

IN THE HIGH COURT OF JUDICATURE AT MUMBAI
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.3896 OF 2016

The Ganesh Co-operative Housing Society Limited ... Petitioners
Vs.
Sanjay Gopalkrishna Ullal ... Respondent

Ms Snehal Modi for Petitioners.
Mr. Chandrakant N. Chavan a/w. Mr. Anand G. Nayak for Respondent.

CORAM : R. G. KETKAR, J.
DATE : JUNE 07, 2016

P.C. :

Heard Ms Modi, learned Counsel for petitioners and Mr. Chavan, learned Counsel for respondent at length. Rule. Mr. Chavan waives service for respondent. At the request and by consent of the parties, Rule is made returnable forthwith and the Petition is taken up for final hearing.

2. By this Petition under Article 227 of the Constitution of India, petitioners have challenged the judgment and order dated 01.03.2016 passed by the learned Judge presiding over Court Room No.8 of the Small Causes Court at Mumbai below exhibit-36 in L.E.Suit No.64/78 of 2012. By that order, the learned trial Judge partly allowed the application exhibit-36 made by the respondent, hereinafter referred to as defendant, under Order VI, Rule 17 of the Code of Civil Procedure, 1908 (for short 'C.P.C.') for amending the written statement.

3. In support of this Petition, Ms Modi submitted that on 26.08.2014, petitioners, hereinafter referred to as plaintiffs, filed affidavit of examination-in-chief. She, therefore, submitted that trial has commenced. Defendant has thereafter filed application exhibit-36 for

amending the written statement. While considering the application for amendment after commencement of trial, the Court has to record a finding as to whether the defendant has satisfied the conditions stipulated in proviso to Order VI, Rule 17 of C.P.C. In the present case, the learned trial Judge has not adverted to this aspect at all. She relied upon the decision of the Apex Court in the case of **Vidyabai Vs. Padmalatha, 2009 (4) Mh.L.J. 30** to contend that proviso to Order VI, Rule 17 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, namely, the 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.

4. On the other hand, Mr. Chavan supported the impugned order. He submitted that the very fact that the learned trial Judge partly allowed the application and partly rejected for amendment shows that the trial Court applied its mind while passing the impugned order. That apart, the proposed amendment is absolutely necessary for deciding the controversy between the parties as it goes to the root of the matter. He also invited my attention to the rulings relied by the defendant and which are referred in the impugned order. He, therefore, submitted that no case is made out for interfering with the impugned order.

5. I have considered the rival submissions advanced by the learned Counsel appearing for the parties. I have also perused the material on record. In the case of **Vidyabai (supra)**, 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'.

6. In paragraph 7, the Apex Court has observed that proviso to Order VI, Rule 17 of C.P.C. 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, namely, the 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 paragraph 8, it observed that the date on which the issues are framed is the date of first hearing. Provisions of C.P.C. envisage taking of various steps at different stages of the proceeding. Filing of an affidavit in lieu of examination in chief of the witness will amount to commencement of proceedings. Perusal of the impugned order does not indicate that the learned trial Judge has considered whether the defendant has satisfied the conditions stipulated in proviso to Order VI, Rule 17 of C.P.C. In view of the decision in **Vidyabai's case** (*supra*), the Courts' jurisdiction to allow application for amendment is taken away unless the conditions precedent are satisfied. In view thereof, on this count alone, the

impugned order cannot be sustained and is liable to be set aside. After remand, the learned trial Judge will record whether the defendant has satisfied the conditions stipulated in proviso to Order VI, Rule 17 of C.P.C. Hence, the following order:

- a. Impugned order dated 01.03.2016 is set aside;
- b. Application exhibit-36 is restored to the file of the trial Court;
- c. The learned trial Judge will deal with the contentions raised by the parties recorded herein as also the other contentions that are available to the parties;
- d. The learned trial Judge will also record a finding as to whether the defendant has satisfied the conditions stipulated in proviso to Order VI, Rule 17 of C.P.C.;
- e. Rule is made absolute in the aforesaid terms with no order as to costs.

(R. G. KETKAR, J.)

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