Delort J.M. v City and Beach Hotels (Mauritius) Ltd

2022 IND 34

Cause Number 517/18

IN THE INDUSTRIAL COURT OF MAURITIUS
(Civil Side)

In the matter of:-

Mr. Jean Marie Delort

Plaintiff

v.
City and Beach Hotels (Mauritius) Ltd

Defendant

Ruling

In this amended Plaint, Plaintiff has averred the following. He joined the employment of Defendant as Waiter on 11 March 1985 and has been in the continuous employment of Defendant since 11 March 1985 till 22 December 2017. He was last employed as Executive Assistant Manager and he was drawing an average monthly remuneration of Rs 125,829.25.

Following an alleged complaint made by an employee of Defendant, Plaintiff was informed by a letter dated 26 August 2017 that it had been decided, *inter alia*, that – (a) an independent enquiry would be conducted through the setting up of a fact-finding committee; (b) Plaintiff would be on paid leave with immediate effect until further notice and (c) could be called for any clarification.

On 5 October 2017, Plaintiff appeared before the fact- finding committee whereby he was notified and confronted with allegations made against him by Mr. Yash Gooly on the night of 14 and 15 August 2017 and which were subsequently set out in the charges as follows:

"That during the night of the 14 and 15 August 2017 and whilst being in a hotel room which had been allocated to another male colleague for an overnight stay in the course of his professional duties, you have been privy to acts and doings which,

i. it is considered, were (a) unbecoming of an officer of your position, (b) tantamount to an unwanted conduct, and/or (c) suggestive of attempts made by you for sexual favours;

ii. you knew and/or ought to have foreseen would have negatively affected the said colleague in his dignity.

Alternatively, you would equally be expected to satisfy the Disciplinary Committee that your acts and doings during that night were not of a nature which is so serious as to (a) undermine your authority and/or (b) impair the bond of trust and good working relationship which ought to subsist between any employer and any employee."

By a letter dated 1 December 2017, Plaintiff was to be suspended from his functions with immediate effect and was further requested to attend a disciplinary committee on 14 December 2017.

When the said disciplinary committee took place, he denied all the charges put to him.

By a letter dated 22 December 2017, he was summarily dismissed and his contract of employment with Defendant was terminated with immediate effect on the ground that he was found guilty of the said charges.

Plaintiff has, therefore, averred that Defendant has without any reasonable cause and/or justification and/or wrongfully dismissed him from his duty and has therefore claimed from Defendant Severance Allowance for unjustified termination of employment for 393 continuous months of employment: Rs 12,362,723.81 and indemnity in lieu of notice: Rs 86,115.00 giving a total of Rs. 12,448,838.81.

Defendant in its amended plea has denied liability as the sequence of events as per the said charges were admitted by Plaintiff during the fact-finding committee and the said committee concluded that the Plaintiff's behavior, especially being a superior officer of the resort was not appropriate towards Mr. Gooly and that he acted improperly by taking advantage of his position of seniority. Following the outcome of the fact-finding committee, Plaintiff was suspended from his duties on 1 December 2017 and was requested to attend a disciplinary committee to answer the said charges. Following the disciplinary committee, Plaintiff was found guilty of the charges levelled against him and in view of the nature and gravity of those charges, Defendant was left with no alternative than to terminate Plaintiff's employment on 22 December 2017, the conduct of Plaintiff being most unwarranted for a person of his standing within the organization.

Defendant has also denied that the computation of the monthly remuneration of Plaintiff was correct and has denied being liable to the Plaintiff in the amount of Rs 12,448,838.81 or in any amount whatsoever as Plaintiff's dismissal was fully justified.

Subsequently, Defendant sought to amend its plea further by putting in a plea *in limine* together with the same amended plea on the merits as follows:

1. The Defendant avers that the proecipe as presently couched cannot stand inasmuch as the Plaintiff has applied for his retirement benefits on 11 January 2018, as such he cannot at the same time aver that his employment has been terminated without any reasonable cause and/or justification and/or that such termination was wrongful, entitling him to severance allowance as claimed.

2. In any event, in the light of the fact that the Plaintiff has had access to his benefits under a pension fund in which the Defendant contributed, the amount of severance allowance prayed for is exaggerated.

Learned Counsel for Plaintiff has objected to the proposed amendment of the first amended plea on the sole ground that it was made at a late stage. Then, the ground was dropped on the day of arguments and it was replaced by the fact that the plea *in limine* cannot be argued *in limine* because the contents are not the same and are not founded on the averments made in the proecipe. Thus, the motion to amend is frivolous and results only in the protraction of the matter which is to the prejudice of Plaintiff. Arguments were accordingly heard.

The main thrust of the argument of learned Counsel for Plaintiff is that the Court must hear evidence before it can rule on the point of law. Nowhere in the plaint has mention been made of retirement benefits and as such it is a disputed fact. He relied on the case of **Rama v Vacoas Transport Co. Ltd** [1958 MR 184] which has been reiterated in **Leelowah M. v Kawol P.** [2019 SCJ 78]. The motion is, therefore, unnecessary and should the amendment be granted, the point would not be taken *in limine* and is therefore unnecessary and frivolous.

The main contention of learned Counsel for Defendant is that the claim of Plaintiff is an alleged unjustified termination of his employment and thus, there is a claim for severance allowance. The second proposed amended plea containing the plea *in limine* is being introduced to the effect that there has not been a termination of employment but there has been a retirement of the Plaintiff inasmuch as he has had access to his retirement benefits. So, the plaint as presently couched cannot stand as he cannot at the same time claim termination of employment and having retirement benefits and claiming full amount for severance allowance. Whether there has been termination or whether there has been retirement is very much a matter of law. If there has in fact been a retirement, it would mean that the Plaintiff is not entitled to severance allowance. He relied on the case of **Dayal S. v Jugnauth P.K. & Ors** [2021 SCJ 178]. The amendment will assist the Court in narrowing down the issues. The case of **Rama (supra)** is how a plea *in limine* should be dealt with once it has been introduced before the Court. It was not as to whether or not there should be an amendment of the defence in order to have a preliminary objection in law through an amendment of a plea. The point to be considered at this stage is not the merits of the preliminary objection but simply whether the Defendant can introduce a point in law through the plea *in limine*.

I have given due consideration to the arguments of both learned Counsel. At this stage, I find it appropriate to quote an excerpt from the Supreme Court case of **Rama v Vacoas Transport Co. Ltd** [1958 MR 184] which reads as follows:

"(…) Objections cannot properly be heard in limine unless the objector accepts – for the purposes of argument only – all the facts alleged by the plaintiff but argues that, even accepting them, his opponent cannot succeed. Where the objection is based on disputed facts the court must hear the evidence before it can rule on the point of law; the objection cannot be taken in limine."

As rightly pointed out by learned Counsel for Defendant that the principle of the case of **Rama (supra)** will apply once the amendment has been granted to accommodate the plea *in limine* and it will be at the stage of the arguments on the merits of the contents of the plea *in limine* that it becomes relevant. It cannot be construed outright that it is frivolous or unnecessary because some evidence needs to be adduced for that purpose.

On the contrary, the amendment sought is to bring in a defence in law namely the impact of retirement benefits (applied for by Plaintiff on 11.1.2018 already provided or still being provided to Plaintiff by Defendant at the time his plaint was lodged on 29.8.2018 and followed by the amended plaint dated 5.12.2019) on the issue of a full claim of severance allowance in relation to an alleged unjustified dismissal. This cannot be construed as bad faith in the sense that the proposed amendment is useless or irrelevant or frivolous or would raise merely a technical point causing undue delay or would unfairly prejudice the Plaintiff let alone that the trial has not started yet. It is apposite to note that there is no absolute prohibition from raising a new cause of action or defence by way of an amendment (see - **Dayal S. v Jugnauth P.K. & Ors** [2021 SCJ 178]).

Indeed, in the Supreme Court case of **Dayal S. v Jugnauth P.K. & Ors** [2021 SCJ 178], I find the following extract directly in point and which reads as follows:

"True it is that the facts now being averred in the PAP were known or must have been known to the respondents at the time they filed their original plea. However, as stated above, the Court is not here to punish a litigant for mistakes in the conduct of his case but to decide the rights of the parties and the matters in controversy. We may here aptly refer to the often quoted principle enunciated by ***Bowen L.J.*** *in* ***Cropper v Smith [1884] 26 Ch. D 700****:*

"I think it is a well established principle that the object of courts is to decide the rights of the parties, and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights…I know of no kind of error or mistake which, if not fraudulent or intended to overreach , the court ought not to correct, if it can be done without injustice to the other party. Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy, and I do not regard such amendment as a matter of favour or of grace…It seems to me that as soon as it appears that the way in which a party has

*framed his case will not lead to a decision of the real matter in controversy , it is as much a matter of right on his part to have it corrected, if it can be done without injustice, as anything else in the case is a matter of right." " (**emphasis added)***

Moreover, the recent Supreme Court case of **Chady S.M. v Veeramundar R. & Ors** [2021 SCJ 376], has reiterated the settled principle that a defence in law can be raised at any stage of the proceedings as the focus of the Court is not to punish parties for their mistakes in the conduct of their cases but to decide cases in accordance with their rights and an extract of which is given below:

*"In **Jekarahjee B v** The **State of Mauritius** [2009 SCJ 227] , the following was stated:*

*"Now, it is an established principle that a defence in law can be raised at any stage of the proceedings before judgment. This principle has been applied in, amongst others, **Dr. A. Bahemia v C. Emamdy** [1998 SCJ 91] and **Dr. Vasantrao Gujadhur v Nundkeswarsingh Deerpalsing** [2008 SCJ 109]. Further, the case of **De Lamothe v Government of Mauritius** [1895 MR 88] cited in the case of **Ww. Baruth v Bundhun** [1959 MR 153] referred to by Counsel for the plaintiff, is authority for the proposition that failure of the defendant to raise the issue of prescription in his pleadings does not debar him from raising it at the hearing. It is evident that a defendant cannot be deprived of the right to raise a defence in law at any stage before judgment, and this, irrespective of whether the defence will succeed or not. Besides, the defence in law will have to be decided on its merits and it will be open to the plaintiff to rebut it."*

*In **Gunness S. v Ramnauth M.S.** [2010 SCJ 107], the court observed:*

*"In the normal course of Court proceedings amendments are often moved for and are granted or refused, the Court exercising its discretion and applying the well known principles set out and applied in numerous decided cases, for example **Soobhany & Ors v. Soobhany & Ors** [1989 MR 191], **Unmar v. Lagesse** [1994 MR 183], **Maxo Products v. Swan Insurance Co. Ltd**[1996 MR 41], some of which have been considered and/or applied with approval in more recent cases e.g., **Reekoye v. Mauritius Union Insurance Co. Ltd & Anor** [2004 SCJ 66], **ABC Motors and Ors v. Ngan Hoy Khen Ngan Chee Wang & Ors** [2008 SCJ 25a], and **C. Marday & Ors v. B. Marday & Ors.**[2008 SCJ 30].*

The following principles stand out prominently therefrom :- (a) The Court should allow all such amendments as are necessary to enable the determination of the real question in controversy between the parties or to correct any defect or error in any proceedings ***(per Jenkins L.J. in G.L. Baker v. Medway Building & Supplies Ltd [1958 3 ALL E.R. 540, p. 546]*** *referred to in* ***Maxo Products v Swan Insurance [1996 MR 41]****), (b) Even if such amendments have been made necessary because of the honest fault or mistake (therefore excluding bad faith) of the party making the motion for amendment , they should be allowed. The focus is on the fact that the Court is not here to punish parties for their mistakes in the conduct of their cases, but to decide cases in accordance with their rights. (c) However blameworthy (short of fraudulent or in bad faith) may have been a party's failure to plead the subject matter of a proposed amendment earlier, and however late in the day the motion for amendment is made, it should, in general, be allowed, provided the amendment will not cause injustice to the other party.*

There is no injustice to the other party if he can be compensated by the appropriate order for wasted costs ***(per Bowen L.J. in Copper v. Smith (1883) 26 Ch. D. 700, pp. 710-711*** *referred to in the case of* ***Maxo Products (supra)****. (d) There is a distinction to be made between an amendment which would clarify the issues and one which is in the nature of a totally different defence from that pleaded to be raised by amendment at the end of the trial, even on terms relating to an adjournment and as to the defendant paying the costs thrown away. (****Ketteman v. Hansel Properties Ltd [1987 AC 189])*** *referred to in the case of* ***Soobhany v. Soobhany(supra)****. (e) To allow an amendment before a trial begins is quite different from allowing it " at the end of the trial to give an apparently unsuccessful defendant an opportunity to renew the fight on an entirely different defence".[****Soobhany v. Soobhany (supra)*** *referring to the case of* ***Ketteman (supra)****. (f) "An amendment for the purpose of adding a plea of fraud is generally allowed at an early stage if the circumstances warrant it but it will only be allowed at a late stage in exceptional circumstances."* ***[Halsbury's Laws of England 3rd edition volume 30 paragraph 72*** *– referred to in* ***Maxo Products (supra)****"."*

It is also interesting to note that in matters of amendment, the Industrial Court has a wider discretion than the Supreme Court as highlighted in the case of **Sénèque v Armand [1883 MR 141]** pursuant to the now **Rule 48 of the District, Industrial and Intermediate Court Rules 1992 (**wherein the Court *"may, at all times, amend all defects and errors, both of substance and of form, … as may be necessary for the*

purpose of determining, in the existing suit, the real question in controversy between the parties…".) an extract of which reads as follows:

"We think that there is a great difference between the rule of the Supreme Court and that of the District Court, and that the words "in substance" which are to be found in the latter give a much greater power of amendment to the District Magistrate than the Rules of the Supreme Court as actually existing give to the Judges of that Court."

Therefore, it is plain enough by virtue of **Sénèque (supra)**, the present Court has not only the power to amend pleadings for the purpose of bringing out clearly the points at issue, but also has a discretionary power to amend *"in substance"* which means that amendments may be granted by the present court in spite of the fact that such amendments will vary a great deal the original conclusions of the plaint.

Thus, although the defence in law will require some evidence to be adduced, it will be open to the Plaintiff to rebut it and hence, there will be no prejudice (see - **Chady(supra):** "*It is evident that a defendant cannot be deprived of the right to raise a defence in law at any stage before judgment, and this, irrespective of whether the defence will succeed or not. Besides, the defence in law will have to be decided on its merits and it will be open to the plaintiff to rebut it...*")

For the reasons given above, the objection is overruled and I allow the further amendment of the first amended plea.

The matter is accordingly fixed *proforma* on a formal matter day for a second amended plea to be filed.

S.D. Bonomally (Mrs.) *(Vice President)*
15.7.22