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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 11216 OF 2019**

ICICI Bank Ltd.

..... Petitioner.
(Original Defendant)

V/s

Arvind Pal Singh

.....Respondent.
(Original Plaintiff)

Mr. Mayur Bhojwani a/w Ms. Ravji Mehta i/b Manilal Kher Ambalal &
Co. for the Petitioner.

Ms. Rupali Akolkar for Respondent No.2.

CORAM: NITIN W. SAMBRE, J.

DATE: JANUARY 25, 2021

P.C.:-

1] This Petition is by the Defendant employer in Civil Suit No. 467 of 2014, which is for declaration that there is breach of contract of service dated 08/01/2004 and as such resignation given by Respondent is proper and to accept his resignation dated **02/09/2008** by issuing him service certificate. Based on the same, Petitioner filed its Written Statement and after framing of issues, Respondent/Plaintiff has completed his evidence. At said stage in December 2017 i.e. after about three years, Respondent has sought amendment to the pleadings and sought declaration that he was in service of the Defendant from 02/09/2008 till 09/04/2013 and Defendant be directed to pay him

salary for the said period. Reinstatement and continuity of service was also sought with entire back-wages by way of amendment.

2] The said amendment application-Exhibit-33 came to be allowed by the order impugned dated 15/6/2019. As such, this Petition.

3] The learned Counsel for the Petitioner would urge that suit initiated by the Respondent/Plaintiff is at an advance stage i.e. recording of evidence of Plaintiff is already over. According to him, cause of action as is claimed in the suit is for the years 2008 to 2013. The suit was initiated in 2016 and the amendment therein is sought in 2017. As such, submissions are, amendment as granted is not permissible as (a) the amendment changes nature of the suit claim which has taken the Petitioner by surprise and (b) stage of the suit at which the same has been moved is not permissible in view of proviso to Rule 17 of Order 6 of the Civil Procedure Code. In support of the said submissions, reliance is placed on the following judgments

(i) Pandit Malhari Mahale vs Monika Pandit Mahale and Others reported in **(2020) 11 SCC 549**

(ii) Vidyabai and Others vs. Padmalatha and Another

reported in **(2009) 2 SCC 409**.

4] While countering the aforesaid submissions, learned Counsel for the Respondent/Plaintiff would urge that the amendment was very much required so as to decide the real controversy between the Plaintiff and Defendant. According to her, at the most, by way of amendment there would be some improvement in the relief claimed, however, nature of pleadings are not sought to be changed which would take the Petitioner by surprise. The learned Counsel would then urge that no prejudice would be caused to the Petitioner/Defendant because of the order impugned as the Petitioner will be entitled for consequential amendment.

5] Considered rival submissions.

6] From the record it appears that initially suit of Respondent was for declaration that there is breach of contract of service dated 18/1/2004 which of-course was verymuch prayed before the amendment was sought. However, the declaration that from 02/09/2008 to 09/04/2013, Plaintiff was in the employment of the Petitioner/Defendant and as such he is entitled for back-wages and

reinstatement is sought to be inserted by way of afterthought. Admittedly trial in the suit has already commenced and in view thereof, proviso to Rule 17 of Order 6 will be attracted. In the background of the aforesaid, it can be inferred that Trial Court while granting amendment has not observed about its satisfaction on the issue of due diligence of the Respondent/Plaintiff in the matter of grant of amendment. It is the duty of the Court to decide as to whether the amendment was necessary so as to decide real controversy between the parties and whether Plaintiff has established that in spite of due diligence he could not introduce the amendment before commencement of trial.

7] In the facts of the case, the pleadings sought to be inserted by way of amendment was verymuch available to the Plaintiff even before commencement of the trial and as such test of due diligence is not satisfied by the Respondent/Plaintiff before the Court below as envisaged under proviso to Rule 17 of order 6 of the Civil Procedure Code. As such learned Counsel for the Petitioner was right in inviting attention of this Court to the judgments in the matter of *Pandit Malhari Mahale* and *Vidyabai* cited supra.

The case sought to be inserted by way of amendment is contradictory to the claim initially made in the suit. Initially, in the suit prayer was for acceptance of resignation whereas through amendment prayer of reinstatement with back-wages is sought to be inserted. As such, a new case is sought to be inserted by way of amendment.

8] As such, Petition stands allowed. The order impugned dated 15th June, 2019 passed below Exhibit-33 is hereby set aside. Application-Exhibit-33 as such stands rejected.

(NITIN W. SAMBRE, J.)

Corrected as per order dated 10.2.2021.