

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 179 OF 2015**

Sou. Sunita Danayya Swami

..Petitioner

Vs

Shri Prabodh Jagannath Kajawe

.. Respondent

Mr. Prashant S. Bhavake, Advocate for Petitioner.

CORAM : R.G.KETKAR,J.

DATE : 11/06/2015

PC:

1. Heard Mr. Prashant Bhavake, learned counsel for the petitioner at length.
2. By this Petition under Article 227 of the Constitution of India, original defendant has challenged the order dated 13.8.2014 passed by the learned Civil Judge, Sr. Dn., Kolhapur below Exhibit-39 in Special Civil Suit No.197 of 2011. By that order, the learned trial Judge rejected the application made by the petitioner under Order VI Rule 17 of C.P.C. for amending Written Statement.
3. In support of this Petition, Mr. Bhavake submitted that the respondent instituted suit for specific performance of Agreement of Sale dated 22.1.2010 and supplementary Agreement dated 26.10.2010. The petitioner filed Written Statement opposing the suit. During the pendency of the suit, the petitioner filed

Application at Exhibit-39 on 14/2/2014 by incorporating paragraph 9-A. He submitted that the facts pleaded in paragraph 9-A were not pleaded in the Written Statement. He further submitted that it is settled principles of law that the defendants can take inconsistent pleas in the Written Statement. He, therefore, submitted that the learned trial Judge ought to have allowed the application as no prejudice would be caused to the respondent and the trial has not commenced. In any case, the learned trial Judge ought to have allowed the application by imposing costs.

4. With the assistance of Mr. Bhavake, I have perused Plaintiff, Written Statement, Application for proposed amendment as also the impugned order. In the Written Statement, the petitioner came with the specific case that he did not execute Agreement of Sale either on 22.1.2010 or subsequent thereto. In fact, the alleged Agreement of sale is a fraudulent document. The petitioner has never received any amount and the assertions made in paragraph 5 are purely imaginary. The petitioner also denied the assertions in paragraphs 7 and 8 of the Plaintiff wherein the respondent-plaintiff alleged that between the parties supplementary Agreement was executed on 26.10.2010. By the proposed amendment, the petitioner wants to incorporate paragraph 9-A to contend that at no point of time any transaction

was entered into between the parties and that he never received any amount from the plaintiff. The learned trial Judge has considered the proposed amendment as also original Written Statement and observed in paragraph 4 that the defendant had denied all the contentions in the Plaint including the agreement of sale and even supplementary agreement of sale. In fact, he also pleaded that the plaintiff was not ready and willing to perform his part of the contract and, therefore, is not entitled to relief for specific performance. The learned trial Judge, thereafter, observed that the proposed amendment is nothing but the same fact projected by different words. In paragraph 5, the learned trial Judge also noted that the trial has commenced and, therefore, in view of proviso to Order VI Rule 17, unless the defendant satisfies the Court that in spite of due diligence, the defendant could not have raised such plea in the Written Statement, amendment cannot be allowed. There is no such explanation.

5. After considering the material on record, I do not find that the learned trial Judge has committed any error in holding that the amendment is not necessary for deciding the real controversy between the parties. Hence, the 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) of C.P.C.

(R.G.KETKAR, J.)