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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO.15335 OF 2023

Rajiv Navinchandra Shah ... Petitioner

V/s.

Chandrakant Kantilal Shah & Ors ... Respondents

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Mr. R. D. Soni a/w Mr. Gaurang Jhaveri, Niyati Sontakke, Mr. Harsh Nishar, Ms. Vandana Bait and Mr. Amey Deshpande, for Petitioner.

Mr. Sharan Jagtyani, Sr. Advocate a/w Mr. Kunal Vajani & Prasanna Tare, for Respondent Nos.1 to 4 & 8 to 10.

Mr. Abhinav Chandrachud a/w Ms. Akshada Shetye, for Respondent No.27.

Mr. Rubhin Vakil, for Respondent No.14 (Through V.C.)

CORAM : AMIT BORKAR, J.

DATED : DECEMBER 11, 2023

P.C.:

1. By this writ petition under Article 227 of the Constitution of India, the petitioner/original plaintiff is challenging an order passed by the Trial Court allowing amendment of a written statement to incorporate a plea of res judicata.

2. The facts relevant to adjudicating issues involved are as follows:

i) The petitioner is the original plaintiff who filed suit for

declaration, injunction and partition.

ii) After the issues were framed, the plaintiff, on *26 June 2023*, filed an affidavit in lieu of examination-in-chief. Therefore, the Trial commenced on *26 June 2023*.

iii) Respondents/original defendant Nos.1 to 4 and 8 to 10 initially filed *additional written statement* on 26 September 2023. However, on the same date, the Trial Court discarded the *additional written statement* on the ground that such an *additional written statement* was filed without permission of the Court.

iv) The respondents/defendants, therefore, on *11 October 2023*, applied to Order 6, Rule 17 of the Code of Civil Procedure, 1908 (for short 'CPC') to incorporate the same plea of res judicata. According to them, on 13 January 2023, a substantive suit was dismissed between the *then* plaintiff and the said defendants. The issues raised in the present suit are similar to those raised in the earlier suit, and, therefore, the present suit is barred by the principle of res judicata.

3. The Trial Court, by the impugned order, allowed the application for amendment. The petitioner has, therefore, filed the present writ petition.

4. Learned Advocate for the petitioner submitted that without recording the specific findings regarding the exercise of "due diligence" and satisfaction thereof in the impugned order, the Trial Court had no jurisdiction to allow such an application for amendment. According to the petitioner, no explanation is provided in the application for amendment, which can be termed

"due diligence" as required under proviso to Order 6, Rule 17 of CPC. It is submitted that the exercise of due diligence is a jurisdictional fact; in the absence of such satisfaction about the existence of due diligence, the Courts could not have allowed the application for amendment.

5. Per contra, learned senior Advocate for respondents /defendant Nos.1 to 4 and 8 to 10 submitted that the defendants were essentially raising plea of mix question of law and fact. The explanation furnished in the application satisfies the existence of due diligence as contemplated by the proviso to Order 6, Rule 17 of CPC. According to him, the Court has exercised its discretion positively and, therefore, unless the exercise of such discretion is perverse, this Court, in writ jurisdiction under Article 227 of the Constitution of India, need not interfere with such order. According to him, the holistic view needs to be adopted while considering application for amendment of such nature. According to him, therefore, it was obligatory for the plaintiff to disclose facts of the pendency of such a suit. On this failure, the defendants are raising the plea of res judicata based on the events that occurred just before filing the application for amendment. According to him, at the most, there can be a delay of one month in filing the application for amendment from the date of commencement of the Trial when the defendants become aware of their right to file an application for amendment. In support of his contentions, he relied on several judgments, i.e. in the case of **Vishal Nitinkumar Kondhia Vs. Jahnavi Vishal Kondhia**, reported in 2018 (3) MH.L.J. 823, in the case of **Gurbakhsh Singh And Others Vs Buta Singh And**

Another, reported in (2018) 6 SCC 567, in the case of **Rohit A. Kapadia and Another Vs Perviz J. Modi**, reported in 940 2013 (4) Mh.L.J. and the judgment in the case of **J. Samuel and Others Vs Gattu Mahesh and Others**, reported in (2012) 2 SCC 300.

6. Having heard learned Advocate for the parties, in my opinion, the issue that arises for consideration is whether the defendants have pleaded “due diligence” in their application for amendment of the written statement, and if yes, whether the defendants have furnished a satisfactory explanation about the exercise of due diligence as required under proviso to Order 6, Rule 17 of CPC.

7. The facts relevant to the adjudication of issues are as follows:

- i) On 13 January 2023, a Special Civil Suit bearing No.55 of 2010 between the *then* plaintiff and defendant Nos.1 to 4 and 8 to 10 *and other defendants* came to be dismissed.
- ii) In an appeal against the said decree, the Appellate Court granted the stay to the effect and operation of the decree passed in Special Civil Suit No.55 of 2010.
- iii) On 27 June 2023, the Appellate Court vacated the stay granted to the execution and operation of Special Civil Suit No.55 of 2010.
- iv) On 26 July 2023, the plaintiff filed an affidavit in lieu of examination-in-chief, which resulted in the commencement of Trial as required under proviso to Order 6, Rule 17 of CPC.

- v) On 26 September 2023, the defendants, without permission of the Court, filed a *additional written statement* raising plead of res judicata.
- vi) On 26 September 2023, the Trial Court discarded such additional written statement on the grounds that permission of the Court was not obtained before filing additional written statement.
- vii) On 11 October 2023, the petitioner filed an application for amendment under Order 6, Rule 17 of CPC.

8. In light of the facts, it is necessary to consider the judgment of Apex Court in the case of **Vidyabai And Others Vs Padmalatha And Another** reported in (2009) 2 SCC 409 had occasioned to consider proviso to Order 6, Rule 17 of CPC. The expression “due diligence” in paragraph 19 is held to be a jurisdictional fact by observing as under:

“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 6 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.”

9. On reading the observations made in paragraph 19, in my view, the Apex Court had clearly held that the existence of jurisdictional fact and due diligence must be considered jurisdictional fact. Unless the Court records satisfaction of the existence of such jurisdictional fact, the Court has no power to

allow the amendment.

10. The judgment in the case of **Vidyabai** (Supra) was thereafter considered in the recent judgment in the case of **Pandit Malhari Mahale Vs. Monika Pandit Mahale and Another**, reported in (2020) 11 SCC 549, the Apex Court was considering the case where the Trial Court and High Court failed to record a finding regarding existence of 'due diligence' before allowing application for amendment. Insisting on recording such a finding of due diligence, the Apex Court held that recording satisfaction about the existence of due diligence is mandatory. Without such a finding, the Courts could not have allowed the application for amendment. Therefore, the consistent law laid down by the Apex Court is that the Court, while allowing amendment under Order 6, Rule 17 of CPC, needs to record a finding of the existence of due diligence.

11. The Trial Court observed in paragraph 12 as under:

“12.... Considering the reasons stated by the applicants as their additional W. S. is rejected on the ground of it was filed without permission of the Court the applicant cannot be precluded from filing the application for amendment of their W. S. Further, in my opinion as the trial Court has decided the matter on merit the ground of res judicata can be raised through the appeal is pending without going to the merits of the plea. Moreover, in view of the ratio laid down by the Hon'ble Supreme Court as well as Hon'ble High Court in the case law cited supra, the Court has to allow the amendment of written statement liberally. Further, if the amendment application is allowed no prejudice will cause to the plaintiff. Moreover, there is no intentional delay attributed on the part of the applicants for non-filing of application at earliest before commencing of Trial....”

12. On reading the impugned order, it is evident that the trial court has failed to record satisfaction about the exercise of due diligence by the defendant as contemplated by proviso to Order 6, Rule 17 of CPC. Therefore, the trial court committed jurisdictional error by allowing the application for amendment.

13. Moreover, the Apex Court, in the case of **J. Samuel and Others Vs Gattu Mahesh and Others**, reported in (2012) 2 SCC 300 had occasion to explain the expression "due diligence" in the context of the proviso to Order 6, Rule 17 of CPC. The Apex Court, in paragraphs 19 and 20 of the said judgment, has held as follows:

“19. 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.

20. 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.”

14. In the facts of the case, the fact of the decision on merits in the previous suit was within the knowledge of the defendants on the date of delivery of such judgment, i.e. on 13 January 2023.

However, it appears that thereafter, the Superior Court granted a stay to such judgment.

15. The Apex Court in the case of **Shree Chamundi Mopeds Ltd. v. Church of South India Trust Assn.**, reported in (1992) 3 SCC 1.

10.While considering the effect of an interim order staying the operation of the order under challenge, a distinction has to be made between quashing of an order and stay of operation of an order. Quashing of an order results in the restoration of the position as it stood on the date of the passing of the order which has been quashed. The stay of operation of an order does not, however, lead to such a result. It only means that the order which has been stayed would not be operative from the date of the passing of the stay order and it does not mean that the said order has been wiped out from existence. This means that if an order passed by the Appellate Authority is quashed and the matter is remanded, the result would be that the appeal which had been disposed of by the said order of the Appellate Authority would be restored and it can be said to be pending before the Appellate Authority after the quashing of the order of the Appellate Authority. The same cannot be said with regard to an order staying the operation of the order of the Appellate Authority because, in spite of the said order, the order of the Appellate Authority continues to exist in law, and so long as it exists, it cannot be said that the appeal which has been disposed of by the said order has not been disposed of and is still pending.

16. In the facts of the present case merely, because the judgment in the civil suit is stayed may not dis-entitle the defendants from raising plea res judicata earlier. However, assuming that the grant of such stay precluded defendants from raising the plea of res

judicata after such stay was vacated on 27 June 2023, the Trial Court had fixed the suit for leading evidence on five occasions thereafter. Therefore, the defendants had the opportunity to file an application for amendment on five occasions till 26 July 2023, which is the date of commencement of the Trial. The vacation of stay and the commencement of the Trial may have a gap of one month. However, since the Trial Court fixed the suit for hearing on five dates, it is the factor that needs to be taken into consideration by the Courts while considering the aspect of due diligence. It was, therefore, necessary for the defendants to explain why an amendment application raising the plea of res judicata could not have been filed on five occasions before the commencement of the Trial.

17. The explanation furnished by the defendants in paragraphs 6 and 7 of the application which reads as follows:

“6) The sequence of events from the date of dismissal of Special Civil Suit no.55/2010 on 13th January 2023 will show that there was a stay to operation of Judgment, Decree & Order in Special Civil Suit No.55/2010 initially granted by the Court which passed the Judgment & Decree of dismissal and later on, extended by the Hon’ble Bombay High Court till 15th June 2023. There was indeed a due diligence on the part of these Defendants but, however, on account of stay as aforesaid, these Defendants could not take up application for amendment of Written Statement earlier.

7) Unfortunately, Defendant No.14 Smt Geeta Patkar in the present suit expired on 1st August 2023 necessitating the Plaintiffs to make an appropriate application and implead the legal representatives of deceased Defendant No.14 on record. Those Defendants verily believed that since they

would get an opportunity to file an Additional Written Statement upon impleadment of legal heirs of deceased Defendant no.14, these Defendants waited and eventually filed an Additional Written Statement, which was given Exhibit-178. On account of objections taken-up by the Plaintiffs for filing of an Additional Written Statement by these Defendants, this Hon'ble Court was pleased to pass an Order on 26th September 2023 and thereby strike out the Additional Written Statement at Exhibit-178 in accordance with Order VI Rule 16 of the Code of Civil Procedure, 1908 primarily the ground that these Defendants ought not to have filed any additional pleadings without seeking permission of the Court, meaning thereby that it was necessary for these Defendants to make an application for amendment of Written Statement. In the circumstances, these Defendants are constrained to move the present application. Needless to state that, the Defendants had always showed due diligence and had filed an Additional Written Statement under bonafide belief that it could be done. In view of the observations made by this Hon'ble Court while passing Order dt.26th September 2023 (alluded supra), these Defendants have moved this application.

18. On meaningful reading of paragraphs 6 and 7, it appears that no due diligence pleaded by the defendants nor any explanation as to why the application to bring on record the events that occurred till 30 June 2023 was not pleaded till the commencement of the Trial. Application for amendment of written statement explains the events before 30 June 2023, i.e. till the date of vacation of stay. Therefore, in my opinion, without explanation regarding due diligence, the Trial Court could not have allowed the application for amendment.

19. In so far as the judgment relied upon by the defendants in the case of **Rohit A. Kapadia** (Supra), the Apex Court in the said case recorded and finding that the defendant has shown reasonable diligence as a prudent man would exercise in the conduct of his own affairs and, therefore, the defendant could not have raised the issue of adversity before the commencement of Trial in spite of due diligence. There cannot be dispute about the proposition of law laid down by the Apex Court in the case of **Chander Kanta Bansal Vs. Rajinder Singh Anand** reported in 2008 (5) SCC 117 where the Apex Court interpreted the expression "due diligence" as doing everything reasonable, not everything possible. In the facts of the case, I do not find that the defendants did a reasonable investigation before filing an application for an amendment to incorporate a plea of res judic. In my opinion, the judgment of **Rohit A. Kapadia** (Supra) is inapplicable.

20. In the case of **Gurbakhsh Singh** (Supra), the Apex Court allowed the amendment in the facts of the case. No preposition of law that runs counter to the ratio laid down in the case of **Vidyabai** (Supra) and **J. Samuel** (Supra) has been laid down by the Apex Court and, therefore, in my opinion, the said judgments are of no help to the defendants to sustain the validity of the impugned order.

21. The learned senior advocate for the defendants relied on the last judgment in the case of **Vishal** (Supra) of the Single Bench of this Court. In the facts of the case, this Court allowed the application for amendment. The Single Judge of this Court observed that the Courts would be more liberal in allowing the

application for amendment of written statement and the plaint. The real question that needs to be decided is whether the plea changes the nature and character of the suit or causes injustice to the defendants to defend as a party. However, in view of judgments in the case of **Vidyabai** (Supra) and **J. Samuel** (Supra), in my opinion, it was necessary for the Trial Court to record a finding of the existence of due diligence, which is absent in the impugned order. In the facts of the case, the Trial Court committed an error of jurisdiction in allowing the application for amendment. Hence, the following order:

- a) The impugned order dated 6 November 2023 passed by the Trial Court below Exhibit 181 in Special Civil Suit No.776 of 2011 is quashed and set aside.
- b) The application below Exhibit 181 in Special Civil Suit No.776 of 2011 stands rejected.
- c) With the result, the consequential issue framed on the point of res judicata needs to be recalled.

22. At the request of the learned senior Advocate for respondents, the effect of the order is stayed for a period of 4 weeks from today.

23. The writ petition stands disposed of in the above terms. No costs.

(AMIT BORKAR, J.)

Note:- This order is modified as per order dated 15 December 2023. Corrections in paragraphs 2 & 7 are shown italicize.