* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ Reserved on: January 14th, 2009

Date of Decision: January 30, 2009

CM(M) 373/2008 & CM No. 4284/2008

PURCHASING MANAGEMENT INTERNATIONAL & ANR.
..... Petitioners
Through: Mr. Vivek Narayan and Mr. Nitesh Rana, Advocates.

versus

RAJAT PANDHI & ANR. ..... Respondents
Through: Mr. Sanjeev Sahay and Mr. Balendu, Advocates.

CORAM:
HON'BLE MR. JUSTICE MANMOHAN

1. Whether the Reporters of local papers may be allowed to see the judgment?No
2. To be referred to the Reporter or not? Yes
3. Whether the judgment should be reported in the Digest? Yes

J U D G M E N T

MANMOHAN, J

1. The present petition has been filed under Article 227 of the Constitution of India against the order dated 28th January, 2008 passed in Civil Suit No. 270 of 2005 (originally Suit No. 1898 of 2001) whereby the petitioners/defendants' application under Order VI Rule 17 read with Section 151 of the Code of Civil Procedure (hereinafter referred to as 'CPC') was dismissed.

2. Briefly stated the facts of the present case are that the respondents/plaintiffs filed the aforesaid suit on 7th September, 2001 for declaration, injunction and rendition of accounts against the petitioners/defendants. While the respondents/plaintiffs sought a declaration that the letter dated 17th August, 2001 issued by petitioners/defendants was illegal, null and void *ab initio,* it was further prayed that the petitioners/defendants are bound by the Memorandum of Understanding dated 19th July, 2001 and Agreement dated 22nd June, 2001.

3. In the initial written statement filed by the petitioners/defendants, they had averred as under:-

> *"……The Defendant Nos. 1 and 2 have already entered into a joint venture Agreement and have further acted pursuant to the said Joint Venture Agreement."*

4. By virtue of the amendment application, the petitioners/defendants have proposed the following amendment/change in the above extracted portion of the written statement:-

> *"……The Defendant Nos. 1 and 2 had entered into an MoU to work together however the same did not culminate into any final Joint Venture Agreement as also no new Company was ever formed by Defendant Nos. 1 & 2 together in terms of the then proposed negotiation & MoU. Both the Defendants did never work together therein and thereafter. Further no business was ever transacted upon between both the Defendants."*

5. The reason given for seeking amendment was that when the petitioners' new counsel went through the records of the case, he discovered that an incorrect fact had been averred in the written statement and, therefore,

the petitioners/defendants wanted to amend their written statement. The relevant portion of the amendment application moved by the petitioners/defendants is as under:-

> *"3. That after going through the files, as obtained from the previous counsels i.e. S.C. Nanda & Associates, Advocates, (who represented the defendant No. 1 in the instant case) as also after inspection of the court file; the new counsels for defendant No. 1 has brought to the notice of defendant No. 1 that one incorrect fact has been averred in the written statement filed for and on behalf of defendant No. 1.*

6. The trial court by virtue of the impugned order rejected the application for amendment primarily on the ground that by way of the amendment application filed on 4th October, 2007, the petitioners /defendants wanted to withdraw certain facts stated in the initial written statement and further that a party cannot be permitted to seek amendment in the present case after 9th April, 2007, which was the date when the plaintiffs' witness was cross-examined.

7. The learned counsel for petitioners contended that the petitioners/defendants by virtue of the amendment application were not seeking to withdraw certain facts but were seeking to offer a supplementary explanation to what had been earlier stated. The learned counsel for the petitioners/defendants referred to the judgment of the Hon'ble Supreme Court in ***Usha Balashahed Swami & Ors. V. Kiran Appaso Swami & Ors.***, reported in ***(2007) 5 SCC 602***, wherein it has been held as under:-

> *"……It is equally well settled principle that a prayer for amendment of the plaint and a prayer for amendment of the written statement stand on different footings. The general principle that amendment of pleadings cannot be allowed so as to alter materially*

> *or substitute cause of action or the nature of claim applies to amendments to plaint. It has no counterpart in the principles relating to amendment of written statement. Therefore addition of a new ground of defence or substituting or altering a defence or taking inconsistent pleas in the written statement would not be objectionable while adding, altering or substituting a new cause of action in the plaint may be objectionable."*

8. The learned counsel for the respondents/plaintiffs stated that by virtue of the present amendment application, the petitioners could not retract what they had already pleaded in their initial written statement. In this connection, he relied upon a judgment rendered by the Hon'ble Supreme Court in ***Chander Kanta Bansal v. Rajinder Singh Anand***, reported in ***AIR 2008 SC 2234***, wherein it has been held as under:-

> *"12. ……..Now by filing the said application, she wants to retract what she pleaded in the written statement, undoubtedly it would deprive the claim of the plaintiff. We are also satisfied that she failed to substantiate inordinate delay in filing the application that too after closing of evidence and arguments. All these aspects have been considered by the High Court. We do not find any ground for interference in the order of the High Court, on the other hand, we are in entire agreement with the same."*

9. The learned counsel for the respondents/plaintiffs further submitted that in view of the amendment of CPC in the year 2002, no Court can allow an application for amendment after the trial has commenced. He referred to the amended Order VI Rule 17 CPC which reads as under:-

> ***"Rule 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."*
>
> *(emphasis supplied)*

10. In this connection he referred to the judgment of Apex Court in ***Ajendraprasadji N. Pande & Anr. V. Swami Keshavprakeshdasji N. & Ors.***, reported in ***AIR 2007 SC 806***, wherein it has been held as under:-

> *"23. It is seen that before the amendment of Order 6 Rule 17 by the Act 46 of 1999, the Court has taken a very wide view of the power to amend the pleadings including even the plaint as could be seen from* ***H.J. Leach*** *v.* ***Jardine Skinner*** *1957 SCR 438 at 450 and* ***Gurdial Singh*** *v.* ***Raj Kumar Aneja*** *MANU/SC/0077/2002. By Act 46 of 1999, there was a sweeping amendment by which Rules 17 and 18 were wholly omitted so that an amendment itself was not permissible, although sometimes effort was made to rely on Section 148 for extension of time for any purpose. Ultimately to strike a balance the Legislature applied its mind and re-introduced Rule 17 by Act 22 of 2002 w.e.f. 1.7.2002. It had a provision permitting amendment in the first part which said that the Court may at any stage permit amendment as described therein. But it also had a total bar introduced by a proviso which prevented any application for amendment to be allowed after the trial had commenced unless the Court came to the conclusion that in spite of due diligence the party could not have raised the matter before the commencement of the trial. It is this proviso which falls for consideration."*

11. Since in the present case, an amendment has been sought on the ground that an incorrect fact has been averred in the written statement inasmuch as neither any final Joint Venture Agreement was executed nor any Joint Venture Company was incorporated, I am of the view that the present amendment is necessary for purposes of determining the real controversy between the parties.

12. I am also of the opinion that in cases where amendment of written statement is sought, the courts have to adopt a more liberal approach than that of a plaint as the question of prejudice would be far less in the former than in the latter as addition of a new ground of defence or substituting or altering a defence or taking inconsistent pleas in the written statement can be allowed. Moreover, at the stage of exercising the power of amendment, the Court has not to go into the falsity or correctness of the allegations made in the amendment application [refer to ***Rajesh Kumar Aggarwal v. K.K. Modi,*** reported in ***2006 (4) SCC 385***].

13. As far as the submission with regard to the newly inserted proviso to Order VI Rule 17 CPC is concerned, I am of the view that Proviso to Order VI Rule 17 CPC introduced in 2002 would not apply to the present case as the plaintiff had filed its suit on 7th September, 2001 i.e. prior to the 2002 Amendment in CPC. Section 16(2)(b) of the Code of Civil Procedure (Amendment) Act, 2002 states as under :-

> *"16. Repeal and savings –…….*
>
> *(b) the provisions of rules 5, 15, 17 and 18 of Order VI of the First Schedule as omitted or, as the case may be, inserted or substituted by section 16 of the Code of Civil Procedure (Amendment) Act, 1999 (46 of 1999) and by section 7 of this Act, shall not apply to in respect of any pleading filed before the commencement of section 16 of the Code of Civil Procedure (Amendment) Act, 1999 and section 7 of this Act;……"*
>
> *(emphasis supplied)*

14. In fact, the Hon'ble Supreme Court in the case of ***State Bank of Hyderabad v. Town Municipal Council***, reported in ***(2007) 1 SCC 765*** has

held that the new proviso to Order VI Rule 17 of the Code shall not apply to suits filed prior to the year 2002.

15. Moreover, I am of the opinion that for alleged negligence or mistake on the part of a counsel, a party/litigant cannot be made to suffer. In fact, when the legality and constitutionality of 2002 amendment to CPC was raised, the Hon'ble Supreme Court upheld the amendment of Order VI Rule 17 CPC in the case of ***Salem Advocate Bar Association, Tamilnadu v. Union of India,*** reported in ***(2005) 6 SCC 344***, by observing as under:-

> *"Order 6 Rule 17 of the Code deals with amendment of pleadings. By Amendment Act, 46 of 1999, this provision was deleted. It has again been restored by Amendment Act 22 of 2002 but with an added proviso to prevent application for amendment being allowed after the trail 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. The proviso, to some extent, curtails absolute discretion to allow amendment at any stage. Now, if application is filed after commencement of trial, it has to be shown that in spite of due diligence, such amendment could not have been sought earlier. The object is to prevent frivolous applications which are filed to delay the trial. There is no illegality in the provision."*
>
> *(emphasis supplied)*

16. Since I have already reached the conclusion that for alleged negligence or mistake by a counsel, a party cannot be made to suffer, I am of the view that in the present case, it cannot be said that the petitioners had not shown due diligence. In any event, the averment that no final Joint Venture Agreement was executed and further that no Joint Venture Company was formed are questions of fact and the respondents/plaintiffs can always lead additional/supplementary evidence to the contrary.

17. Consequently, I set aside the impugned order and allow the amendment application filed by the petitioners/defendants subject to the petitioners paying costs of Rs. 35,000/- to the respondents/plaintiffs. Needless to say that the respondents/plaintiffs can still urge that the averment in the amended written statement is false and contrary to record.

18. With the above observations, the present petition is disposed of.

CM No. 4284/2008 (stay)

Since the petition has been disposed of, the present application has become infructuous. Accordingly, the same is dismissed as having become infructuous.

MANMOHAN, J

January 30, 2009
sb/rn