

IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment delivered on: 21.07.2011

+W.P. (C) No. 3976/2010 & CM No. 7928/2010

Municipal Corporation of Delhi Petitioner
Through: Mr. Gaurang Kanth, Advocate.

Vs.

The Workmen, Workers Working in Electrical
Department of MCD Respondent

Through: Mr. V.N. Shrama, Advocate.

CORAM:

HON'BLE MR. JUSTICE KAILASH GAMBHIR

1. Whether the Reporters of local papers may be allowed to see the judgment? Yes
2. To be referred to Reporter or not? Yes
3. Whether the judgment should be reported in the Digest? Yes

KAILASH GAMBHIR, J.Oral:

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1. By this petition filed under Article 226 of the Constitution of India, the petitioner seeks to challenge the order dated 14.5.2010 passed by the learned Trial Court thereby dismissing the application of amendment of pleadings moved by the petitioner under Order VI Rule 17 of the Code of Civil Procedure, 1908.

2. Brief facts of the case relevant for deciding the present petition are that the members of the respondent union were working in the petitioner's electrical department (General Wing) of the petitioner MCD. That the respondent union raised an industrial dispute claiming parity in the pay scale with the employees of Delhi Electric Supply Undertaking (DESU) and vide order dated 10.10.1996, the Labour Court decided the reference in favour of the respondent union and the petitioner challenged the said award before this Hon'ble High Court which vide order dated 21.11.2006, set aside the award. That the respondent union being aggrieved by the said order, challenged the same before the Hon'ble Division Bench of this Court which vide

order dated 2.2.2009 set aside the award dated 10.10.1996 and the order of the learned Single Judge dated 21.11.2006 and remanded the matter back to the Labour Court for deciding the matter afresh. Consequently, the parties appeared before the Ld. Labour Court on 25.2.2009 which directed the parties to reconstruct the file, during which process, the petitioner realized that the written statement filed by him in the earlier round did not contain relevant facts to finally and conclusively decide the disputes due to which in order to avoid further complexity, the petitioner on 23.10.2009 moved an application under Order VI Rule 17 CPC for amending the earlier written statement which vide order dated 14.5.2010 was dismissed by the Labour Court. Feeling aggrieved by the same, the petitioner has preferred the present petition.

3. Mr. Gaurang, learned counsel appearing for the petitioner submits that vide award dated 10.10.1995, the learned Labour Court has decided the reference in favour of

the respondent workmen Union and the said award was challenged by the petitioner by filing W.P.(C) No. 2650/1996. Inviting the attention of this Court to the observations made by the learned Single Judge in the order dated 21.11.2006, counsel points out that in the said order the learned Single Judge has clearly observed that for deciding the issue of “equal pay for equal work” evidence is required to determine the nature of work being done by persons working at different posts in MCD and different posts in DESU; the qualifications for these posts in both the said organizations; the mode of recruitment and the responsibility put on such employees. Counsel further submits that since the said issues were not considered by the learned Labour Court in deciding the reference, therefore, the learned Single Judge allowed the writ petition filed by the petitioner. Counsel further submits that the said order of the learned Single Judge was challenged by the respondents before the Hon'ble Division Bench in LPA No. 7/2007 and even the Hon'ble Division Bench in the LPA clearly observed

that in the order passed by the Industrial Tribunal there is hardly any discussion on the qualification, nature of duties being performed by the workman in Electrical Department (General Wing) and the employees of erstwhile DESU. Counsel further submits that the Court also observed that the reasoning and grounds given in the award to apply the doctrine of "equal pay for equal work" is cryptic and keeping in view the principles expounded by the Supreme Court, the same cannot be accepted. The counsel also submits that in the said LPA, the appellant also brought to the notice of the Court that the detailed evidence earlier recorded before the Industrial Tribunal was destroyed and in the pleadings filed by the appellant MCD the only objection taken was that the DESU is a commercial wing while the general wing of the MCD is not a commercial wing and taking into consideration the said facts brought forth before the Court by both the parties, the Hon'ble Division Bench remanded the matter back to the Labour Court to decide the reference afresh. Counsel further submits that the Hon'ble Division Bench in

the said order also observed that while doing so the parties will be given opportunity to lead evidence and while deciding the reference the learned Presiding Officer was directed to consider the judgments of the Supreme Court including the judgment in the case of ***State of Haryana vs. Charan Jeet, 2006 1 LLJ 43.***

4. The learned counsel for the respondent on the other hand, opposing the present petition, submits that the petitioner cannot under the garb of reconstructing the record be allowed to amend the written statement, especially when the Hon'ble Division Bench had only directed the parties to lead the evidence afresh.

5. I have heard learned counsel for the parties.

6. By order dated 2.2.2009, the Hon'ble Division Bench of this Court directed the Labour Court to decide the reference again. It would be apt to reproduce para 3 and 4 of the said judgment of the Division Bench in LPA as under:-

"3. The award dated 10.10.1995 passed by the learned Presiding Officer Industrial Tribunal does not deal with these aspects. There is hardly any discussion on the qualification, nature of duties

etc. being performed by workman in Electrical Department (General Wing) and the employees of erstwhile DESU. The reasoning and grounds given in the Award to apply the doctrine of "equal pay for equal work" is cryptic and keeping in view the principles expounded by the Supreme Court, cannot be accepted. Learned counsel for the Appellant at this stage, however, submits that detailed evidence was recorded before the Industrial Tribunal but the said record has been destroyed. It is also submitted that the Respondent MCD had raised only one objection stating, inter alia, that the DESU is a commercial wing, whereas general wing of MCD is not a commercial wing and no other objection was raised. Therefore, even on the basis of the pleading and evidence the doctrine of "equal pay for equal work" applies. This is disputed by the counsel for the MCD.

4. In the absence of material and records/evidence before us, we cannot examine merits and demerits of the case of the either side. Statement of witnesses are not available and have been destroyed in a fire. In view of the facts and circumstances of the case and specially the fact that the Appellants had succeeded before the Industrial Tribunal and records are not available, we remand the matter back to the Industrial Tribunal to decide the reference afresh. While doing so, parties will be given opportunity to lead evidence as it has been stated that the original records are not available. While deciding the reference the Presiding Officer, Labour Court will consider the judgments of the Supreme Court including judgment in the case of State of Haryana v. Charan Jeet (supra). Parties will appear before the Labour Court on 25.2.2009 when fresh dates will be fixed. Reference will be decided expeditiously and preferably within a period of six months from the said date. In view of the above observations the impugned order dated 21.11.2006 and the award dated

10.10.1995 are set aside. It is also clarified that the

Industrial Tribunal will decide the matter afresh without being influenced by any observation in the award dated 10.10.1995 and the impugned judgment dated 21.11.2006”.

7. Pursuant to the said directions given by the Hon'ble Division Bench, the matter was sent back for fresh trial. Since there was no evidence available, therefore, directions were given by the Court to the parties to lead evidence. Accordingly respondent union had filed examination-in-chief by way of affidavit and the matter was posted by the learned Court for cross-examination of the respondent. It is at that stage that the petitioner had moved an application under Order VI Rule 17 read with Section 151 CPC to seek amendment in the written statement. The said application of the petitioner was dismissed by the learned Labour Court vide order dated 14.5.2010 and feeling aggrieved by the said order the petitioner has preferred the present writ petition.

8. Order VI rule 17 was deleted from the statute book with a view to avoid delay and for speedy disposal of cases on the recommendation of the Justice Malimath Committee by

the Amendment Act of 1999, but was followed by much public hue and cry because of which it was again introduced, but with a proviso. Order VI Rule 17 was thus amended vide Civil Procedure Code (Amendment) Act, 2002 and after the amendment a proviso to the said section was appended. For better appreciation, the said Order VI Rule 17 along with proviso is reproduced as under: -

“17. Amendment of pleadings.-

The Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real question in controversy between the parties.

Provided that no application for amendment shall be allowed after the trial has commenced, unless the Court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial.”

9. From a bare perusal of Order VI Rule 17 of the Code of Civil Procedure, it is clear that the court is conferred with wide discretion to allow alteration and amendments of the pleadings, at any stage of the proceedings, if it is of the view that such amendment would be necessary for

determining the real question in controversy between the parties. The proviso to Order VI 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. Undoubtedly the said proviso is mandatory and the amendment can be allowed only when the conditions envisaged in the said proviso are satisfied by the party seeking amendment. Undeniably prior to the said amendment of 2002, the Courts were liberal in permitting the parties to seek amendment in the pleadings even at the advance stage of the proceedings but now with the embargo placed in the proviso, the amendment after the commencement of a trial can only be allowed if the Court comes to conclusion that such amendment could not have been sought by the party before the commencement of the trial despite exercise of due diligence. Therefore, it is pertinent to note that the proviso does not in absolute terms bar seeking of an amendment even

after the commencement of trial, if the court is satisfied and comes to the conclusion that the in spite of due diligence the parties could not have raised the matter before the commencement of the trial. Hence, the proviso which was introduced aiming to curtail the delay that occurred because of the applications that were filed under this rule, has also struck a balance as on one hand it does limit the scope of amendment of pleadings and on the other it still vests the courts with enough judicial discretion to deal with cases with unanticipated situations whenever they arise. Now whether the parties have acted with due diligence or not is a matter to be determined by the court from the facts and circumstances of each case. Here it would be useful to refer to the judgment of the Apex Court in the case ***Chander Kanta Bansal vs. Rajinder Singh Anand (2008)5SCC117*** where the court explained the concept of due diligence in the said proviso and held that:

"The words "due diligence" have not been defined in the Code. According to Oxford Dictionary (Edn. 2006), the word "diligence" means careful and persistent application or effort. "Diligent" means

careful and steady in application to one's work and duties, showing care and effort. As per Black's Law Dictionary (18th Edn.), "diligence" means a continual effort to accomplish something, care; caution; the attention and care required from a person in a given situation. "Due diligence" means the diligence reasonably expected from, and ordinarily exercised by a person who seeks to satisfy a legal requirement or to discharge an obligation. According to Words and Phrases by Drain-Dyspnea (Permanent Edn. 13-A) "due diligence", in law, means doing everything reasonable, not everything possible. "Due diligence" means reasonable diligence; it means such diligence as a prudent man would exercise in the conduct of his own affairs."

Hence, what is required by due diligence would be everything reasonable, and reading it into the proviso would mean that even if the parties were careful, they could not have raised the matter before commencement of the trial. In the facts of the case at hand, the petitioner sought the amendment of the written statement on the basis of the observations made by the learned Single Judge and the Hon'ble Division Bench of this court, without which the whole object as to why the matter was in the first place sent for deciding reference afresh would be rendered futile.

10. However, with the over emphasis on the proviso, the real spirit behind rule 17 should not be pretermitted. It has also been time and again held that the general principle is

that the courts at any stage of the proceedings may allow either party to alter or amend the pleadings in such a manner and on such terms as may be just and all those amendments must be allowed which are imperative for determining the real question in controversy between the parties. The basic principles for grant or refusal of amendment articulated almost 125 years ago are still considered to be correct statement of law and our courts have been following the basic principles laid down in those cases. It would be relevant here to refer to the judgment of the Apex Court in the case of ***Revajeetu Builders & Developers vs. Narayanswamy & Sons.***(2009)10SCC84 where the court has not only traced the history of the provision but has also after examining the English and Indian precedents laid down the following guiding principles when dealing with the application under Order VI rule 17:

"FACTORS TO BE TAKEN INTO CONSIDERATION WHILE DEALING WITH APPLICATIONS FOR AMENDMENTS:

67. On critically analyzing both the English and Indian cases, some basic principles emerge which ought to be taken into consideration while allowing or rejecting the application for amendment.

(1) Whether the amendment sought is imperative for proper and effective adjudication of the case?

(2) Whether the application for amendment is bona fide or mala fide?

(3) The amendment should not cause such prejudice to the other side which cannot be compensated adequately in terms of money;

(4) Refusing amendment would in fact lead to injustice or lead to multiple litigation;

(5) Whether the proposed amendment constitutionally or fundamentally changes the nature and character of the case? and

(6) As a general rule, the court should decline amendments if a fresh suit on the amended claims would be barred by limitation on the date of application.

68. These are some of the important factors which may be kept in mind while dealing with application filed under Order VI Rule 17. These are only illustrative and not exhaustive.

69. The decision on an application made under Order VI Rule 17 is a very serious judicial exercise and the said exercise should never be undertaken in a casual manner.

70. We can conclude our discussion by observing that while deciding applications for amendments the courts must not refuse bona fide, legitimate, honest and necessary amendments and should never permit mala fide, worthless and/or dishonest amendments."

Admittedly in the present case, the entire previous evidence recorded was destroyed, which means that no evidence at all on record exists and parties were permitted to lead fresh evidence and even the Hon'ble Division Bench in its order has

observed that the learned court shall decide the reference afresh. Hence, it would necessarily mean that the parties would have to lead fresh evidence but certainly based on previous pleadings. The petitioner herein felt the necessity to seek amendment in the written statement because the Hon'ble Single Judge as well as the Hon'ble Division Bench in their respective orders clearly observed that in the absence of necessary material on record with regard to the qualification, nature of duties and responsibilities of both set of employees working in the Electrical Department (General Wing) and the employees of erstwhile DESU the issue of 'equal pay for equal work' cannot be properly adjudicated by the Labour Court to answer the said reference. Hence, applying the aforesaid parameters to the facts of the case at hand, it can be unequivocally stated that the amendment is essential for the proper adjudication of the case as otherwise the sole purpose of deciding the matter afresh would be rendered nugatory. The amendment would not cause any prejudice to the other party which cannot be balanced by imposing costs on the

petitioner if there is any delay or more number of appearances for deciding the reference afresh by allowing the amendment.

11. However, as the issue involved here is the amendment of the written statement, it would also be imperative to refer to the decision of the Apex Court in the case of ***Baldev Singh & Ors. vs. Manohar Singh & Anr. (2006)6SCC498*** where it was held that the amendment sought in the plaint and the written statement stand on different footings. The relevant para of the same is as under:

"That apart, it is now well settled that an amendment of a plaint and amendment of a written statement are not necessarily governed by exactly the same principle. It is true that some general principles are certainly common to both, but the rules that the plaintiff cannot be allowed to amend his pleadings so as to alter materially or substitute his cause of action or the nature of his claim has necessarily no counterpart in the law relating to amendment of the written statement. Adding a new ground of defence or substituting or altering a defence does not raise the same problem as adding, altering or substituting a new cause of action. Accordingly, in the case of amendment of written statement, the courts are inclined to be more liberal in allowing amendment of the written statement than of plaint and question of prejudice is less likely to operate with same rigour in the former than in the latter case."

This was reiterated by the Apex Court in the case of ***Usha Balasaheb Swami vs. Kiran Appaso Swami***(2007)5SCC602 with the following observations:

"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.

17. 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 Co. Ltd. v. Jardine Skinner and Co.*** : [1957]1SCR438 , 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."

Hence, an amendment in the written statement and the plaint should not be treated similarly. Technicality should not come in the way of granting relief to the party. Here it would be relevant to reproduce the oft quoted para as in ***Jai Jai Ram Manohar Lal vs. National Building Material Supply***(1969)1SCC869 wherein it was held that:

"Rules of procedure are intended to be a handmaid to the administration of justice. A party cannot be refused just relief merely because of some mistake, negligence, inadvertence or even

infraction of the rules of procedure. The Court always gives leave to amend the pleading of a party, unless it is satisfied that the party Applying, was acting mala fide, or that by his blunder, he had caused injury to his opponent which may not be compensated for by an order of costs. However negligent or careless may have been the first omission, and, however late the proposed amendment, the amendment may be allowed if it can be made without injustice to the other side."

This view has been consistent has been the torch bearer in deciding application under order VI rule 17. It would also be relevant to refer to the judgment of the Apex Court in the case of ***B.K. Narayan Pillai vs. Parameswaran Pillai (2000)1SCC712*** wherein it was observed as under:

"The-purpose and object of Order 6 Rule 17 CPC is to allow either party to alter or amend his pleadings in such manner and on such terms as may be just. The power to allow the amendment is wide and can be exercised at any stage of the proceedings in the interests of justice on the basis of guidelines laid down by various High Courts and this Court. It is true that the amendment cannot be claimed as a matter of right and under all circumstances. But it is equally true that the courts while deciding such prayers should not adopt hypertechnical approach. Liberal approach should be the general rule particularly in cases where the other side can be compensated with the costs. Technicalities of law should not be permitted to hamper the courts in, the administration of justice between the parties. Amendments are allowed in the pleadings to avoid uncalled for multiplicity of litigation."

Hence adopting a hyper technical approach in the present case also would thus defeat the purpose of recording the evidence afresh.

12. It is also evident that the learned Labour Court has heavily relied on the judgment of the Supreme Court in the case of ***Vidyabai & Ors. vs. Padmalatha & Anr. (2009) 2 SCC 409*** to dismiss the said application of the petitioner. Referring to the ratio of the said judgment, the learned Court held that in the said judgment the Supreme Court took a view that the Court has no jurisdiction to allow the amendment after filing of an affidavit in evidence. This interpretation taken by the learned Trial Court is misconceived. The Apex Court in the said judgment has held that the proviso of Order VI Rule 17 is couched in mandatory form and the Courts jurisdiction to allow an amendment is taken away unless conditions precedent are satisfied viz. it must come to the conclusion that in spite of due diligence, the party could not have introduced the facts before the commencement of the trial. It would be thus seen that it is not that there is a complete bar on seeking an amendment after the commencement of the trial. The party seeking amendment after commencement of trial has to satisfy the Court that

despite the exercise of due diligence it could not have raised the facts before the commencement of the trial. In any event of the matter, the fact situation of the present case is entirely different as here the learned Single Bench of this Court and also Hon'ble Division Bench of this Court clearly took a view that without leading the evidence the matter in reference cannot be decided afresh. It would be thus quite apparent that unless the amendment sought by the petitioner is allowed the trial court would not be able to determine the controversy between the parties in an effectual manner.

13. Hence, in the light of the above discussion and considering the peculiar facts of the case and the fact that the previous records already stand destroyed and also taking in view the observation made by the Hon'ble Division Bench and the learned Single Bench, this Court is of the view that the amendment sought by the petitioner deserves to be allowed. However, a cost of Rs. 10,000/- is imposed upon the petitioner for seeking the said amendment at such a belated stage which shall be paid by the petitioner to the respondent

through counsel within a period of four weeks from the date of this order.

14. With the above directions, the matter is remanded back to the learned Labour Court. The parties are directed to appear before the Labour Court on 9th August, 2011.

JULY 21, 2011

KAILASH GAMBHIR, J