

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 1029 OF 2014

Ibrahim Hussain Miya Lalchadi .. Petitioner
vs.
Zeenat Bano and ors. .. Respondents

Mr. M.N. Dhamal for Petitioner.
Mr. R.R. Sharma for Respondent Nos.1 and 2.
Mr. S.P. Thorat for Respondent No.3.

CORAM : M. S. SONAK, J.
DATE : 26 MARCH, 2015

P.C. :-

1] Rule. With the consent of and at the request of learned counsel for the parties, Rule is made returnable forthwith.

2] This petition is directed against the order dated 9 December 2013 made by the City Civil Judge, Dindoshi, dismissing the petitioner's (original plaintiff) Chamber Summons No.516 of 2013 for amendment of the plaint.

3] In the present case, the affidavit in evidence on behalf of the petitioner came to be filed on 10 November 2010. Before the cross-examination could commence, the petitioner by an application 24 September 2012 applied for production of additional documents on record. By an order made on 1 December 2012, such application was allowed and additional documents were permitted to be brought on record. In March 2013, respondent Nos.1 and 2 (original defendant Nos.1 and 2) applied for leave to amend their written statement, in the context of the additional documents permitted to be taken on record. On 9 July 2013, the petitioner also applied for amendment

to the plaint, mainly in the context of the additional documents, which were already permitted to be brought on record. The petitioner also applied on 8 August 2013 for leave to file an additional affidavit-in-evidence, again in the context of the additional documents already permitted to be produced on record. Such application was duly allowed and in pursuance thereof, the petitioner has filed an additional affidavit-in-evidence on 8 August 2013 itself.

4] The learned City Civil Judge, did not take up the Chamber Summons filed by the petitioner and respondent Nos.1 and 2 seeking amendment to the plaint and written statement respectively, for consideration at one and same time. Instead, the learned City Civil Judge, by an order dated 1 October 2013, allowed the Chamber Summons No. 282 of 2013 taken out by respondent Nos.1 and 2, for amendment to their written statement. Thereafter, by the impugned order dated 9 December 2013, the learned City Civil Judge has rejected the petitioner's Chamber Summons No. 516 of 2013 seeking amendment of the plaint. Hence, the present petition.

5] Mr. M.N. Dhamal, learned counsel for the petitioner, submitted that the learned City Civil Judge ought to have taken up the two Chamber Summons seeking leave to amend the respective pleadings together and further, both the Chamber Summons could have, in the facts and circumstances of the present case, been allowed. Further, Mr. Dhamal submitted that once leave was granted to produce additional documents on record, leave to amend, merely for the purposes of incorporating pleadings in the context of such additional

documents, could not have been denied. Mr. Dhamal submitted Order 6 Rule 17 of the CPC was not really attracted in the facts and circumstances of the present case, particularly since the Chamber Summons seeking leave to amend was filed on 9 July 2013 and the learned City Civil Judge granted leave to file additional affidavit-in-evidence on 8 August 2013. For all these reasons, Mr. Dhamal submitted that the Chamber Summons seeking leave to amend the plaint ought to have been allowed, may be subject to payment of some reasonable costs.

6] Mr. R.R. Sharma, learned counsel for respondent Nos.1 and 2, defended the impugned order and submitted that the conduct of the petitioner was such as would dis-entitle the petitioner to any equitable relief from this Court. The petitioner, has virtually inverted procedure and thereby is attempting to draw a mileage. The petitioner, first produced additional documents. Thereafter, realising that respondent Nos.1 and 2 have applied for leave to amend their written statement, himself applied for leave to amend. The petitioner, thereafter applied for and obtained leave to file additional affidavit-in-evidence. There is no explanation as to why the pleas sought to be raised by way of amendment could not be raised despite due diligence before the commencement of the trial. In the present case, the trial has commenced on 24 September 2012 and therefore, the proviso to Order 6 Rule 17 of the CPC applies.

7] Mr. Sharma placed reliance upon the decision of the Hon'ble Apex Court in case of *Vidyabai & others vs. Padmalatha & anr.*¹.

1 2009(4) Mh.L.J. 30

8] Mr. S.P. Thorat, learned counsel for respondent No.3, submitted that since the respondent No.3 is a public authority, he will have no submissions to make with regard to the controversy raised in the present petition, provided of course that no prejudice is caused to respondent No.3.

9] Having heard, learned counsel for the parties and perused the records, though there is substance in the contentions raised by Mr. Sharma with regard to the procedure adopted by the petitioner, in my judgment, opportunity to amend the pleadings ought to have been granted to the petitioner. The prejudice, if any, that may occasion, respondent Nos.1 and 2, can, in the facts and circumstances of the present case, be always compensated by way of costs.

10] As noted earlier, in this case, the learned City Civil Judge, had permitted the petitioner to bring on record the additional document. This order has not been challenged by the respondent Nos.1 and 2. Instead, the respondent Nos.1 and 2 applied for leave to amend their written statement, in order to explain their position with regard to such additional documents. It is possibly, at this stage, that the petitioner realised that mere production of the documents without there being any pleadings to back the same would not suffice. Therefore, soon after the respondent Nos.1 and 2 took out their Chamber Summons, the petitioner on 9 July 2013 took out his Chamber Summons seeking leave to amend the plaint. In a situation of this type, the learned City Civil Judge should have taken up both the Chamber Summons for consideration at the same time. Further, the

learned City Civil Judge also granted permission to the petitioner to file additional affidavit-in-evidence, in the context of additional documents already permitted to be produced on record. If such circumstances are cumulatively considered, then there was no real reason to reject the petitioner's Chamber Summons, seeking leave to amend, particularly, since such amendment was basically in the context of additional documents already permitted to be produced on record.

11] In the case of *Vidyabai (supra)*, the Hon'ble Apex Court has held that the Courts jurisdiction to allow an application for amendment is taken away, unless the Court comes to the conclusion that inspite of due diligence, the parties could not have raised the matter before the commencement of trial. In the present case, even though, affidavit-in-evidence had been filed by the petitioner on 10 January 2005, it cannot, in the light of subsequent events, be regarded as the complete affidavit-in-evidence. As noted earlier, the learned City Civil Judge by order dated 8 August 2013, permitted the petitioner to file additional affidavit-in-evidence, which the petitioner filed on the same date, i.e., 8 August 2013. Admittedly, the application seeking leave to amend, was made on 9 July 2013. Thus, in the peculiar facts of the present case, it does appear that the proviso to Order 6 Rule 17 of the CPC was not applicable in its full vigor. Besides, the circumstance that the learned City Civil Judge has permitted the petitioner to bring on record the additional documents, even after, first affidavit-in-evidence had been filed, cannot be ignored.

12] No doubt, Mr. Sharma, learned counsel for respondent Nos.1 and 2 his right that the procedure adopted by the petitioner was by no means proper and the same has resulted in some prejudice to respondent Nos.1 and 2. Such prejudice, however, is clearly one, which can be compensated by way of costs.

13] Accordingly, the impugned order dated 9 December 2013, is set aside. Chamber Summons No.516 of 2013 is made absolute. The necessary amendment to be carried out within a period of two weeks from today. The petitioner to also pay costs of Rs.10,000/- to respondent Nos.1 and 2. Such costs to be paid or deposited before the learned City Civil Court within a period of two weeks from today. In case, the costs are not paid or deposited, this petition shall be deemed to have been dismissed and the impugned order made on 9 December 2013 shall revive.

14] The learned City Civil Judge is directed to dispose of Special Civil Suit No.51 of 2007, as expeditiously as possible and in any case within a period of one year from the date of this judgment and order.

15] Rule is made absolute to the aforesaid extent. There shall be no order as to separate costs in the present petition.

16] All parties to act upon an authenticated copy of this order.

(M. S. SONAK, J.)