

IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO. 769 OF 2014

MRS. VARSHA VINOD MAKWANA THROUGH
P.O.A. MR. VINOD M. MAKWANA.

... Petitioner

Versus

MRS. SHARADA RAMSHANKAR YADAV AND
4 ORS.

... Respondent

Mr. Sagar B. Rivankar, with Mr. S. R. Rivankar, Advocates for the
petitioner.

Mr. Ashwin D. Bhobe, Advocate for the respondent No.1.

Coram:- M. S. SANKLECHA, J.

Date:- 20th April, 2015

P.C.

This petition challenges an order dated 16 September 2014 passed by the trial Court, under Article 227 of the Constitution of India. By the impugned order, the trial Court rejected the petitioner's application for amendment of the plaint under Order VI Rule 17 of the Civil Procedure Code.

2. The petitioner had filed a suit for permanent injunction to restrain the defendants from interfering with the petitioner's possession of the suit premises, as well as seeking damages. The issues in the suit were framed on 19 July, 2011 and the copy of the petitioner's affidavit in evidence was furnished to the other side on 3 August 2013. The petitioner moved an application on 18 February 2014 seeking to amend the plaint, so as to bring on record certain developments which according to him are subsequent to the institution of the suit.

In view of the above, the impugned order in terms of the proviso to Order VI Rule 17 of Civil Procedure Code dismissed the application for amendment to the plaint. The impugned order relied upon the decision of the Apex Court in "Vidyabai and others vs. Padmalatha and another, reported in [2009(4) Mh.L.J. 30]" and held that the proviso to Order VI Rule 17 of the Civil Procedure Code, would be attracted to the present facts. The impugned order while dismissing the application records that no attempt was made in the application to explain due diligence on the part of the petitioner for not having amended the proceedings before the commencement of the trial. In the above view, the impugned order dismissed the application for the amendment.

3. Mr. Rivankar, learned counsel for the petitioner submits that the proposed amendment ought to have been allowed as the same is necessary to bring out the real controversy between the parties. Particularly so as no prejudice or injustice would be caused to the other party, if the amendment is allowed. Although he concedes that no application is offered for not moving the application before framing of issues, he submits that the petitioner had moved interim applications in the suit touching the amendments in the year 2009 and 2011, which were dismissed. Therefore a liberal view be adopted and amendments be allowed. Reliance was placed upon the decision of this Court in the case of "Teodolinda Dais Mandoly and ors. vs. Laurie Periera, 2014 (7) Bom CR 222".

4. Mr. Bhobe, learned counsel for the respondent besides placing reliance upon the impugned order also points out that the proposed amendments are in respect of events of the year 2009. Thus, if a fresh suit was to be filed on the same cause of action it would be barred by the limitation, on the date of the application.

5. The petitioner admits that he has not made an attempt to satisfy the Court that the proviso to Order VI Rule 17 of the Civil Procedure Code, would not apply as the amendment could not be moved inspite of due diligence on his part. In this case, admittedly the issues have been framed and affidavit of the petitioner had been served upon the other side. The reliance placed upon the decision of this Court in "Teolinda Dais Mandoly" (supra) by the petitioner is of no assistance for the reason that in that case the affidavits of evidence were not yet filed. In this case copies of the affidavits of evidence have been filed. Further the decision of the Apex Court in "Vidyabai" (supra) would apply in this case, as not only the issues have been framed but affidavit of evidence of the petitioner was filed on 3 August 2013, and was served upon the other side. Therefore, in the present facts, the trial had commenced for the purposes of the proviso to Order VI Rule 17 of the Civil Procedure Code being triggered. There can be no dispute that all amendments which are necessary to decide the real controversy, must be allowed, in the absence of the prejudice to the other side. However, the proviso to Order VI Rule 17 of the Civil

Procedure Code puts a limitation on the exercise of its jurisdiction and unless the party is able to establish due diligence, the amendments are not be allowed. Moreover, the proposed amendments if brought by a separate suit, would admittedly be time barred. Thus allowing the proposed amendments would cause prejudice to the other side. Therefore, in the present facts, there is no warrant to exercise the supervisory jurisdiction under Article 227 of the Constitution of India as the impugned order is not beyond the limits of jurisdiction of the trial Court, in view of the clear mandate of law as found in the proviso to Order VI Rule 17 of the Civil Procedure Code.

6. In the above view, there is no reason to interfere with the impugned order. Accordingly, petition is dismissed. No order as to costs.

M. S. SANKLECHA, J.

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