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

Reserved on: 25.08.2015
Pronounced on :02.09.2015

+ LPA 553/2015 & CM No.16232/2015

DIRECTORATE GENERAL OF FOREIGN TRADE..... Appellant

Through Mr.Sanjay Jain, ASG with
Mr.Vineet Malhotra, Ms.Shreya
Sinha, Mr.Vishal Gohri and
Ms.Natasha Thakur, Advs.

versus

M/S MASUMI OVERSEAS PVT LTD Respondent

Through Mr.Balbir Singh, Sr. Adv. with
Mr. Sameer Jain, Mr.Angad
Sandhu and Mr.K.Gurumurthy,
Advs.

CORAM:
HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE JAYANT NATH

JAYANT NATH, J.

1. The present appeal is filed seeking to impugn the order dated 3.8.2015 passed by the learned Single Judge. By the impugned order the

application filed by the respondent under Order VI Rule 17 CPC for amendment of the petition was allowed.

2. Respondent filed the writ petition seeking a Writ of Certiorari for setting aside the communication/order dated 25.3.2011 issued by the appellant putting the respondent on the Denied Entity List (DEL) issued by the appellant. It was the contention of the respondent in the writ petition that the respondent had entered into an agreement with the public sector undertaking STC (State Trading Corporation of India Limited) which is one of the agencies nominated by Union of India for promotion of import and export of gold and other precious metals under the foreign trade policy for selling/exporting gold jewellery and diamond to prospective overseas buyers. It was stated that as per the Agreement the respondent was to obtain orders for gold jewellery from prospective foreign buyers in the name of STC. The role of STC was that of an 'Exporter' as defined under section 2(20) of the Customs Act, 1962 and the role of the respondent was that of a 'Shipper'.

3. It was further urged by the respondent that certain disputes arose between the respondent and STC. It is the contention of the respondent that after 2009 STC has not cleared the dues of the respondent despite repeated requests. The respondent states that it invoked the arbitration clause as per the agreement. Different proceedings have been filed by both STC and the respondent before the Bombay High Court. The respondent had filed a petition seeking appointment of an Arbitrator. STC has filed summary suits for recovery against the respondent. It is urged that it was only in May 2014 that the respondent came to know that the respondent's Importer Exporter Code has been put in DEL category by

the appellants vide communication/order dated 25.3.2011. This was apparently done on the basis of a written request/complaint dated 27.1.2011 of STC. The respondent claims that the order dated 25.3.2011 was never supplied to it and no opportunity whatsoever was given to the respondent to show cause. Hence, the writ petition was filed.

4. During pendency of the writ petition it appears that on 27.3.2015 the Additional Director General of Foreign Trade, Mumbai issued a Show Cause Notice to the respondent for having prima facie violated the provisions of The Foreign Trade (Development and Regulation) Act, 1992. The respondent was called upon to show cause why its Importer-Exporter Code No.(IEC) should not be cancelled with immediate effect.

5. Pursuant to receipt of the said Show Cause Notice dated 27.03.2015 the respondent has filed the present application under Order VI Rule 17 CPC seeking amendment in the prayer clause of the writ petition for the purpose of adding the Show Cause Notice dated 27.03.2015 in the order/communication sought to be impugned. Other connected amendments are also sought.

6. The impugned order dated 03.08.2015 permitted the amendment application holding that the amendment sought will not change the nature of the petition and is formal in nature.

7. We have heard learned counsel for the parties and perused the record. The learned Additional Solicitor General who has appeared for the appellant has argued that the amendment application was mischievous, malafide and an abuse of the process of Court. He submits that the impugned Show Cause Notice dated 27.3.2015 is issued by the Bombay office of the appellant and in case the said Show Cause Notice

is to be challenged the Writ Petition would lie before the appropriate High Court having jurisdiction. He reiterates that the entire record of the case is with the Bombay office and the Bombay High Court would be the appropriate Court to deal with a challenge of the said Show Cause Notice if permissible. However, he submits that to circumvent the said jurisdictional issue the respondent has mischievously sought to move the present amendment application. He further submits that amendment which has now been allowed by the impugned order seeks to completely change the nature of the writ petition which would cause grave prejudice to the appellant and is impermissible in law.

8. Learned counsel appearing for the respondent, however, submits that the amendment which was allowed permits the respondent to impugn the Show Cause Notice dated 27.3.2015 which is based on the same set of facts as the earlier impugned order dated 25.3.2011.

9. We may first have a look at the relevant portion of the impugned order which reads as follows:-

“This is an application under Order VI Rule 17 read with Section 151 CPC for amendment of the present petition seeking to add the following relief:-

“setting aside the impugned order/communication dated 25.03.2011 and 19.09.2014 along with SCN dated 27.03.2015.”

In my view, the amendment sought will not change the nature of the petition and is formal in nature.

For the reasons given in the application, the same is allowed and the amended petition is taken on record.

The application stands disposed of.”

10. The original relief as claimed by the respondent in the writ petition reads as follows:-

“i) Issue a writ of certiorari thereby setting aside the impugned communication/order dated 25.3.2011 issued by the respondent which has never been supplied to detainee but is clear from the DEL status obtained from the website of the respondent.”

11. A perusal of the writ petition as originally filed by the respondent shows that the case of the respondent was that no Show Cause Notice was issued to the respondent before issuing/passing the impugned order dated 25.3.2011 by which the respondent was placed on the Denied Entity List. Hence, it is contended that the said order was passed contrary to the principles of natural justice. No Show Cause Notice or personal hearing was given to the respondent. It is also stated that the said order is contrary to the guidelines of the appellant dated 31.12.2003 which require passing of a speaking order after giving an opportunity of hearing. It is also contended that the dispute between the respondent and STC is a contractual dispute on which suits/arbitration proceedings have been initiated.

12. A perusal of the Show Cause Notice dated 27.3.2015 now issued to the respondent which is sought to be added as an impugned document to the petition, shows that it notes the following reasons to cancel the IEC of the respondent:-

- a. “Committing economic offence under the Negotiable Instruments Act since “Stop Cheque Payment” instructions were given by you to the bank.

- b. There is reason to believe that you had entered into a agreement with State Trading Corporation wherein you had taken full responsibility in terms of clause 10(b)(v) of the said agreement to arrange as shipper, the realization of the export proceeds from the foreign buyer. However, you failed to fulfill this commitment and therefore, acted in a manner gravely prejudicial to the interests of State Trading Corporation which is one of the most important government canalizing agency for exports and imports.
- c. You have failed to realize an amount of Rs. 17.93 Crores from various foreign importers. Since you have failed to give the factual details on when the said amount was supposed to be realized and whether you have obtained any extension for the period of realization after the due period of realization was over and if so from which authority the said extension was obtained, you have created a position which goes against you and points towards an economic offence committed by you under FEMA.”

13. The Show Cause Notice further prima facie concludes that the respondent has committed the following offences:-

- a) “In terms of Section 138 of Negotiable Instruments Act and thereby violated the provisions of Section 8(a) of the Foreign Trade (Development & Regulation) Act 1992, as amended, as the post dated cheques furnished by you to M/s. STC Ltd, as per clause 10 (b) (i) & (ii) of the agreement dated 15.12.2006 has bounced;
- b) There is reason to believe that while you had entered in to an agreement with State Trading Corporation wherein you had taken full responsibility in terms of clause 10 (b)(v) of the said agreement to arrange as shipper, the realization of the export proceeds from the foreign buyer, you failed to fulfill

this commitment and, therefore, acted gravely prejudicial to the interest of State Trading Corporation which is engaged in imports and exports and therefore, violated provisions of Section 8 (b) of Foreign Trade (D&R) Act, 1992;

- c) You have failed to realize an amount of Rs. 17.93 Crores from various foreign importers. Since you have failed to give the factual details on when the said amount was supposed to be realized and whether you have obtained an extension for the period of realization after the due period of realization was over and if so from which authority the said extension was obtained, you have created a position which goes against you and points towards an economic offence committed by you under FEMA and have, therefore violated provisions of Section 8(a) of Foreign Trade (D&R) Act. 1992.”

14. In the aforesaid factual matrix the Show Cause Notice seeks to cancel the Importer Exporter Code of the respondent.

15. A perusal of the application filed by the respondent for amendment shows that detailed amendments are now sought to be added to explain as to why the Show Cause Notice dated 27.3.2015 is erroneous and is liable to be quashed. The application seeks to amend or add number of paragraphs in the writ petition by the proposed amendment application. About 14 paras are sought to be amended and 17 paras added. About 25 new grounds are also sought to be added.

16. Some of the new contentions which are sought to be added by way of amendment application are:-

- (a) Every customer introduced by the respondent was verified and checked by ITC.
- (b) After the buyer had failed to make payment, STC failed in its responsibility to invoke the insurance policy to recover the money due.

(c) Afterwards the respondent requested STC to reconcile accounts and the respondent also invoked the arbitration clause.

(d) STC in a malafide manner, despite knowing that because of bonafide disputes the respondent had sent a letter regarding stop payment of PDCs which have been given on secondary securities, sought to encash the said post dated cheques.

(e) STC was not interested to proceed with the arbitration proceedings.

17. A perusal of the above contentions shows that now the respondent seeks to, on facts and law, contend that the contentions as stated by the appellant in the show cause notice dated 27.03.2015 are erroneous and the said show cause notice is liable to be quashed.

18. It is clear that by the proposed amendment which has been allowed by the impugned order, the nature of the writ petition gets substantially and materially altered and changed from the original writ petition.

19. In the context of amendments of pleadings in a suit the legal position is well settled. Amendments which seek to add entirely new cause of actions which virtually amount to substitution of a new plaint or a new cause of action in place of what was originally there, would normally be refused by a Court. Reference in this context may be had to the judgment of the Supreme Court in ***Ganesh Trading Co. Vs. Moji Ram, AIR 1978 SC 484*** where the Supreme Court in paragraph 5 held as under:-

“5. It is true that, if a plaintiff seeks to alter the cause of action itself and to introduce indirectly, through an amendment of his pleadings, an entirely new or inconsistent cause of action, amounting virtually to the substitution of a new plaint or a new cause of action in

place of what was originally there, the Court will refuse to permit it if it amounts to depriving the party against which a suit is pending of any right which may have accrued in its favour due to lapse of time. But, mere failure to set out even an essential fact does not, by itself, constitute a new cause of action...”

20. Reference in the above context may also be had to *Abdul Rehman and Anr. vs. Mohd. Ruldu and Ors.*, (2012) 11 SCC 341 and *State of Madhya Pradesh vs. Union of India AIR 2012 SC 2518*.

21. No doubt the Code of Civil Procedure does not apply to writ proceedings under Article 226 of the Constitution of India. Section 141 of CPC provides that the procedure provided in the Code regarding a suit shall be followed in all proceedings in a Court of civil jurisdiction. The explanation, however, clarifies that proceedings does not include proceedings under Article 226 of the Constitution of India. However, the principles governing amendment of pleadings in suits would be a guide.

22. In the above context reference may be had to the judgment of the Supreme Court in the case of *Puran Singh vs. State of Punjab, AIR 1996 SC 1092* where in the context of interpretation of the explanation to Section 141 CPC the Supreme Court held as follows:-

“9. We have not been able to appreciate the anxiety on the part of the different courts in judgments referred to above to apply the provisions of the Code to Writ Proceedings on the basis of Section 141 of the Code. When the Constitution has vested extraordinary power in the High Court under Articles 226 and 227 to issue any order, writ or direction and the power of superintendence over all courts and tribunals throughout the territories in relation to which such High Court is exercising jurisdiction, the procedure for exercising such power and jurisdiction, have to be traced and found in Articles 226 and 227 itself. No

useful purpose will be served by limiting the power of the High Court by procedural provisions prescribed in the Code. Of course, on many questions, the provisions and procedures prescribed under the Code can be taken up as guide while exercising the power, for granting relief to persons, who have invoked the jurisdiction of the High Court. It need not be impressed that different provisions and procedures under the Code are based on well recognised principles for exercise of discretionary power, and they are reasonable and rational. But at the same time, it cannot be disputed that many procedures prescribed in the said Code are responsible for delaying the delivery of justice and causing delay in securing the remedy available to a person who pursues such remedies. The High Court should be left to adopt its own procedure for granting relief to the persons concerned. The High Court is expected to adopt a procedure which can be held to be not only reasonable but also expeditious.”

Hence, the principles regarding amendment of pleadings as provided in the CPC would be a guiding factor while adjudicating applications for amendment in a writ petition.

23. In our opinion the amendment now sought by the respondent has the effect of changing the entire writ petition substantially. New facts and issues are being added to the writ petition. The amended writ petition would virtually tantamount to substitution of an altogether new case when compared to the original case. It is appropriate that the respondent challenges the Show Cause Notice in different proceedings and not mix up the facts and submissions.

24. In the light of the above, we set aside the impugned order dated 3.8.2015 by which the amendment application being CM No.7907/2015 was allowed. CM No.7907/2015 is dismissed. However, liberty is

granted to the respondent to impugn the communication dated 19.09.2014 and the show cause notice dated 23.7.2015 in appropriate proceedings, as per law.

25. The appeal is allowed. All applications are dismissed.

**(JAYANT NATH)
JUDGE**

(CHIEF JUSTICE)

**SEPTEMBER 02, 2015
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