Sharma S. v Omnia Group International Ltd

2024 IND 6

Cause Number 553/18

IN THE INDUSTRIAL COURT OF MAURITIUS
(Civil Side)

In the matter of: -

Sanjeev Sharma

Plaintiff

v.

Omnia Group International Ltd

Defendant

Ruling

The averments of this amended plaint (*hereinafter referred to as* "plaint") are reproduced *verbatim* below:

"1. The Plaintiff has been in the continuous employment of the Defendant as its Managing Director from 01/03/2016 up to 01/08/2018.

2. On 01/08/2018, the Defendant, without any reason or justification and unfairly terminated the employment of the Plaintiff.

3. At the time, the Plaintiff's employment was terminated without any reason or justification and unfairly, the Plaintiff was in receipt of a terminal monthly remuneration of Rs. 524,327 which is made up as follows: -

(i) monthly basic salary Rs. 236,657.-

(ii)	*monthly contributory pension*	*Rs. 20,116.-*
(iii)	*monthly medical cover*	*Rs. 2,500.-*
(iv)	*refundable leaves*	*Rs. 19,721.-*
(v)	*passage benefits*	*Rs. 14,200.-*
(vi)	*meal allowance*	*Rs. 2,000.-*
(vii)	*telephone allowance*	*Rs. 5,000.-*
(viii)	*use of company car*	*Rs. 70,000.-*
(ix)	*fuel allowance*	*Rs. 15,000.-*
(x)	*refundable ACCA membership*	*Rs. 1,083.-*
(xi)	*end of year bonus*	*Rs. 19,721.-*
(xii)	*performance bonus*	*Rs. 118,329.-*

4. As a result of the unfair and unjust termination of his employment by the Defendant on 01/08/2018, the Plaintiff hereby claims severance allowance at punitive rate made up as follows: -

(i)	*3 months' salary in lieu of notice (Rs.524,327 x 3): -*	*Rs. 1,572,981.-*
(ii)	*6 months' salary in lieu of confidentiality and restraint undertakings (Rs. 524,327 x 6)*	*Rs. 3,145,962.-*
(iii)	*1day salary on 01.08.2018*	*Rs. 10,757.-*
(iv)	*1% Director's Bonus on Revenue for FY 2017-18 unpaid at 01.08.2018 (1% x USB 159,465,000 x Rs. 35)*	*Rs. 55,812,750.-*
(v)	*Severance allowance at punitive rate (Rs. 524,327 x 30/12 x 3)*	*Rs. 3,932,453.-*

Rs. 64,474,903.-

5. The Plaintiff avers that the Defendant is indebted to the Plaintiff in the said sum of Rs. 64,474,903.

6. The Plaintiff therefore prays from the Industrial Court for a judgment condemning and ordering the Defendant to pay to the Plaintiff the said sum of Rs. 64,474,903 together with interests thereon at the rate of 12% per annum as from 01/08/2018 (being the date of dismissal) until final payment, with costs."

The answers to demand of particulars on the Plaint at different levels are as follows:

"***Under paragraph 4(iv) of the Amended Proecipe***

Q.47 Defendant moves for the communication of all the documentary evidence in support of the claim made under item 4. (iv).

A.47 The Defendant is referred to Clause 9.6.2 of the Contract of Employment which is available for inspection at the office of the undersigned attorney. The Defendant is further referred to an email dated 08th of August 2016 as addressed by the Plaintiff to the Defendant as regards the Plaintiff's entitlement to Director's Bonus.

Q. 48 Defendant moves for communication of the contract providing for payment of any alleged director's bonus on revenue to the Plaintiff.

A.48 The Plaintiff refers to the particulars in A38.

[A.38 The Plaintiff refuses to answer this question which is in the form of an interrogatory and amounts of fishing of evidence. In any event, the question does not arise from the averments in the Proecipe.] (emphasis added)

Q.49 Defendant moves for particulars, if any, of payment of such alleged bonus in previous years to the Plaintiff, together with documentary evidence in support thereof.

A.49 No incentive bonus was applicable for the year 2016-2017. Incentive bonus is payable when there is an increase in revenue in a financial year as stipulated in the Employee Handbook which is in the Defendant's possession.

A copy of an email dated 08 August 2016 in support of an award of Director's incentive bonus is available for inspection at the office of the undersigned Attorney.

Q.50 Was such an alleged director's bonus accrued in the books of the Defendant for financial years prior to financial year 2017-2018? If so, who accrued the sum and when?

A.50 No. There has never been any practice to accrue any employee benefits in the books of the Defendant.

Q.51 Defendant moves for communication of any document to the effect that the alleged claim under paragraph 4. (iv) is to be effected on the figure of USD 159,465,000.

A.51 This is a matter of evidence.

Q.52 Was the payment of such alleged director's bonus approved by:

(a) the board of directors? If in the affirmative, when was it approved? Defendant moves for full particulars thereof together with documentary evidence in support thereof.

(b) The shareholders, either by way of written resolution or by way of a general assembly? If in the affirmative, when was it approved? Defendant moves for full particulars thereof together with documentary evidence in support thereof.

A.52 The Plaintiff refuses to answer this question which is in the form of an interrogatory and amounts to fishing evidence. In any event, the question does not arise from the averments in the Proecipe. (emphasis added)

Q.53 If the payment of the alleged director's bonus was neither approved by the shareholders nor the board of directors, who approved the payment of such director's bonus?

A.53 The Plaintiff refuses to answer this question which is in the form of an interrogatory and amounts to fishing evidence. In any event, the question does not arise from the averments in the Proecipe." (emphasis added)

Upon demand of further and better particulars on the Amended Proecipe:

*"**Under paragraph 4(iv) of the Amended Proecipe and Answer 48 of the Particulars supplied by the Plaintiff***

Q.36 Defendant insists on communication of the contract providing for payment of any alleged director's bonus on revenue to the Plaintiff.

A.36 The Defendant is referred to an email dated 8.08.2016 wherein the Plaintiff's Director Bonus is mentioned. A copy of the said email is available for inspection.

Under paragraph 4(iv) 4 of the Amended Proecipe and Answer 49 of the Particulars supplied by the Plaintiff

Q.37 Defendant moves for particulars, if any, of the relevant provision of the Employee Handbook which provides for payment of the alleged bonus.

A.37 The Defendant is referred to the Plaintiff's contract of employment and the Employee Handbook which is in the possession of the Defendant.

Under paragraph 4(iv) of the Amended Proecipe and Answer 51 of the Particulars supplied by the Plaintiff

Q.38 Defendant insists on communication of any document to the effect that the alleged claim under paragraph 4. (iv) is to be effected on the figure of USD 159,465,000/-.

A.38 The turnover of the Defendant amounted to approximately USD 159,465,000 as per the audited accounts of the Defendant for the year 2018.

Under paragraph 4(iv) of the Amended Proecipe and Answer 52 of the Particulars supplied by the Plaintiff

Q.39 Defendant insists for a proper answer.

A.39 This question does not arise from the averment in the Proecipe and is in the form of interrogation. (emphasis added)

Under paragraph 4(iv) of the Amended Proecipe and Answer 53 of the Particulars supplied by the Plaintiff

Q.40 Defendant insists for a proper answer.

A.40 <u>This question does not arise from the averment in the Proecipe</u> and is in the form of interrogation." (emphasis added)

<u>Defendant has raised a plea *in limine* as follows</u>:

1. The alleged claim for 1% Director's bonus does not fall within the jurisdiction of the Industrial Court and therefore the Plaintiff is estopped from making that claim part of his action before the Industrial Court.

2. The Court ought not entertain that claim and therefore refrain from making any finding nor making any order *quoad* that claim of 1% Director's bonus.

The matter was fixed for arguments.

The main thrust of the argument of learned Counsel for the Defendant is that the Industrial Court has jurisdiction in matters where the Employment Rights Act 2008 applies given that the material time for the facts was in 2018. However, pursuant to Section 3(1) of the Act, an agreement means a contract of employment or contract of service between an employer and a worker so that there has to be a *lien de subordination juridique*. He relied on the case of **Ocean Fishing Co Ltd v Urjoon** [2001 SCJ 27] where a Director was held to be never employed by a company, but like other Directors was receiving emoluments or remuneration approved by the Board. That specific bonus does not form part of remuneration *ex facie* the plaint as it does not form part of the exhaustive list of all items of Plaintiff's remuneration package. Therefore, the Director's bonus which is not the employee's bonus cannot be pursued before the present Court which has no jurisdiction because it does not fall under the provisions of the said Act in the absence of an employer and worker relationship. Such item has to be claimed before another forum.

The main thrust of the argument of learned Senior Counsel for the Plaintiff is that the point taken is premature. In **Ocean Fishing(supra)**, it was an issue before the trial Court as to whether the Respondent, a shareholder, Director of the Appellant company was an employee of the latter. It was the contention of the Appellant that the Respondent was simply a Director and was never employed by it and like other Directors, the employer was receiving emoluments from May 1982 until June 1988. Then, the matter was heard before the trial Court to determine whether he was an employee or whether he was purely and simply seeking to be paid Director's fees. It became clear on the evidence adduced that what he was receiving was more consonant with Director's fees. In the present case, Plaintiff has averred that he has

been in the continuous employment of Defendant as Managing Director. The fact that he has not factored in the remuneration items the 1% Director's bonus for the purposes of determining remuneration, does not mean that the item which is claimed under Paragraph 4 cannot be termed remuneration as it is not conclusive. At Paragraph 4, the Plaintiff is claiming 1% Director's bonus on revenue for financial year 2017-2018 unpaid at first of August was Rs 55 million. In the course of the trial, evidence would be heard from the Plaintiff as to what condition, basis on which that 1% bonus boils down to Rs 55 million. As per the definition of remuneration, it includes any amount due as share of profit which is within the jurisdiction of the present Court. The point raised can only be determined after all the evidence has been adduced.

Learned Counsel for the Defendant submitted in reply that paragraph 3 of the plaint identifies exactly what is in the monthly remuneration of Plaintiff. Therefore, the Court should conclude that because he himself stated that this *1% Director's Bonus on Revenue for Financial Year 2017-18 unpaid at 01.08.2018* is not part of his remuneration in paragraph 3, that item cannot be proceeded with before this Court. If remuneration was part of the share of profits alleged, then in paragraph 3, he should have included it as part of remuneration. He has said himself what remuneration is earlier at paragraph 3 and he cannot lead evidence contrary to his own averment in paragraph 3, that the 1% Director's bonus are his items in his remuneration package, that would be contrary to his own case.

I have duly considered the arguments of both learned Counsel for the Defendant and learned Senior Counsel for the Plaintiff.

It is relevant to note that procedures to be followed before the Industrial Court as regards pleadings are those adopted before a District Court under the provisions of **Section 7(1)** of the **Industrial Court Act 1973** which read as follows: -

*"**7. Institution and conduct of proceedings***

(1) Subject to the other provisions of this Act and to any specific procedural provisions in any enactment set out in the First Schedule, all proceedings before the Court shall be instituted and conducted in the same manner as proceedings in a civil or criminal matter, as the case may be, before a District Magistrate.

In the present case, it is not disputed that the relevant enactment that applies is the Employment Rights Act 2008 and in conformity with the purport of Section 7(1) of the Industrial Court Act 1973, there are no other provisions of the latter Act nor any specific procedural provisions in any enactment set out in its First Schedule to preclude the application of the procedure obtained before a District Court to the Industrial Court.

Under **Section 2 of the Employment Rights Act 2008** the following terms have been defined:

"(…) "remuneration"-

(a) means all emoluments, in cash or in kind, earned by a worker under an agreement;

(b) includes-

(i) any sum paid by an employer to a worker to cover expenses incurred in relation to the special nature of his work;

(ii) (…)

(iii) any money due as a share of profits;"

"employer", subject to section 33 –

(a) means a person who employs a worker and is responsible for the payment of remuneration to the worker;

(b) includes –

…(ii) a person, other than another shareworker, who shares the profit or gross earnings of a shareworker;

(…)

"shareworker" means a person who –

(a) is remunerated wholly or partly by a share in the profits of the enterprise for which he works, or gross earnings of an enterprise obtained from the work done by him; (…)

"worker", subject to section 33 or 40 –

(a) means a person who has entered into, or works under an agreement or a contract of apprenticeship, other than a contract of apprenticeship regulated under the Mauritius Institute of Training and Development Act, whether by way of casual work, manual labour, clerical work or otherwise and however remunerated;

(b) includes –

(…) (iii) a shareworker;" ***(emphasis added)***

Furthermore, Section 25 of the said Employment Rights Act 2008 provides:

*"**25. Payment of remuneration due on termination of agreement***

(…)

(4) Where an agreement is terminated otherwise than by notice under section 37, or by expiry of the period for which the agreement was agreed to last, the employer shall pay to the worker any remuneration due on the termination of the employment."

Now, the impugned claim of 1 % Director's bonus should have been averred in the plaint under the authority of **New Beau Bassin Co-operative Store v Juggroo [1980 MR 320]** (although it is not conclusive whether it is "remuneration" or not and that it would have been apparent only after evidence has been heard in relation to both parties), an extract of which reads as follows:

"A cause of action is constituted by the averment of facts which, if denied, require to be proved to enable a plaintiff to obtain a remedy he seeks. The nature and extent of the remedy sought is a legal consequence of those facts and, as such, is a matter of law which the court has to apply." (**emphasis added**)

Therefore, it is clear that the nature and extent of the remedy sought viz. the 1% Director's bonus by the Plaintiff is a legal consequence of those averred facts in support thereof and as such is a matter of law that the Court has to decide. In the present plaint, there are no averred facts at all in support of the Plaintiff's claim of the 1% Director's bonus.

In that regard, it is imperative to note that the Supreme Court cited with approval the case of **Ramjan v Kaudeer [1981 SCJ 387]** in **Tostee J.Y. v Property Partnerships Holdings (Mauritius) Ltd [2015 SCJ 41]** whereby the former had *"explained that once a party has stated the facts on which he relies, these facts are binding and the Court cannot ground its judgment on other facts which may come to light in the course of the trial" (**emphasis added**).*

With the same token, in the recent case of **Seereekissoon S. and Ors v Mauritius Commercial Bank Ltd & Anor [2024 SCJ 104]**, the Supreme Court

highlighted the importance of the object of pleadings after the following authority was cited by Counsel for the co-defendant as follows:

"Counsel for the co-defendant relied on ***Bedacee A.D. v Hookoomsing Y.*** *[2002 SCJ 271] on what amounts to a cause of action by citing the following extract: "the words "cause of action" comprise every fact (though not every piece of evidence) which it would be necessary for the plaintiff to prove, if traversed, to support his right to the judgment of the Court…."*

and the Supreme Court had this to say:

"The object of pleadings is to enable a party to know what case it has to meet. This is the reason why it is important to look at the averments of a plaint and or a plea. (…) A close look at the amended plaint with summons shows that there is a precise averment about the co-defendant to the effect that it is the 'Central Bank of Mauritius' and one of its functions is to regulate and supervise financial institutions under its purview, for example, the defendant. These functions of the Bank of Mauritius have been statutorily embodied under section 5(1)(b) of the Bank of Mauritius Act. In view of the clear averments of the plaint with summons, the purpose of the plaintiffs to have lodged this case in the presence of the co-defendant has been established." (**emphasis added**)

In the present plaint, there is no averment whatsoever of the purpose or reason why the said 1% Director's bonus has been claimed as one of the items of remedy prayed for by Plaintiff in the sum of around Rs 55 million so that the Defendant is compellingly unable to know what case it has to meet more importantly when upon five attempts of Defendant's request for the above particulars of such an extortionate claim, it was answered that the question does not arise from the averments in the *proecipe* let alone that such bonus was not claimed for the financial year 2016-2017 but is being claimed for the financial year 2017-2018.

Although there is the possibility that the 1% Director's bonus could not be inserted as an item of monthly remuneration because a bonus does not form part of "basic wages or salary" pursuant to **Section 2 of the Employment Rights Act 2008**, yet it could have been included as a different item of remuneration by being averred under another paragraph of the plaint as by virtue of **Section 2 of the said Act 2008** *"remuneration" means all emoluments, in cash or in kind, earned by a worker under an agreement*.

Therefore, in the present plaint, the Plaintiff cannot adduce evidence in relation to facts not averred in his plaint and thus, cannot adduce evidence in Court in relation to the 1% Director's bonus.

At this stage, it is significant to note that despite such a defect or omission in the present plaint, the Industrial Court can overrule the objection to its competency by ordering that the plaint be amended *proprio motu* by the insertion of the omission to which learned Counsel for the Defendant had specially directed attention be it in the same paragraph or in a different paragraph of the plaint. This is possible by virtue of the very broad and extensive powers of amendment of defective pleadings before a District Magistrate under the authority of **Galéa v Autard and Ux. [1869 MR 49]**.

Amendment of pleadings is governed by **Rule 48 of the District, Industrial and Intermediate Court Rules 1992**:

*"**48.** The District Magistrate may, at all times, amend all defects and errors, both of substance and of form, in any proceedings in civil matters, whether there is anything in writing to amend by or not, and whether the defect or error be that of the party applying to amend or not; all such amendments may be made with or without costs, as to the Magistrate may seem fit, and also such amendments as may be necessary for the purpose of determining, in the existing suit, the real question in controversy between the parties shall be so made."(**emphasis added**)*

Besides, **Rule 1** of the said **Rules 1992** provides:

*"**1.** These rules –*

(a) may be cited as the District, Industrial and Intermediate Court Rules;

*(b) shall regulate the practice and proceedings of District Courts in the exercise of their civil jurisdiction and, where appropriate, the practice of Industrial and Intermediate Courts in similar matters." (**emphasis added**)*

In the same vein, it is imperative to quote the following extract from the Supreme Court case of **Galéa v Autard and Ux. [1869 MR 49]** which reads as follows:

"(…) the power of the District Judge to amend defective Pleadings under our form of process; it is one of a very broad and extensive nature;

The words of the Rules in the Court below S 48, are these:

"The District Magistrate may at all times, amend all defects and errors, both of substance and of form , in any proceedings in Civil matters, whether there is anything in writing to amend by or not, and whether the defect or error be that of the party applying to amend, or not; all such amendments may be made with or without costs as to the Magistrate may seem fit; and all such amendments as may be necessary for the purpose of determining in the existing suit, the real question in controversy between the parties, shall be so made."

It was contended by the Appellant's counsel, that as the complainant did not make a formal motion for leave to amend, the Judge had no power to make such an amendment ex-proprio motu. But this is a mistake. In practice, the suggestion to amend defective pleadings often comes from the Judge; indeed it is his duty with the view of shortening the delay and lessening the costs of Justice, to put the pleadings in any case where this is possible, in such a shape as to determine in the suit actually before him, the real question at issue between the parties. This is undoubtedly the meaning and intention of the legislature, and is, I think, clearly evinced by the concluding of the section of the Rule just quoted. The first ground of appeal cannot, therefore, be admitted." **(emphasis added)**

Furthermore, District Courts have extensive powers to amend pleadings by virtue of (previously Rule 48 of the District Court Rules) now the District Industrial and Intermediate Courts Rules 1992 at any stage of the proceedings in order to determine the real matter in controversy between the parties even if the amendment would incidentally introduce new matters, provided the amendment does not change the action into one of a substantially different character(see- **Dookun v Gooriah**[1966 MR 122]) although such a discretionary power to amend *"in substance"* would vary a great deal the original conclusions of the plaint (see- **Sénèque v Armand** [1883 MR 141]). Such a course would neither prejudice nor embarrass the Defendant should the latter be given an opportunity of meeting the new allegation (see- **Harel Frères Ltée v Bundhun**[1963 MR 181]).

It is apposite to note that there has been no motion for such amendment suggested by learned Senior Counsel for Defendant in the light of the plea *in limine* raised, when he contended that it was premature for the Court to pronounce itself on the jurisdiction of the impugned claim and that evidence had to be heard.

Be it as it may, under the authority of **Ocean Fishing(supra)** for which both learned Senior Counsel for Plaintiff and learned Counsel for Defendant have no

dispute, the Supreme Court adjudicated on the issue of an employer and Director employee relationship on the basis of the evidence ushered in the course of the trial.

Likewise, in the present case, the Court will have to adjudicate upon the issue as to whether the Plaintiff, a managing Director of the Defendant company was an employee of the latter or not in the sense that whether he was employed by Defendant for the purposes of the claim of around Rs 55 million in respect of the said 1 % Director's bonus, only after evidence has been heard in relation to both parties which is apparent from the following extract of **Ocean Fishing(supra)** itself relied upon by Defendant as follows:

"The issue before the trial court was whether the respondent, a shareholder-director of the appellant company, was an employee of the latter. It was the contention of the appellant that the respondent was simply a director of the company and was never employed by it and that, like the other directors, the respondent was receiving emoluments from May 1982 until June 1988 and thereafter, (…)

When we consider that the latest recruit employed by the appellant earns a monthly salary of Rs 6000, it becomes clear that what the respondent had been receiving was not wages as an employee but rather an amount which was more consonant with the remuneration of the directors as approved by the Board. (…)

In the light of the above, we do not share the view of the Learned Magistrate that the mere fact that the respondent used to deliver goods on board the ships was indicative of a relationship of employer/employee. The real bone of contention of the respondent was in actual fact his diminished role in the affairs of the company in which he was a promoter.

For the reasons given above, ground 1 must succeed.

(…)

As regards ground 3 which finds fault with the finding of the trial court that the respondent was dismissed, we have already brushed upon it when dealing with ground 1. This ground must also succeed since the respondent is not an employee of the company but a shareholder/director who cannot be dismissed by the managing director but who can be revoked according to set procedures as laid down in the article of associations and the Companies Act."

Hence, I exercise my discretion under **Rule 48 of the District, Industrial and Intermediate Court Rules 1992** and I *proprio motu* order that the present plaint be amended by the insertion of the omission to which learned Counsel for the Defendant had specially directed attention(be it in the same paragraph or in a different paragraph of the plaint) given that it is necessary for the Court to determine the real question in controversy between the parties under the authority of **Galéa(supra)**. I also hold that such amendment does not change the action into one of a substantially different character (see- **Dookun(supra)**) although it could vary a great deal the original conclusions of the plaint (see - **Sénèque(supra)**) and that there is no prejudice or embarrassment being caused to the Defendant as it is being given an opportunity of meeting the new allegation following the amendment to be brought thereto. (see- **Harel Frères Ltée(supra)**).

It is apposite to note for the sake of completion and clarity although not pressed, that at paragraph 4 of the plaint where it has been averred that - *"As a result of the unfair and unjust termination of his employment by the Defendant on 01/08/2018, the Plaintiff hereby claims severance allowance at punitive rate made up as follows: -*",

it should have read instead: "*As a result of the unfair and unjust termination of his employment by the Defendant on 01/08/2018, the Plaintiff hereby claims as follows:-"* because the averments of *"severance allowance at punitive rate made up"* are useless prolix averments which could have been avoided as the breakdown of such precise item has been given thereafter among others unrelated with *Severance allowance at punitive rate (Rs. 524,327 x 30/12 x 3)* in the amount of *Rs. 3,932,453.*

For all the reasons given above, I agree with the contention of learned Senior Counsel for the Plaintiff that it would be premature at this stage for the present Court to adjudicate on the issue as to whether the said 1% Director's bonus claimed in the plaint was an item of remuneration or not in the sense that whether the Plaintiff can be termed an employee or not of Defendant for that purpose, as it is a matter of evidence. It will be only at that level when evidence has been heard in relation to both parties that the presence or absence of a "*lien de subordination juridique"* in respect of the Plaintiff towards the Defendant can be assessed.

Thus, I overrule the plea *in limine* in relation to both limbs. The matter is being fixed *proforma* for the plaint to be amended as per the terms ordered by me on a formal matter day. Furthermore, the Plaintiff is to bear half of the costs of the day for such amendment.

S.D. Bonomally (Mrs.) *(Vice President)*
11.3.24