

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR**Writ Petition (227) No.128 of 2016**

Bhola Prasad Agrawal, S/o late Harfulmal Agrawal, aged about 60 years, Occupation-Business, R/o Village Surajpur, Police Station Tahsil Surajpur, District Surajpur (CG)

---- Petitioner**Versus**

1. Sunil Kumar S/o Ramashankar Upadhyay, aged about 35 years,
2. Santosh Kumar S/o Ramashankar Upadhyay, aged about 32 years,
3. Sanjay Kumar S/o Ramashankar Upadhyay, aged about 28 years,

All are R/o Village Surajpur, Police Station Tahsil Surajpur, District Surajpur (CG)

---- Respondents

 For Petitioner : Mr.Ashok Kumar Shukla, Advocate
 For Respondents : Mr.Manoj Paranjape, Advocate

Hon'ble Shri Justice Sanjay K. Agrawal**Order on Board****20/10/2016**

1. The petitioner herein is the plaintiff before the trial Court. He filed a bare suit for permanent injunction before the trial Court on 18.7.2003, in which the defendants/respondents were summoned. The respondents/defendants have filed their written statement on 10.9.2003 clearly informing that they have raised construction on the suit land. Thereafter the trial Court has framed the issues on the basis of pleadings of the parties on 29.10.2012. Thereafter the plaintiff filed his affidavit under Order 18 Rule 4 of the CPC on 12.11.2013 and

thereafter amendment application was filed on 21.7.2014 and by way of amendment, leave was sought to amend the suit for adding relief of declaration of title and possession, which was opposed by the defendants.

2. By the order impugned, the trial Court has rejected his application for amendment holding that nature of suit would change as earlier the plaintiff has filed only suit for permanent injunction.

3. Feeling aggrieved against the order rejecting application for amendment, this writ petition has been filed.

4. Mr.Ashok Kumar Shukla, learned counsel appearing for the petitioner, would submit that such an amendment is procedural in nature and in fact, necessary pleadings have already been made, but only to claim the relief of declaration and possession, amendment is proposed and leave is sought and would further submit that proposed amendment would avoid the multiplicity of the litigation and amendment is essential to adjudicate the real controversy between the parties and as such, the order impugned deserves to be set aside.

5. Mr.Manoj Paranjape, learned counsel appearing for the respondents, would submit that the trial has already been commenced as affidavit under Order 18 Rule 4 of the CPC has

been filed by the plaintiff on 12.11.2013 and proviso to Order 6 Rule 17 of the CPC is mandatory in nature and therefore, amendment is hit by proviso to Order 6 Rule 17 of the CPC. He would rely upon the judgment of the Supreme Court in the matters of **Vidyabai and others vs. Padmalatha and another**¹ and Revajeetu Builders and Developers vs. **Narayanaswamy and Sons and others**².

6. I have heard learned counsel appearing for the parties and perused the order impugned.

7. In order to decide the plea raised at the Bar, it would be appropriate to notice Order 6 Rule 17 of the CPC which reads as under:-

“17. Amendment of pleadings.- The Court may at any stage of the proceedings allow either party to alter or amend his pleading 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.”

¹ (2009) 2 SCC 409

² (2009) 10 SCC 84

8. A careful reading of proviso to Order 6 Rule 17 of the CPC, which was brought into statute book on 1.7.2002, that application for amendment cannot be entertained after the trial has commenced, unless the party making amendment has to be established that in spite of due diligence the party could not have raised the matter before the commencement of trial.

9. The aforesaid proviso came into consideration before the Supreme Court in **Vidyabai** case (supra) and it has been held that it is couched in a mandatory form. The court's jurisdiction to allow such an application is taken away unless the conditions precedent therefor are satisfied and the trial Court must come to a conclusion that in spite of due diligence the parties could not have raised the matter before the commencement of the trial. In **Vidyabai** case (supra), it has also been considered that filing of an affidavit in lieu of examination-in-chief of the witness would amount to commencement of proceeding and held as under:-

“11. From the order passed by the learned Trial Judge, it is evident that the respondents had not been able to fulfill the said precondition. The question, therefore, which arises for consideration is as to whether the trial had commenced or not. In our opinion, it

did. The date on which the issues are framed is the date of first hearing. Provisions of the Code of Civil Procedure envisage taking of various steps at different stages of the proceeding. Filing of an affidavit in lieu of examination in chief of the witness, in our opinion, would amount to 'commencement of proceeding'.

Their Lordships further considered the meaning of the terms of "trial" and "commence" and observed as under:-

"19. It is the primal duty of the court to decide as to whether such an amendment is necessary to decide the real dispute between the parties. Only if such a condition is fulfilled, the amendment is to be allowed. However, proviso appended to Order VI, Rule 17 of the Code restricts the power of the court. It puts an embargo on exercise of its jurisdiction. The court's jurisdiction, in a case of this nature is limited. Thus, unless the jurisdictional fact, as envisaged therein, is found to be existing, the court will have no jurisdiction at all to allow the amendment of the plaint."

10. Keeping in view the principles laid down by Their Lordships of the Supreme Court in the aforesaid case, if the

facts of the present case are examined, it is quite vivid that an affidavit under Order 18 Rule 4 of the CPC was filed on 12.11.2013 and thereby the trial has already been commenced.

11. The writ petitioner/plaintiff did not aver in his application for amendment that in spite of due diligence he could not have raised the matter before the commencement of trial as the application for amendment filed by the petitioner is blissfully silent. Apart from the fact that written statement was filed on 10.9.2003 the defendants in that written statement have clearly pleaded that construction has already been completed, therefore, the plaintiff has miserably failed to establish the fact that in spite of due diligence he could not have moved an application for amendment before the commencement of trial. Concludingly, this Court has left with no other option except to affirm the order of the trial Court dismissing the application for amendment as the application for amendment filed after commencement of trial has failed to establish that despite due diligence the plaintiff could not move amendment before the Court.

12. Resultantly, the writ petition deserves to be and is hereby dismissed leaving the parties to bear their own cost(s). However, taking the view that the suit was filed on 18.7.2003, the trial Court is directed to conclude the trial as early as

possible preferably within a period of four months from the date of receipt of copy of this order.

Sd/-

(Sanjay K Agrawal)
Judge

B/-