
(2018) 08 BOM CK 0116
In the Bombay High Court
Case No : Writ Petition No.5266 Of 2018

Mohd. Sajid S/O Rafiq Miyan

APPELLANT

Vs

Smt. Hasina Wd/O Abdul Rashid And Others

RESPONDENT

Date of Decision : 21-08-2018

Acts Referred:

Code of Civil Procedure, 1908 — Order 6 Rule 17

Citation : (2018) 08 BOM CK 0116

Hon'ble Judges : S.B. SHUKRE, J

Bench : Single Bench

Advocate : S. Raisuddin, C.S. Samudra

Final Decision : Dismissed

Judgement

[01] Heard Shri S. Raisuddin, learned Counsel for the petitioner and Shri C.S. Samudra, learned Counsel for the respondents, who appears by waiving notice.Â

[02] Rule.Â Rule made returnable forthwith. Heard finally by consent.

[03] It is not in dispute that the amendment application has been filed by the petitioner, the original defendant, after the commencement of the trial.Â

It is also not in dispute that the amended proviso to Order 6 Rule 17 of the Code of Civil Procedure (â??Codeâ? for short) applies to the present suit

filed in the year 2008. It would be, therefore, necessary for the petitioner to clear the test of due diligence as contemplated under the proviso to Order

6 Rule 17 of the Code.

[04] Of course, the justification given by the petitioner is that no new facts are being stated and what is being done by him, is only an elaboration of the

defence already taken by him, which is permissible under the provisions of the

Code. He places his reliance upon the judgment of the Hon'ble Apex

Court in the case of State of Bihar & Ors. vs. Modern Tent House & Anr. - AIR 2017 SC 4966. 05] On the other hand, resisting the petition, the

learned Counsel for the respondents submits that no explanation has been given by the petitioner as to why the petitioner could not state these facts,

which are only in the nature of additions being made to the facts on record earlier in spite of acting with due diligence in the matter and, therefore, this

case is squarely covered by the view taken by this Court in the case of Conception Fernandes & anr. vs. Tasneem Shaikh (Mrs.) & ors. - 2014 (6)

Bom.C.R 179.Â

[06] In the case of Modern Tent House (supra), the Hon'ble Apex Court has taken a view that as the proposed amendment was on facts and was in

the nature of elaboration of the facts originally pleaded in the written statements, not introducing any new defence compared to what was originally

pleaded and there being no prejudice being caused to the plaintiff, the amendment deserves to be allowed and accordingly it allowed the amendment.

It appears that in that case, the amendment application was moved before the amendment to Order 6 Rule 17 of the Code came into force and it

came into force with effect from 01/07/2002 and this can be noted from the year, in which the suit was filed.Â Here the suit was filed in the year

2008.Â That apart, the amendment was for elaboration of defence, unlike the amendment proposed here, which seeks to add some new facts.Â

Therefore, in my respectful submission, this judgment would render no assistance to the petitioner in the present case.Â

[07] On the contrary, the law settled by the Hon'ble Apex Court in the case of Ajendraprasadji N. Pandey vs. Swami Keshavprakeshdasji N. - (2006)

12 SCC 1, would guide us in the present case.Â This Court following the law laid down in the cases of Ajendraprasadji N. Pandey (supra) and also

Kishor R. Pande vs. Narendra D. Shah â?" 2012 (2) Bom.C.R. 629, in the case of Conception Fernandes (supra), has held that the test of due

diligence is required to be cleared by the party, in a case where the amendment application is filed after the commencement of the trial and if it is not

done, the application cannot be allowed by the Court.

[08] So, it has to be seen as to whether or not the test of due diligence has been cleared in the present case.Â This is all the more so, because what

has been stated to be only an elaboration of the facts already stated and thus amplification of the defence by the learned Counsel for the petitioner, is

actually an effort to make addition of many facts, which, though within the knowledge of the petitioner, were not pleaded specifically in the written statement.

On perusal of the proposed amendments, one cannot agree with the submission that they contain only those facts which are nothing but an

amplification of the defence, rather they are something, as rightly submitted by the learned Counsel for the respondents, which amount to making an

effort to add some new facts, not stated earlier.Â Therefore, the petitioner was required to give a reasonable explanation as contemplated under

Order 6 Rule 17 proviso, but it appears from the facts established on record that the petitioner has failed to do so.

[09] The learned Counsel for the petitioner has also referred to me a few more cases in support of his argument and they are as follows :

1. Emersan Hyde vs. Ram Kali â?" 1987(1) Civil LJ 312.
2. Vineet Kumar vs. Mangal Sain Wadhera â?" AIR 1985 SC 817.
3. Tarsem Singh vs. Kashmir Kaur & others â?" AIR 2017 (NOC) 35 (P.&J.)

The first two cases relate to the legal position, as it stood before the amendment to Order 6 Rule 17 of the Code and, therefore, would not be of any

help for us to determine the controversy involved in this case.Â The third case of Tarsem Singh appears to be reported only in the nature of Notes of

Cases, in which there is no reference made to or finding given upon the interpretation of the concept of â??due diligenceâ? introduced in Order 6

Rule 17 of the Code and, therefore, even this case would provide us no guidance in the matter.Â

[10] In view of above, I find no merit in the petition.Â There is no patent illegality noticed in the impugned order.Â

[11] The petition stands dismissed.Â Rule is discharged with no order as to costs.