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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 10609 OF 2016.**

Shaban Amirsaheb Bamne ... Petitioner

V/s.

Rahimtabi Ibrahim Hussain (decd)
through legal heirs ... Respondents

Mr. Samit S. Kothari, for the Petitioner.
Mr. Nitin P.Deshpande, for the Respondents.

CORAM : DR.SHALINI PHANSALKAR-JOSHI, J.

DATE : 12st MARCH, 2018.

P.C. :

1] Heard learned counsel for the petitioner and learned counsel for the respondents.

2] By this petition, the petitioner is challenging the order dated 1st April, 2016, passed by District Judge 2, Khed, below Application at Exh.19 in Regular Civil Appeal No.28 of 2015.

3] Application at Exh.19 was filed by the petitioner before the Appellate Court stating that his suit which was simplicitor for injunction came to be dismissed by the Court of Civil Judge Junior Division, Khed and therefore, he has preferred the said appeal.

During pendency of appeal, he has filed application at Exh.19 seeking amendment in the plaint in order to bring on record that now the City Survey Scheme has been implemented at village Dabhol where the suit plot is situate. In that Scheme two different plot numbers have been given to the property as City Survey No.1047/a and 1047/b, out of city survey No.1047. City Survey No.1047/a is admeasuring 102. sq. meter and building thereon is belonging to the respondent/defendant. City survey No.1047/b admeasuirng 88 sq. meters, and is the open land falling under the "*Gavthan*". It belongs to the State Government. The disputed approach road is passing through city survey No.1047/b and hence it is necessary to bring on record these facts by way of amendment in the plaint before the decision of the Appellate Court.

4] This application came to resisted strongly by the respondent and the Appellate Court has vide its order rejected this application, and in my considered opinion rightly so, because even a cursory glance to the pleadings of the petitioner before the trial Court goes to show that he was very much aware of the changes made in the City Survey record which were effected in 2002. Thereafter, the petitioner has filed affidavit- in-lieu of evidence in 2007 and suit came to be decided in the year 2012.

5] This application for amendment is filed after the suit came

to be dismissed and during the course of the appeal. However, absolutely no explanation is offered by the petitioner for this delay in bringing the facts on record, which had occurred prior to filing of the suit. The Appellate Court was, therefore, justified in rejecting the said amendment which is sought at the belated stage, particularly in facts of the case that the petitioner has not pleaded in the original suit that the State Government is owner of City Survey No.1047/b admesuring 88 sq. meters. Therefore, by way of proposed amendment the nature of the suit is going to change particularly when now Government is not joined as party to the suit and if this amendment is allowed, the petitioner will seek further consequential amendment to add State Government as party to the suit. Thus, totally different set of facts will be brought before the Court and that too in a suit for limited scope of injunction. It is brought on record that the petitioner's earlier suit seeking easementary right has been dismissed.

6] In such situation, as the entire endeavour on the part of petitioner appears to be to protract the hearing of the appeal and keep litigation pending as hanging sword on the respondent, the Appellate Court, has rightly rejected the said application after considering all the aspects of the case.

7] As to the Judgment of Supreme Court, relied upon by learned counsel for petitioner in **Ragu Thilak D. John -vs-**

S.Rayappan and ors, [(2001) 2 SCC 472], the facts are that the amendment in the plaint was sought during the pendency of the suit and that too, such amendment was sought much prior to Proviso to Order VI Rule 17 of Code of Civil Procedure was introduced.

8] Now the Proviso to Order VI Rule 17 CPC, restricts the scope of the Court while considering Application for amendment. Unless such amendment is sought before commencement of hearing of the suit, as held by this Court in various judgments, Proviso acts as jurisdictional embargo for the Court to entertain such application for amendment, if it is not shown that despite due diligence the party to the litigation could not have brought these facts to the notice of the Court earlier. In the present case, no such due diligence is shown or averred by the Petitioner. Otherwise also, amendment being sought in the course of appeal, that too after lapse of 10 years, from the occurrence of cause of action. It is not in respect of events which had occurred subsequently, but those events which have occurred prior to filing of suit or during the pendency of the suit and again by that amendment the controversy is not going to be resolved completely as State Government would be necessary and proper party in the suit or appeal.

9] Considering all these facts of the case, when the Appellate Court has rejected the amendment application, in the limited scope of

writ jurisdiction, no interference in the impugned order is required.

Hence Writ Petition stands dismissed.

[DR.SHALINI PHANSALKAR-JOSHI, J.]