

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Writ Petition NO. 11741 OF 2015

Shri. Balkrushna Dnyanoba Tupe
And Ors

...Petitioners

Versus

Shri. Kaluram Yeshwant Padwal
And Ors

...Respondents

....

Mr.Ravindra S. Panchundkar, Advocate for the Petitioners.
Mr.Vishal L. Kolekar, Advocate for Respondent No.1.

....

CORAM : R. G. KETKAR, J.

DATE : 20th DECEMBER, 2016

P.C.

1. Heard Mr. Ravindra Panchundkar, learned Counsel for the petitioners and Mr.Vishal L. Kolekar, learned Counsel for respondent No.1, at length.

2. Mr. Panchundkar seeks leave to delete rest of the respondents on the ground that respondent No.1, hereinafter referred to as 'defendant No.1' is the only contesting respondent. On the oral application made by Mr. Panchundkar, leave to delete rest of the respondents is granted. Amendment shall be carried out forthwith.

3. Rule. Mr.Kolekar waives service. In view of the narrow controversy raised between the parties as also at the request and by consent of the parties as also in view of order dated 5.2.2016, Rule is made returnable forthwith and the Petition is taken up for final hearing.

4. By this Petition under Article 227 of the Constitution of India, the petitioners have challenged the judgment and order dated 27.8.2015 passed by learned Civil Judge, Senior Division at Khed-Rajgurunagar below Exh.102 in Special Civil Suit NO.427 of 2014. By that order, learned trial Judge allowed the application filed by defendant No.1 under Order VI Rule 17 of Code of Civil Procedure, 1908 (for short, 'CPC') for amending the written statement at Exhibit-89.

5. Mr. Pachundkar submitted that by the proposed amendment, defendant no.1 seeks to challenge the sale deed dated 5.7.1985 executed by defendant No.1 in favour of the plaintiffs' father. Application for amendment is filed on 12.8.2015. He submitted that the proposed amendment is clearly barred by limitation. Learned trial Judge has also not considered whether the trial has commenced and whether the

defendant No.1 has satisfied the conditions stipulated in proviso to Order VI Rule 17 of CPC. He submitted that on behalf of the plaintiffs, affidavit of evidence was filed on 18.2.2014 and additional affidavit of evidence was filed on 9.10.2014. In short, he submitted that when the application for amendment was made, the trial has already commenced.

6. Mr.Pachundkar submitted that the learned trial Judge has merely observed that the proposed amendment is necessary for effective adjudication of the dispute.

7. On the other hand, Mr.Kolekar supported the impugned order. He relied upon the decision of this Court in the case of ***Twist Spin Industries v. KMH Enterprises, 2009(4) Bom. C. R. 216*** to contend that the amendment application though belatedly filed can be allowed.

8. It is not in dispute that defendant No.1 has filed written statement on 27.4.2009 at Exhibit-31 and additional written statement on 3.11.2014 at Exhibit-91. It is also evident that the plaintiffs filed affidavit of evidence on 18.2.2014 and additional affidavit of evidence on 9.10.2014. Defendant No.1 has filed application for amendment on 12.8.2015 that is to say

that after commencement of the trial. Perusal of the impugned order shows that the learned trial Judge has not considered whether defendant No.1 has satisfied the conditions stipulated in proviso to Order VI Rule 17 of C.P.C.

9. 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 7 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'.

10. 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.

11. Perusal of the impugned order shows that the learned trial Judge has not adverted to this aspect at all. The learned trial Judge also not considered whether defendant No.1 has raised his time barred claim in the sense that by the proposed amendment defendant No.1 has challenged the sale deed dated 5.7.1985 executed by defendant No.1 in favour of the plaintiff's father. The learned trial Judge has also not considered whether the proposed amendment is time barred or not and whether the amendment can be allowed by keeping issue of limitation open. In view thereof, the impugned cannot be sustained and as such is liable to be set aside thereby directing the trial Court to decide the application Exhibit-102 afresh. Hence, following order:

(i) Impugned order dated 27.8.2015 below Exh.102 in Special

Civil Suit NO.427 of 2014 is set aside and application Exhibit-102 filed by defendant No.1 is restored to the file of learned trial Judge. The learned trial Judge will decide the application afresh and consider the contentions recorded in this order and any other contention that are available to the parties.

- (ii) The learned trial Judge is requested to decide the application within four weeks from production of the authenticated copy of this order.
- (iii) Rule is made absolute in aforesaid terms with no order as to costs.
- (iv) All parties, including the trial Court, to act upon the authenticated copy of this order.

(R. G. KETKAR, J.)