

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
AURANGABAD BENCH, AT AURANGABAD.**

Writ Petition No. 01764 of 2017

District : Latur

1. Laxman s/o. Mallikarjunappa
Mitkare,
Age : 72 years,
Occupation : Agriculture.

2. Rajkumar s/o. Laxman Mitkare,
Age : 34 years,
Occupation : Agriculture.

3. Ram s/o. Laxman Mitkare,
Age : 30 years,
Occupation : Agriculture.

All R/o. Dhanora (Bk.),
Taluka Ahmedpur,
District Latur.

.. Petitioners
(Original defendants)

versus

Suryakant s/o. Kashinathappa
Pune,
Age : 64 years,
Occupation : Agriculture,
R/o. Dhanora (Bk.),
Taluka Ahmedpur,
District Latur.

.. Respondent
(Original plaintiff)

.....

Mr. Jayant R. Patil, Advocate, for petitioners.

Mr. A.N. Nagargoje, Advocate, for the respondent.

.....

CORAM : SMT. VIBHA KANKANWADI, J.

DATE : 29TH NOVEMBER 2017

ORAL ORDER :

01. With the consent of parties, the matter is taken up for disposal at admission stage.

02. Present respondent - original plaintiff has filed Regular Civil Suit No. 37 of 2015 and it is pending before 3rd Joint Civil Judge (Junior Division), Ahmedpur, District Latur. The said suit was for declaration of ownership and perpetual injunction. The petitioner - original defendants filed their written statement and thereafter issues came to be framed. The plaintiff filed his affidavit in chief and thereafter an application has been filed at Exhibit 31 under Order VI Rule 17 of the Code of Civil Procedure. It was contended in the application, that initially when the suit was filed, the plaintiff claimed ownership to the extent of 01 Hectare 73 Are land from Survey No. 53/2 situated at village Dhanora (Bk.), Taluka Ahmedpur. However, a compromise decree in Regular Civil Suit No. 283 of 2016 has been passed on 16.04.2016 between the plaintiff and his brothers as well as sisters. In the said decree, the plaintiff got 96 Are land consisting of two pieces, one to the extent of 14 Are and second is 82 Are out of the same survey number. According to the plaintiff, the said piece of 14 Are land is adjacent to the defendants' land and, therefore, he intended to incorporate boundaries of the said 14 Are land by way of amendment in the suit.

03. The application was objected mainly on the ground that the plaintiff has filed the affidavit of examination in chief on 31.08.2016 and, therefore, the trial has commenced. The application under Order VI Rule 17 of the Code of Civil Procedure is, therefore, barred.

04. After hearing both sides, the learned trial court has allowed the application subject to the payment of costs on the ground that the proposed amendment is necessary to arrive at perfect conclusion and to avoid multiplicity of litigation. It was also mentioned that if the proposed amendment is allowed, then it will not change nature of the suit and will not cause prejudice to the defendants. The original defendants have now invoked the writ jurisdiction of this Court under Article 227 of the Constitution of India in order to challenge the said order below Exhibit 31 in R.C.S. No. 37 of 2015, passed by 3rd Joint Civil Judge (Junior Division), Ahmedpur, on 19.11.2016.

05. It has been argued on behalf of the petitioners, that when the plaintiff had filed affidavit in chief after issues were framed, it will have to be stated that the trial has commenced. Reliance has been placed on judgment of the Apex Court in the case of *Vidyabai & others Vs. Padmalatha & another* [2009(4) Mh.L.J. 30], wherein it has been held that *the date on which 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'. It was also submitted that absolutely no explanation has been given by the plaintiff, as to why any attempt was not made earlier and even the delay has not been acknowledged in the application. Further reliance has been placed by the petitioners, on a judgment of this Court in the case of *K.T. Kubal And Company (M/S) Vs. Mujibur Rehman Haji Israr Alam Siddiqui* [2015(3) Mh.L.J. 892].*

06. Further it is argued on behalf of the petitioners, that when the applicant had not even acknowledged the delay in filing the application and had not explained the same, he cannot be said to be a diligent litigant. It was also submitted that even the learned trial Judge has not given proper reasons for allowing the application. It cannot be stated that the proposed amendment which is necessary to arrive at perfect conclusion and to avoid multiplicity of litigation would give jurisdiction to the trial Court to allow the amendment.

07. Per contra, it has been submitted on behalf of the respondent - original plaintiff, that the amendment is the outcome of the subsequent events during the pendency of the suit. The plaintiff intended to bring on record, the compromise decree and its effect and to assert his title in pursuance to the compromise decree. He had taken steps to

mutate his name in pursuance to the compromise decree which has consumed time and in the meantime, he had filed the affidavit in chief. That does not mean that the trial had commenced as contemplated under Order VI Rule 17. Reliance has been placed on the judgment of the Apex Court in the case of *Baldev Singh & others Vs. Manohar Singh & another* [2006(5) Mh.L.J. 634], wherein it has been observed thus :-

" Before we part with this order, we may also notice that proviso to Order 6, Rule 17 of the Civil Procedure Code provides that amendment of pleadings shall not be allowed when the trial of the Suit has already commenced. For this reason, we have examined the records and find that, in fact, the trial has not yet commenced. It appears from the records that the parties have yet to file their documentary evidence in the Suit. From the record, it also appears that the Suit was not on the verge of conclusion as found by the High Court and the trial Court. That apart, commencement of trial as used in proviso to Order 6, Rule 17 in the Code of Civil Procedure must be understood in the limited sense as meaning the final hearing of the suit, examination of witnesses, filing of documents and addressing of arguments. "

08. Learned Counsel for the respondent - original plaintiff further submitted that the proposed amendment was necessary taking into consideration the assertion of the title. The proposed amendment would not have caused any kind of prejudice to the defendants as the cross examination has not yet begun. The learned trial Court has given proper reasons while allowing the application and

they are based on the principles laid down by various authorities. He has relied on the judgment of Apex Court in the case of *Chakreshwari Construction Pvt. Ltd. Vs. Manoharlal* [2017(5) Mh.L.J. 195], wherein the principles culled out in *Revajeetu Builders and Developers Vs. Narayanaswamy and Sons* [(2009) 10 SCC 84] were reiterated.

09. It is to be noted that initially the plaintiff had come with a case that he is the lawful owner and possessor of Survey No. 53/2 to the extent of 01 Hectare 73 Are and the boundaries were given. Now, the plaintiff has stated that during the pendency of the suit, a compromise had arrived between him and his brothers in R.C.S. No. 283 of 2016 on 16.04.2016. Thus, it can be seen that it is during the pendency of the suit, that means, it is a subsequent event. According to the plaintiff, in all, he has got 96 Are land in two pieces, one is 14 Are and another is 82 Are. 14 Are piece of land is stated to be adjacent to the defendants' land and, therefore, he intended to correct the boundaries. Definitely, by the proposed amendment, nature of the suit would not have change. Further, it would not have caused any prejudice to the defendants.

10. Taking into consideration the fact that the cross examination has not yet begun, the question therefore, is whether the said amendment application can be said to have been barred since the trial has commenced. No doubt, in the case of *Vidyabai & others*

(*supra*), it has been held by the Apex Court, that the date of framing of the issues would be the date of first hearing. However, taking into consideration the fact that principles have been laid down in the case of *Revajeetu Builders and Developers (supra)*, which have been reiterated in the case of *Chakreshwari Construction Pvt. Ltd. (supra)*, we are required to apply those principles. Definitely, it has not been shown by the defendants, that the proposed amendment is with a *mala fide* intention. On the contrary, the amendment was necessitated due to the subsequent events because it affected assertion of the title by the plaintiff. Therefore, it was imperative for proper and effective adjudication of the case. Definitely, refusal of the amendment would have led to the multiple litigation because the question of interest of the brothers of the plaintiff can be said to have cropped up and since they had resorted their title over the property by effecting partition, the said amendment can be said to be definitely helping the dispute to be narrowed down.

11. Now, as regards acknowledgment of the delay is concerned, it was submitted that some time was consumed for effecting mutation in pursuance to the compromise decree. It may not have been specifically so worded as to these are the factors which caused delay but those factors are separately conveyed. The said compromise was arrived at on 16.04.2016 and the application has been given on 17.10.2016. Even if

for the sake of argument it is accepted that there is delay, that delay has not caused any prejudice or adversely affected rights of the defendants. Under such circumstance, the citations on which the petitioners have relied are not helpful to them. Ultimately, in the interest of justice and in order to cover the dispute in one matter, the amendment was necessary and it has been so allowed. No doubt, the order that has been passed by the trial Court appears to be cryptic but the result is proper. Taking into consideration these aspects, I do not find any merit in the present petition.

12. In the result, the writ petition fails and the same is dismissed with no order as to costs.

(Smt. Vibha Kankanwadi)
JUDGE

.....