

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 1238 OF 2016**

Smt. Laxmibai Vishnu Madhvi
and Ors

Petitioners

Vs

Shri Ramchandra Shimgya
Madhavi and Ors

.. Respondents

Mr. Sachin P. Shetye, Advocate for Petitioners.

CORAM : R.G.KETKAR,J.

DATE : 26/04/2016

PC:

1. Heard Mr. Sachin Shetye, learned counsel for the petitioners at length.
2. By this Petition under Article 227 of the Constitution of India, the petitioners have challenged the Judgment and order dated 17.4.2015 passed by the learned 4th Jt. Civil Judge, Jr. Dn., Vashi below Exhibit 36 in Regular Civil Suit No. 364 of 2012. By that order, the learned trial Judge rejected the application made by the petitioners, hereinafter referred to as 'defendants no.2 to 10', under Order VI, Rule 17 of C.P.C. for amending written statement. The learned trial Judge rejected the application on two grounds viz : (i) in the written statement filed by defendants no.2 to 10 at Exh.14, they admitted that the suit property is ancestral property of the father of the plaintiff and defendants no.3 to 10 and by the proposed amendment, the defendants are trying to withdraw admission given in the written statement and

(ii) the defendants did not fulfill conditions stipulated in proviso to Order VI, Rule 17 of C.P.C.

3. Mr. Shete invited my attention to the plaint in Special Civil Suit No. 10 of 2012 as also written statement filed by defendants no. 2 to 10 and submitted that the learned trial Judge committed error in observing that defendants no.2 to 10 admitted that the suit property is ancestral property. He further submitted that assuming that the defendants have given admission, the same can be explained in case there is inconsistency. He relied upon the decision of the Apex Court in the case of Panchdeo Narain Srivastav V. KM Jyoti Sahay 1984 (Supp) SCC 594.

4. I have considered the submissions advanced by Mr. Shetye. I have also perused the material on record. In paragraph 1 of the plaint, the plaintiff specifically asserted that the suit property is ancestral property of the plaintiff and defendants no. 2 to 10. In reply to that, the defendants contended in paragraph 6(1) that the contents of paragraph no.1 are partly admitted by the defendants and remaining portion of paragraph 1 is not admitted by these defendants. Defendants did not admit that 500 sq.meters equivalent to 5 Ares out of Gat no.41 is excluded from the land acquisition and that on five Guntha land, house property 20'x35' is standing.

5. Perusal of paragraph 6(1) prima facie shows that defendants no.2 to 10 have admitted that the suit property is

ancestral property of plaintiff and defendants no. 2 to 10. That apart, in paragraph 14, the learned trial Judge has noted that the defendants are trying to withdraw the admission given by them in the written statement. In paragraph 13, the learned trial Judge also observed that the application for amendment is moved at the time of cross examination of the plaintiff. The learned trial Judge, therefore, came to the conclusion that defendants no.2 to 10 have not shown due diligence in filing the application.

6. In the case of Vidyadevi Vs. Padmalatha (2009) 2 S.C.C. 409 , Apex Court observed in paragraphs 10 and 11 as under.

“10. By reason of the civil Procedure Code (Amendment) Act, 2002 (Act 22 of 2002), the Parliament inter alia inserted a proviso to Order VI Rule 17 of the Code, which reads as under:

“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.”

It is couched in a mandatory form. The court's jurisdiction to allow such an application is taken away unless the conditions precedent therefore 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 the trial.

11. From the order passed by the learned Trial Judge, it is evident that the respondents had not been able to fulfill the said pre-condition. 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'."

7. Applying the tests laid down by the Apex Court, I do not find that the learned trial Judge has committed any error in rejecting the application on the ground that defendants no. 2 to 10 did not make out the case of due diligence. Mr. Shetye relied upon the decision in the case of Panchdeo Narain Srivastava (supra) to contend that if there is inconsistency, the defendants can explain the admission.

8. In the present case, I do not find that there is any inconsistency in the defence set up by the defendants. In view thereof, no case is made out for invocation of powers under Article 227 of the Constitution of India. Petition fails and the same is dismissed.

9. 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 Memorandum of Appeal as contemplated by Section 105(1) of C.P.C.

(R.G.KETKAR, J.)