



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

**WRIT PETITION NO. 317 OF 2022**

Vaijanath Maroti Rakh

**VERSUS**

Harichandra Sitaram Pardeshi And Another

Mr. B. R. Kedar, Advocate for petitioner

Mr. S. S. Shaikh, Advocate for respondent Nos. 1 and 2

**CORAM : R. M. JOSHI, J.**

**DATE : 21<sup>st</sup> January, 2025**

**PER COURT :-**

1. Question arises in this petition is as to whether the parties or even Courts can be permitted to over look the statutory provisions and to pass order which will make the statutory provisions redundant.

2. Here, in this case, respondents/original defendants filed application for amendment under Order VI Rule 17 of the Code of Civil Procedure. This application came to be filed after remand of Regular Civil Suit No. 23/2010 by First Appellate Court by its order dated 23.03.2018. In the said order, it is specifically stated that it is open for the defendants to file an application for amendment.

3. In view of this order, application is moved after about an year i.e., on 24.04.2015 for seeking amendment to the written statement. Though, it is averred in the said application that the amendment is only

by way of explanation and that the same is necessary for the proper decision of the case, there is absolutely no averment with regard to any due diligence on the part of the defendants in not taking the said plea at the time of filing of the written statement.

4. At this stage, it would be relevant to take note of Order VI Rule 17 which reads thus:

*17. "The Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties :*

*Provided 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."*

Proviso of Order VI Rule 17 mandates that no application for amendment shall be allowed after the trial has commenced unless the Court comes to the conclusion that in respect of due diligence, party could not have raised the matter before commencement of trial. Thus, before considering the merit of the amendment, it is absolutely to record a finding that in respect of due diligence and that party could not raise the matter before commencement of trial in spite of the same. Needless to say that unless case is made out by party to that effect, question of recording such satisfaction would not arise.

5. Here, in this Case, perusal of the application reveals nothing about the due diligence nor even by implication, it can be said so. Merely, because liberty was granted by Appellate Court to file application for amendment, that would not dispense with the party to prove due diligence.

5. Learned counsel for the petitioner has tried to draw attention of the Court to order passed by First Appellate Court in Regular Civil Appeal Nos. 71/2015 and 72/2015 wherein permission was granted to file an application to amendment of written statement. The said permission, however, cannot be construed as a direction to the Trial Court to allow such application. Thus, for filing any application after the commencement of trial, it is incumbent on the part of the party to show due diligence for which the said matter would not have been raised before the commencement of trial.

6. Though, it is contended by the learned counsel for the petitioner that the First Appellate Court has directed rehearing of the suit however, the said order does not indicate de novo trial. The operative part Clause No. 3 of the order indicates that defendants were permitted to cross examine plaintiff's witness. This part of order, therefore, more than sufficiently demonstrates that the suit was remitted back for trial at

the stage of evidence. Once issues are framed, the trial stands commenced. In such circumstances, in absence of any averment and proof thereof of due diligence, defendants are not entitled to seek amendment to the written statement.

7. Learned counsel for the petitioner has placed reliance on the judgment of Bombay High Court in case of **Sonabai Sahebrao Pathrud v. Bhausahb Ganpati Gaikwad And Others** 2019 SCC ONLINE BOM 1533. Paragraph 12 of the judgment shows that in that case denovo trial was directed. In case of **N. C. Bansal v. Uttar Pradesh Financial Corporation And Another** 2018 AIR SC 685, the Hon'ble Supreme Court was dealing with the issue wherein the suit was at initial stage i.e., trial has not commenced similarly in case of **Amanollah Merwan Irani & Anr. Vs. Naagraj Ganeshmal Jain in Writ Petition (st) No. 19374/2018**, the trial was directed denovo. Lastly, in the judgment of Hon'ble Supreme Court in case of **Abdul Rehman And Another v. Mod. Ruldu And Others** 2010 SLT 7 295 though, it is stated that for the purpose of determining the real controversy, the amendment needs to be allowed however, in the same judgment, the Court refers to the due diligence shown by the parties. Having regard to these facts, judgments referred above would not come to the aid of respondents.

8. As a result of the above discussion, petition is allowed. Hence, impugned order cannot sustain it is set aside. Application Exhibit 47 filed before Trial Court is set aside.

**(R. M. JOSHI, J.)**

bsj