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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.2880 OF 2016

Prakash Tukaram Walwekar ..Petitioner.

V/s.

Walpet Industries registered Partnership firm ..Respondent.

Mr.Wasim Samlewale i/b. Akhil Kupade for the petitioner.

Mr.Umesh H.Pawar for respondent Nos.1, 2, 3A & 3B.

CORAM : M.S.SONAK, J.

DATE : APRIL 4, 2019

ORAL JUDGMENT

Heard Mr.Samlewale, learned counsel for the petitioner and Mr.Pawar, learned counsel for respondent Nos.1, 2, 3A and 3.

2. Mr.Samlewale, learned counsel for the petitioner points out that the remaining respondents have been served by substituted service by publication.

3. Challenge is to the order dated August 4, 2015 by which learned trial Judge has rejected the petitioner's application for amendment to the plaint.

4. Upon reading the impugned order, it is very clear that learned trial Judge has failed to exercise jurisdiction vested in him only

Corrected pursuant to the speaking to the minutes of the order dated 9/4/2019

on the ground that the petitioner, in his application seeking leave to amend, or even otherwise, has failed to explain that such an application seeking leave to amend was not taken out before commencement of the trial. In short, learned trial Judge has relied upon the proviso to Order 6 Rule 17 of the Code of Civil Procedure (the CPC) which requires the party seeking amendment after trial, has commenced to demonstrate that despite due diligence, the said party could not have raised such matter before commencement of the trial.

5. However, as was rightly pointed out by Mr.Samlewale, the present suit was instituted in the year 2001 i.e. prior to the 2002 amendment to the CPC by which the proviso to order 6 Rule 17 of the CPC was introduced. Mr.Samlewale pointed out that the Supreme Court *State Bank of Hyderabad V/s. Town Municipal Council*¹ has categorically held that amendment in the CPC by which proviso to order 6 Rule 17 of the CPC was introduced, has no application to a suit instituted prior to the said amendment coming into force.

6. Therefore, in the present case, learned trial Judge was not justified in placing upon the proviso to order 6 Rule 17 of the CPC and on such basis declining to exercise jurisdiction to even consider the petitioner's application for leave to amend.

7. On the aforesaid short ground, the impugned order is liable

¹ (2007) 1 SCC 765

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to be set aside and is hereby set aside.

8. Learned trial Judge is directed to decide the petitioner's application seeking leave to amend on its own merits and in accordance with law without advertent to the proviso to order 6 Rule 17 of the CPC. Such application is now directed to be decided as expeditiously as possible and in any case, within a period of two months from today.

9. It is made clear that this Court has not adverted to the rival contentions on merits and, therefore, all contentions on merits are left open for determination by learned trial Judge.

10. Interim relief granted in this petition is now vacated. The parties to appear before the trial Judge on April 16, 2019 at 11.00 a.m. and file an authenticated copy of this order.

11. Rule is made absolute in aforesaid terms. There shall be no order as to costs.

12. All concerned to act on the basis of an authenticated copy of this order.

(M.S.SONAK, J.)