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

WRIT PETITION NO.13902 OF 2016

Sunil Bhosale ... Petitioner
V/s.
Mohammad Ayaj Maqbool Shaikn
and ors ... Respondents.

Mr. Rajshekhar Sangappa Alange, for the Petitioner.
Mr. Prasad Pradeep Kularni, for the Respondents.

CORAM : DR.SHALINI PHANSALKAR-JOSHI, J.

DATE : 1st FEBRUARY, 2018.

P.C. :

- 1] Heard learned counsel for the petitioner and respondents.
- 2] Rule.
- 3] Rule is made returnable forthwith with the consent of parties and the petition is heard finally at admission stage.
- 4] By this writ petition, filed under Article 227 of the Constitution of India, the petitioner is challenging the order dated 10th August, 2016, passed by 4th Ad-Hoc Additional District Judge, Solapur, below Exh.5, in Civil Appeal No.444 of 2012.
- 5] Application at Exh.5 was filed by the petitioner under Order VI Rule 17 of the Code of Civil Procedure, seeking amendment in the plaint, in order to specifically plead that he was ready and

willing to perform his part of the agreement. It is submitted that in the absence of such averment in the plaint, the trial Court has not granted the specific performance of the agreement and decreed the suit only to the extent of refund of earnest money. Therefore, the request was made to the Appellate Court that the petitioner may be permitted to plead that he was and is ready and willing to perform his part of the contract, so that on technical ground, he should not be deprived from getting relief of specific performance of the agreement.

6] This application, was, however, resisted by respondent contending that this application was filed at a very belated stage. The suit was filed in the year 2011. The suit is partly decreed, then appeal was filed in the year 2012 and the application for amendment is filed in the year 2016. Therefore, at this stage, if such amendment is allowed, then the matter would be required to be remanded to trial Court for recording of the evidence and for giving finding on the said issue.

7] The Appellate Court, accordingly rejected the application on the ground that the amendment is sought at the belated stage and that too without any satisfactory explanation for the same. It was held that the amendment is not only an after thought but if it is allowed, it will cause prejudice to the respondent.

8] While challenging this order of the Appellate Court,

submission of learned counsel for the petitioner is that under Order 41 Rule 25 of Code of Civil Procedure, the Appellate Court can not only permit such amendment, but can also call upon the finding over a particular issue from the trial Court and can thereafter decide the appeal.

9] Here in the case, it is urged that on account of absence of averment in the plaint that petitioner was ready and willing to perform his part of the contract, the trial Court has rejected petitioner's prayer for specific performance. Hence, in the interest of substantive cause of justice, the petitioner may be permitted to carry out such amendment and this Court may also make the hearing of the suit time bound.

10] However, in my considered view, allowing such amendment in the plaint, at this stage, when the appeal is fixed for final hearing and that too in a suit which was filed in the year 2011, would be as good as reverting the parties to the original status, because if the amendment is allowed, then respondent will get right to challenge the same by filing written statement. Thereafter additional issue will be required to be framed and then petitioner needs to be given an opportunity to lead evidence. In the light of such issue and additional evidence, the judgment of the trial Court will have to be set aside. Thus, it will amount to re-opening of the entire suit, that too

after the lapse of about 7 years from the date of filing of the suit and after 10 years from the date of agreement, which was executed on 14.8.2008. It is, hence, going to cause grave prejudice to the respondent, especially in the light of the fact that such amendment is sought at a belated stage and therefore, the Appellate Court has already held it to be as an after thought.

11] As against it, in my considered view, no prejudice is likely to be caused to the petitioner if the amendment is not allowed as even in the absence of such averment of readiness and willingness in the plaint, the petitioner can succeed in proving, on the basis of other averments in the plaint and the evidence already led that, he was and is ready and willing to perform his part of the contract. Absence of such averment, as per settled position of law is not fatal, if readiness and willingness can be proved otherwise. If according to petitioner, there is sufficient evidence on record, like issuance of three month's notice prior to filing of suit and also his remaining present in the office of Sub Registrar for execution of the sale deed, then the petitioner, can on the basis of same put forward his prayer for specific performance in the Appellate Court . Therefore, no prejudice is going to be caused to the petitioner. However, if the amendment is allowed, then definitely as parties would be reverted back to the same position, after 10 years from the date of agreement, grave prejudice is

going to be caused to the respondent.

12] In view thereof, no interference is warranted in the impugned order passed by the trial Court.

13] Writ Petition being without merits stands dismissed.

14] It is clarified that whatever observations are made herein-above, are only for the purpose of deciding this writ petition and the Appellate Court should not swayed thereby.

[DR.SHALINI PHANSALKAR-JOSHI, J.]