SUPREME COURT OF INDIA

State of Andhra Pradesh and Others

Vs

Messrs Pioneer Builders

Appeal (Civil) 6114 of 1999; Civil Appeal No.6115/1999; Civil Appeal No.1005/2000 and Civil Appeal No.1006/2000

(H. K. Sema and D. K. Jain, JJ)

25.09.2006

JUDGMENT

D. K. JAIN, J.

These four cross appeals, by special leave, are directed against two judgments and orders, both dated 3.3.1999, rendered by the High Court of Judicature Andhra Pradesh at Hyderabad in Appeals No.2206-2207 of 1996 and 236-237 of 1998. The State of Andhra Pradesh, the first defendant in the suit and plaintiff, namely, M/s. Pioneer Builders, Engineers and Contractors, Hyderabad, hereinafter referred to as "the contractor" are the appellants before us. Since the factual matrix and the questions of law involved in all the appeals are common, these are being disposed of by this judgment. However, we shall refer to the facts of Civil Appeal No.6115/1999 as illustrative.

2. Sometime in the year 1988, the Superintending Engineer, Srisailam Right Branch Canal (for short "SRBC"), defendant No.2 in the Suit, issued notice inviting tenders from pre-qualified bidders of eligible source countries, which included India, for the work of excavation, lining and construction of structures of SRBC. It was a time bound project supported by credit loans from the International Development Association and International Bank for Reconstruction and Development.

3. The tender of the contractor being the lowest, he was awarded the work valued at Rs.8, 42, 93,

617/-. A formal agreement was executed. Time for completion of the work was thirty six months from the date of handing over of the site. Clause 57 of General Conditions of Contract laid down the procedure for resolution of disputes. It reads thus:

"57. RESOLUTION OF DISPUTES:

1) Settlement of claims for Rs.50, 000/- and below by Arbitration.

All disputes or differences in respect of which the decision, if any, of the Engineer or Employer has not become final and binding as aforesaid, shall on the initiative of either party in dispute be referred to the adjudication as follows:

a) Claims upto a value of Rs. 10, 000/-, Superintending Engineer S.R.B.C., Circle No.III Banganapalli at Nandyal

b) Claims above Rs. 10, 000/- & upto Rs.50, 000/- Chief Engineer, Major Irrigation, Hyderabad The arbitration shall be conducted in accordance with the provisions of Indian Arbitration Act of 1940 or any statutory modifications thereof.

2. Settlement of claims above Rs.50, 000/-, All claims of above Rs.50, 000/- are to be settled by a court of competent jurisdiction by way of Civil Suit."

4. It seems that only 50% of the allotted work could be completed by the due date. Apprehending expulsion, on 24.3.1992, the contractor filed a petition under Sections 8 and 20 of the Indian Arbitration Act, 1940 read with Section 26 and Order VII Rule 1 of the Code of Civil Procedure (for short "C.P.C"), registered as an original suit, with the following prayers:

"(a) Arbitrate the disputes mentioned in para 17 arising between the plaintiff and defendant under clauses 56 and 57 of section 2, vol.I of the contract and also direct the defendants to pay to the plaintiff the amount so determined as payable.

(b) Or in alternative to direct the defendants to file the agreement before the Hon'ble Court and appoint a sole arbitrator for adjudicating the said disputes referred to in paragraph 17 arising between the plaintiff and defendants under the Arbitration Act, 1940.

(c) Payment of interest on the amount payable to the plaintiff at the rate of 21% per annum from the date of execution of work till payment.

(d) Costs."

5. On 26.3.1992 defendant No.2 issued notice to the contractor expelling them from the contract on the ground that they had failed to maintain the rate of progress as per the approved programme. On 13.4.1992, the contractor filed an application seeking interim injunction, restraining the defendants from encashing the bank guarantees for an amount of Rs.1, 26, 00, 000/-, furnished by them towards mobilization advance and as performance guarantee. The suit was resisted by the defendants mainly on merits though it was averred that "the plaintiff suit is not maintainable either in law or on facts". No separate reply to the application appears to have been filed. However, the application was dismissed by the subordinate Judge. Aggrieved, the contractor preferred appeal to the High Court, which was dismissed vide order dated 13.11.1992. While dismissing the appeal, the High Court observed that having regard to the language of the arbitration agreement between the parties and the fact that there was no claim for any specified amount in the petition, the suit as filed by the contractor was not maintainable. The Court, however, clarified that it would be open to the contractor to amend the plaint in accordance with law, if so advised.

6. In the light of the said order, on 17.1.1993, the contractor filed three applications in the pending suit: (i) I.A. No.1/1993 under Order VI Rule 17 C.P.C. for amendment of the plaint; (ii) I.A. No. 2/1993 - for production of documents by the defendants; (iii) I.A. No.3/1993 - for dispensing with notice under Section 80 of C.P.C. All the applications were opposed by the defendants on merits of the claims made in the application seeking amendment of the plaint. No objection with regard to the maintainability of the applications was raised. However, in the penultimate paragraph of reply to I.A. No. 3/1993, it was stated that since time was required to examine the claims, "issue of notice under Section 80 C.P.C. was necessary and was not superfluous". All the three applications were allowed by the subordinate Judge vide docket order dated 2.2.1993. Order passed in I.A. No.3/1993 reads as follows: "Heard both counsels. I don't find any tenable ground to refuse the relief asked for, allowed."

7. The orders passed in the said applications were not challenged. Instead two additional written statements were filed on behalf of the defendants. On the basis of the pleadings, as many as eighteen issues were framed. None of the issues pertained to maintainability of the suit. After trial, the suit was decreed in respect of some of the claims made by the contractor with interest from the date of the filing of the suit. However, some of the claims made by the contractor were rejected.

8. Being aggrieved, both the parties preferred First Appeals to the High Court (No.2206-2207 of 1996 and 236-237 of 1998). By the impugned order, the High Court has dismissed all the appeals. Hence, the present appeals.

9. We have heard Mr. Anoop G. Choudhary, learned senior counsel appearing on behalf of the State and Mr. V.R. Reddy, learned senior counsel appearing for the contractor only on the two legal issues emanating from the orders passed by the subordinate Judge in I.A. Nos. 1 and 3/1993, namely, (i) maintainability of the amendment application filed under Order VI Rule 17 C.P.C. and (ii) maintainability of the suit for want of notice under Section 80 C.P.C.

10. Mr. Choudhary has vehemently submitted that Section 80 C.P.C. being mandatory and in the

absence of any prayer for an urgent and immediate order, the Trial Court was not justified in dispensing with the requirement of issue of notice under that Section. It is asserted that the provisions of sub-Section (2) of Section 80 C.P.C. were not attracted on the pleaded facts and, therefore, in the absence of requisite notice under sub- section (1) of Section 80, the Trial Court could not entertain the suit. Learned counsel has also urged that the petitions filed by the contractor initially under Sections 8 and 20 of the Arbitration Act could not be converted into civil suits by way of amendment applications under Order VI Rule 17 C.P.C. In support reliance is placed on the decisions of this Court in P.A. Ahammed Ibrahim Vs. Food Corporation of India and Bharat Coking Coal Ltd. Vs. Raj Kishore Singh and Another , wherein it has been held that converting an application under Section 20 of the Arbitration Act into a suit for recovery by permitting it to be amended under Order VI Rule 17 C.P.C. would amount to introducing a totally new cause of action and change the nature of the action. It is, thus, pleaded that the High Court has failed to take into consideration the settled principles of law on both the issues.

11. Per contra, Mr. Reddy has contended that though the suit filed initially was styled as a petition under Sections 8 and 20 of the Arbitration Act on account of vague language of the arbitration agreement but in fact it was a civil suit. Learned counsel has also submitted that having failed to take any objection with regard to the maintainability of the suit for want of notice under Section 80 C.P.C. and further having failed to challenge the orders passed by the Trial Court, allowing the applications filed under Section 80(2) and Order VI Rule 17 C.P.C., and having participated in proceedings before the Trial Court, the defect, if any, stood waived and the State is now estopped from raising such objections. Relying on Ghanshyam Dass and Others Vs. Dominion of India and Others , learned counsel has submitted that Section 80 C.P.C. being merely a part of the adjective law, dealing with procedure alone, it should be interpreted in a manner so as to subserve and advance the cause of justice rather than to defeat it on a mere technicality. Learned counsel has also urged that relegating the contractor to the stage of notice under Section 80 C.P.C. would be travesty of justice.

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12. The first question that arises for determination is as to whether or not the suit filed by the contractor was maintainable because of the alleged non-compliance with the provisions of Section 80 C.P.C.?

Section 80 C.P.C. reads as follows:-

"80. Notice (1) Save as otherwise provided in sub-section (2), no suit shall be instituted against the Government (including the Government of the State of Jammu and Kashmir) or against a public officer in respect of any purporting to be done by such public officer in his official capacity, until the expiration of two months next after notice in writing has been delivered to, or left at the office of

(a) in the case of a suit against the Central Government, [except where it relates to a railway], a Secretary to that Government;

(b) in the case of a suit against the Central Government where it relates to a railway, the General

manager of that railway;

(bb) in the case of a suit against the Government of the State of Jammu & Kashmir, the Chief Secretary to that Government or any other officer authorised by that Government in this behalf;

(c) in the case of a suit against [any other State Government], a Secretary to that Government or the Collector of the district; and in the case of a public officer, delivered to him or left at his office, stating the cause of action, the name, description and place of residence of the plaintiff and the relief which he claims; and the plaint shall contain a statement that such notice has been so delivered or left.

(2) A suit to obtain an urgent or immediate relief against the Government (including the Government of the State of Jammu and Kashmir) or any public officer in respect of any purporting to be done by such public officer in his official capacity, may be instituted, with the leave of the Court, without serving any notice as required by sub-section (1); but the Court shall not grant relief in the suit, whether interim or otherwise, except after giving to the Government or public officer, as the case may be, a reasonable opportunity of showing cause in respect of the relief prayed for in the suit:

Provided that the Court shall, if it is satisfied, after hearing the parties, that no urgent or immediate relief need be granted in the suit, return the plaint for presentation to it after complying with the requirements of sub-section (1).

(3) No suit instituted against the Government or against a public officer in respect of any act purporting to be done by such public officer in his official capacity shall be dismissed merely by reason of any error or defect in the notice referred to in sub-section (1), if in such notice

(a) the name, description and the residence of the plaintiff had been so given as to enable the appropriate authority or the public officer to identify the person serving the notice and such notice had been delivered or left at the office of the appropriate authority specified in sub-section (1) and

(b) the cause of action and the relief claimed by the plaintiff had been substantially indicated."

13. From a bare reading of sub-section (1) of Section 80, it is plain that subject to what is provided in sub-section (2) thereof, no suit can be filed against the Government or a public officer unless requisite notice under the said provision has been served on such Government or public officer, as the case may be. It is well-settled that before the amendment of Section 80 the provisions of unamended Section 80 admitted of no implications and exceptions whatsoever and are express, explicit and mandatory. The Section imposes a statutory and unqualified obligation upon the Court and in the absence of compliance with Section 80, the suit is not maintainable. (See: Bhagchand Dagdusa Gujrathi & Ors. Vs. Secretary of State for India ; Sawai Singhai Nirmal Chand Vs. The

Union of India and Bihari Chowdhary & Anr. Vs. State of Bihar & Ors.). The service of notice under Section 80 is, thus, a condition precedent for the institution of a suit against the Government or a public officer. The legislative intent of the Section is to give the Government sufficient notice of the suit, which is proposed to be filed against it so that it may reconsider the decision and decide for itself whether the claim made could be accepted or not. As observed in Bihari Chowdhary (supra), the object of the Section is the advancement of justice and the securing of public good by avoidance of unnecessary litigation.

14. It seems that the provision did not achieve the desired results inasmuch as it is a matter of common experience that hardly any matter is settled by the Government or the public officer concerned by making use of the opportunity afforded by said provisions. In most of the cases, notice given under Section 80 remains unanswered. In its 14th report (reiterated in 27th and 54th Report), the Law Commission, while noting that the provisions of this section had worked a great hardship in a large number of cases where immediate relief by way of injunction against the Government or a public officer was necessary in the interests of justice, had recommended omission of the Section. However, the Joint Committee of Parliament, to which the Amendment Bill 1974 was referred, did not agree with the Law Commission and recommended retention of Section 80 with necessary modifications/relaxations.

15. Thus, in conformity therewith, by the Code of Civil Procedure (Amendment Act, 1976) the existing Section 80 was renumbered as Section 80(1) and sub-sections (2) and (3) were inserted with effect from 1.2.1977. Sub- section (2) carved out an exception to the mandatory rule that no suit can be filed against the Government or a public officer unless two months' notice has been served on such Government or public officer. The provision mitigates the rigours of sub-section (1) and empowers the Court to allow a person to institute a suit without serving any notice under sub-section (1) in case it finds that the suit is for the purpose of obtaining an urgent and immediate relief against the Government or a public officer. But, the Court cannot grant relief under the sub- section unless a reasonable opportunity is given to the Government or public officer to show cause in respect of the relief prayed for. Proviso to the said sub-section enjoins that in case the Court is of the opinion that no urgent and immediate relief should be granted, it shall return the plaint for presentation to it after complying with the requirements of sub-section (1). Sub-section (3), though not relevant for the present case, seeks to bring in the rule of substantial compliance and tends to relax the rigour of sub-section (1).

16. Thus, from a conjoint reading of sub-sections (1) and (2) of Section 80, the legislative intent is clear, namely, service of notice under sub-section (1) is imperative except where urgent and immediate relief is to be granted by the Court, in which case a suit against the Government or a public officer may be instituted, but with the leave of the Court. Leave of the Court is a condition precedent. Such leave must precede the institution of a suit without serving notice. Even though Section 80(2) does not specify how the leave is to be sought for or given yet the order granting leave must indicate the ground(s) pleaded and application of mind thereon. A restriction on the exercise of power by the Court has been imposed, namely, the Court cannot grant relief, whether interim or otherwise, except after giving the Government or a public officer a reasonable opportunity of showing cause in respect of relief prayed for in the suit.

17. Having regard to the legislative intent noticed above, it needs little emphasis that the power conferred in the Court under sub-section (2) is to avoid genuine hardship and is, therefore, coupled with a duty to grant leave to institute a suit without complying with the requirements of sub-section (1) thereof, bearing in mind only the urgency of the relief prayed for and not the merits of the case. More so when want of notice under sub-section (1) is also made good by providing that even in urgent matters relief under this provision shall not be granted without giving a reasonable opportunity to the Government or a public officer to show cause in respect of the relief prayed for. The provision also mandates that if the Court is of the opinion that no urgent or immediate relief deserves to be granted it should return the plaint for presentation after complying with the requirements contemplated in sub-section (1).

18. Bearing in mind the afore-noted legal position, we advert to the facts in hand. As noted above, the subordinate Judge, vide Order dated 2nd February, 1993 came to the conclusion that "there was no tenable ground to refuse the relief asked for". Though there may be some substance in the submission of Mr. Choudhary, learned senior counsel appearing for the State, that the order allowing the application, seeking dispensation of the requirement of notice, is cryptic but the fact remains that by allowing the application, after hearing the defendant State, the Judge has opined that the suit is for the purpose of obtaining an urgent and immediate order. Had the satisfaction been against the contractor, the Court was bound to return the plaint to the contractor for re-presentation after curing the defect in terms of sub- section (1) of Section 80. Although we do not approve of the manner in which the afore-extracted order has been made and the leave has been granted by the subordinate Judge but bearing in mind the fact that in its reply to the application, the State had not raised any specific objection about the maintainability of the application on the ground that no urgent and immediate relief had either been prayed for or could be granted, as has now been canvassed before us, we are of the opinion that having regard to the peculiar facts and the conduct of both the parties it is not a fit case where the matter should be remanded back to the subordinate Judge for re-consideration. We find it difficult to hold that the order passed by subordinate Judge on contractor's application under Section 80(2) C.P.C. was beyond his jurisdiction. Accordingly, we decline to interfere with the finding recorded by the High Court on this aspect of the matter. The High Court has held that having participated in the original proceedings, it was not now open to the State to raise a fresh issue as to the maintainability of the suit, in view of waiving the defect at the earliest point of time. The High Court has also observed that knowing fully well about non-issue of notice under Section 80 C.P.C. the State had not raised such a plea in the written statement or additional written statement filed in the suit and therefore, deemed to have waived the objection. It goes without saying that the question whether in fact, there is waiver or not necessarily depends on facts of each case and is liable to be tried by the Court, if raised, which, as noted above, is not the case here.

19. We may now advert to the other aspect of the matter, viz. whether or not leave to amend the petition/plaint was granted by the subordinate Judge in accordance with the principles regulating amendments of pleadings?

20. Principles governing amendment of pleadings are well-settled. Order VI Rule 17 C.P.C. deals with the amendment of pleadings and provides that the Court may at any stage of the proceedings allow either party to alter or amend pleadings in such a 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

questions in controversy between the parties. It is trite that though an amendment cannot be claimed as a matter of right under all circumstances, yet the power to allow the amendment is wide and can be exercised at any stage of the proceedings in the interest of justice. It is equally well-settled that unless serious injustice or irreparable loss is likely to be caused to the other side, the Court should adopt liberal approach and not a hyper- technical approach particularly in a case where the other side can be compensated with costs. Dominant object to allow the amendment in the pleadings liberally is to avoid multiplicity of proceedings (See: L.J. Leach & Co. Ltd. & Anr. Vs. M/s. Jardine Skinner & Co. , Smt. Ganga Bai Vs. Vijay Kumar & Ors. and B.K. Narayana Pillai Vs. Parmeswaran Pillai & Anr. Nevertheless, one distinct cause of action cannot be substituted for another nor the subject-matter of the suit can be changed by means of an amendment. The following passage from the decision of the Privy Council in Ma Shwe Mya Vs. Maung Mo Hnaung , succinctly summarises the principle which may be kept in mind while dealing with the prayer for amendment of the pleadings:

"All rules of court 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."

21. Having briefly noted the principles governing amendment of pleadings, we may advert to the facts of the present case.

22. Incidentally, the order passed by the subordinate Judge allowing the amendment application has not been filed but learned counsel appearing for both the parties have stated before us that it was identical to the one passed in the Application under Section 80(2) C.P.C. (I.A. No. 3 of 1993), extracted above. Before the High Court it was argued on behalf of the State and so before us that since the amendment prayed for had the effect of changing the nature and character of the suit, it could not be allowed. However, we find that though the submission has been noted but somehow in the impugned judgment the High Court has altogether omitted to deal with the aspect of amendment of the plaint and straight away proceeded to decide the claims on merits. Initially filed as a petition under Sections 8 and 20 of the Arbitration Act, by means of an application under Order VI Rule 17 C.P.C. it was sought to be converted into a civil suit. It is pleaded before us that the original petition was also, in fact, in the nature of a civil suit as the court fee paid was much more than what was required to be paid on a petition under the Arbitration Act. We are of the considered view that in the absence of any finding by the High Court on this aspect of the matter, it will not be proper for us to comment on the validity of the order passed by the subordinate Judge on contractor's application seeking amendment of the plaint/petition, particularly when, as noted above, the High Court, in its order dated 13.11.1992 had observed that in the absence of any claim for a specified amount, the suit, originally filed by the contractor, was not maintainable. We feel that certain factual aspects may also have to be gone into by the High Court in the First Appeals filed by the State, wherein orders passed by the subordinate Judge on 2.2.1993 (in I.A. Nos. 1 and 3/1993) had been challenged. Under these circumstances, we deem it just and proper to remand the matter back to the High Court for consideration of the issue with regard to the maintainability and the merits of the application filed by the contractor under Order VI Rule 17 C.P.C.

23. In the result, the appeals filed by the State are allowed to the extent indicated above. We may, however, clarify that we have not expressed any opinion on the merits of the decree passed by the subordinate Judge and upheld by the High Court. We keep the issue open. It will be open to the parties to take recourse to appropriate proceedings, including revival of the present appeals, after the High Court has rendered its decision on the afore-noted issue. The parties are, however, left to bear their respective costs.