

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

WRIT PETITION NO. 10170 OF 2017

M/s.Rehab Housing Pvt. Ltd.	...	Petitioner
V/s.		
Vaman Laxman Shelke & Ors.	...	Respondents

Mr.Salik Khan for the Petitioner.
None for the Respondents.

CORAM : DR.SHALINI PHANSALKAR-JOSHI, J.

DATE : 4th JANUARY, 2018.

ORAL JUDGMENT :-

1] Heard learned counsel for the Petitioner, finally at the stage of admission itself.

2] By this petition filed under Article 227 of the Constitution of India, the Petitioner is challenging the order dated 1st August, 2016 passed by Joint Civil Judge Senior Division, Panvel, below Exhibit 74 in Special Civil Suit No.433 of 2007. The said application was filed by the Petitioner under Order-VI Rule-17 of the Civil Procedure Code (for short "C.P.C.") seeking amendment in the plaint in order to claim additional relief that the sale-deed executed by Defendant No.2 in favour of subsequent transferee i.e. Defendant No.3 is not binding on

him. An incidental amendment in the suit valuation clause was sought.

3] This application, however, came to be rejected by the trial Court holding that the amendment is sought in respect of the relief which is time barred and hence, it is going to jeopardize the rights of the Respondents-Defendants and therefore, it was held that the amendment is unjustified and against the principle of law of limitation.

4] While challenging this impugned order of the trial Court, the submission of the learned counsel for the Petitioner is that on the application of Defendant No.3, he was impleaded in the suit under Order-1 Rule-10(2) of C.P.C. vide order dated 30th July, 2012. However, at that time, this consequential relief of declaration remained to be claimed against him and therefore, by this amendment application, the Petitioner was only seeking the consequential relief. It is submitted that Defendant No.3 has not opposed this application, only Defendant No.2 has opposed it on the count that the issues are framed and the suit is fixed for hearing. It is urged that the question of limitation should not have been considered by the trial Court at the stage of deciding the application for amendment. According to learned counsel for the Petitioner, therefore, the amendment sought being of a consequential nature, the trial Court should have allowed the same.

5] However, in my considered opinion, in view of Proviso to Order-VI Rule-17 of C.P.C., a clear embargo is laid down to the effect 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. As held by the Apex Court in the case of *Vidyabai & Ors. Vs. Padmalatha & Anr. [(2009) 2 SCC 409]*, the Proviso to Order-VI Rule-17 is couched in a mandatory form. Hence the Court's jurisdiction to allow such an application is taken away unless the conditions precedent laid down therein therefor are satisfied viz. Court must come to a conclusion that inspite of due diligence the party could not have raised the matter before the commencement of the trial. In the present case, it is evident that the Petitioner has not been able to fulfill the said condition. Admittedly, in this case, the suit was filed in the year 2007 itself. Issues are also framed therein and the trial has commenced. Hence it was incumbent upon the Petitioner to show that despite due diligence he could not have sought this amendment earlier before the commencement of the trial.

6] In the case, the entire application for amendment which is filed by the Petitioner before the trial Court is conspicuously silent as to why this amendment was not sought earlier; especially, when in the

year 2012 itself, on the application of Defendant No.3 he was added as a party to the suit, on the very ground that Defendant No.2 has executed sale-deed of the suit property in his favour. Therefore, in the year 2012 itself, the Petitioner was aware about the impleadment of Defendant No.3 and also about the sale-deed executed by Defendant No.2 in his favour. Despite that, the amendment was not sought seeking the consequential relief of setting aside the said sale-deed till the year 2016 and that too after the issues were framed and the suit was fixed for recording of the evidence.

7] In such situation, sans any averments in the application to show that despite due diligence, the Petitioner could not have sought this amendment at an earlier stage, such amendment application cannot be allowed in view of the clear embargo laid down in view of Proviso to Order-VI Rule-17 of C.P.C.. As held by the Apex Court in the case of *Vidyabai & Ors. Vs. Padmalatha & Anr. (supra)*, the Proviso appended to Order-VI Rule-17 C.P.C. restricts the power of the Court. It puts an embargo on exercise of its jurisdiction. The Court's jurisdiction in a case of this nature is limited. Thus, unless the jurisdictional fact, as envisaged therein, is found to be existing, the Court will have no jurisdiction at all to allow the amendment of the plaint.

8] In this case, the trial Court has also considered the aspect of the amendment sought being barred by limitation. Even if one accepts that the point of limitation could have been considered after the amendment was allowed, the fact remains that the Petitioner has failed to cross the bar created under the Proviso to Order-6 Rule-17 of C.P.C.. In view thereof, the trial Court has rightly rejected the Petitioner's application for amendment of the plaint. As a result, no interference is warranted in the impugned order of the trial Court.

9] Writ Petition, therefore, being without merits, stands dismissed.

[DR.SHALINI PHANSALKAR-JOSHI, J.]