

Mr. Wadikar i/b. Nandu V. Pawar for Petitioners.

P.C. :

2. Heard Mr. Wadikar, learned Counsel for petitioners.

4. Respondents No.1 and 2, hereinafter referred to as plaintiffs, instituted Suit for specific performance of contract dated 12.06.1974 entered into by S/Sh. Laxmanrao and Jagannath, since deceased, in their favour, among other reliefs. Defendants No.1 to 3 filed their written statement on 12.01.2009 opposing the Suit. During the pendency of the Suit, defendants No.1 to 3 took out application exhibit-65 on 27.08.2015 for adding paragraphs 20A and 20B. By the impugned order, the learned trial Judge rejected the application.

5. Mr. Wadikar invited my attention to paragraph 8 of the plaint wherein plaintiffs asserted that after negotiations, S/Sh. Laxmanrao and Jagannath executed agreement of sale on 12.06.1974 whereunder they agreed to sell the property in dispute upon obtaining permission for a total consideration of Rs.5,500/-. On the same day, S/Sh. Laxmanrao and Jagannath accepted Rs.4,500/- and handed over possession in part performance to the plaintiffs. It was further agreed that after obtaining permission from the Government, S/Sh. Laxmanrao and Jagannath, since deceased, were to intimate in writing about obtaining such permission and were to execute the sale deed after receipt of the remaining consideration of Rs.1,000/- It is further asserted that S/Sh. Laxmanrao and Jagannath executed the agreement of sale and it was signed by the witnesses.

6. Mr. Wadikar invited my attention to paragraph 8 of the written statement wherein defendants No.1 to 3 denied the contents of paragraph 8 in its entirety. Mr. Wadikar also invited my attention to - (i) paragraph 11 of the plaint wherein plaintiffs alleged that they were all along ready and willing to perform their part of contract and (ii) paragraph 11 of the written statement wherein defendants have denied contents of paragraph 11. He submitted that as the denial in paragraph 8 of the written statement was evasive as also for giving better particulars, defendants No.1 to 3 took out application for amendment. The amendment proposed is in fact an elaboration of the defence already raised in the written statement. He submitted that it cannot be said that this was the case of withdrawal of admission given in the earlier written statement. It is settled law that an application for amendment of plaint and an application for amendment of written statement are not governed by the same principles. Adding a new ground of defence or substituting or altering the defence is permissible. In support of these submissions,

he relied upon ***Baldev Singh Vs. Manohar Singh***, AIR 2006 SC 2832, and in particular paragraphs 14 and 15 thereof.

7. I have considered the submissions advanced by Mr. Wadikar. I have also perused the material on record. As noted earlier, plaintiffs specifically asserted that Laxmanrao and Jagannath, since deceased, have executed agreement of sale on 12.06.1974 and that witnesses have signed this agreement of sale. Defendants No.1 to 3 filed written statement on 12.01.2009 and in paragraph 8, they denied contents of paragraph 8. However, by the proposed amendment, defendants want to contend that the agreement of sale dated 12.06.1974 was not executed by S/Sh. Laxmanrao and Jagannath, since deceased, and that they did not sign this agreement for sale. In other words, defendants No.1 to 3, for the first time, are contending that this document was never executed by Laxmanrao and Jagannath on 12.06.1974 and that they did not sign the said agreement of sale. As far as the amendment proposed in paragraph 20B is concerned, defendants have already denied contents of paragraph 11 in paragraph 11 of the written statement.

8. While rejecting the application, the learned trial Judge has noted that the Suit is for hearing from last year and is instituted in the year 2008. Mr. Wadikar submitted that denial in paragraph 8 was evasive and the proposed amendment is in fact an elaboration of the facts stated in the written statement. It is not possible to accept this submission. Denial of the contentions raised in paragraph 8 of the plaint is one thing to say and for the first time contending that this document was neither executed nor signed by S/Sh. Laxmanrao and Jagannath is altogether different thing. As noted by the learned trial Judge, the Suit is for hearing for more than one year. The Suit is instituted in the year 2008 and the present application is taken out on 27.08.2015, that is, at the fag

end of the trial.

9. Mr. Wadikar submitted that the observation made by the learned trial Judge that the Suit is for hearing from the last year is incorrect. On 10.10.2014, plaintiffs filed affidavit in lieu of examination-in-chief. In short, he submitted that the Suit is not for final arguments and P.W.1 has merely filed affidavit in lieu of examination-in-chief. Admittedly, the Suit is instituted in the year 2008. Order VI, Rule 17 of C.P.C. reads thus,

“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.”

10. Even accepting that only PW1 has filed affidavit of evidence in lieu of examination-in-chief as contended by Mr. Wadikar, nonetheless, the trial has commenced. Proviso to Order VI, Rule 17 lays down 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. In the present case, written statement is filed in the year 2009. P.W.1 has filed affidavit in lieu of examination-in-chief on 10.10.2014. The trial has, therefore, commenced. The application filed by defendants No.1 to 3 on 27.08.2015 does not satisfy the conditions stipulated in proviso to Order VI, Rule 17 of C.P.C.

11. The Apex Court in the case of ***Vidyabai Vs. Padmalatha, 2009 (4) Mh.L.J. 30*** held that filing of an affidavit in lieu of examination-in-

chief of the witness, would amount to commencement of proceeding. It is further held that the proviso to Order 6, Rule 17 of C.P.C. is couched in a mandatory form. The Court's jurisdiction to allow an application for amendment is taken away unless the condition precedent therefor are satisfied viz. it must come to a conclusion that in spite of due diligence the parties could not have raised the matter before the commencement of trial. Only if such a condition is fulfilled, the amendment is to be allowed.

12. In view thereof, Petition fails and the same is dismissed. It is, however, expressly made clear that where a decree is appealed from by the petitioner, any error, defect or irregularity in the impugned order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of appeal as contemplated by Section 105(1) C.P.C.

(R. G. KETKAR, J.)

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