

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.1074 OF 2017

Kishor Haribhau Gaidhani and another ... Petitioners
Vs.
Shankar Pandit Shauche (decd) through legal
heirs Nalani Shankar Shauche and others ... Respondents

Mr. Satyjeet P. Dighe for Petitioners.

CORAM : R. G. KETKAR, J.
DATE : FEBRUARY 08, 2017

P.C. :

Not on Board. At the request of Mr. Dighe, learned Counsel for petitioners, taken up for admission.

2. By this Petition under Article 227 of the Constitution of India, petitioners, hereinafter referred to as 'defendants', have challenged the judgment and order dated 17.09.2016 passed by the learned 3rd Joint Civil Judge Senior Division, Nashik below exhibit-22 in Special Civil Suit No.453 of 2014. By that order, the learned trial Judge rejected the application filed by the defendants under Order VI, Rule 17 of the Code of Civil Procedure, 1908 (for short 'C.P.C.') for amending the written statement.

3. Respondent, hereinafter referred to as 'plaintiff', has instituted the Suit against defendants under Section 34 of the Specific Relief Act, 1963 read with Article 65 of the Limitation Act, 1963. Plaintiff has sought declaration that defendants were never tenants in the property described in paragraph 1 of the plaint and for possession of the suit property. Mr. Dighe submitted that defendants' father Haribhau Gaidhani was admittedly tenant of the suit property. He died on

14.12.1995. In paragraph 2, plaintiff contended that after the death of original tenant Haribhau, the relationship of landlord and tenant came to an end. Haribhau died leaving behind three sons namely, defendants herein and Laxman. Laxman was not residing in the suit premises and he died on 22.08.2008. Defendants herein were not residing in the suit property. After the death of Laxman, his widow orally handed over possession of the suit premises to the plaintiff. In fact, plaintiff has instituted Suit in the Court of Civil Judge, Junior Division, Nashik against Laxman for recovery of possession of the suit property on the footing that there is a relationship of landlord and tenant. That Suit was dismissed and appeal preferred by the plaintiff was also dismissed. In paragraph 7, plaintiff alleged that defendants have unlawfully taken possession of the suit property after the death of Laxman. Plaintiff, therefore, alleged that defendants are trespassers in the suit property and not tenant. He invited my attention to paragraph 10 onwards of the plaint, wherein plaintiff has claimed possession of the suit property on reasonable and bonafide ground; that Corporation has issued notice on the ground that building where suit premises is situate is in a dangerous and ruinous condition.

4. He submitted that defendants filed written statement opposing the Suit and in paragraph 11, defendants have contended that as the Suit is not instituted under the Maharashtra Rent Constrol Act, 1999, pleadings in paragraphs 10 to 13 are irrelevant and unnecessary. On behalf of the plaintiff, Chandrakant Shankar Shauche filed examination-in-chief on 06.04.2015. Defendants filed application exhibit-22 on 10.06.2015 for amending the written statement for introducing paragraph 11A. He submitted that the learned trial Judge rejected the application on the ground that no case of due diligence is made and the trial has commenced. He has relied upon the decision of this Court in Writ

Petition No.2656 of 2011 and other companion Writ Petition decided on 06.04.2011 and in particular paragraphs 9 and 10 thereof to contend that mere filing of affidavit in lieu of examination-in-chief does not necessarily amount to commencement of trial unless the witness has started his deposition and the affidavit in lieu of evidence has been proved and is taken on record along with the documents.

5. I have considered the submissions advanced by Mr. Dighe. I have also perused paragraph 11A, which is sought to be incorporated by the defendants. It is not in dispute that plaintiff has filed examination-in-chief on 06.04.2015. Present application is filed on 10.06.2015. The learned trial Judge has referred to the decision of the Apex Court in the case of ***Vidyabai Vs. Padmalatha***, AIR 2009 SC 1433, wherein it is observed thus,

“Proviso to Order-6, Rule-17 of the Code of Civil Procedure has been framed in a mandatory form and it gives jurisdiction to the court in a limited manner. The civil Court can allow the amendment application after the trial has commenced only when the condition prescribed in the proviso is satisfied. The condition is that Court must come to the conclusion that despite due diligence, the parties could not have raised the matter before the commencement of the trial. The date on which the issues are framed is the date of first hearing and filing of an affidavit in lieu of examination in chief of the witness is “commencement of proceeding”.

6. Perusal of the above extracted portion shows that the Court can allow amendment application after trial has commencement only when the condition prescribed in the proviso is satisfied. The condition is that Court must come to the conclusion that despite due diligence, the parties could not have raised the matter before the commencement of the trial. The date on which the issues are framed is the date of first hearing and filing of an affidavit in lieu of examination in chief of the witness is commencement of trial.

7. In view thereof, it has to be held that the trial has commenced after filing of examination-in-chief on 06.04.2015. The learned trial Judge held that no case of due diligence is made out by the defendants and accordingly rejected the application. For the reasons recorded in paragraphs 3 and 4 of the impugned order, no fault can be found. Hence, Petition fails and the same is dismissed. It will be however open to the defendants to put his case set out in paragraph 11A during the cross-examination of the plaintiff's witness. It is also made clear that where a decree is challenged by the petitioners, any error, defect or irregularity in the impugned order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of the proceedings as contemplated by Section 105 (1) of C.P.C.

(R. G. KETKAR, J.)

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