amendment of the written statement stand on different footings. The general principle that amendment of pleadings cannot be allowed so as to alter materially or substitute cause of action or the nature of claim applies to amendments to plaint. It has no counterpart in the principles relating to amendment of the written statement. Therefore, addition of a new ground of defence or substituting or altering a defence or taking inconsistent pleas in the written statement would not be objectionable while adding, altering or substituting a new cause of action in the plaint may be objectionable.

21. Such being the settled law, we must hold that in the case of amendment of a written statement, the courts are more liberal in allowing an amendment than that of a plaint as the question of prejudice would be far less in the former than in the latter case [see B.K.N. Narayana Pillai Vs. P. Pillai and Another, and Baldev Singh and Others Etc. Vs. Manohar Singh and Another Etc.,]. Even the decision relied on by the plaintiff in Modi Spinning (supra) clearly recognizes that inconsistent pleas can be taken in the pleadings. In this context, we may also refer to the decision of this Court in Basavan Jaggu Dhobi v. Sukhnandan Ramdas Choudhary . In that case, the defendant had initially taken up the stand that he was a joint tenant along with others. Subsequently, he submitted that he was a licensee for monetary consideration who was deemed to be a tenant as per the provisions of Section 15A of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947. This Court held that the defendant could have validly taken such an inconsistent defence. While allowing the amendment of the written statement, this Court observed in Basavan Jaggu Dhobi's case (supra) as follows:-

As regards the first contention, we are afraid that the courts below have gone wrong in holding that it is not open to the defendant to amend his statement under Order 6 Rule 17 CPC by taking a contrary stand than was stated originally in the written statement. This is opposed to the settled law open to a defendant to take even contrary stands or contradictory stands, the cause of action is not in any manner affected. That will apply only to a case of the plaint being amended so as to introduce a new cause of action.

22. As we have already noted herein earlier that in allowing the amendment of

the written statement a liberal approach is a general view when admittedly in the event of allowing the amendment the other party can be compensated in money. Technicality of law should not be permitted to hamper the Courts in the administration of justice between the parties. In the case of *L.J. Leach and Company Ltd. Vs. Jardine Skinner and Co.*, , this Court observed "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". In that case this Court also held "that the defendant has right to take alternative plea in defence which, however, is subject to an exception that by the proposed amendment the other side should not be subjected to serious injustice.

11. Therefore, upon careful perusal of the discussion in above mentioned paragraphs-18 to 22 in the case of *Usha Balasaheb Swami and others (supra)*, it will have be held that, a prayer for amendment of the plaint and a prayer for amendment of the written statement stand on different footings. The general principle that amendment of pleadings cannot be allowed so as to alter materially or substitute cause of action or the nature of claim applies to amendments to plaint. It has no counterpart in the principles relating to amendment of the written statement. Therefore, addition of a new ground of defence or substituting or altering a defence or taking inconsistent pleas in the written statement would not be objectionable while adding, altering or substituting a new cause of action in the plaint may be objectionable. Therefore, the Supreme Court held that, Courts should be more liberal in allowing the amendment in written statement than that of plaint as the question of prejudice would be far less in the former than in the latter case.

12. The Supreme Court in the case of *Abdul Rehman and another (supra)*, in paragraphs-14 and 15 held thus:

14) In *Pankaja and Another Vs. Yellappa (D) by Lrs. and Others*, , this Court held that if the granting of an amendment really subserves the ultimate cause of justice and avoids further litigation, the same should be allowed. In the same decision, it was further held that an amendment seeking declaration of title shall not introduce a different relief when the necessary factual basis had already been laid down in the plaint in regard to the title.

15) We reiterate that all amendments which are necessary for the purpose of determining the real questions in controversy between the parties should be allowed if it does not change the basic nature of the suit. A change in the nature of relief claimed shall not be considered as a change in the nature of suit and the power of amendment should be exercised in the larger interests of doing full and complete justice between the parties.

13. It follows from the authoritative pronouncement of the Supreme Court in the case of *Abdul Rehman and another (supra)*, that all amendments which are necessary for the purpose of determining real question in controversy between the parties should be allowed if it does not change basic nature of the suit. The

power of amendment should be exercised in the larger interests of doing full and complete justice between the parties.

14. As already observed, by way of proposed amendment in the written statement, the defendant i.e., petitioner herein, who wish to bring on record the fact that minimum wages are already paid by the petitioner to the guards which are appointed by the plaintiff for the security of the petitioner. The said amendment, if allowed, would not cause prejudice to the plaintiff and will have opportunity to reply the amendment in the written statement. The plaintiff can be compensated by imposing costs of Rs. 5000/- on the petitioner. In the light of above, the impugned order dated 15/02/2013 below Exhibit-56 in R.C.S. No. 251/2012 is quashed and set aside. The application at Exhibit-56 is allowed subject to depositing costs Rs. 5000/- (Rs. Five thousand only) by the petitioner before the trial Court within three weeks from today. It is made clear that, depositing cost amount of Rs. 5000/- is a condition precedent. The parties to appear before the trial Court on 23/12/2013. Upon depositing amount of Rs. 5000/- towards costs by the defendant, the petitioner should be allowed to amend the written statement. The plaintiff should be given opportunity to reply/contest the amended portion in the written statement. Writ petition is allowed to above extent. Rule made absolute on above terms. The writ petition stands disposed of.