



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.14783 OF 2022**

Shri Chhatrapati Sahakari Sakhar Karkhana Ltd.
Bhavaninagar through its Managing Director
Ashok Bhargav Jadhav
Age 55, Occu – Service,
r/o Bhawaninagar, Tal Indapur. Dist. Pune

... Petitioner

versus

1. Shri Mahalaxmi Trading Company,
Proprietor Chandulal Karwa,
Age 50 years, Occu – Sugar Merchant
and Commission Agent
r/o 40 Marwad Peth, Phaltan,
Dist. Satara Phaltan – 415523

2. Mahesh kantilal Karwa,
Age 50 Occu : owner proprietor
R/o 40 Marwad Peth, Phaltan,
Dist. Satara, Phaltan 415523.

... Respondents

Ms. Savita Asok Prabhune, for Petitioner.
Ms. Sairuchita Chowdhary, for Respondents.

CORAM: N.J.JAMADAR, J.

DATE : 24 JULY 2023

JUDGMENT :

1. Rule. Rule made returnable forthwith. With the consent of the learned Counsel for the parties, heard finally.

2. This Petition under Article 227 of the Constitution of India assails the legality, propriety and correctness of an order dated 10 February 2022 passed by the

learned Judge, Co-operative Court, Pune on an application for amendment (Exhibit 44) in Dispute No.12 of 2012, whereby the learned Judge rejected the prayer of the Petitioner to permit the amendment in the dispute application so as to implead Respondent No.2 as owner/proprietor of Shri Mahalaxmi Trading Company - Respondent No.1.

3. Shorn of unnecessary details, the background facts can be stated as under :

3.1 The Petitioner is a co-operative sugar factory registered under the Maharashtra Co-operative Societies Act, 1960. It manufactures and sells sugar. To sell the free-sale component of the sugar, the Petitioner floats tenders and invites bids. In response to the tenders issued on 21 January 2010 and 23 January 2010, Shri Mahalaxmi Trading Company, through its proprietor Mr. Chandulal Karwa - Respondent No.1, had placed the bids, and the bids of the Respondent No.1 for 7085 bags of sugar were accepted.

3.2 Respondent No.1, however, paid for and lifted only 300 bags. The Petitioner repeatedly called upon the Respondent No.1 to lift rest of the sugar bags and pay for them. Upon failure of the Respondent No.1, the Petitioner was constrained to sell those bags by resorting to fresh tender process.

3.3 Under the terms of the contract, the Respondent No.1 was to pay a sum of Rs.2,65,97,555/- for those bags of sugar. In the resale, necessitated on account of

the refusal on the part of the Respondent No.1 to lift 6785 of sugar bags, the Petitioner could fetch Rs.1,84,82,375/- only. The Petitioner, thus, suffered a loss of Rs.81,15,180/- being the difference between the contract price and the resale price. Hence, the Dispute against the Respondent No.1 who was also a C Class member of the Petitioner Society.

3.4 Respondent No.1 resisted the Dispute by raising various grounds of defences including a specific contention that Mr. Chandulal Karwa was not and never a proprietor of Shri Mahalaxmi Trading Company. Mr. Chandulal Karwa had no concern whatsoever with Shri Mahalaxmi Trading Company. The impleadment of Mr. Chandulal Karwa as a proprietor of Shri Mahalaxmi Trading Company was, thus, stated to be wholly unwarranted and, resultantly, rendered the Dispute bad for mis-joinder of the parties.

3.5 It would be contextually relevant to note that after the settlement of the issues on the basis of the aforesaid pleadings, Mr. Chandulal Karwa filed an application for framing an additional issue. The said application came to be allowed and an additional issue as to whether Mr. Chandulal Karwa was a proprietor of Shri Mahalaxmi Trading Company came to be framed, though another application (Exhibit 40) preferred by Mr. Chandulal Karwa for deciding the said issue as a preliminary issue came to be rejected.

3.6 The parties led evidence and the trial concluded. After hearing final

arguments, the learned Judge Co-op. Court closed the Dispute for pronouncement of judgment. However, it appears, the judgment was not delivered on the scheduled date and, thereafter, the Petitioner preferred an application seeking permission to withdraw the Dispute with liberty to institute a fresh Dispute.

3.7 Later on, the said Application (Exhibit 40) came to be disposed of as not pressed, and, thereafter, the Petitioner preferred the instant application seeking amendment in the Dispute asserting, inter alia, that upon enquiry with BSNL and other firms, it transpired that Mr. Mahesh Kantilal Karwa – Respondent No.2, was the proprietor of Shri Mahalaxmi Trading Company. Mr. Chandulal Karwa who had been impleaded as a proprietor of Shri Mahalaxmi Trading Company, represented Shri Mahalaxmi Trading Company before the disputant. Hence, the disputant be permitted to amend the Dispute so as to implead proprietor of Shri Mahalaxmi Trading Company, in addition to Mr. Chandulal Karwa who was now sought to be impleaded as Defendant No.2, and add consequential averments in the Dispute.

3.8 The Respondents resisted the application for amendment.

3.9 By the impugned order, the learned Judge, Co-op. Court was persuaded to reject the application holding, inter alia, that Mr. Chandulal Karwa had taken a specific defence in the written statement that he was not the proprietor of Shri Mahalaxmi Trading Company and the witness for the disputant admitted in the cross-examination that there was no evidence to show that Mr. Chandulal Karwa was the

proprietor of Shri Mahalaxmi Trading Company. The impleadment of Mr. Mahesh Karwa as a proprietor of Shri Mahalaxmi Trading Company would materially alter the nature of the suit, and, thus, the Petitioner cannot be permitted to amend the Dispute application at its own whims and fancies. Being aggrieved, the Petitioner-disputant has preferred this Petition.

4. I have heard Ms. Savita Prabhune, learned Counsel for the Petitioner and Ms. Sairuchita Chowdhary, learned Counsel for the Respondents.

5. The learned Counsel for the Petitioner would submit that the learned Judge, Co-op. Court misdirected himself in rejecting the application for amendment of the Dispute. The learned Judge, according to Ms. Prabhune, lost sight of the fact that the application for amendment deserved to be allowed so as to decide the real question in controversy between the parties. Had the learned Judge, Co-op. Court kept in view the object of permitting the parties to amend the pleadings, the impugned order could not have been passed. Strenuous endeavour was made to draw home the point that the impleadment of Mr. Mahesh Karwa as a proprietor of Shri Mahalaxmi Trading Company was necessary for determination of the real question in controversy between the parties, though it is a specific case of the disputant that, for all intent and purpose, Mr. Chandulal Karwa represented Shri Mahalaxmi Trading Company. Ms. Prabhune also endeavoured to impress upon the Court that ultimately the issue is of the recovery of public money in the sense that a body of the members of the Petitioner Society

would suffer the loss.

6. To buttress the submission that an application for amendment of pleadings should receive liberal consideration where the amendment is necessary to decide the real question in controversy, Ms. Prabhune placed reliance on the judgments of the Supreme Court in the cases of **B.K.Narayana Pillai V/s. Parameswaran Pillai and Anr.**¹ and **Rameshkumar Agarwal V/s. Rajmala Exports Pvt. Ltd. And Ors.**²

7. As against this, Ms. Chowdhary, learned Counsel for the Respondents submitted that no fault can be found with the impugned order. Emphasis was laid on the fact that the application came to be preferred after the conclusion of the trial and when the matter was posted for delivery of judgment. There is not a whisper about the due diligence warranted by the proviso to Rule 17 of Order VI of the Code of Civil Procedure, 1908, especially when Mr. Chandulal Karwa had taken a specific defence in the written statement that he was not the proprietor of Shri Mahalaxmi Trading Company. In such circumstances, the learned Judge was wholly justified in rejecting the application for amendment which was preferred with a view to delay the disposal of the Dispute having realized the fate thereof in the light of the evidence adduced by the parties, urged Ms. Chowdhary.

8. It is trite, all such amendments in the pleadings are required to be

1 (2000) 1 SCC 712

2 (2012) 5 SCC 337

allowed which are necessary for determining the real question in controversy between the parties and do not cause such prejudice to the adversary which cannot be compensated by way of costs. Ordinarily, an application for amendment of the pleadings receives liberal consideration. Invariably, the amendments are allowed to avoid the multiplicity of litigation. However, where the proposed amendment has the propensity to fundamentally alter the nature and character of the suit/defence, the courts may be justified in declining to permit a party to amend the pleadings. The amendment which takes away the rights which are vested in a party on account of admission or otherwise, is also not liberally allowed.

9. The propositions of law enunciated in the cases of **B.K.Narayana Pillai (supra)** and **Rameshkumar Agarwal (supra)**, on which reliance was placed by Ms. Prabhune, are well recognized. However, in those cases, the legal position which obtains after the 2002 amendment to the Code of Civil Procedure, 1908 came into force, has not been dealt with.

10. The power of the Court to grant amendment in pleadings is further regulated by the proviso to Rule 17 of Order VI. It contains an interdict against permitting a party to amend the pleadings after the trial has commenced, unless the court comes to the conclusion that, in spite of due diligence, a party could not have prayed for amendment before the commencement of the trial.

11. A profitable reference in this context can be made to a decision of the

Supreme Court in the case of **Vidyabai and Ors. V/s. Padmalatha and Anr.**³ wherein the Supreme Court after following the previous pronouncements in the cases of **Kailash V/s. Nanhku**⁴ and **Salem Advocate Bar Association V/s. Union of India**⁵ enunciated that the proviso appended to Order 6 Rule 17 of the Code restricts the power of the court. It puts an embargo on exercise of its jurisdiction. Thus, unless the jurisdictional fact, as envisaged therein, is found to be existing, the Court will have no jurisdiction at all to allow the amendment of the plaint. The observations of the Supreme Court in paras 10, 11, 19 and 20 are material and, hence, extracted below :

“10. By reason of the Civil Procedure Code (Amendment) Act, 2002 (Act 22 of 2002), Parliament inter alia inserted a proviso to Order 6 Rule 17 of the Code, which reads as under :

“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.”

It is couched in a mandatory form. The court’s jurisdiction to allow such an application is taken away unless the conditions precedent therefor are satisfied viz. It must come to a conclusion that in spite of due diligence the parties could not have raised the matter before the commencement of the trial.

11. From the order passed by the learned trial Judge, it is evident that the respondents had not been able to fulfill the said precondition. The question, therefore, which arises for consideration is as to whether the trial had commenced or not. In our opinion, it did. The date on which the issues are framed is the date of first hearing. Provisions of the Code of Civil

3 (2009) 2 SCC 409

4 (2005) 4 SCC 480

5 (2005) 6 SCC 344

Procedure envisage taking of various steps at different stages of the proceeding. Filing of an affidavit in lieu of examination in chief of the witness, in our opinion, would amount to “commencement of proceeding.”

19. It is the primal duty of the court to decide as to whether such an amendment is necessary to decide the real dispute between the parties. Only if such a condition is fulfilled, the amendment is to be allowed. However, proviso appended to Order VI, Rule 17 of the Code restricts the power of the court. It puts an embargo on exercise of its jurisdiction. The court's jurisdiction, in a case of this nature is limited. Thus, unless the jurisdictional fact, as envisaged therein, is found to be existing, the court will have no jurisdiction at all to allow the amendment of the plaint.

20. In Salem Advocate Bar Assn (supra), this Court has upheld the validity of the said proviso. In any event, the constitutionality of the said provision is not in question before us nor we in this appeal are required to go into the said question. Furthermore, the judgment of the High Court does not satisfy the test of judicial review. It has not been found that the learned Trial Judge exceeded its jurisdiction in passing the order impugned before it. It has also not been found that any error of law has been committed by it. The High Court did not deal with the contentions raised before it. It has not applied its mind on the jurisdictional issue. The impugned judgment, therefore, cannot be sustained, which is set aside accordingly.”

12. The aforesaid pronouncement has been followed, with approval, in the cases of **Mohinder Kumar Mehra V/s. Roop Rani Mehra and Ors.**⁶ and **Pandit Malhari Mahale V/s. Monika Pandit Mahale and Ors.**⁷ The object of the Amendment Act, 2002 was expounded by the Supreme Court in the case of **Mohinder Kumar Mehra (supra)**, as under :

6 (2018) 2 SCC 132

7 (2020) 11 SCC 549

“14. By Amendment Act 46 of 1999 with a view to shortage litigation and speed of the trial of the civil suits, Rule 17 of Order VI was omitted, which provision was restored by Amendment Act 22 of 2002 with a rider in the shape of the proviso limiting the power of amendment to a considerable extent. The object of newly inserted Rule 17 is to control filing of application for amending the pleading subsequent to commencement of trial. Not permitting amendment subsequent to commencement of the trial is with the object that when evidence is led on pleadings in a case, no new case be allowed to set up by amendments. The proviso, however, contains an exception by reserving right of the Court to grant amendment even after commencement of the trial, when it is shown that in spite of diligence, the said pleas could not be taken earlier. The object for adding proviso is to curtail delay and expedite adjudication of the cases.”

13. In the backdrop of the aforesaid legal position, readverting to the facts of the case, the question as to whether the Petitioner -disputant succeeded in making out a prima facie case that despite the embargo contained in Order VI Rule 17, it was entitled to seek amendment in the Dispute, crops up for consideration.

14. For an answer, the stage at which the amendment was sought assumes critical salience. The facts are gross. As noted above, the application came to be preferred not only after the commencement of the trial but at the conclusion thereof. In fact, a couple of dates intervened between the date the matter was closed for judgment and the date of the application preferred by the Petitioner initially for withdrawal of the Dispute with liberty to institute a fresh Dispute.

15. That wrenches to the fore the aspect of ‘due diligence’. Again, the Petitioner-disputant has to surmount an insuperable impediment in bolstering up its

claim of due diligence. Not only a specific stand was taken in the written statement that Mr.Chandulal Karwa was not the proprietor of Shri Mahalaxmi Trading Company but also a specific additional issue came to be framed as regards the jural relationship between Mr. Chandulal Karwa and Shri Mahalaxmi Trading Company. Yet the disputant made no effort to seek impleadment of the real proprietor of Shri Mahalaxmi Trading Company till the conclusion of the trial. What accentuates the situation is the fact that the disputant's witness, as noted by the learned Judge, Co-op. Court, conceded in the cross-examination that there was no material to indicate that Mr. Chandulal Karwa was the proprietor of Shri Mahalaxmi Trading Company.

16. In the backdrop of the aforesaid facts, the disputant can hardly claim that despite due diligence it could not seek impleadment of the real proprietor of Shri Mahalaxmi Trading Company. Ambivalent stand of the disputant in first seeking withdrawal of the Dispute with liberty to institute a fresh Dispute, and, then, by taking a summer-sault, seeking amendment in the Dispute, further dents the claim of the disputant.

17. In the aforesaid view of the matter, the learned Judge, Co-op. Court was justified in declining to permit the Petitioner to amend the plaint so as to implead Mr. Mahesh Kantilal Karwa as the proprietor of Shri Mahalaxmi Trading Company. The submission on behalf of the Petitioner-disputant that the public money is at stake, does not merit countenance as the non-impleadment of the real proprietor of Shri

Mahalaxmi Trading Company, despite being put to notice at the earliest, can be said to be at the peril of the Petitioner-disputant.

18. Resultantly, no interference is warranted in exercise of extra ordinary writ jurisdiction.

19. Hence, the following order :

ORDER

- (i) The Writ Petition stands dismissed.
- (ii) Rule discharged.
- (iii) No order as to costs.

(N.J.JAMADAR, J.)