

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

WRIT PETITION NO. 10534 OF 2022

Prabhakar Gangadhar Bhingardive,
Age : 56 Years, Occu. : Agriculture
R/o Room No. 154, Police Headquarters,
Near Ambamata Mandir,
Old Police Line, Shivajingar,
Pune – 5.

.. Petitioner

Versus

1. Padmakar Gangadhar Bhingardive,
Age : 65 Years, Occu. : Service
R/o Bahujan Vasti, Opp. Zilla
Parishad Office, Maliwada,
Ahmednagar.
2. Sudevphant Gangadhar Bhingardive,
Age : 72 Years, Occu. : Agriculture
R/o Bahujan Vasti, Opp. Zilla
Parishad Office, Maliwada,
Ahmednagar.
3. Bhaskar Gangadhar Bhingardive,
Age : 70 Years, Occu. : Agriculture
R/o Bahujan Vasti, Opp. Zilla
Parishad Office, Maliwada,
Ahmednagar.
4. Satish Gangadhar Bhingardive,
Age : 69 Years, Occu. : Service
R/o Bahujan Vasti, Opp. Zilla
Parishad Office, Maliwada,
Ahmednagar.
5. Deelip Vitthal Vithate,
Age : 62 Years, Occu. : Agriculture,
R/o Maliwada, Opp. Zilla
Parishad Office, Ahmednagar.

6. Rajkumar Vitthal Vithate,
Age : 60 Years, Occu. : Agriculture,
R/o Maliwada, Opp. Zilla
Parishad Office, Ahmednagar.
7. Nilima Vijay Shinde
Since deceased through her L.Rs.
- 7A Nilesh Vijay Shinde,
Age : 37 Years, Occu. : Service,
R/o Sr. No. 79, Vikas Nagar,
Ghorpadi Gaon, Opp. Budha Vihar,
Pune – 1.
- 7B Rupali Sagar Bhosle,
Age : 35 Years, Occu. : Household,
R/o At Post Galanimb, Shrirampur,
Tal. Shrirampur, District Ahmednagar.
- 7C Rohini Rahul Gaikwad,
Age : 32 Years, Occu. : Household,
R/o Plot No. 43/5, Aanuj Pawan Society,
Flat No. 5, Ganpati Matha,
Varje Malwadi, Pune.
8. Amol Bhaskar Waghmare,
Age : 42 Years, Occu. : Labour Work,
R/o At Post Mugasgaon,
Visapur Railway Station,
Tal. Shrigonda, Dist. Ahmednagar.
9. Suwarna Bhausaheb Shinde,
Age : 35 Years, Occu. : Household,
R/o : At Post Mugasgaon,
Visapur Railway Station,
Tal. Shrigonda, Dist. Ahmednagar.
10. Monihi Yuvraj Ujagare,
Age : 32 Years, Occu. : Household,
R/o Delhigate, Nalegaon,
Ahmednagar.

11. Kamalbai Ghansham Bhingardive,
Age : 72 Years, Occu. : Household,
R/o Near Paach Godown, Shahu
Nagar, Kedgaon, Ahmednagar.
12. Kusum Ghansham Bhingardive,
Age : 67 Years, Occu. : Household,
R/o Vadarwadi, Zopadpatti,
Devlali, Near Rahuri Factory,
Rahuri, Ahmednagar.
13. Aruna Bhausahab Pagare,
Age : 67 Years, Occu. : Household,
R/o Vadarwadi, Zopadpatti,
Devlali, Near Rahuri Factory,
Rahuri, Ahmednagar.
14. Vaishali Ajay Pakhare,
Age : 34 Years, Occu. : Household,
R/o Nagardevle,
Tal & District Ahmednagar. .. Respondents

Shri Pratik P. Kothari, Advocate al/w Ms. Nandini Chittal,
Advocate for the Petitioner.

Shri S. V. Suryawanshi, Advocate h/f Shri L. B. Palod, Advocate
for the Respondent No. 1.

Shri S. S. Dixit, Advocate for Respondent Nos. 3 and 4.

CORAM : SANDEEP V. MARNE, J.

DATE : 20TH OCTOBER, 2022.

ORAL JUDGMENT :

. Rule. Rule made returnable forthwith. With the consent
of parties taken up for final hearing.

2. Petitioner assails order dated 15.09.2022 passed by the 10th
Joint Civil Judge Senior Division, Ahmednagar on application
below Exhibit 98 in R.C.S. (Special Civil Suit) No. 88 of 2020
thereby rejecting his application for amendment of plaint. By

that application, he sought to add para No. 6A to the plaint to bring on record the events of the defendant No. 1 carrying out construction over the suit property. The application is rejected as the trial in the suit had commenced and the plaintiff could not show due diligence required under Proviso to Order VI Rule 17 of the Code of Civil Procedure (for short “Code”).

3. Appearing for the petitioner, Mr. Kothari, the learned counsel would submit that the issue of defendant No. 1 carrying out construction on the suit property was specifically highlighted for seeking temporary injunction and considering that aspect, temporary injunction is already granted in favour of the petitioner. He therefore submits that the factum of defendant No. 1 carrying out construction on the suit property has already been a subject matter of controversy atleast in the application for temporary injunction. The same needs to be incorporated in the plaint as well. Mr. Kothari relies upon the judgment of this Court in **Rashed Ali Vs. Avni Ventruers and others** reported in ***MANU/MH/0158/2022***.

4. Per contra, Mr. Suryawanshi, learned counsel holding for Mr. Palod, learned counsel for the respondent No. 1 opposes the petition and supports the order passed by the Trial Court. He submits that this was the third amendment sought for by the plaintiff after the first two amendments were allowed. He would further submit that by amendment, plaintiff proposes to bring on record the events related to the month of May 2020, while the suit is filed in June 2020. The plaintiff was thus fully aware of the events, but chose not to incorporate them in the plaint. He

would therefore submit that the plaintiff has not cleared the test of due diligence required under the Proviso to Order VI Rule 17 of the Code. He therefore prays for dismissal of the petition. In support of his contention Mr. Suryawanshi relies on the judgment of this Court in **the Liquidator the Maratha Market People's Co-op. Bank Ltd. Vs. M/s Jeejaee Estate and others** reported in 2019(1) All MR 884.

5. Mr. Dixit, learned counsel appearing for respondent Nos. 3 and 4 submits that, respondent Nos. 3 and 4 have neither filed reply opposing amendment application, nor opposed the same before the Trial Court.

6. Having heard learned counsel for parties, there can be no iota of doubt that plaintiff has been extremely negligent in filing application for amendment. The only reason cited in the application is inadvertence and typographical error. It is beyond comprehension as to how non-inclusion of events of 31st May, 2020 can fit into the expression "typographical error". There is no averment in the application that despite due diligence the events sought to be incorporated by amendment could not be narrated in the plaint. Be that as it may. It is a matter of fact that the act of defendant No. 1 carrying out construction on the suit property was subject matter of application for temporary injunction. By order dated 07th July, 2020, the Trial Court has granted temporary injunction in favour of the plaintiff restraining the defendant No. 1 from raising any further construction over the suit property till final disposal of the suit. Also, prayer clause B in the suit covers the aspect of carrying out

construction on the suit property. Thus the amendment does not introduce any new case. Since the issue of defendant No. 1 carrying out construction on the suit property has already been considered by the Court while deciding application for temporary injunction, it would be in the interest of justice the said events are also incorporated in the plaint.

7. The judgment in the case of **Liquidator the Maratha Market People's Co-op. Bank Ltd.** (supra) relied upon by Mr. Suryawanshi essentially decided the issue as to whether trial would commence on the date of filing of affidavit of evidence or not. It also dealt with the issue of due diligence. However, the facts of the present case are unique where aspect of the defendant No. 1 carrying out construction on the suit property has been considered while deciding application for temporary injunction, whereas, the same does not form part of the plaint. In view of these peculiar facts of this case, the decision in **Liquidator the Maratha Market People's Co-op. Bank Ltd.** (supra) would not be applicable in the present case.

8. On the other hand judgment **Rashed Ali** (supra) holds amendment can be allowed even after commencement of trial and application for amendment should not be rejected by adopting hypertechnical approach. It has also been held that failure to show due diligence can be compensated by awarding costs on the plaintiff. Para No. 11 of the judgment reads thus :

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, hyper technical 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 aforestated 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:

9. I am therefore of the considered view that though the Plaintiff has been negligent in prosecuting the suit, his failure to show due diligence can be compensated by award of costs.
10. In the circumstances, I proceed to pass following order.

O R D E R

- A. The order dated 15.09.2022 passed by the 10th Joint Civil Judge Senior Division, Ahmednagar on application below Exhibit 96 is set aside. The application filed by the petitioner for amendment at Exhibit 96 stands allowed in terms of prayers therein. Needless to state that the defendants shall have opportunity to file an additional written statement.
- B. Costs of Rs. 25,000/- (Rs. Twenty Five thousands only) are imposed upon the petitioner. He shall pay costs directly to

the defendant No. 1 within a period of four (04) weeks from today. Failure to pay costs within stipulated time shall result in automatic rejection of amendment application.

D. Rule is made absolute in above terms.

[SANDEEP V. MARNE, J.]

bsb/Oct. 22