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

Date of decision: 16th September, 2019

+ **CM(M) 1067/2018 & CM APPL. 36593/2018**

DELHI DEVELOPMENT AUTHORITY Petitioner
Through: Mr. Pawan Mathur, Standing Counsel
(M-9810129577)
versus

BRAHMAPUTRA INFRASTRUCTURE LTD Respondent
Through: Mr. Yogesh Jagia, Mr. Amit Sood &
Mr. Rishabh Nangia, Advocates (M-
9810043405)

CORAM:
JUSTICE PRATHIBA M. SINGH

Prathiba M. Singh, J. (Oral)

1. The present petition challenges the impugned order dated 2nd May, 2018 by which the Respondent's/Plaintiff's (*hereinafter*, "*Plaintiff*") application under Order VI Rule 17 CPC has been allowed by the Id. Trial Court and the amended plaint has been taken on record.
2. The brief background is that the contractor i.e. the Plaintiff was awarded a construction contract by the Delhi Development Authority (*hereinafter*, "*DDA*") for some outstanding work in the Commonwealth Games. Disputes arose between the parties as to whether the DDA would be liable to reimburse service tax deposited by the Plaintiff with the Government. The case of the DDA is that service tax liability is purely of the Plaintiff. However, the Plaintiff alleges otherwise. Since the DDA refused to pay the component of service tax to the Plaintiff, a suit for recovery came to be filed seeking recovery of the service tax component.

3. Thereafter, during the pendency of the suit, the Plaintiff realised that some part of the service tax component was also the CENVAT credit, which were amounts paid by the contractor to suppliers of inputs services to them. The same was contained in a computation chart which was annexed with the plaint. However, due to an inadvertent error, the said amount was not included in the amount claimed in the prayer. Accordingly, an application was filed under Order VI Rule 17 CPC to claim the CENVAT credit amount. The DDA resisted the application. However, the Id. Trial Court allowed it subject to the payment of Rs.3,000/- as costs.

4. Mr. Mathur, Id. counsel appearing for the DDA, submits that he has three objections against the amendment being allowed:

- i) that the claim towards the additional amount is barred by limitation;
- ii) that the trial in the suit has already started as the affidavits in evidence have been filed by the Plaintiff;
- iii) that the claim would be barred by Order II Rule 2 CPC.

5. He relies upon the following three judgments in support of his case:

i) Arjuna & Ors. v. State of Maharashtra & Ors., 1995 Supp (3) SCC 19

ii) South Konkan Distilleries & Anr. v. Prabhakar Gajanan Naik & ors., (2008) 14 SCC 632

iii) Van Vibhag Karamchari Griha Nirman Sahkari Sanstha Maryadit (Registered) v. Ramesh Chander & Ors., (2010) 14 SCC 596

6. On the other hand, Id. counsel for the Plaintiff submits that the CENVAT credit is nothing but service tax in a different *avatar* and the only

mistake was the computation. The claim for the amount already exists and thus it would not be barred by limitation. He further submits that Order II Rule 2 CPC does not bar correction of computational errors in respect of amounts which have already been claimed and thirdly, since evidence has not yet been tendered, hence commencement of trial has not taken place.

7. This Court has heard the parties and perused the plaint. A perusal of paragraph 19 of the plaint shows that the Plaintiff has, in fact, mentioned the chart which is annexed to the plaint i.e., Annexures P-3 and P-4. A perusal of the said chart which has been presented to the Court shows that there is a separate column in respect of CENVAT credit adjusted. While the service tax is mentioned in the chart in the column titled '*Service Tax Claim*', the CENVAT credit adjusted has not been added into the final relief of service tax claimed.

8. The Id. Trial Court has considered the submissions of the parties and has clearly come to the conclusion that the basic nature of the case has not changed and hence, Order II Rule 2 CPC will not apply. Further, the law of limitation does not bar computational or other errors which may have crept into a plaint.

9. This Court, after seeing the impugned order and the chart is convinced that nothing new is being claimed in the present suit by the addition of the CENVAT credit amount. If the Plaintiff has, in fact, made payments, towards CENVAT credit, which would have to be proved by the Plaintiff in accordance with law, the addition of the same would not create a new cause of action. Insofar as the objection of limitation and Order II Rule 2 CPC is concerned, the Id. Trial Court has held that there is no new cause of action which has been pleaded and has now become time barred. The question of

limitation is a mixed question of fact and law which requires to be adjudicated at the final stage. The CENVAT credit would form an integral component of the service tax amount which the Plaintiff could claim recovery of, subject to the objections of the DDA being adjudicated by the Court. Thus, the application under Order VI Rule 17 CPC has being rightly allowed. However, the costs in this case are enhanced to Rs.10,000/- per suit, as the costs which have been awarded by the Id. Trial Court are on the lower side. Considering the fact that the Plaintiff was well aware that it had to claim these amounts and had omitted to do so, it will be open to the DDA to raise all legal and factual objections in respect of CENVAT credit claims and the same shall be adjudicated in accordance with law.

10. This Court has not expressed its view on merits as to whether CENVAT credit being claimed would form a component of service tax in the present case, on facts, or not.

11. The DDA is allowed to urge any additional issue that it wishes to be framed in view of the amendment allowed by the Id. Trial Court vide the impugned order, including the issue of limitation insofar as the CENVAT credit component is concerned.

12. The petition along with all pending applications is disposed of.

PRATHIBA M. SINGH
JUDGE

SEPTEMBER 16, 2019

Rahul