

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

INTERIM APPLICATION NO. 4749 OF 2025
IN
COMMERCIAL SUIT NO. 15 OF 2010

Banka Constructions

...Plaintiff

V/s.

State of Maharashtra and Ors.

...Defendants

WITH
COMMERCIAL SUIT NO. 15 OF 2010

Ms. Sumi Soman i/b Praxis Legal for the Plaintiff.

Mr. Amar Mishra, AGP for the State- Defendants No. 1 to 4.

CORAM : ABHAY AHUJA, J.
DATE : 4th FEBRUARY, 2026

PC. :

Interim Application No. 4749 of 2025

1. This Interim Application seeks to amend the Plaint as per the schedule.
2. Ms. Soman, learned Counsel appears for the Applicant and submits that the present Application has been filed to place on record certain subsequent events that have transpired after the filing of the Suit in the year 2009.
3. Ms. Soman submits that neither the cause of action nor the claim is sought to be amended nor would be altered if the amendments are

allowed. Ms. Soman submits that subsequent to the filing of the Suit in December 2009 the parties had several meetings, wherein the claims of the Plaintiff's were discussed for further actions by the Defendant. During the meetings, the Defendant had revealed that the data maintained by the Defendant records the existence of the soft rock and has *inter alia* admitted that the Plaintiff has carried out extra work, which has been earlier claimed as a cause of action in paragraph 71 of the Plaint arising when the Superintending Engineer of the Defendant requested the Plaintiff to submit the details of the extra claim for sinking of wells in soft rock vide communication dated 7th September, 2004 annexed as Exhibit MM to the Plaint and that the Superintending Engineer of the Defendant fixed meeting on 29th September 2006, for discussing various claims of the Plaintiffs, vide communication dated 19th September, 2006.

4. Ms.Soman submits that the Applicant was part of the meetings along with his late father and had communicated with the Defendants regarding the queries raised by them in various meetings that took place subsequent to the filing of the Suit. However, it is submitted that the Applicant's late father used to communicate with the Advocates and also used to maintain the entire records including the communications

exchanged between the parties. Ms.Soman submits that the Applicant was under the *bonafide* belief that his father must have intimated the erstwhile Advocates regarding the subsequent events and documents and that the same would be part of the proceedings before this Court. That, subsequent to the death of the Applicant's father in July 2022, the Applicant was involved in co-ordination and giving necessary instructions to his Advocates regarding the Suit. That, upon perusal of the documents as filed before this Court, he observed that the subsequent events regarding various meetings and documents recording minutes of the meetings were not placed on record. That, though this was noticed immediately after perusing the plaint and the evidence, he was unable to trace the relevant documents exchanged between the parties subsequent to the filing of the Suit as the documents forming part of the disputes in various suits were handled by the Applicant's father. It was also enquired with the erstwhile Advocates whether the Applicant's father had handed over the documents recording events that transpired subsequent to the filing of the Suit to them but was informed by the Advocates that no such documents were handed over to them.

5. Ms.Soman submits that recently, additional office had been taken by the Applicant at Flat No.1705, Morya Garden, Plot No.B-3, Off Oshiwara Link Road, Morya Estate, Near Andheri Station, Mumbai – 400 038, and while shifting the documents and records to the new office, the Applicant came across few documents forming part of the Suit including communications exchanged between the parties and minutes of the few meetings which took place after the filing of the Suit after which the Advocate was contacted and instructed to take appropriate steps.

6. Ms. Soman further submits that the Applicant/Plaintiff is a Civil Engineer and Contractor engaged in several major government contracts across Maharashtra and considering the nature of the various works executed by the Plaintiff (construction of bridges, roads, dams etc.) the documents and records maintained by the Plaintiff are quite voluminous and hence the documents were not easily traceable.

7. Ms. Soman submits it is therefore that the documents were not traceable and hence the Applicant could not place the subsequent events and documents on record immediately.

8. Learned Counsel submits that the subsequent events and documents as mentioned in the schedule to the Interim Application are

subject matter of the Suit and are just and necessary to decide the issues involved in the Suit and that the amendments as sought for by the Applicant are *bonafide* and necessary for determining the real question in controversy between the parties. Learned Counsel submits that the proposed amendments would not change the nature of the Suit or the cause of action nor is it inconsistent with the original cause of action nor does it alter the nature of the Suit. That, the said amendment would not cause any injustice to the Defendants and is necessary and relevant for the adjudication of the dispute.

9. Ms. Soman submits that it is true that the trial has commenced and the cross-examination of the Plaintiff's first witness – Late Mr. Mahendra Banka - father of the Applicant has also been completed in the March 2016 and the Commissioner's Report has also been filed. However, since the Applicant was unable to trace the documents to place the subsequent events on record, which have transpired after the cross-examination of the Plaintiff's first witness was concluded, there has been a delay that has been occasioned in preferring this application and that the delay be condoned in view of the compelling circumstances and the amendments be permitted.

10. Ms. Soman further submits that there is no without prejudice communication or settlement talks. That, after the cross-examination of the Plaintiff's witness, Mr. Banka, who passed away in July 2022, the parties had several meetings to re-evaluate and re-inspect the claims of the Plaintiff, which communications show that meetings were not settlement talks but discussions based on records maintained by the Defendants, the existence of which records have not been denied by the Defendants. Ms. Soman submits that, in fact, there is no communication or any indication that the said talks were without prejudice negotiations. Ms. Soman submits that the subsequent events have transpired after commencement of the trial and for reasons submitted, this Interim Application could not be filed earlier. That, only in April 2025 when the Plaintiff had taken an additional office premises and was shifting the documents, that the Plaintiff could lay his hands on the communications exchanged between the parties which are annexed to the Interim Application.

11. Ms. Soman, accordingly, submits that the Interim Application be allowed.

12. On the other hand, Mr. Amar Mishra, learned AGP appearing for the Defendants no.1 to 4 has submitted that firstly there has been delay

of nine years in bringing the documents on record, which documents were already known to the Plaintiff. Mr. Mishra has submitted that since the Applicant admits to being a partner and having been part of the meetings with the Defendants, the Applicant, cannot now aver that he was under the *bonafide* belief that the erstwhile Advocates were intimated of the subsequent developments of the documents concerning the same. That, there is no proof of the same that has been adduced by the Applicant, and that therefore, the explanation with respect to the delay is untenable. Mr. Mishra has secondly submitted that, the proposed schedule of amendments is trying to bring out an entirely new case with respect to the claim for sinking well in soft rock which cannot be permitted as the scope of the Suit would then be widened to claims which were not made originally. It is submitted that the documents sought to be brought on record are only to cover up the lacuna in the case of the Plaintiff. Thirdly, the said documents sought to be brought on record form part of the without prejudice settlement talks and cannot be relied upon by the Plaintiff. And lastly, the settlement talks were out of Court which are akin to privileged communications and cannot be permitted by this Court to be brought on record and that too after various admissions having been made in the cross-examination of Mr. Banka.

13. Mr. Mishra submits that, therefore, this Court may dismiss the Interim Application.

14. Mr. Mishra has relied upon the decision of the Hon'ble Supreme Court in the case of *Dinesh Goyal @ Pappu vs. Suman Agarwal (Bindal) and Others*¹ and in particular to paragraph 11.2 thereof to submit that by an amendment the other side should not lose a valid defence. Mr. Mishra has also drawn this Court's attention to paragraph 17 of the said decision of the Hon'ble Supreme Court to submit that in that case, the Hon'ble Supreme Court has clearly held that any and all delays in the judicial process should be avoided and minimized to the largest extent possible and should generally be frowned upon.

15. I have heard the learned Counsel and considered the rival contentions.

16. Before proceeding further, it would be pertinent to refer to the decision of the Hon'ble Supreme Court in the case of *Dinesh Goyal @ Pappu vs. Suman Agrawal (Bindal) and Others (supra)* and in particular to paragraph 11.2 relied upon by Mr. Mishra, learned AGP for the Defendants. Paragraph 11.2 of the said decision is usefully quoted as under :

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“11.2 Over the years, through numerous judicial precedents certain factors have been outlined for the application of Order VI Rule 17. Recently, this Court in *Life Insurance Corporation of India v. Sanjeev Builders Pvt. Ltd. & Anr.* (2022 SCC Online SC 1128), after considering numerous precedents in regard to the amendment of pleadings, culled out certain principles:-

(i) All amendments are to be allowed which are necessary for determining the real question in controversy provided it does not cause injustice or prejudice to the other side. This is mandatory, as is apparent from the use of the word “shall”, in the latter part of Order VI Rule 17 of the CPC.

(ii) In the following scenario such applications should be ordinarily allowed if the amendment is for effective and proper adjudication of the controversy between the parties to avoid multiplicity of proceedings, provided it does not result in injustice to the other side.

(iii) Amendments, while generally should be allowed, the same should be disallowed if -

(a) By the amendment, the parties seeking amendment does not seek to withdraw any clear admission made by the party which confers a right on the other side.

(b) The amendment does not raise a time-barred claim, resulting in the divesting of the other side of a valuable accrued right (in certain situations)

(c) The amendment completely changes the nature of the suit;

(d) The prayer for amendment is malafide,

(e) By the amendment, the other side should not lose a valid defence.

(iv) Some general principles to be kept in mind are –

(I) The court should avoid a hyper-technical approach; ordinarily be liberal, especially when the opposite party can be compensated by costs.

(II) Amendment may be justifiably allowed where it is

intended to rectify the absence of material particulars in the
plaint or introduce an additional or a new approach.

(III) The amendment should not change the cause of action,
so as to set up an entirely new case, foreign to the case set
up in the plaint.”

(emphasis supplied)

17. The Hon'ble Supreme Court has emphasized on the use of the
word “shall” in the latter part of Order VI Rule 17 of the Code of Civil
Procedure, 1908 (“CPC”) which is usefully quoted as under :

“17. Amendment of pleadings.-- 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.”

(emphasis supplied)

18. The Hon'ble Supreme Court has set out the scenario in which the
application under Order VI Rule 17 of the CPC should ordinarily be
allowed i.e. if the amendment is for effective and proper adjudication
of the controversy between the parties to avoid multiplicity of
proceedings provided it does not result in injustice to the other side.
The Hon'ble Supreme Court has also set out situations where the

amendment should be disallowed, although observing that the amendments should be generally allowed and the general principles which are to be kept in mind.

19. That, the Court should also avoid a hyper-technical approach and ordinarily be liberal in such matters. That particularly the amendment may be justifiably allowed where it is intended to rectify the absence of material particulars in the plaint. That, the amendment should not change the cause of action or set up an entirely new case, foreign in the case set up in the plaint or change the nature of the Suit and of course if the amendment is malafide or raises a time barred claim resulting in divesting the other side of a valuable accrued right or seeks to withdraw an admission made by a party which confers a right on the other side, it ought not to be allowed. Of course, by an amendment the other side should not lose a valid defence. Infact, the Hon'ble Supreme Court in the decision cited above refused to interfere with the order of the High Court allowing the amendment setting aside the refusal of the trial Court to grant such amendment. Paragraph 17 of the said decision is also relevant and is usefully quoted as under :

“17. Any and all delays in judicial processes should be avoided and minimised to the largest extent possible, and should generally be, and are rightly frowned upon. However, not in all

cases can delay determine the fate of a Suit. The Defendant submits that the time gap between submitting the written statement to the Suit and the presentation of the application seeking leave to amend is unexplained. If this argument of the Defendant is accepted, the question of Will shall remain undecided or at best will be decided with great delay. The trial which has admittedly already commenced, would be stalled by way of a challenge to the framing of issues which, in turn, would not be in consonance with the object of Order VI Rule 17 of CPC which is aimed at preventing multiplicity of multiple avenues of litigation, subsumed under the umbrella of one dispute.”

(emphasis supplied)

20. In the backdrop of the aforesaid principles, let us now examine the case at hand.

21. The first objection by the Defendants is that there was a delay of over 9 years in bringing the documents on record, which were already known to the Plaintiff as the Applicant was not only a partner of the Plaintiff – firm but was also attending meetings and cannot now aver that he was under a *bona fide* belief that, the erstwhile Advocates were intimated of the subsequent developments concerning the same, but did not do the needful and no proof of the same has also been adduced. It is true that, there is no proof adduced with respect to the intimation or non intimation of the subsequent development of the documents to the erstwhile Advocates, however, what the Applicant has submitted is

that the Applicant's late father used to communicate with the Advocates and also used to maintain the entire records including the communication exchanged between the parties. Firstly, the submission on behalf of the Applicant cannot be disbelieved, although there is no evidence that the erstwhile Advocates were intimated or not intimated of the subsequent developments of the documents. Secondly and more particularly, in my view, the same is not relevant as the Applicant was only under a *bona fide* belief that his father must have intimated the erstwhile Advocates regarding the subsequent developments and documents and that the same would be part of the proceedings before this Court. It has been submitted on behalf of the Applicant that subsequent to the death of the Applicant's father in July, 2022, the Applicant was involved in co-ordination and giving necessary instructions to his Advocates regarding the Suit and that, upon perusal of the documents as filed before this Court, he observed that the subsequent events regarding various meetings and documents recording minutes of the meetings were not placed on record. That, though this was noticed immediately after perusing the plaint and the evidence, he was unable to trace the relevant documents exchanged between the parties subsequent to the filing of the Suit as the documents forming part of the disputes in various suits were handled

by the Applicant's father. It was also enquired with the erstwhile Advocates whether the Applicant's father had handed over the documents recording events that transpired subsequent to the filing of the Suit to them but was informed by the Advocates that no such documents were handed over to them. None of the above submissions have been controverted by placing any cogent material before this Court. It has been further submitted but not controverted by any material placed before this Court, that only recently when an additional office had been taken by the Applicant at Flat No. 1705, Morya Garden, Plot No. B-3, Off Oshiwara Link Road, Morya Estate, Near Andheri Station, Mumbai-400 038, and while shifting the documents and records to the new office, the Applicant came across few documents forming part of the Suit including communications exchanged between the parties and minutes of the few meetings which took place after the filing of the Suit, after which, the Advocate was contacted and instructed to take appropriate steps.

22. I, therefore, agree with Ms. Soman, that although the trial has commenced and the cross-examination of the Plaintiff's first witness- Late Mr. Mahendra Banka- father of the Applicant had also been completed in the March 2016 and the Commissioner's Report has also

been filed but since the Applicant was unable to trace the documents to place the subsequent events on record, which have transpired after the cross-examination of the Plaintiff's first witness was concluded, there has been a delay that has been occasioned in preferring this Application.

23. It has been submitted on behalf of the Applicant, which has not been controverted by any material before this Court that since, after the Applicant's father passed away in July, 2022, several meetings to re-evaluate and re-inspect the claims of the Plaintiff took place and communications were exchanged and that only in April, 2025, when the Plaintiff had taken an additional office premises and was shifting the documents that the Plaintiff could lay his hands on the communications exchanged between the parties which are annexed to the Interim Application.

24. It has also not been disputed that since the Applicant is a Civil Engineer and Contractor engaged in several major government contracts across Maharashtra and considering the nature of the various works executed by the Plaintiff (construction of bridges, roads, dams etc.) the documents and records maintained by the Plaintiff were voluminous and hence, the documents were not easily traceable.

25. Therefore, although the delay is large, in my view, the same has been sufficiently explained.

26. Moreover, whether or not a delay is fatal to an amendment application has been very succinctly explained in paragraph 17 of the decision of the Hon'ble Supreme Court in the case of *Dinesh Goyal @ Pappu vs. Suman Agrwal (Bindal) and Others (supra)* which has been quoted above where the Hon'ble Supreme Court has clearly observed that not in all cases can delay determine the fate of the Suit.

27. It has been alleged that by the proposed schedule of amendments the Applicant has tried to bring on an entirely new case with respect to the claim for sinking of wells in soft rock which cannot be permitted as the scope of the Suit would be widen to include claims which were not made originally. I am unable to accept the said arguments. In the facts of this case, all that the amendment is seeking is to bring on record the events that transpired subsequent to the filing of the Suit in the year 2009. It is also an admitted position that the said documents sought to be brought on record pertain to a period after the filing of the Suit and include recording of meetings and communications exchanged between the parties with respect to existence of the soft rock. In paragraph 71 of the plaint in the Suit, which pertains to the cause of action, the

reference to the extra claim for sinking of wells in the soft rock has already been stated. During the meetings, the Defendant had revealed that the data maintained by the Defendant records the existence of the soft rock and has *inter alia* admitted that the Plaintiff has carried out extra work, which has been earlier claimed as a cause of action in paragraph 71 of the Plaint arising when the Superintending Engineer of the Defendant requested the Plaintiff to submit the details of the extra claim for sinking of wells in soft rock vide communication dated 7th September, 2004 annexed as Exhibit MM to the Plaint and that the Superintending Engineer of the Defendant fixed meeting on 29th September 2006, for discussing various claims of the Plaintiffs, vide communication dated 19th September, 2006. The relevant portion of the said paragraph is, therefore, usefully quoted as under :

“Further cause of action arose when the Superintending Engineer of the Defendants requested the Plaintiffs to submit details of the extra claim for sinking of well in soft rock vide communication dated 07.09.2004. Further cause of action arose when the Superintending Engineer of the Defendants fixed a meeting on 29.09.2006 for discussing the various claims of the Plaintiffs vide communication dated 19.09.2006.”

28. It is, therefore, clear that neither the nature of the claim nor the original cause of action is sought to be altered. The claim is also not

sought to be enhanced by the proposed amendment. The submissions of Mr. Mishra, learned AGP for the Defendant-State that the proposed schedule of amendments is trying to bring out an entirely new case with respect to the claim for sinking well in soft rock or scope of the Suit is being widen or that the documents sought to be brought on record are only to cover up the lacuna in the case of the Plaintiff are therefore completely without merit. It is true that the amendments have been sought after the commencement of the trial and after recording of the cross-examination of the original Plaintiff, but if the amendment is not permitted, then it cannot be said that there would be effective and proper adjudication of the controversy between the parties.

29. As regards the submission that the amendment is seeking to bring in material relating to without prejudice settlement talks as the talks were intended to resolve the matter out of Court, I am afraid, I am unable to agree with the learned AGP, in as much as, any without prejudice communication either for a settlement within Court or outside Court has to be specifically so stated. It is settled law that if a communication is intended to be without prejudice, the same is to be expressly stated and in the event it is not so stated, the same cannot be

said to be without prejudice. A perusal of the said schedule or supporting material does not indicate that the settlement meetings were stated to be without prejudice.

30. The learned AGP appearing for the Respondent-State has endeavoured to convince this Court that out of Court settlement is the same as a without prejudice settlement or a communication and that the same is privileged. Sections 122 to 132 of the Indian Evidence Act, 1872 (Sections 128 to 134 of Bharatiya Sakshya Adhiniyam, 2023) refer to privileged communication and the same do not refer to meeting or negotiations or discussions of out of Court settlement are *per se* between the parties to the Suit to be privileged communications, as sought to be made out by the learned AGP. Ergo, the communications/meetings of the nature that ensued between the parties as evidenced by the documents mentioned in the schedule cannot be even remotely considered to be a privileged communication and, therefore, this objection is only stated to be rejected.

31. Even otherwise as submitted by Ms. Soman and she is right that the Defendants have not denied the existence of the record relating to the several meetings and corresponding communications to re-evaluate and re-inspect the claims of the Plaintiff after the passing away of the

Applicant's father in July, 2022, which indicates that the meetings were not settlement talks but discussions based on record maintained by the Defendants.

32. In my view, therefore, the subsequent events and documents mentioned in the schedule of amendments to the Interim Application are subject matter of the suit and are just and necessary to decide the issues involved in the Suit and that the amendments as sought for by the Applicant are *bona fide* and necessary for determining the real question in controversy between the parties, the proposed amendments neither changing the nature of the Suit, nor the cause of action, nor being inconsistent with the original cause of action and would not in any manner cause injustice to the Defendants being necessary and relevant for the adjudication of the dispute between the parties. In my view, there is no valid defence that the Defendant would lose. In fact, if the amendment is not allowed, the determination of the real question in controversy may be impaired resulting in injustice which has to be avoided at any cost. The Hon'ble Supreme Court has, as noted above, clearly observed that amendment may be justifiably allowed where it is intended to rectify the absence of particular material in a plaint. The minutes of meeting and the communications sought to be brought on

record are not material which are alien to the Defendants. All that is being done is to bring on record the material pertaining to events subsequent to the filing of the Suit for effective and proper adjudication of the controversy between the parties, which in my view, would also avoid multiplicity of the proceedings. In fact, although, in the facts of this case, the delay have been sufficiently explained, not in all cases can delay determine the fate of the Suit, as not permitting the amendment will result in the question of the claim regarding soft rock not being effectively and properly adjudicated, the claim in respect whereof, having already been made in the original plaint in paragraph 71, the Defendants nowhere having denied the existence of the records with respect to the scheduled documents or the meetings which the parties had.

33. In this view of the matter, I am inclined to allow the Interim Application.

34. The Interim Application is allowed in terms of prayer Clauses (a) and (b), which read thus:-

“(a) The Hon’ble Court may be pleased to allow the Plaintiff to amend the Plaint as pr the Schedule annexed hereto.

(b) Consequential amendments may please be allowed.”

35. Let the amendments as per the schedule be carried out within a period of two weeks from the date of uploading of this order. Let the amended Complaint and the proceedings be served upon the other side within a period of two weeks thereafter and an appropriate affidavit of service be filed.

36. After service, let the additional written statement be filed on behalf of the Defendants within a period of 30 days with copy to the other side.

37. The Interim Application accordingly stands allowed and disposed as above.

(ABHAY AHUJA, J.)

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