

Harvinder Singh and another Vs. Mahindra and Mahindra	...	Petitioners Respondent
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CORAM : R. G. KETKAR, J.
DATE : APRIL 13, 2016

Heard Mr. Dalvi, learned Counsel for petitioners.

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3. In support of this Petition, Mr. Dalvi strenuously contended that the proposed amendment is not inconsistent with the basic case made out in the written statement. He submitted that even if the counter claim set up by the defendants exceeds the pecuniary jurisdiction of the City Civil Court, it has option of transferring the Suit to the Original Side of this Court. He also invited my attention to the Schedule of amendments and submitted that the learned trial Judge should have allowed the Chamber Summons in at least part.

4. It is not in dispute that the plaintiffs have filed affidavit of evidence. In the case of ***Vidyabai Vs. Padmalatha***, 2009 (1) ALL MR 471, the Apex Court has observed in paragraphs 7 and 8 thus,

“7. 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 therefor 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.

8. 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'.

5. Perusal of paragraph 8 extracted hereinabove shows that the Apex Court has held that the date of framing issues of the Suit is the first date

of hearing and filing of affidavit of evidence of witness is commencement of trial. The learned trial Judge while rejecting the Chamber Summons has held that defendants have not made out a case of due diligence. Even otherwise, perusal of paragraph 4 of the affidavit in support of Chamber Summons shows that defendants sought amendment on the ground that at the time of filing the written statement, defendants made all reasonable efforts to trace all the particulars of the claims / documents in support of the claims made by the defendants but were unable to do so. Vide letters dated 13.09.2013 and 07.02.2014, the Chartered Accountant of the defendants requested the defendants to collect a large number of papers belonging to them from the office of the Chartered Accountant. After collecting the documents and papers pertaining to the present matter, defendants are in a position to give full particulars of claim made by them in the written statement. The learned trial Judge has considered this aspect and has observed in paragraphs 9 to 11 that no case of due diligence is made out. The learned trial Judge also noted that evidence is already filed and the matter is for cross-examination. That apart, in view of proviso to Order VIII, Rule 6A(1) of C.P.C., counter claim of Rs.2,43,40,967/- exceeding pecuniary jurisdiction of City Civil Court, Mumbai (Rs.1 crore) can't be allowed. In view thereof, I do not find that the learned trial Judge has committed any error in dismissing the Chamber Summons. Hence, Petition fails and the same is dismissed.

6. 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.)