

**:: ORDER BELOW EXH. 23 IN REG.CIVIL SUIT NO. 37/2012 ::**

This is the application filed by the plaintiff under Order 6, Rule 17 of Civil Procedure Code, 1908. Defendant has filed his say below Exh. 24 and thereby resisted the application.

2) Perused application as well as say. Heard both the learned advocates for the respective parties. According to plaintiff, the suit is for recovery of the amount. Now the suit is fixed for hearing. However, due to oversight, some mistakes have been committed in the pleading, which are necessary to be corrected by way of amendment. Accordingly, he has prayed to correct the date "05/09/2008" instead of "06/09/2008" in para no. 3, line no. 16. So also, one sentence in the same line is prayed to be added by this application. According to him, the nature of the suit will not be changed, if the application is allowed. Plaintiff has not introduced any new case by this amendment. No prejudice will be caused to defendant, if the application is allowed. On the contrary, according to defendant, by this application, plaintiff is trying to introduce a new case. Now the affidavit of examination-in-chief is filed on record. Therefore, amendment cannot be allowed. So also, plaintiff cannot be permitted to withdraw the admissions. It will cause injustice to defendant. The amendment is not to clarify the mistakes by oversight. So also, delay is caused, which is not explained. Hence prayed to reject the application.

3) Before going into the merits of the application, the material argument by both the learned advocates for respective parties, has to be considered. The learned advocate for

defendant Shri. S. D. Bhosale has raised the law point that in view of the proviso to Order 6, Rule 17 of Civil Procedure Code, once the trial has commenced, the application for amendment cannot be allowed as the Court has no jurisdiction to allow such application. On the contrary, the learned advocate for plaintiff Shri. G. T. Thakur submitted that the application can be allowed, even if, there is proviso, as the said proviso must be understood in the limited sense as meaning the final hearing of the suit, examination of witnesses, filing of documents and addressing of documents as observed by the Hon'ble High Court in "Bharat Petroleum Corporation Ltd. V/s. Precious Finance Investment Pvt. Ltd." reported in "2007 (1) Mh.L.J. 331". On the contrary, the learned advocate for defendant has strongly relied upon the judgment in "Ajendra Prasadji N. Pande & another V/s. Swamy Keshav Prakeshdasji N. & others" reported in "AIR 2007 SC 806" wherein it is observed as under,

*" 57. The above averment, in our opinion, does not satisfy the requirement of Order VI, Rule 17 without giving the particulars which would satisfy the requirement of law that the matters now sought to be introduced by the amendment could not have been raised earlier in respect of due diligence. As held by this Court in Kailash vs. Nankhu & Ors. (supra), the trial is deemed to commence when the issues are settled and the case is set down for recording of evidence."*

At the same time, the learned advocate for defendant has relied upon the judgment of Hon'ble Apex Court in "Vidyabai & ors. V/s. Padmalatha & another" reported in "2009 (4) Mh. L.J 30" wherein it is observed that the date on which the issues

are framed, is the date of first hearing. Provisions of the Code of Civil Procedure envisaged taking of various steps at different stages of the proceeding. Filing of an affidavit in lieu of examination-in-chief of the witness, would amount to "commencement of proceeding". Thus, by these judgments, it can be considered that the commencement of trial means, where the affidavit in lieu of examination-in-chief of the witness is filed. In case on hand, admittedly, the affidavit of plaintiff is filed at Exh. 17 and the matter is fixed for his cross-examination. Therefore, in the light of above observation, now the proviso to Order 6, Rule 17 came into the picture.

4) At this juncture, the judgment filed by the learned advocate for plaintiff in Bharat Petroleum Case (Supra), can be seen wherein it is observed that the proviso to Order 6, Rule 17 is procedural and not a part of substantive law. It does not deal with the power of the Court and also does not specifically take away the power of the Court to allow the amendment after the commencement of trial. It only empowers the Court to reject the application, if it comes to the conclusion that in spite of due diligence, the parties could not have sought the amendment before the commencement of trial. The same ratio is laid down in the judgment produced by the learned advocate for defendant in "Sai Shraddha Developers, Sangamner & Ors. V/s. Ravindra Ganapatrao Bharitkar & Ors." reported in "2012 (6) Mh. L.J. 348". In that light, now the question is whether the plaintiff can be set to be diligent to take steps to correct the mistakes due to oversight as alleged. Perusal of record shows that the suit is filed in the year 2010. It appears that the written statement is filed on 06/07/2010 but defendant has not taken any objection

regarding the date of cheque or the account of the said cheque. The plaintiff has filed this application positively stating that it is a mistake due to oversight. It is significant to note that the application is supported by the affidavit of plaintiff. The reason is probable and acceptable. The first objection of defendant, therefore, cannot be sustained as the plaintiff cannot be said to be not diligent. The another objection of defendant is that plaintiff cannot be allowed to withdraw the admissions by amendment. Nowhere it is the case of defendant that it is an admission. It is at the stage of evidence to decide whether the date & amount of the cheque is correct or not. This is not the proper stage to ascertain the same. Moreover, defendant has every right to amend his written statement in view of the amendment of plaint as provided in the judgment of Bharat Petroleum Case (Supra). So also, defendant will have every right to cross-examine the plaintiff in that regard. Therefore, it will not cause any injustice to the defendant. So also, by this amendment, the original nature of the suit will not be changed at all. Plaintiff is not introducing a new case by this amendment. Therefore, in my view, application deserves to be allowed. Accordingly, I pass the following order,

**:: ORDER ::**

- 1] Application is allowed.
- 2] Plaintiff to carry the amendment within 14 days from the date of this order.

Gargoti.  
Date : 01/03/2013.

**Sd/-.**  
( P. V. Kulkarni )  
Civil Judge Junior Division,  
Gargoti.