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

WRIT PETITION NO.7849 OF 2016

Hind Saurashtra Industries Co-op
Soc Ltd

... Petitioner

V/s.

The Municipal Corporation of
Greater Mumbai and anr

... Respondents

Mr. Mayur Khandeparkar a/w Mr. Tushar Gujar and
Mr. Deepak Singh i/by Solicis Lex, for the Petitioner.
Mr. B. M. Chatterji, Senior Advocate with Mr. Pradeep
Patil and Mrs. Maya Majumdar, for the Respondent
Nos. 1, 2 and 6.

CORAM : DR.SHALINI PHANSALKAR-JOSHI, J.

DATE : 18th APRIL, 2018.

P.C. :

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

2] By this petition filed under Article 227 of the Constitution
of India, the petitioner is challenging the order dated 6.2.2016, passed
by City Civil Court, Dindoshi, Borivali Division, Goregaon, Mumbai, in
Draft Chamber Summons in L. C. Suit No.2805 of 2009.

3] The said Draft Chamber Summons was filed by the present
petitioner, who is plaintiff before the trial Court, for carrying out

necessary amendment in the plaint under Order VI Rule 17 of Code of Civil Procedure.

4] It was submitted that the Draft Chamber Summons is filed only to bring on record certain facts which remained to be pleaded in the plaint and consequential reliefs thereto. The petitioner has filed the suit for injunction restraining the respondents from demolishing and from digging/excavating private road of the plaintiff's structures, and from encroaching/trespassing upon the property of the petitioner and to pay compensation and/or to restore and to reconstruct the compound wall of the petitioner society.

5] However, during the cross examination of the petitioner, it was pointed out that the petitioner has not raised any challenge to the notice issued by the respondent corporation in the year 2006 and hence now it has become necessary for the petitioner to seek consequential pleading that the notice dated 23.2.2006, which was issued by the respondent corporation is not legal and valid. For seeking such relief, various grounds were sought to be added in the plaint.

6] The trial Court has considered the proposed amendment and it was found by the trial Court that the amendment was sought at very belated stage, when the suit was kept for final argument and particularly, application for amendment was also conspicuously

silent about the delay and the exercise of due diligence as to why all these facts were not brought to the notice of the Court at an earlier stage. Hence, on both these grounds, the trial Court has rejected the said application.

7] While challenging this order of the trial Court, the submission of learned counsel for the petitioner is that the grounds on which the notice dated 23.2.2006 is challenged, are implicit in the plaint. Now the petitioner seeks to add those averments expressly so as to take care that no technical objection remains on that score. It is submitted that these facts remained to be brought to the notice of the Court, when the plaint was drafted by the earlier advocate and therefore, trial Court should have allowed to bring on record these facts by allowing the amendment application, by keeping all the questions and contentions of the parties expressly open.

8] In support of his submission, learned counsel for the petitioner has relied upon the judgment of this Court in *Sarvadaman M. Doshi and anr -vs- Bank of India and ors*, [2016 SCC Online Bom 855], wherein; as the amendment was merely seeking to add one more effective relief so as to take care of any technical objection on that score, this Court has allowed the said amendment, without prejudice to the rights and contentions of the parties in pending Notice of Motion as well in the suit.

9] Per contra, learned counsel for respondent corporation has relied upon the law laid down by the Hon'ble Apex Court in the case of *Vidyabai and others -vs- Padmalatha and another [(2009) 2 SCC 409]*, and submitted that the amendment is sought at such a belated stage when the matter is kept for final argument, the amendment application is devoid of consideration in view of the express bar laid down in the Proviso to Order VI Rule 17 of the Code of Civil Procedure, which is couched in a mandatory form and therefore without there being any averment as to the exercise of due diligence, such application for amendment has been rightly rejected by the trial Court and no interference is warranted in the impugned order.

10] It is undisputed position that the suit is filed in the year 2009. Alongwith the suit, Notice of Motion was also filed for interim relief. Interim relief was obtained, restraining the Municipal Corporation from acting in pursuance of statutory duties. That relief was continued from time to time till the matter was kept for hearing. In paragraph No.4 of the order, trial Court has observed that, the matter was kept for cross-examination and after adjournments on several dates matter was adjourned for want of evidence. Ultimately, it kept on 12..8.2015 granting a last chance to proceed with the cross examination. Thereafter cross-examination of the petitioner was conducted and then this application was filed for amendment, when

the matter was kept for argument and final hearing on 6.1.2016.

11] Thus, the facts of the case apparent on the face of record show that there is inordinate delay in filing the application for amendment. Therefore, it was for the petitioner to explain such delay as to why he could not bring to the notice of the Court these facts at an earlier stage, when all the facts were very much within his knowledge since the date of filing of the suit and much before it. The petitioner has not offered any explanation about this delay and hence as held by the Apex Court in the case of *Vidyabai and ors -vs- Padmalath and anr (supra)*, in view of Proviso to Order VI Rule 17 C.P.C., a clear embargo is laid down that, once the trial has commenced, no amendment in the pleading shall be allowed, unless the party makes out a case that despite due diligence, he could not have sought such amendment earlier. Here in the case, entire Draft Chamber Summons and the affidavit in support thereof is conspicuously silent about the exercise of due diligence. In absence thereof, this Court cannot consider even the merits of the application for amendment.

12] As regards the submission of learned counsel for petitioner that whatever amendment sought is implicit in the plaint, this Court cannot close eyes to the fact that on account of the proposed amendment, the suit will go to its original stage and

meanwhile the order of interim relief which is already extended from time to time for about 9 years will again have to be extended. It is definitely going to cause great prejudice to the respondent Municipal Corporation. Moreover, if the facts proposed to be brought on record were very much within the knowledge of the petitioner and not pleaded, now the requisite relief in respect of declaration of the notice dated 23.2.2006 as being illegal, null and void is allowed to be brought on record, it being a time barred relief, it will cause grave prejudice to respondent corporation. It will also change the nature of the suit.

13] The trial Court has, thus, after considering all these aspects of the case, rightly rejected the said Draft Chamber Summons. In writ jurisdiction, this Court cannot substitute its opinion in place of the opinion or view taken by the trial Court. The writ petition, therefore, being without merit stands dismissed.

[DR.SHALINI PHANSALKAR-JOSHI, J.]