

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

WRIT PETITION NO.5342 OF 2020

Rashed Ali S/o Ghulam Hussain Khan

Age: 60 years, Occu: Business,

R/o: C.T.S. No. 18811/3-B, Silk Mill Compound,
Aurangabad.

... Petitioner
(Original Plaintiff)

Versus

1. M/s Avni Ventruers
Registered Partnership Firm,
Office H-13, Harnam Plaza,
Rang Mandir, New Osmanpura,
Aurangabad.

2. Nitin S/o Ashok Pagaria,
Age: 43 years, Occu: Business,
R/o: Block No.4, Sai Vishva,
Jyotinagar, Aurangabad.

3. Yogesh S/o Walmikrao Gayke
Age: 45 years, Occu: Business,
R/o: Plot No.36, Shreyanagar,
New Osmanpura, Aurangabad.

4. M/s Choudhari Builders (Through)
Bhaskar s/o Shankarrao Choudhari,
Age: 49 years, Occu: Business,
Office: 331/332, Labh Chambers,
Station Road, Aurangabad.

5. M/s Thakkar Construction (Through)
Bhaskar s/o Shankarrao Choudhari,
Age: 49 years, Occu: Business,
Office: Raj Towers, Seven Hills Fly Over
Cidco, Aurangabad.

... Respondents
(Original Defendants)

...

Mr. Ajit D. Kasliwal, Advocate for the Petitioner

Mr. A.P. Bhandari, Advocate for the Respondent No.4

...

CORAM : NITIN B. SURYAWANSHI, J.

DATE : 5th January, 2022

ORAL JUDGMENT :

. **RULE.** Rule made returnable forthwith. Heard finally with the consent of the parties.

2. This petition takes exception to the order passed by the learned Joint Civil Judge, Senior Division, Aurangabad below Exhibit-87 in Special Civil Suit No.193/2011, thereby rejecting the application filed by the petitioner/original plaintiff under Order 6 Rule 17 of the Civil Procedure Code.

3. On 08-03-2011, the petitioner/original plaintiff filed Special Civil Suit No.193/2011 for declaration and recovery of possession against the respondents. In the suit, the respondent Nos. 1 to 3/original defendants though served, are not appeared and therefore, the suit is proceeded ex-parte against them. Respondent Nos.4 and 5 have filed their written statement and resisted the suit filed by the petitioner/plaintiff. The respondents/original defendant Nos.4 and 5 have filed their written statement on 29-08-2011. On 09-02-2017, the issues were framed and on 02-04-2017, also additional issues were framed. On 02-03-2019, the petitioner filed his affidavit-in-lieu of examination-in-chief, and it is cross-examined and it has also closed his evidence by filing pursis on 02-03-2019. Thereafter, the plaintiff filed application (Exhibit-87) seeking amendment in the plaint. By way of amendment, the petitioner sought

to incorporate the pleadings that from the admitted facts on record, she is entitled to recover consideration amount of Rs.35,00,000/- from the defendants jointly and severally and the said claim of the petitioner for recovery of the amount of consideration is without prejudice to the prayer clauses A, B and C of the petition. The said application was resisted by the respondent Nos.4 & 5. The learned trial judge rejected the said application. Hence, the present petition.

4. Heard the learned advocate for the petitioner and the learned advocate for the respondent Nos.4 & 5. Though the learned advocate the respondent Nos.1 to 3 are served, they have not appeared.

5. The learned advocate for the petitioner submits that, taking into consideration the averments made in the plaint and the written statement filed by defendant Nos.4 & 5 and in view of suggestion given by the defendant Nos.4 & 5 in the cross-examination to the plaintiff, the amendment ought to have been allowed by the trial court. He further submits that the amendment would not cause any prejudice to the defendant Nos.4 & 5, as the recovery which the petitioner is seeking by way of amendment can only be made against original defendant Nos.1 to 3. He, therefore, submits that writ petition may be allowed.

6. The learned advocate for the respondent Nos.4 & 5, on the other hand, vehemently opposed the prayer by supporting the impugned order. By placing reliance on **Vidyabai & Ors. Vs. Padmakatha & Anr.** reported in **AIR 2009 SC 1433**, **Rajkumar Gurawara (Dead) Thr. LRs. Vs. S.K. Sarwagi & Co. Pvt. Ltd. & Anr.** reported in **AIR 2008 SC 2303**, **Sai Shraddha Developer, Sangamner and Others Vs. Ravindra Ganpatrao**

Bharitkar and Others reported in **2013(1) Civil Court Cases 507** and **Bharat Petroleum Corporation Limited Vs. Precious Finance Investment Pvt. Ltd.** reported in **2006 4 BLR 3241**, he submitted that there is total lack of due diligence on the part of the petitioner/plaintiff in filing the said application. The suit is filed in the year 2011 and in the same year, written statement was filed. Thereafter, in the year 2017, the issues and additional issues were framed and in the year 2019, the plaintiff commenced his evidence and his evidence is also over. After laps of almost 8 years, the present application for amendment was filed which is rightly rejected by the trial court. He, therefore, submits that no interference is called for in the impugned order, as the trial court has passed a well reasoned order.

7. It is a matter of record that respondents/defendant Nos.4 and 5 have made an averment in the written statement that, the plaintiff is at liberty to file suit for recovery of balance amount. The facts of execution of sale deed by all the defendants are admitted, consideration amount is also admitted so also handing over the possession. The grievance of the plaintiff is that consideration amount has not been paid.

The suggestion is given by the defendant Nos.4 & 5 to the plaintiff during cross-examination that, “it is true that if I received Rs.35,00,000/- and expenses, I have no dispute with the defendants. This amount was to be given by the defendant Nos.1, 2 & 3.” From this suggestion and from the tenor of the cross-examination of the plaintiff by the defendant No.5, it appears that, they are not disputing the claim of consideration amount of the plaintiff. Considering all these aspects, the trial court ought to have allowed the amendment application filed by the petitioner. It is a settled legal position that, amendments are to be

liberally allowed. True it is that, the amendment application was belatedly filed, but for the same, the defendants can be compensated.

8. In Vidyabai & Ors. (Supra), the Supreme Court has observed thus;

“19. It is the primal duty of the court to decide as to whether such an amendment is necessary to decide the real dispute between the parties. Only if such a condition is fulfilled, the amendment is to be allowed. However, proviso appended to Order VI, Rule 17 of the Code restricts the power of the court. It puts an embargo on exercise of its jurisdiction. The court's jurisdiction, in a case of this nature is limited. Thus, unless the jurisdictional fact, as envisaged therein, is found to be existing, the court will have no jurisdiction at all to allow the amendment of the plaint.

20. In Salem Advocate Bar Assn (supra), this Court has upheld the validity of the said proviso. In any event, the constitutionality of the said provision is not in question before us nor we in this appeal are required to go into the said question. Furthermore, the judgment of the High Court does not satisfy the test of judicial review. It has not been found that the learned Trial Judge exceeded its jurisdiction in passing the order impugned before it. It has also not been found that any error of law has been committed by it. The High Court did not deal with the contentions raised before it. It has not applied its mind on the jurisdictional issue. The impugned judgment, therefore, cannot be sustained, which is set aside accordingly.

9. In Rajkumar Gurawara (Dead) Thr. LRs. (Supra), the Supreme Court has also observed thus;

“13. To put it clear, Order VI Rule 17 C.P.C. confers jurisdiction on the Court to allow either party to alter or amend his pleadings at any stage of the proceedings on such terms as may be just. Such amendments seeking determination of the real question of the controversy between the parties shall be permitted to be made. Pre-trial amendments are to be allowed liberally than those which are sought to be made after the commencement of the trial. As rightly pointed out by the High Court in the former case, the opposite party is not prejudiced because he will have an opportunity of meeting the amendment sought to be made. In the

latter case, namely, after the commencement of trial, particularly, after completion of the evidence, the question of prejudice to the opposite party may arise and in such event, it is incumbent on the part of the Court to satisfy the conditions prescribed in the proviso.

18. Further it is relevant to point out that in the original suit, the plaintiff prayed for declaration of his exclusive right to do mining operations and to use and sell the suit schedule property and in the petition filed during the course of the arguments, he prayed for recovery of possession and damages from the second defendant. It is settled law that the grant of application for amendment be subject to certain conditions, namely, (i) when the nature of it is changed by permitting amendment; (ii) when the amendment would result introducing new cause of action and intends to prejudice the other party; (iii) when allowing amendment application defeats the law of limitation. The plaintiff not only failed to satisfy the conditions prescribed in proviso to Order VI Rule 17 but even on merits his claim is liable to be rejected. All these relevant aspects have been duly considered by the High Court and rightly set aside the order dated 10.3.2004 of the Additional District Judge.

10. In Bharat Petroleum Corporation Limited (Supra), the Supreme Court has further observed thus;

“2. The order dated 4.3.2006 rejecting the application for amendment of written statement under Order 6 Rule 17 of the Code of Civil Procedure (for short "CPC") passed by the learned Judge of the Small Causes Court at Mumbai, is now under challenge before this Court by way of the writ petition under Article 227 of the Constitution of India filed at the instance of the Article 227 defendants-petitioners, hereinafter referred to as "the defendants".

3. The suit has been filed by the plaintiffs-respondent, hereinafter referred to as "the plaintiffs", on 11th November, 2003 against the defendants inter alia contending that the plaintiffs required a suit premises i.e. plot of land bearing C.S.No.3/590 and 4/590 with the building standing thereon comprising seven flats or dwelling units, garage, covered spaces for car parks, servant quarters and compound, situate at L.Jagmohandas Marg, Mumbai, reasonably for their growing needs. It is further contended that the tenancy Page 3245 of the defendants has been terminated by notice dated

23.9.2003 and they are entitled to vacant possession of the suit premises from them. In the suit, besides the prayer for possession of the suit premises, the plaintiffs have also prayed for institution of an enquiry into mesne profits under Order 20, Rule 12 of the CPC and for final determination of the mesne profits payable to the plaintiffs. The defendants filed a written statement on 12th January, 2004 and prayed for dismissal of the suit with costs, being false, frivolous and vexatious. On 15.3.2004 issues were framed, and it appears, the evidence of the plaintiffs witness has already been recorded and while the suit was at the stage of evidence of the defendants being recorded, on 20th October, 2005 they have filed an application seeking amendment of the written statement bearing interim notice no.414 of 2005 in T.E. and R.Suit No.257/279 of 2003.

10. From bare perusal of this provision, it is clear that it consist of two parts. The first part is that the court may at any stage of the proceedings allow either party to amend his pleadings and the second part is that such amendment shall be made for the purpose of determining the real question in controversy raised between the parties. This provision confers wide power and unfettered discretion on the court to allow amendment of pleadings to the party in such manner and on such terms as it appears to the court as just and proper. By the Amendment act of 2002, the proviso has been added to Rule 17, Order 6 by which the right of a party seeking an amendment has been circumscribed as now it does not permit a litigant to amend the pleadings after commencement of trial, unless he satisfies the court that inspite of due diligence, such amendment could not have been sought earlier.

11. At this stage I would like to make brief reference to the background against which proviso to Rule 17 has been inserted. After 1976, the CPC was amended by the Code of Civil Procedure (Amendment), Act 1999 (for short "Amendment Act" of 1999) with a view to cutting short the delay in disposal of suits. After its enactment there was stiff resistance from the members of the Bar against its enforcement. The Bar Council of India, a statutory body constituted under the Advocates Act, was at forefront in opposing certain amendments and in particular deletion of Rule 17 of Order 6 by the Amendment Act of 1999. The Amendment Act of 1999, therefore, could not be promptly notified for enforcement. The Legislature, after consulting various concerned and based on the outcome of the deliberations introduced the Amendment Act of 2002 with effect from 1.7.2002. The purpose of such like amendments as stated in the statement of Object and Reasons is "to reduce delay in the disposal of civil cases". The Supreme Court

in Salem Advocate Bar Associations (*supra*) had an occasion to consider the constitutional validity of all the provisions in Amendment Act of 2002, wherein in paragraph 26 of the judgment it has held, insofar as Order 6 Rule 17 is concerned, as follows:

26. Order 6 Rule 17 of the Code deals with amendment of pleadings. By Amendment Act 46 of 1999, this provision was deleted. It has again been restored by Amendment Act, 22 of 2002 but with an added proviso to prevent application for amendment being allowed after the trial has commenced unless the court comes to the conclusion that in spite of Page 3248 due diligence, the party could not have raised the matter before the commencement of trial. The proviso, to some extent, curtails absolute discretion to allow amendment at any stage. Now, if application is filed after commencement of trial, it has to be shown that in spite of due diligence, such amendment could not have been sought earlier. The object is to prevent frivolous applications which are filed to delay the trial. There is no illegality in the provision.

11. In the light of the ratio laid down in the above rulings, it is clear that the amendment can be allowed, even after commencement of the trial, if the amendment is found to be necessary for the purpose of determining the real questions in controversy between the parties. It is also held that while deciding the application for amendment, hypertechnical approach should not be adopted and liberal approach should be the general rule particularly in case where the other side can be compensated with the costs. Amendment needs to be allowed to avoid uncalled-for multiplicity of litigation.

Applying the aforesaid principles to the facts of the present case, this Court is of the opinion that, the amendment application of the petitioner deserves to be allowed to avoid multiplicity of the proceedings between the parties and for deciding real controversy between the parties. Fact remains that, there is total lack of due

diligence on the part of the petitioner in filing the present application which can be taken care of by compensating the respondents/defendants adequately. Hence, the following order:

ORDER

- (i) Writ Petition is allowed in terms of prayer clause 'A'.
- (ii) The impugned judgment and order passed below Exhibit-87 by the learned Joint Senior Division, Aurangabad in Special Civil Suit No.193/2011, is hereby quashed and set aside.
- (iii) The application (Exhibit-87) is allowed subject to the petitioner paying cost of Rs.25000/- to the respondent Nos.4 & 5.
- (iv) The amendment shall be carried out within a period of two weeks from the date of receipt of this order by the trial court.
- (v) Needless to mention that the defendants shall be entitled to file additional written statement. After completion of this exercise, the suit shall be expeditiously decided by the trial court.
- (vi) The amount to be deposited in the trial Court.

(NITIN B. SURYAWANSHI, J.)