

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 1899 OF 2014

Shri Babu Sadu Mare & Anr.	..	Petitioners
VS.		
Shri Kisan Babu Mare & Ors.	..	Respondents

Mr. U. B. Nighot for Petitioners.
Mr. S. R. Agarkar for Respondent Nos. 2 and 3.

CORAM : M. S. SONAK, J.
DATE: 20 JULY 2016

P.C :

1] The challenge in this petition is to the order dated 4 October 2013 made by the 5th Joint Civil Judge, Junior Division, Pune, rejecting the petitioners application at Exhibit '116' seeking leave to amend the written statement by resort to the provisions contained in Order VI Rule 17 of the CPC.

2] Mr. Nighot, learned counsel for the petitioners has submitted that the proposed amendment was necessary for the purposes of adjudication of the issues which arise in the suit. Mr. Nighot pointed out that the plaintiffs in the suit have suppressed material particulars, *inter alia* in the matter of sale of certain properties in the adjacent village by making a statement that the petitioner no.1 had already expired. In this regard, Mr. Nighot made reference to the

mutation entries recorded almost 20 years ago, wherein, there is a statement with regard to the demise of the petitioner no. 1. Mr. Nighot submitted that if the plaintiffs have suppressed material particulars or played a fraud and that by itself, is a ground for rejection of the suit. The proposed amendment seeks to place on record these circumstances and urged for dismissal of the suit on the said grounds. There was sufficient diligence on the part of the petitioners in applying for leave to amend. For all these reasons, Mr. Nighot submitted that the impugned order may be set aside.

3] Mr. Nighot placed reliance upon the judgment in the case of ***Piedade Fernandes vs. Charlene Leitao***¹, to submit that the facts which are necessary and relevant for deciding the matter are required to be permitted to be brought on record by means of amendment and that such leave to amend cannot be denied only on the ground that such facts were known earlier and ought to have been stated in the original written statement. Mr. Nighot pointed out that amendment in the said case was allowed at an appellate stage.

4] In this case, admittedly, the application seeking leave to amend was applied for much after the trial in the suit commenced. The record as well as the impugned order indicates that the deposition i.e. chief as well as cross-examination of the original

1 2012 (1) Mh. L.J. 317

plaintiff has already concluded. The deposition of the witness for the plaintiff was being recorded when the application at Exhibit '116' came to be made.

5] The application makes reference to the incidents that are alleged to have taken place almost 20 years ago. Further, the statement with regard to the demise of the petitioner no. 1, according to Mr. Nighot is recorded in the mutation entries, which are public records. If this be the position, certainly, greater diligence was expected from the petitioners. That apart, if the application at Exhibit '116' is perused, there is hardly any explanation with regard to the delay or with regard to the diligence of the petitioners. There is a bare statement that certain new facts came to light in the course of cross-examination of the plaintiff. This hardly constitutes due diligence.

6] The proviso to Order VI Rule 17 of the CPC provides that no application for amendment shall be allowed after the trial has commenced, unless the court comes to the conclusion that inspite of due diligence, the party could not have raised the matter before the commencement of the trial. In this case, since the petitioner has failed to make out a case that the circumstances which the petitioners seeks to include in the written statement after the trial is

commenced, could not have been raised by the petitioners inspite of due diligence, there is no question of permitting such amendment.

7] There is yet another reason as to why no interference is warranted with the impugned order. If the proposed amendment is disallowed, there is no question of any serious prejudice to the petitioners. The petitioners had already applied for rejection of the plaint on the ground that the plaintiffs have suppressed material particulars and practiced fraud. It is these very contentions that the petitioners seek to substantially raise by way of amendment of the written statement. The application seeking rejection of the plaint came to be dismissed by the trial court by order dated 21 January 2013. However, the dismissal is not on merits but on the ground that the allegations made in the said application can always be considered while deciding a suit on merits. The petitioner challenged the order dated 21 January 2013 before this court by instituting writ petition no. 4891 of 2013. The petition was dismissed on 8 July 2013. At paragraph 3 of the said order, this court has observed thus :

“3. The question as to whether there is suppression of material fact or whether fraud is played, are the question to be decided in the suit. Hence, no fault can be found with the view taken by the Trial court dismissing the Application.”

8] From the aforesaid, it is quite clear that even as of now the petitioners have not precluded from urging that the suit itself be dismissed on the grounds that the plaintiff has suppressed material particulars or practiced fraud. All that the trial Judge as well as this court have held is that such an issue can as well be considered at the stage of finally deciding the suit. Therefore, even if leave to amend is declined, this is not a case where any serious prejudice as such will occasion the petitioners. The petitioners cannot be permitted to overcome the effects of orders dated 21 January 2013 made by the trial Judge and the order dated 8 July 2013 made by this court, by seeking to amend the written statement to raise very same issues at an earlier stage.

9] In case of ***Piedade Fernandes*** (supra), this Court, has accepted the position that the facts in question came to the knowledge of the applicant during the pendency of the appeal. Further, the finding is recorded that no prejudice would be caused to the respondents in case the proposed amendment is allowed. This Court, has relied upon the decision of the Hon'ble Apex Court in the case of ***Usha Balasaheb Swami vs. Kiran Appaso Swami***², which takes note of the liberality in grant of applications for leave to amend but points out that the liberality will not be restricted in a situation where the trial has already commenced and no due

2 2007 (5) SCC 602

diligence is demonstrated. Accordingly, the decision in the case of ***Piedade Fernandes*** (supra) is not of much assistance to the petitioners in the present case.

10] The impugned order records that the petitioners have been avoiding cross-examination of further witnesses and that was the reason for filing the application to seek amendment. At this stage, it is not necessary to comment upon such reason. However, there is no case made out to interfere with the impugned order.

11] Accordingly, this petition is dismissed. There shall be no order as to costs.

(M. S. SONAK, J.)