

(2018) 10 DEL CK 0592

In the Delhi High Court

Case No : Civil Suits(Comm) 361 Of 2017

Pentel Kabushiki Kaisha & Anr

APPELLANT

Vs

M/S Arora Sationers And Ors

RESPONDENT

Date of Decision : 25-10-2018

Acts Referred:

Code of Civil Procedure, 1908 — Order 6 Rule 17

Citation : (2018) 10 DEL CK 0592

Hon'ble Judges : Jayant Nath, J

Bench : Single Bench

Advocate : Saurabh Banerjee, Afzal B. Khan, Shailen Bhatia, Ekta Nayar Saini, Shivam, Saltanat, Vidushi, H.P.Singh, Navroop Singh

Judgement

Jayant Nath, J

IA No. 646/2018

1. This application is filed under Order 6 Rule 17 CPC on behalf of defendants No. 2 and 3 seeking amendment of the written statement. It is pleaded

in the application that the issues have been framed and the present

suit is listed for the plaintiffsâ? evidence. In the meantime, it is pleaded that defendant No. 3 has received a Certificate of Registration for Design

No.282909 in Class 19-06 for the Pen bearing the name â??MONTEX MASTANIâ? from the Office of Controller of Designs, Design Office

Kolkata in respect of the application for registration of the design of Pen in class 19-06. It is pleaded that the grant of Certificate of the design is a

subsequent event post filing of the present suit and also post filing of the written statement. Hence, defendants No. 2 and 3 seek to add the following

to the written statement:-

13. That the Defendant is holding registration of the design which is complained by the Plaintiff under no.282909 in class 19-06 and the application was filed prior to the filing of the suit i.e. on 26/04/2016. The Design of the Defendant is valid and subsisting and the Defendant may be allowed to use the registered design. The Defendant seek to use the design which is subject matter of the said registration as the Controller of Designs after examining the factual positions has granted the registration to the Defendant's design which is different from the Plaintiffs alleged registration.

Also a similar averment is sought to be added in para 10 of the written statement under the heading history of the defendants where a list of designs in favour of the defendants is spelt out and the newly added design is sought to be added to the said list.

2. I have heard learned counsel for the parties.

3. Learned counsel for the plaintiffs has vehemently opposed the present application stating as follows:-

(i) He submits that the plea which is now sought to be added is a mutually destructive plea inasmuch as in the written statement that was filed by the defendants, it was pleaded that they are only copying the earlier designs and that there was no novelty in the design. Now they are claiming that the design has been registered which is destructive to the plea taken in the written statement.

(ii) It is further stated that the plaintiffs have already filed an affidavit of evidence and hence, at this stage, the present amendment cannot be accepted. Reliance is placed on the judgment of the Single Judge of this court in *Dolby International AB and Ors. vs. Das Telecom Private Ltd. & Ors.*, 2018 III AD (DEL) 435.

4. It is quite clear that what the defendants seek to add by way of amendment are subsequent developments which have arisen after filing of the suit, namely, registration of the said design in favour of the defendants. The opposition is that by allowing defendants No. 2 and 3 to raise this plea, it would be tantamount to allowing them to add a mutually destructive plea. Para 6 of the preliminary objections of the written statement shows that defendants No. 2 and 3 plead as follows:-

6. The present suit is liable to be dismissed as the writing instrument of the plaintiff is not a new and novel but a combination of various

distinct features of various pre-published designs of pens of defendant's sold under the trademarks MONTEX MELODY, MONTEX

ADDICT, MONTEX LINER, MONTEX FERRARI, MONTEX HAIWA and MONTEX EASY FLOW and defendant's pen MONTEX

MASTANI has been developed and designed by the defendants by taking the designs of various parts from its existing pre-published designs: ..

5. Hence, what is pleaded in the written statement is that the writing pen of the plaintiff is not new or novel but a combination of various distinct

features of various pre-published designs of the pen of the defendants sold under various trademarks. By the present amendment, what the defendants

seeks to add is that they have been, based on a prior application, granted registration of a design complained off by the plaintiffs under the stated

registration number in class 19-06. In my opinion, on an apparent reading of the proposed amendment it cannot be concluded that the proposed

amendment is contradictory or mutually destructive to the earlier pleas taken by the defendants in the written statement.

6. In any case, at this stage, this court has not to go into the merits of the proposed amendment. These are issues which the plaintiffs would have to

raise at the time of adjudication of the suit. Wrongly or rightly, the defendants have received a registration of their design. They only seek to place this

subsequent development on record. There is no merit in the pleas of the plaintiffs.

7. As far as the second plea of the learned counsel for the plaintiff is concerned, namely, the plaintiffs' evidence is already on record relying upon

the judgment of this court in Dolby International AB and Ors. Das Telecom Private Ltd. & Ors.(supra). This court in the said judgment had noted as

follows:-

9. This law with respect to ordinary suits of disallowing amendments after commencement of trial in my opinion will with greater emphasis

apply to commercial suits under the Commercial Courts Act, inasmuch as, the procedure and the requirements under the Commercial Courts Act are

very strict with respect to commercial suits with the stated object of the legislature to ensure early disposal of the commercial suits. Of course it is not

that even after commencement of trial amendment to pleadings should never be allowed, but that amendments should be allowed only in very limited

cases having such facts that courts should depart from the normal rule of declining amendments after commencement of trial.â??

8. Hence, even assuming for the sake of argument that the plaintiff is correct that the trial has commenced, though this aspect is seriously disputed as

the affidavit by way of evidence filed by the plaintiffs has not been tendered in evidence, even then, there is no absolute bar on bringing on record any

subsequent events arising after filing of the suit.

9. Reference may be had to the judgment of the Honâ?ble Supreme Court in the case of Baldev Singh and others versus Manohar Singh, 2006(6)

SCC 498, where in paragraph 17 the Court held as follows:-

â??17. Before we part with this order, we may also notice that proviso to Order 6 Rule 17 CPC provides that amendment of pleadings shall not be

allowed when the trial of the suit has already commenced. For this reason, we have examined the commenced. It appears from the records that the

parties have yet to file their documentary evidence in the suit. From the record, it also appears that the suit was not on the verge of conclusion as

found by the High Court and the trial court. That apart, commencement of trial as used in proviso to Order 6 Rule 17 in the Code of Civil Procedure

must be understood in the limited sense as meaning the final hearing of the suit, examination of witnesses, filing of documents and addressing of

arguments. As noted hereinbefore, parties are yet to file their documents, we do not find any reason to reject the application for amendment of the

written statement in view of proviso to Order 6 Rule 17 CPC which confers wide power and unfettered discretion to the court to allow an amendment

of the written statement at any stage of the proceedings.â??

10. Hence, the plaintiffs plea that recording of evidence has commenced is misplaced.

11. The principles relating to amendment of pleading are well settled. Reference may also be had to the judgement of the Supreme Court in the case

of Revajeetu Builders and Developers vs. Narayanswamy and Sons and Ors., (2009) 10 SCC 84, where the Supreme Court held as follows:-

â??67. On critically analyzing both the English and Indian cases, some basic principles emerge which ought to be taken into consideration while

allowing or rejecting the application for amendment:

(1) whether the amendment sought is imperative for proper and effective

adjudication of the case;

(2) whether the application for amendment is bona fide or mala fide;

(3) the amendment should not cause such prejudice to the other side which cannot be compensated adequate in terms of money;

(4) refusing amendment would in fact lead to injustice or lead to multiple litigation;

(5) whether the proposed amendment constitutionally or fundamentally changes the nature and character of the case; and

(6) as a general rule, the court should decline amendments if a fresh suit on the amended claims would be barred by limitation on the date of application.

68. There are some of the important factors which may be kept in mind while dealing with application filed under Order 6 Rule 17. These are only

illustrative and not exhaustive.â??

12. The amendment sought is bona fide. It is necessary for the purpose of determining the real question in controversy between the parties.

Accordingly, subject to payment of costs of Rs. 15,000/-, the present application is allowed.

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13. The plaintiffs may file their replication to the amended written statement within four weeks.

14. In case the plaintiffs seek to amend their affidavit by way of evidence on account of the present amendment to the written statement, they may do so within six weeks from today.

List before the Joint Registrar on 18.01.2019.