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HIGH COURT OF CHHATTISGARH, BILASPUR**WP227 No. 743 of 2016**

1. Smt. Prabha Dubey D/o Late Shivshankar Prasad Tiwari Aged About 46 Years R/o Ward No. 7, Pathak Para, Takhatpur, Tahsil- Takhatpur, District- Bilaspur, Chhattisgarh
2. Smt. Asha Dubey D/o Late Shivshankar Prasad Tiwari Aged About 40 Years R/o Ward No.7, Pathak Para, Takhatpur, Tahsil- Takhatpur, District- Bilaspur, Chhattisgarh

---- Petitioner

Versus

1. Smt. Kamla Tiwari W/o Late Ram Kumar Tiwari Aged About 60 Years R/o Village Gondkhamhi, Tahsil- Lormi, District- Mungeli, Chhattisgarh
2. Virendra Tiwari @ Guddu S/o Late Ram Kumar Tiwari Aged About 32 Years R/o Village Gondkhamhi, Tahsil Lormi, District- Mungeli, Chhattisgarh
3. Smt. Neelu Pathak D/o Late Ram Kumar Tiwari Aged About 29 Years W/o Vinod Pathak, R/o Ward No. 6, Takhatpur,district- Bilaspur, Chhattisgarh
4. Montu Tiwari S/o Late Ram Kumar Tiwari Aged About 27 Years R/o Village Gondkhamhi, Tahsil Lormi, District- Mungeli, Chhattisgarh
5. Smt. Rekha Tiwari D/o Late Ram Kumar Tiwari Aged About 25 Years W/o Bhuwan Tiwari, R/o Ashok Nagar, Sarkanda, Bilaspur, District- Bilaspur, Chhattisgarh
6. Pinku Tiwari S/o Late Ram Kumar Tiwari Aged About 24 Years R/o Village Gondkhamhi, Tahsil Lormi, District- Mungeli, Chhattisgarh
7. Smt. Bharti Tiwari W/o Late Rajendra Tiwari Aged About 46 Years R/o Village Gondkhamhi, Tahsil Lormi, District- Mungeli, Chhattisgarh
8. Ku. Binni D/o Late Rajendra Tiwari Aged About 24 Years R/o Village Gondkhamhi, Tahsil Lormi, District- Mungeli, Chhattisgarh
9. Ku. Pooja D/o Late Rajendra Tiwari Aged About 21 Years R/o Village Gondkhamhi, Tahsil Lormi, District- Mungeli, Chhattisgarh
10. Kiran Dubey D/o Chandra Kumar Dubey Aged About 36 Years Mother Late Munni Bai, R/o Katiya Para, Juna Bilaspur, Bilaspur, District- Bilaspur, Chhattisgarh
11. Deepak Dubey S/o Chandra Kumar Dubey Aged About 30 Years Mother Late Munni Bai, R/o Katiya Para, Juna Bilaspur, Bilaspur, District- Bilaspur, Chhattisgarh
12. Chandra Kumar Dubey W/o Late Munni Bai Aged About 75 Years R/o

Katiya Para, Juna Bilaspur, Bilaspur, District- Bilaspur, Chhattisgarh

13. Smt. Keshar D/o Late Shivshankar Prasad Tiwari Aged About 60 Years
W/o Manidhar Tiwari, R/o Masjid Para, Kota, tahsil Kota, District-
Bilaspur, Chhattisgarh

14. State Of Chhattisgarh, Through The Collector, Mungeli, Chhattisgarh

---- Respondents

For Petitioners : Shri Ravindra Agrawal, Advocate
For Respondents No.1,3,6 & 7. : Shri Anand Shukla, Advocate.
For Respondent No. 14 : Shri Aditya Sharma, PL

Hon'ble Shri Justice Sanjay K. Agrawal

Order On Board

07/07/2017

(1) Application for amendment filed by the petitioners/plaintiffs after commencement of the trial was rejected by the trial Court by its order impugned.

(2) Against which, this writ petition has been filed questioning the same.

(3) Learned counsel for the petitioner would submit that proposed amendment is clerical in nature and Khasra No.62/2 area 0.032 Hectare could not be inserted in Schedule I on account of inadvertent clerical mistake and it ought to have been allowed.

(4) On the other hand, Mr.Ashish Surana, learned Panel Lawyer appearing for the respondents/State, would submit that trial has already been commenced and in the application filed by the petitioner it has not been shown that in spite of due diligence earlier such application could not be moved. He would rely upon the judgment of the Supreme Court in the matter of **Vidyabai and others Vs. Padmalatha and**

another¹ and would submit that amendment cannot be allowed and it has rightly been rejected by the trial Court.

(5) I have heard learned counsel appearing for the parties and perused the order impugned.

(6) In order to decide the plea raised at the Bar, it would be appropriate to notice Order 6 Rule 17 of the CPC which reads as under:-

“17. Amendment of pleadings.- The Court may at any stage of the proceedings allow either party to alter or amend his pleading in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties:

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.”

(7) A careful reading of proviso to Order 6 Rule 17 of the CPC, which was brought into statute book on 1.7.2002, that application for amendment cannot be entertained after the trial has commenced, unless the party making amendment has to be established that in spite of due diligence the party could not have raised the matter before the commencement of trial.

(8) The aforesaid proviso came into consideration before the Supreme Court in **Vidyabai** case (supra) and it has been held that it

1 (2009) 2 SCC 409

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 and the trial 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 **Vidyabai** case (supra), it has also been considered that filing of an affidavit in lieu of examination-in-chief of the witness would amount to commencement of proceeding and held as under:-

“11. From the order passed by the learned Trial Judge, it is evident that the respondents had not been able to fulfill the said precondition. 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’.

Their Lordships further considered the meaning of the terms of “trial” and “commence” and observed as under:-

“19. It is the primal duty of the court to decide as to whether such an amendment is necessary to decide the real dispute between the parties. Only if such a condition is fulfilled, the amendment is to be allowed. However, proviso appended to Order VI, Rule 17 of the Code restricts the power of the court. It puts an embargo on exercise of its jurisdiction. The court's jurisdiction, in a case of this nature is limited. Thus, unless the jurisdictional fact, as envisaged therein, is

found to be existing, the court will have no jurisdiction at all to allow the amendment of the plaint.”

(9) The writ petitioner did not aver in his application for amendment that in spite of due diligence, he could not have raised the matter before the commencement of the trial as the application for amendment filed by the petitioner is blissfully silent. Thus, the petitioner has failed to establish the fact that in spite of due diligence he could not move an application for amendment before the commencement of the trial.

(10) Since the proviso to Order 6 Rule 17 CPC is mandatory as held in the matter of **Vidyabai** (supra) and the petitioner has failed to establish the same, the trial Court has rightly rejected the application, in which I do not find any error warranting interference by this Court under Article 227 of the Constitution of India.

(11) The writ petition is liable to be and is hereby dismissed. No order as to cost(s).

Sd/-

(Sanjay K. Agrawal)
Judge

D/-