

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 5930 OF 2016

Vasantrao S. Bhosale and ors. .. Petitioners

vs.

Ganesh V. Bhosale and anr. .. Respondents

Mr. A.B. Tajane for the Petitioners.

CORAM : M. S. SONAK, J.

DATE : 02 MAY 2019.

ORAL JUDGMENT :-

1] Heard Mr. Tajane, learned counsel for the petitioners.

2] The challenge in this petition is to the order dated 2nd July 2015 by which the Appeal Court has dismissed the petitioners' application at Exhibit-21 seeking leave to amend the written statement.

3] Mr. Tajane submits that the pleadings can be amended at any stage. He submits that the appeal is nothing but a continuation of the suit and therefore, there is no bar to seeking leave to amend the pleadings at the appellate stage. He submits that the impugned order is quite cryptic and was passed even before the opposite party could file any reply to

the amendment. He now clarifies that the opposite party were not given opportunities to file reply and no replies were filed. He points out that the amendment is necessary to decide the real controversy which arises between the parties. He submits that no prejudice whatsoever will occasion the respondents and the prejudice, if any, can always have been compensated by way of costs. He submits that severe prejudice will occasion to the petitioners, in case, the leave to amend is denied. For all these reasons, Mr. Tajane submits that the impugned order warrants interference.

4] The record indicates that the suit was instituted in the year 2008. The suit was decreed on 14th May 2013. during pendency of the suit, the petitioners, who are defendants, chose not to seek any leave to amend their written statement. In the appeal, the petitioners took out application at Exhibit-21 on 19th March 2015 and have applied for leave to amend the written statement.

5] If the application at Exhibit-21 is perused, then the only reason stated therein for seeking leave to amend at such

a belated stage is that such amendment remained to be incorporated or such pleadings remained to be made in the original written statement on account of “*inadvertence*” or “*oversight*”.

6] The proviso to Order 6 Rule 17 of CPC is very clear inasmuch as an application seeking leave to amend after commencement of the trial in the suit is not to be allowed unless of-course the Court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial.

7] In the case of ***J. Samuel and others vs. Gattu Mahesh and ors. - (2012) 2 SCC 300***, the Honble Supreme Court has held that the legal position consequent upon introduction of the proviso to Order 6 Rule 17 of CPC has undergone a significant change and the Courts are not to allow amendment to the pleadings after commencement of trial unless, the Court record conclusion that despite due diligence the party could not have raised the matter before the commencement of the trial.

8] Further, the Supreme Court in *J. Samuel (supra)* has observed in paragraph 18 to 23, which read as under:

18) The primary aim of the court is to try the case on its merits and ensure that the rule of justice prevails. For this the need is for the true facts of the case to be placed before the court so that the court has access to all the relevant information in coming to its decision. Therefore, at times it is required to permit parties to amend their complaints. The Court's discretion to grant permission for a party to amend his pleading lies on two conditions, firstly, no injustice must be done to the other side and secondly, the amendment must be necessary for the purpose of determining the real question in controversy between the parties. However to balance the interests of the parties in pursuit of doing justice, the proviso has been added which clearly states that:

“no application for amendment shall be allowed after the trial has commenced, unless the court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial.”

(emphasis supplied)

19) Due diligence is the idea that reasonable investigation is necessary before certain kinds of relief are requested. Duly diligent efforts are a requirement for a party seeking to use the adjudicatory mechanism to attain an anticipated relief. An advocate representing someone must engage in due diligence to determine that the representations made are factually accurate and sufficient. The term ‘due diligence’ is specifically used in the Code so as to provide a test for determining whether to exercise the discretion in situations of requested amendment after the commencement of trial.

20) A party requesting a relief stemming out of a claim is required to exercise due diligence and it is a requirement which cannot be dispensed with. The term “due diligence” determines the scope of a party's constructive knowledge, claim and is very critical to the

outcome of the suit.

21) In the given facts, there is a clear lack of 'due diligence' and the mistake committed certainly does not come within the preview of a typographical error. The term "typographical error" is defined as a mistake made in the printed/typed material during a printing/typing process. The term includes errors due to mechanical failure or slips of the hand or finger, but usually excludes errors of ignorance. Therefore the act of neglecting to perform an action which one has an obligation to do cannot be called as a typographical error. As a consequence the plea of typographical error cannot be entertained in this regard since the situation is of lack of due diligence wherein such amendment is impliedly barred under the Code.

22) The claim of typographical error/mistake is baseless and cannot be accepted. In fact, had the person who prepared the plaint, signed and verified the plaint showed some attention, this omission could have been noticed and rectified there itself. In such circumstances, it cannot be construed that due diligence was adhered to and in any event, omission of mandatory requirement running into 3 to 4 sentences cannot be a typographical error as claimed by the plaintiffs. All these aspects have been rightly considered and concluded by the trial court and the High Court has committed an error in accepting the explanation that it was a typographical error to mention and it was an accidental slip.

23] Though the counsel for the appellants have cited many decisions, on perusal, we are of the view that some of those cases have been decided prior to the insertion of Order 6 Rule 17 with proviso or on the peculiar facts of that case. This Court in various decisions upheld the power that in deserving cases, the Court can allow delayed amendment by compensating the other side by awarding costs. The entire object of the amendment to Order 6 Rule 17 as introduced in 2002 is to stall filing of application for amending a pleading

subsequent to the commencement of trial, to avoid surprises and that the parties had sufficient knowledge of other's case. It also helps checking the delays in filing the applications. [vide Aniglase Yohannan vs. Ramlatha and Others, (2005) 7 SCC 534, Ajendraprasadji N. Pandey vs. Swami Keshavprakeshdasji N. - (2006) 12 SCC 1, Chander Kanta Bansal vs. Rajinder Singh Anand- (2008) 5 SCC 117, Rajkumar Gurawara vs. S.K.Sarwagi and Company (P) Ltd. - (2008) 14 SCC 364, Vidyabai vs. Padmalatha - (2009) 2 SCC 409 and Man Kaur vs Hartar Singh Sangha, (2010) 10 SCC 512.]”

9] In the present case, there is absolutely no explanation on the aspect of due diligence and on that short ground, the petitioners' application seeking leave to amend warranted dismissal.

10] The fact that the opposite party may not have filed any reply despite being granted opportunities to do so, does not mean that the Court is obliged to act in breach of proviso to Order 6 Rule 17 of CPC. In this case, the delay is inordinate. The original suit had already been disposed of. In the appeal, without furnish of any explanation on the aspect of due diligence, the petitioners seek to amend the written statement.

11] From the perusal of the application seeking leave to amend, it is clear that the petitioners seek to withdraw their

own pleadings and on such basis, seek reversal of the decree made. Mr. Tajane, however, submits that the Courts are required to go into the merits of the proposed amendment at the stage of deciding whether leave to amend should be granted or not. The Courts, can go into the issue as to whether proposed amendment seeks to set up an entirely new case or seeks to withdraw admission earlier made. However, even if this aspect is kept aside for the moment, it is clear that the proviso to Order 6 Rule 17 of CPC comes in the way of the petitioner.

12] For the aforesaid reasons, this petition is required to be dismissed and is hereby dismissed. There shall be no order as to costs.

13] All concerned to act on the basis of authenticated copy of this order.

(M. S. SONAK, J.)