

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR

WRIT PETITION NO. 374 OF 2016

(VIJAY ALWIN MASIH & ANR....VS..SAFDAR HUSSAIN SAHEB KHAN.)

Office Notes, Office Memoranda of Coram,
appearances, Court's orders of directions
and Registrar's orders

Court's or Judge's orders

CORAM : Z.A.HAQ, J.

DATED : JANUARY 27, 2016.

Heard Shri Shyam Dewani, advocate for the
petitioners-original defendants.

The petitioners have challenged the order passed
by the trial Court allowing the application filed by the
plaintiff seeking permission to amend the plaint by
incorporating the prayer clause.

The plaintiff filed civil suit praying for decree for
specific performance of contract, for declaration that the
defendants have no right and interest in the property and for
restraining the defendants from transferring, selling,
disposing of the suit property to any other person. The
defendants opposed the claim of the plaintiff. The trial
proceeded and the arguments on behalf of the plaintiff and
the defendants also concluded. According to the petitioners,
the learned advocate representing the plaintiff sought time to
give reply and then the application (Exh.92) came to be filed
seeking permission to amend the plaint.

The learned trial Judge considered the rival
submissions and allowed the application observing that the
plaintiff is seeking to incorporate the additional prayer clause
only and it will neither change the nature of the suit nor any
prejudice would be caused to the defendants.

Shri Shyam Dewani, learned advocate for the petitioners has submitted that the learned trial Judge has overstepped his jurisdiction by considering and allowing the application (Exh.92) overlooking the proviso below Rule 17 of Order VI of the Code of Civil Procedure which bars the jurisdiction of the Civil Court to entertain and allow the amendment application after commencement of the trial, unless the party seeking amendment at such stage shows that it was not possible for it to move the amendment application earlier, inspite of due diligence. It is submitted that in the present case, right from 2009 i.e. much prior to filing of the civil suit the defendants have come out with the case that the agreement between the parties stood cancelled and it died its own death because of the lapse of time. In the circumstances, the plaintiff should have incorporated the prayer seeking declaration that the cancellation of the agreement of sale by the defendant No.1 is illegal and bad in law, in the plaint and in any case before the commencement of the trial. It is submitted that the plaintiff has not been able to establish that inspite of due diligence he could not incorporate the proposed amendment earlier.

Shri Dewani, learned advocate has relied on the following judgments :

- i) Judgment given in the case of *I.S. Sikandar V. K. Subramani*, reported in **(2013) 15 SCC 27**,
- ii) Judgment given in the case of *Jayashree Subhash Kalbande Vs. Bhaurao Nagorao Derkar*, reported in **2015(1) Bom.C.R. 403**.

The proposition of law laid down in the above referred judgments is well established and the restriction on the powers of the Court to deal with the amendment application after the commencement of trial is clear and unambiguous. However, in the present case, I find that the application (Exh.92) filed by the plaintiff cannot be rejected mechanically relying on the proviso below Rule 17 of Order VI of the Code of Civil Procedure. The proviso restricts the power of the Court to deal with the amendment application after commencement of trial. However, it cannot be said that looking to the nature of the facts of the case, the Civil Court lacks jurisdiction to deal with the amendment application. In the present case, after going through the averments of paragraph Nos. 8 and 11 of the plaint, I find that there are certain pleadings which are considered by the learned trial Judge also which support the incorporation of prayer clause and it cannot be said that the prayer sought to be incorporated by the amendment is without any foundation.

I see no patent illegality or irregularity in the impugned order. I do not find that the learned trial Judge has overstepped the jurisdiction vested in him. I see no reason to interfere with the impugned order.

The petition is **dismissed**. No costs.

It is clarified that the observations made by this Court are only for considering the legality of the order passed by the trial Court allowing amendment application and the merits of the matter are not considered.

JUDGE