

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

**WRIT PETITION NO.3415 OF 2013
WITH CA/259/2022 IN WP/3415/2013**

**M/S. USHAKANT STEELS PVT. LTD. AND OTHERS
VERSUS
M/S. BHUVNESH FINANCE AND INVESTMENT PVT. LTD. AND
ANOTHER**

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Advocate for Petitioners : Mr. Siddharha B. Yawalkar
Advocate for Respondent No.1 : Mr. Prasad Jarare h/f
Mr. S. S. Thombre

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CORAM : NITIN B. SURYAWANSHI, J.

DATE : 29th JUNE, 2022

PER COURT :

1. This petition, filed under Article 227 of the Constitution of India, is directed against the order passed below Exhibit-139 in Summary Suit No.05/2000, by the 3rd Joint Civil Judge, Senior Division, Jalgaon, by which the trial Court has allowed the application filed by the respondent No.1 under Order 6 Rule 17 read with Order 37 Rule 7 of the Code of Civil Procedure.

2. Respondent No.1 filed the summary suit under Order 37 of the Code of Civil Procedure against the petitioners seeking recovery of Rs.53,02,771/- which includes principal amount of Rs.27,81,670/- and interest of Rs.24,44,516/-. In the said suit issues were framed on 21-09-2005. On 20-12-2005 affidavit in lieu of evidence is filed by the plaintiff. Thereafter on 26-02-2008 the

application for amendment is filed, which though resisted is allowed by the trial Court. Hence, the present petition.

3. Heard the learned advocate for petitioners and learned advocate for respondent No.1.

4. Learned advocate for petitioners assailed the impugned order contending that the amendment changes the nature of the suit and the reliefs claimed. There is total lack of due diligence on the part of the respondents in seeking the amendment. The notice reply was given by the petitioners on 08-11-2000 and since then the respondents had knowledge and from that date limitation starts running. According to him, as per Article 137 of the Limitation Act, the amendment sought is beyond limitation and hence, ought not to have been allowed. The claim which is sought to be raised by way of amendment, is beyond limitation. Since Order 37 prescribes summary procedure, this amendment should have been rejected by the trial Court. In support of his submissions, he relied on *Harinarayan G. Bajaj and Another Vs. Vijay Agarwal and Others* [2012(2) Mh.L.J. 106], *J. Samuel and Others Vs. Gattu Mahesh and Others* [(2012)2 SCC 300], *K. Raheja Constructions Ltd. Vs. Alliance Ministries and Others* [AIR 1995 SC 1768] and *Van Vibhag Karamchari Griha Nirman Sahkari Sanstha Maryadit (Registered) Vs. Ramesh Chander and Others* [(2010) 14 SCC 596].

5. Learned advocate for respondent No.1, on the other hand, submits that there is no change in cause of action as the claim of the same amount is there. In terms of order 6 Rule 17 of the Code of Civil Procedure, at any stage the trial Court is entitled to permit the parties to amend their pleadings. By relying on ***Revajeetu Builders and Developers Vs. Narayanaswamy and Sons and Others [(2009) 10 SCC 84]***, he submits that the Trial Court is justified in allowing the amendment and the petition being devoid of merit be dismissed.

6. As per record, in a suit filed under Order 37 of the Code of Civil Procedure by respondent No.1, issues are framed on 21-09-2005. The plaintiff has filed his affidavit in lieu of evidence on 20-12-2005, and thereafter the present application for amendment is filed on 26-02-2008 i.e. after commencement of the trial.

7. While allowing the application, the Trial Court has held that *"it appears that there is admitted position about the business relation in plaintiff and defendants Chmapak Steels and etc. However, considering the facts and circumstances of the case and as the hearing of the suit is not beginning up till now, considering this facts in order to avoid multiplicity of the cases and to decide real controversy between the parties and for want of fair trial and considering the respected principle of Hon'ble Supreme Court and*

High Court mentioned about the provisions of law, I came to the conclusion that this application is likely to be allowed...”

8. It is also a matter of record that the defendants in the suit are the directors of Champak Steel. The business relations between the parties are admitted on record. In that view of the matter, the Trial Court is justified in coming to the conclusion that in order to avoid multiplicity of the litigation and to decide real controversy between the parties and for fair trial, the amendment needs to be allowed.

9. In ***Revajeetu Builders and Developers*** (supra), the Hon’ble Supreme Court has held :-

"67. On critically analyzing both the English and Indian cases, some basic principles emerge which ought to be taken into consideration while allowing or rejecting the application for amendment.

(1) Whether the amendment sought is imperative for proper and effective adjudication of the case?

(2) Whether the application for amendment is bona fide or mala fide?

(3) The amendment should not cause such prejudice to the other side which cannot be compensated adequately in terms of money;

(4) Refusing amendment would in fact lead to injustice or lead to multiple litigation;

(5) Whether the proposed amendment constitutionally or fundamentally changes the nature and character of the case? and

(6) As a general rule, the court should decline amendments if a fresh suit on the amended claims would be barred by limitation on the date of

application."

10. In the case in hand, since the question of limitation is kept open, this judgment would not help the case of the petitioners.

11. In ***J. Samuel and Others*** (supra) the Hon'ble Supreme Court has held :-

"12. 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.

13. 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.

14. A party requesting a relief stemming out of a claim is required to exercise due diligence and 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.

15. 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.

16. 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. 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 VI 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 VI 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 Yohanna Vs. Ramlatha and Others, (2005) 7 SCC 534, Ajendraprasadji N. Pandey and Anr. V. Swami Keshavprakeshdasji N. and Ors. Chander Kanta Bansal V. Rajinder Singh Anand, (2008) 5 SCC 117, Rajkumar Guraward (dead) through LRS. vs. S.K.Sarwagi and Company Private Limited and Another, (2008) 14 SCC 364, Vidyabai and Others V. Padmalatha and Anr., (2009) 2 SCC 409, Man Kaur (dead) By L.Rs. V. Hartar Singh Sangha, (2010) 10 SCC 512.]

12. Since this Court has upheld the finding of the trial Court that, to decide real controversy between the parties amendment is required to be allowed and as the trial Court has already compensated the defendants by way of costs, this ruling would not help the case of the petitioners.

13. The learned advocate for petitioners has assailed the impugned order by placing reliance on Article 137 of the Limitation Act. According to him, the claim raised by the respondents by way of amendment is beyond limitation and therefore, the amendment ought to have been rejected. This Court is not inclined to interfere in the impugned order, but the point of limitation is kept open to be decided by the trial Court at the time of final decision of the suit.

14. In ***Harinarayan G. Bajaj and Another*** (supra) Coordinate Bench of this Court has held :-

"...The distinction between a claim sought to be introduced by an amendment being barred by limitation and the application for amendment being barred by limitation must be borne in mind. ..."

15. In ***K. Raheja Constitutions Ltd.*** (supra) the Hon'ble Supreme Court has held that, having allowed the period of 7 years elapsed from the date of filing of the suit and the period of limitation being three years under Article 54 of the Schedule to the Limitation Act, 1963, any amendment on the grounds set out would defeat the valuable right of limitation accrued to the respondent.

16. Such are not the facts of the present case, as the point of limitation is already kept open by this Court. For the reasons stated hereinabove, no case is made out to warrant interference in the findings recorded by the trial Court. The writ petition being devoid of merit is dismissed. Civil Application is also accordingly disposed off. The suit be expedited.

(NITIN B. SURYAWANSHI, J.)