

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

WRIT PETITION NO.3326 OF 2015

Devising s/o Pratapsing Girase,
Age: 51 years, Occ: Agri.,
R/o. Chimthane, Tq. Shindkheda,
Dist. Dhule.

...Petitioner

versus

1. Ramakant s/o Amrutlal Upacharya,
Age: 50 years, Occ: Service & Agri.,
2. Premanand s/o Amrutlal Upacharya,
Age: 50 years, Occ: Service & Agri.,

Both R/o. Chimthane, Tq. Shindkheda,
Dist. Dhule,
At present R/o. Adhar Nagar,
Walwadi Shiwar, Deopur, Dhule.

...Respondents

.....
Mr. P.B. Patil, Advocate for petitioner
Mr. S.P. Shah, Advocate for respondent No.1
.....

CORAM : N.W. SAMBRE, J.

**Reserved on : 02/12/2015
Pronounced on: 07/12/2015**

ORAL ORDER :

This is a petition questioning the order passed by learned Civil Judge, Junior Division, Shindkheda on 04/02/2015 below Exhibit-68, an application under the provisions of Order 6 Rule 17 of the Code of Civil Procedure for amendment in written statement, rejecting the same.

2. The facts as are necessary for deciding present petition are as under :

On 13/07/2012 the respondents herein filed civil suit for permanent injunction. In the said suit, written statement was filed by the petitioner on 04/08/2012 and on 13/09/2013 an application was filed by respondents-plaintiffs before the Collector alleging therein that their father Amrutilal was allotted land in question being serviceman and the defendant-petitioner has mutated the same in his name. It is further claimed that since the plaintiffs were out of Dhule district for the purpose of their education, the land in question which is tribal land, petitioners are not permitted to cultivate the same.

3. The claim was objected by the defendant alleging therein that the suit land is in possession of the defendant since 1950 and as such, has carried out certain developments thereon. Another land adjacent to the suit property is also owned by the defendant. It is further claimed that the suit land was allotted to mother of the defendant by father of plaintiffs pursuant to an agreement.

4. By amendment in question, the defendant-petitioner sought to incorporate in the written statement that the plaintiff has filed an application on 10/09/2012 claiming that the land in question

is tribal land. It is further claimed that the land was allotted to the plaintiffs' father in 1976 and claimed issue of estoppel.

5. The said application came to be rejected by learned trial Court on the ground that the petitioner-defendant was not diligent in pursuing the remedy, which according to him, is basis for exercising of power under Order 6 Rule 17 of the Code of Civil Procedure. While doing so, he has relied upon certain judgments of the Apex Court.

6. Mr. Patil, learned Counsel for the petitioner would urge that the reasons given by the learned trial Court in rejecting the application are not sustainable, as according to him, in catena of judgments, the Apex Court has already declared that application for amendment of written statement irrespective of inconsistent stand is required to be considered liberally while granting. He would then urge that the application in question was filed by the plaintiffs on 13/09/2013 before the Collector claiming that the land in question is tribal land. According to him, in fact, the petitioner has moved the application for amendment on 02/05/2014 i.e. within period of six months and as such, there is no delay or negligence on the part of the petitioner. He would then urge that rejection of the application Exhibit-49 and present application i.e. Exhibit-68 are altogether

different.

7. He would then urge that the order impugned is not sustainable and is liable to be set aside, if necessary by putting the petitioner to certain conditions.

8. Mr. Shah, learned Counsel for respondent No.1, while supporting the order passed by learned trial Court, would urge that the petitioner-defendant is trying to delay the suit, as according to him, this is second application for amendment after rejection of earlier application Exhibit-49. He would then urge that from 04/08/2012 the petitioners for no reasons by moving one or other application, without any basis, are trying to delay the proceedings. According to him, the trial has reached at advanced stage and as such, the application was rightly rejected by learned trial Court. According to him, the petitioner was not diligent in pursuing the matter. He would then urge that the amendment as is sought is based on the communication issued by the plaintiffs to the Collector and according to him, it is for the plaintiffs to prove their case, as such, amendment to the written statement is not germane to cause, as such, liable to be rejected.

9. Having bestowed my anxious thoughts over to the

submissions made, it is noted that the application dated 13/09/2013 was moved by plaintiffs to Collector claiming suit land to be tribal land and have sought restoration of the same. After the said application was allowed by the Collector on 04/10/2013, the petitioner-defendant moved present application Exhibit-68 on 02/05/2014. While rejecting the application, trial Court has formed an opinion that the agreement executed in between the father of plaintiffs and father of defendant was well within knowledge of the defendant, when the written statement was filed on 04/08/2012. Learned trial Court has noted that the documents which ought to have been filed alongwith written statement were not produced. The trial Court then considered that the application Exhibit-49 was rejected, which was for amendment of written statement. Trial Court then proceeded to consider that the petitioner-defendant has filed an application under Section 9-A of the Code of Civil Procedure, Section 115 of the Evidence Act and under Section 36-C of the Maharashtra Land Revenue Code. It is observed by learned trial Court that the petitioner-defendant has not explained due diligence about delay in making amendment to the written after commencement of trial. He then observed that the applications Exhibit-60 and 49 were already rejected. The trial Court claimed that in the suit issues were framed on 12/07/2013 at Exhibit-42 and as the petitioner was not diligent, rejected the application for amendment.

10. It is required to be noted that from the dates as are narrated hereinabove, the petitioner has moved amendment application within six months from the date of tendering of the application by the plaintiffs-respondents to the Collector. The stand taken therein by the plaintiffs, that the land in question is tribal land is a issue which goes to the root of the matter. The amendment, in question, is based on subsequent developments, for which, the cause was at the behest of plaintiffs and not the defendant as the plaintiffs have moved to the Collector with prayer for restoration of suit land to the tribal. Apart from above, the Apex Court in catena of judgments has already laid down that the amendments to the written statement are required to be dealt with liberally. In my opinion, in view of the fact that the defendant-petitioner is entitled to raise inconsistent plea, said plea was required to be permitted to be raised by the petitioner-defendant in the written statement. Apart from above, it is to be noted that even if the trial has commenced, it is not at advanced stage.

11. As such, rejection of the application by learned trial Court by an order impugned on the ground of failure to show due diligence by the petitioner is required to be over ruled. Apart from above, Exhibit-49 an earlier amendment application was based on

altogether different grounds which are narrated by learned trial Court in its order in paragraph-6.

12. For all these reasons, in my opinion, the order impugned is not sustainable and as such, is hereby set aside, by declaring that the application Exhibit-68 stands allowed, subject to payment of costs of Rs. 3500/- (Rs. Three thousand five hundred only) to be deposited before learned trial Court within two weeks from today, to which, the plaintiffs shall be entitled for withdrawal of the same. The petitioner shall carry out amendment immediately thereafter. The writ petition is allowed in above terms.

[N.W. SAMBRE, J.]