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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO. 4364 OF 2015

Trambak Sahadu Chavan	...	Petitioner
V/s.		
Vikram Ramnath Jadhav		
and ors	...	Respondents

Mr. Sagar Kasar a/w Mr. Amol Wagh a/w Mr.
Satish Chettiyar, for the Petitioner.
Mr. Shriram S. Kulkarni, for the
Respondents.

CORAM : DR.SHALINI PHANSALKAR-JOSHI, J.

DATE : 25th JANUARY, 2018.

P.C. :

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

2] Rule

3] Rule is made returnable forthwith with the consent of
learned counsel for both the parties.

4] The petitioner, by this petition filed under Article 227 of
the Constitution of India, is challenging the order dated 18.12.2014,

passed by 6th Joint Civil Judge Senior Division, Nashik, in R.C.S.No.252 of 2006 below the application Exh.66.

5] Application at Exh.66 was filed by the petitioner under Order VI Rule 17 of the Code of Civil Procedure for amendment in the plaint in order to bring on record certain additional facts, including the averment that he was ready and willing to perform his part of the the agreement of sale and also for seeking one additional relief that the sale deed dated 12.6.2006 executed by respondent No.1 in favour of respondent No.2 is not binding on him or on the suit property.

6] This application came to be rejected by the trial Court, on the ground that in view of Proviso to Order VI Rule 17 CPC, application cannot be tenable as the trial has already commenced and no satisfactory explanation is given about exercise of due diligence.

7] When this writ petition came up before this Court on 27th October, 2015, learned counsel for the petitioner had made a statement at Bar that he would press amendment application only as regards to addition of paragraph 5(a) and substitution of prayer clause 12(b). As regards the rest of the amendments, learned counsel for petitioner has submitted that he would not press the same.

Accordingly the parties were put to notice that in view of the narrow controversy involved, writ petition would be heard and disposed of finally at the stage of admission itself, in respect of these two paragraphs of proposed amendment in the plaint.

8] The facts of this writ petition are to the effect that, the petitioner has filed suit for specific performance of the agreement dated 24.5.2006, on the ground that respondent No.1 had refused and neglected to execute the sale deed and not only that, respondent No.1 has also executed another sale deed of the suit property in favour of respondent No.2 on 12.6.2006. Subsequent thereto, one application for amendment in the plaint was filed on the ground that respondent No.1 had made encroachment in the suit property. That application was allowed and the amendment was carried out. Thereafter the issues were framed and then petitioner has also filed his affidavit in-lieu of evidence.

9] According to petitioner, at the stage of recording evidence, on account of change of advocate, the new advocate brought to his notice that necessary averments which are required to be made in the plaint in a suit for specific performance of the contract, relating to readiness and willingness of the plaintiff to perform his part of the

contract, are not appearing in the plaint and hence it was necessary to amend the suit otherwise, the said defect will go to the root of the matter and may result into dismissal of the suit. It was also brought to notice of the petitioner by his new advocate that necessary declaration was also required to be sought that the sale deed executed by respondent No.1 in favour of respondent No.2 on 12.6.2006 is not binding on him or on the suit property.

10] Hence he has preferred the instant application for amendment of the plaint, which was strongly resisted by the respondents, firstly, on the ground that it was filed at a belated stage and secondly also, on the ground that the bar of Proviso to Order VI Rule 17 CPC, is attracted, as the trial has already commenced.

11] As regards relief of declaration sought by proposed amendment, it was submitted that the said relief is barred by limitation and therefore, said amendment relating to the declaration being apparently barred by limitation, cannot be permitted.

11A] The trial Court, vide its impugned order, rejected the said application. Hence the question necessarily arising in the present writ petition is whether in view of the Proviso to Order VI Rule 17 CPC, the

proposed amendment, which is now restricted only to para 5A and prayer clause 12(b), can be allowed.

12] It is true that the Proviso to Order VI Rule 17 CPC, clearly lays down that once trial is commenced, no application for amendment shall be allowed unless the Court comes to the conclusion that despite due diligence, the party was not able to bring these facts to the notice of the Court at an earlier stage. In the present case, however the averment made in paragraph 3 of the application clearly goes to show that petitioner became aware about the necessity of pleading as to his readiness and willingness to perform his part of contract, only when said fact was brought to his notice by the new advocate. This is a technical aspect and being a layman, the petitioner may not be aware about the importance of the averments which are required to be made in the plaint itself about readiness and willingness to perform his part of the contract. This technicality could be brought to his notice only by legal counsel and according to him, said fact remained to be pleaded in the plaint inadvertently and on account of such defect which is going to the root of the suit, his suit is likely to be dismissed.

13] In my considered opinion, therefore, in the interest of

substantive cause of justice, such amendment, which is only to remove the technical defect in the pleadings needs to be allowed. It is not that, by this amendment petitioner is introducing any new cause of action or the proposed amendment is changing the nature of the suit. Moreover, though the trial has commenced, till today the cross examination of the petitioner -plaintiff is yet to start. Hence, respondents would get an opportunity to cross examine the petitioner on this aspect of the fact and also they will get opportunity to lead their evidence. Therefore, no question of any prejudice is likely to be caused to the respondents if the amendment is allowed, even at this stage, after technically speaking the trial has commenced.

14] As regards the second amendment sought by the petitioner that of declaration, relating to sale deed, it is pertinent to note that in the plaint paragraph 12(b), he has already sought declaration that the sale deed executed by respondent No.1 in favour of respondent No.2 be declared as cancelled. Now the petitioner is seeking declaration that the sale deed is not binding upon him or on the suit property. Thus, the relief of declaration relating to said sale deed was definitely stated in the plaint and there are specific averments in the plaint as to why he was challenging the said sale deed. Therefore, it cannot be said that he has any intention of giving

up or omitting or rescinding the said relief in the plaint. Conversely, such relief was very much sought. Now only he wants to change the nature of the declaration which he has sought earlier. Therefore, on this aspect also, it cannot be said that the relief, which petitioner is seeking by way of proposed amendment is apparently barred by limitation or it is changing the nature of the suit or in any way causing grave prejudice to the respondent. There is sufficient foundation made in the plaint for the relief sought by the proposed amendment.

15] As held by the Hon'ble Apex Court, in **Abdul Rehman and another -vs- Mohd. Ruldu and others**, [(2012) 11 SCC 341], if entire factual matrix of the relief sought for under the proposed amendment had already been set out in the unamended plaint and the proposed amendment does not change the nature of the suit as alleged, such amendment can be allowed. It was held that the challenge to the sale deeds was implicit in the factual matrix set out in the unamended plaint and therefore, the relief of cancellation of sale deeds as sought by the amendment does not change the nature of the suit. It is settled law that if necessary factual basis for amendment is already contained in the plaint, the relief sought on such basis would not change the nature of the suit. Moreover, if such

proposed amendment is to protect plaintiff's interest and not to change basic nature of the suit, in order to avoid multiplicity of proceeding and to determine real question in controversy between the parties, such amendment should be allowed in the larger interests of doing full and complete justice between the parties.

16] As per the settled position of law also, the approach of the Court has to be liberal while considering the application for amendment in the pleading. Such amendment should not be rejected merely because it is sought at a belated stage. To the contrary, all the amendments which are necessary for determining real question of controversy between parties, completely and finally need to be allowed in order to avoid multiplicity of proceeding and to sub-serve substantive cause of justice.

17] Here in the case, proposed amendment is having foundation in the pleading and also not changing the nature of the suit and it is also not causing any prejudice to the respondents as respondents can cross examine the petitioner on the proposed amendment. Moreover, as the proposed amendment is going to help the Court to determine the question involved in controversy between the parties finally, effectively and completely, the trial Court should

have allowed the said amendment application.

18] The impugned order, therefore, passed by the trial Court rejecting the same, being not just, legal and correct, it is set aside.

19] Writ Petition is, thus allowed.

20] The impugned order passed by the trial Court is quashed and set aside.

21] The Petitioner's application for amendment of the plaint at Exh.66 is hereby allowed.

22] The petitioner to carry out the proposed amendment in the plaint within two weeks from the receipt of order.

23] In case of petitioner's failure to do so, application will stand automatically dismissed without further reference to this Court.

24] Rule is made absolute in above terms.

[DR.SHALINI PHANSALKAR-JOSHI, J.]