

**FARAD CONTINUATION SHEET
IN THE HIGH COURT OF JUDICATURE AT BOMBAY.
CIVIL APPELLATE JURISDICTION.**

WRIT PETITION NO. 5176 OF 2015

Ajaykumar Garg & Anr.	... Petitioners
V/s.	
Ajit D. Lalwani	... Respondent

Mr. Satyam Vaishnav a/w Ms. Nupur Mukherjee i/b M/s. N. N. Vaishnawa & Co. for the Petitioners.
Mrs. Soma Singh and Shubro Dey i/b Vivek Sharma for the Respondent.

**CORAM : K. K. TATED, J.
DATED : 31/03/2016**

P.C.:

. Heard learned Counsel for the parties.

2 By consent of both the parties, matter is taken on board for final hearing at the stage of admission.

3 By this petition under Article 227 of the Constitution of India, the petitioner plaintiff challenges the order dated 25.03.2015 passed by Small Causes Court, Mumbai below Exh. 43 in R.A.E. Suit No. 123/201 of 2004 allowing the respondent's defendant's application for carrying out amendment in his written statement.

4 In the present proceeding, the petitioner plaintiff filed R.A.E. Suit No. 123/201 of 2004 in the Court of Small Causes, Bombay on 28.01.2004 for an order and decree directing defendant to quit, vacate

and hand over the peaceful possession of the suit premises namely Flat No.3, 1st floor Guzdar House, situated at 45, Bhulabhai Desai Road, Malabar, Mumbai to the plaintiff. In that suit, the defendant filed his written statement on 03.12.2004. Thereafter, the plaintiff amended the plaint to include one of the property i.e. Garage etc. To the amended plaint, the defendant filed his additional written statement on 05.09.2007. In the meanwhile, on the basis of pleading, the Trial Court framed issues on 23.01.2006 and directed both the parties to file list of witnesses, affidavit of documents and complete inspection of documents on or before 16.02.2006. Thereafter, the plaintiff filed affidavit of evidence on 13.12.2011 along with compilation of documents. Thereafter, the defendant filed application below Exh. 43 on 26.09.2013 for carrying out amendment in written statement. In the said application, the defendant pleaded that he learnt about the sale deed dated 12.11.1998 by which the plaintiff purchased the property i.e. Gazdar House. After perusing the sale deed, they learnt that property was belonging to trust of one Jahagir Shapoorji created under Deed dated 18.10.1922. In 1988 according to defendant, there were four trustees namely Jehangir Framroze Gazdar, Jimmy Gazdar, Anita Malhotra and Lyla Ghaswala. The defendant learnt that minimum trustees which were required under the Trust Deed were three. After perusing the sale deed dated 12.11.1998, it was not executed by all the trustees. Therefore, the defendant filed application for carrying out appropriate amendment in written statement challenging the ownership of the plaintiffs in respect of suit premises itself. That application was vehemently opposed by the plaintiffs. Considering the pleading on record, the Trial Court by impugned order

dated 25.03.2015 allowed defendant's application below Exh.43 for carrying out appropriate amendment in written statement. Hence, the present Writ Petition.

5 The learned Counsel Mr. S. N. Vaishnava for the plaintiff submits that the Trial Court failed to consider provisions of Order 6 Rule 17 of Code of Civil Procedure, 1908. He submits that it is specifically stated in Order 6 Rule 17, once the trial starts, court should not allow to carry out the amendment in the pleading. He submits that in the present proceeding Trial Court framed the issues on 23.01.2006 and thereafter, the defendant filed application for carrying out amendment on 26.09.2013. He submits that even the Trial Court erred in recording in paragraph 7 of the impugned order that in his opinion the trial of the suit was not yet commenced, though it was specifically placed on record that the issues were framed on 23.01.2006, affidavit of evidence filed by the plaintiff alongwith compilation of documents. He submits that the Apex Court in the matter of *Vidyabai And Ors. V/s. Padmalatha & Anr, (2009) 2 Supreme Court Cases 409* specifically held that the under the proviso of Order 6 Rule 17 of Code of Civil Procedure, 1908, no application for amendment shall be allowed after the trial has commenced. He relies on paragraphs 2, 4 and 10 of the said Judgment.

6 The learned Counsel for the plaintiff also relied on Judgment of the Apex Court in the matter of *Ajendraprasadji N. Pandey & Arn. V/s. Swami Keshavprakeshdasji N. & Ors., (2006) 12 Supreme Court Cases 1*, particularly paragraphs 43 and 47. He submits that in this authority, the Apex Court held that the settlement of the issues is the

date of commencement of trial.

7 The learned Counsel for the plaintiff also relies on judgment of the Apex Court in the matter of *Jaswant Kaur & Anr. V/s. Subhash Paliwal & Ors., (2010) 2 Supreme Court Cases 124*, particularly on paragraphs 26 and 28. He submits that in this case, the Apex Court held that under Section 116 of Evidence Act, if the tenant is regularly paying the rent to the landlord then tenant cannot question the ownership of the landlord.

8 The learned Counsel for the plaintiff submits that in the present proceeding, issues were framed on 23.01.2006 and the defendant filed application for amendment on 26.09.2013 i.e. when the trial already commenced. In spite of that the Trial Court in impugned order in paragraph 7 held that trial of the suit was not yet commenced. He submits that in view of above mentioned submissions and the law laid down by the Apex Court, this Hon'ble Court be pleased to set aside the impugned order dated 25.03.2015 passed by the Small Causes Court allowing defendant's application below Exh. 43 for carrying out amendment in the written statement.

9 On the other hand, the learned Counsel Mrs. Soma Singh appearing on behalf of Respondent defendant vehemently opposed the present Writ Petition. She submits that before filing the written statement, the defendant called upon the plaintiffs to give the inspection of the documents referred and relied upon by him in the plaint. She submits that the same was not given by the plaintiff. She submits that when the plaintiffs filed their affidavit of evidence

alongwith compilation of documents, at that time they learnt that the plaintiffs purchased the suit property by the Purchase Deed Dated 12.11.1998, on that basis the plaintiffs can not claimed the ownership of the suit property. Hence, the defendant immediately filed the application on 26.09.2013 for carrying out amendment in his written statement. She submits that the amendment of written statement is necessary to decide the dispute between the parties. She submits that if the plaintiffs failed to prove the ownership and/or defendant proved that the plaintiffs were not owners of the suit property, then suit itself is not maintainable on that ground. She further submits that the trial of the suit was not commenced because the plaintiffs have filed only their affidavit of evidence and compilation of documents, as the plaintiffs have not entered in the witness box for cross examination.

10 The learned Counsel for the defendant submits that if the amendment is necessary for deciding the dispute between the plaintiff and the defendant, then that can be allowed at any stage. In support of her contentions, the learned Counsel for the defendant relied on Judgment of the Apex Court in the matter of **Rajesh Kumar Aggarwal & Ors. V/s. K.K. Modi & Ors. 2006(2) Indian Law Reports (Kerala Series) 543**. Particularly paragraph 14. The part of paragraph 14 which reads thus:

“14.

This rule declares that the court may, at stage of the proceeding, allow either party to rule or amend his pleadings in such a manner and on such terms as may be just. It also states that such amendments should be necessary for the purpose of determining the real question in controversy between the parties. The proviso enacts that no application for amendment should 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 for which amendment is sought before the commencement of the trial.”

The learned Counsel for the defendant also relies on paragraph 22 of this Judgment. Part of paragraph 22, reads thus:

“22.

The purpose and object of Order 6, Rule 17 C.P.C. is to allow either party to alter or amend his pleadings in such manner and on such terms as may be just. The power to allow the amendment is wide and can be exercised at any stage of the proceedings in the interests of justice on the basis of guidelines laid down by various High Courts and this Court. It is true that the amendment cannot be claimed as a matter of right and under all circumstances. But it is equally true that the courts while deciding such prayers should not adopt a hypertechnical approach. Liberal approach should be the general rule particularly in cases where the other side can be compensated with the costs. Technicalities of law should not be permitted to hamper the courts in the administration of justice between the parties. Amendments are allowed in the pleadings to avoid uncalled for multiplicity of litigation'.”

11 The learned Counsel for the defendant submits that it is crystal clear from these authorities that the amendment of the pleading can carry out at any stage, if it is required to determine the real question in controversy between the parties. She submits that the defendant in his application in paragraph 7 specifically stated that to determine the ownership of suit property in favour of the plaintiffs, it is necessary to carry out appropriate amendment in written statement. On the basis of these submissions and the law laid down by the Apex Court in the matter of **Rajesh Kumar Aggarwal** (supra), the learned Counsel for the defendant submits that there is no substance in the present Writ Petition and same to be dismissed with costs.

12 I heard both the sides at length. The Point arise in the present Writ Petition is “whether the amendment can be allowed after the framing of issues”.

13 In the present proceeding, after considering the pleading of the parties, the Trial Court framed issues on 23.01.2006. Thereafter, the plaintiffs filed their affidavit of evidence along with compilation of documents on 13.12.2011. Thereafter, the defendant filed application on 26.09.2013 for carrying out amendment in his written statement. The Trial Court at the time of allowing defendant's application below Exh.43 in paragraph 7 failed to consider that the trial commence as soon as issues are framed on the basis of pleading. Though, the plaintiffs specifically pleaded in their reply that issues were framed on 23.01.2006, the Trial Court recorded in paragraph 7 of impugned order that the trial of the suit was not yet commenced.

14 Considering the authorities cited by the plaintiffs in the matters of Vidyabai (supra), Jaswant Kaur (supra) and Ajendraprasadji (supra), I am of the opinion that defendant has not made out case for allowing him to carry out amendment in written statement after framing the issues on 23.01.2006. The authorities cited by the defendant in the matter of Rajesh Kumar Aggarwal (supra) is not applicable to the facts and circumstances of the present case.

15 Considering the submissions made by the learned Counsel for the plaintiffs and the authorities of the Apex Court, I am of the view that

the order passed by the Trial Court dated 25.03.2015 below Exh.43 allowing the defendant to carry out amendments in written statement is required to be set aside.

16 Hence, following order is passed:

a) Writ Petition is allowed.

b) Order dated 25.03.2015 passed by the Trial Court below Exh. 43 in R.A.E. Suit No. 123/201 of 2004 allowing the defendant's application for carrying out amendment in written statement is set aside.

c) No order as to costs.

(K.K.TATED, J.)