

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO. 5929 OF 2014

Shri Pravinsinh Vishwanath Patil.	... Petitioner.
Versus	
Shri Dashrath Rama Pawale & ors.	... Respondents.

Mr. Amit B. Borkar, advocate for petitioner.

Mr. S.S. Patwardhan i/b. Mr. Ajit M. Savagave, advocate for respondent Nos. 1 to 4.

Mr. Rakesh Singh i/b. M.V.Kini & Co., advocate for respondent No. 5.

**CORAM : SMT.SADHANA S. JADHAV,J
DATE : NOVEMBER 21, 2017**

P.C.:

1 Heard the learned Counsel for the Petitioner and the learned Counsel for the respondents.

2 Rule. Rule made returnable forthwith with the consent of the parties.

3 The Petitioner herein happens to be the original defendant No. 1 in R.C.S. No. 74 of 2010 pending before the Civil Judge, J.D. Kagal. In the suit, the Plaintiffs prayed that the sale deed executed by the father of the plaintiffs in favour of the defendant No. 1 dated 13/9/1993 be declared as null and void. It was averred in the said plaint that the plaintiffs are in possession of the suit property. The defendant No. 1 happens to be the chairman of the Naamdar Shri Yashwantravji Chavan Sahakari Audyogik Vasahat Maryadit Murgud. Defendant had filed the written statement on 7/6/2010. The suit was instituted on 6/5/2010. The defendant No. 1 had filed written statement on 7/6/2010.

4 The learned Court had framed issues. The plaintiff had filed affidavit of evidence on 22/1/2014 and the suit was posted for recording of evidence. On 7/3/2014 the defendant No. 1 had filed an application under Order 6 Rule 17 and had prayed for amendment of Written Statement. The proposed amendment was as follows :

“11-a) That the def. no. 1 is co-operative society registered under the provisions of the Maharashtra Co.Op. Societies Act

and to act purchase the land for its objects according to its byelaws is part and parcel of its business and management. That under the circumstances before filing of suit notice under sec. 164 of M.C.S. Act is mandatory to be served on registrar of Co.op.Societies and the plaintiff have not served such notice before filing of suit and as such the suit is not maintainable and the Hon'ble Court is not having jurisdiction to try and decide the suit. Hence on this ground the suit may kindly be dismissed.”

5 It was contended in the application that inadvertently the legal defence has remained to be taken in the written statement. The plaintiffs had objected to the amendment of the written statement and have specifically contended that the plaintiffs are not the members of the said society. That the plaintiffs have not challenged any issue which has touched the conduct of the business of the society. The Petitioner had also filed application below Exh. 61 seeking the relief of adducing consequential evidence. However, the said application was rejected. The application filed below Exh. 58 seeking amendment to the written statement was rejected by an order dated 3rd May, 2014. Hence, the present petition.

6 By way of proposed amendment, legal issue was raised that the suit deserves to be dismissed for non compliance of the mandatory provisions under section 164 of the Maharashtra Cooperative Societies Act, 1960. The section 164 of said Act reads as follows :

164. Notice necessary in suits.- No suit shall be instituted against a society, or any of its officers, in respect of any act touching the business of the society, until the expiration of two months next after notice in writing has been delivered to the Registrar or left at his office, stating the cause of action, the name, description and place of residence of the plaintiff and the relief which he claims, and the plaint shall contain a statement that such notice has been so delivered or left.

7 It was incumbent upon the defendant No. 1 to raise the said issue in the Written Statement which was filed on 7/6/2010. However, for 4 years no such issue was raised neither there was any application seeking framing of issues, but when the suit was ripped for adducing evidence, the defendant No. 1 had filed said application seeking proposed amendment. This Court cannot be oblivious of the

fact that in the said application filed below Exh. 58 there was no contention as to whether the suit involves conducting the business of the society nor election of the society, nor the management of the affairs of the society, which would be the mandatory requirement for a mandatory notice under section 164 of the Maharashtra Cooperative Societies act. Order 6 Rule 17 of the Code of Civil Procedure, 1908 reads as follows :

“17. Amendment of Pleadings.- the Court may at any stage at the proceedings allow either party to alter or amend his pleadings 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.”

8 The amendment was brought with effect from 1/7/2002. Admittedly a mandate is cast upon the trial court to see that the

proper procedure is followed and no application seeking amendment is filed at the commencement of the trial. Moreover a duty is cast upon the applicant to show that despite due diligence, the party could not raise the said issue while filing the written statement. In the present case, upon perusal of the application filed by defendant No. 1, it is clear that the actual reason for seeking proposed amendment at the belated stage is that due to inadvertence, the said issue could not be raised. That would not be a good ground to allow the proposed amendment. It would not only protract the proceedings, but it was the intention of the legislature that once the issues are framed, if the pleadings are amended, then it would necessitate framing of issues on the basis of the contentions raised in the plaint as well as the written statement. In the present case, no such issue was framed as it touches the very root of the matter. It would be incumbent upon the defendants to show that the issue involved in the suit pertains to the issues covered under section 164 of the Maharashtra Co-operative Societies Act.

9 The learned Counsel for the Petitioner has placed implicit reliance upon the Judgment of the Hon'ble Division Bench of this Court in the case of **Mohan Meakin Ltd. v/s. Pravara Sahakari Sakhar Karkhana, reported in 1987 MLJ 503** and has urged that issuance of notice under section 164 of the Maharashtra Cooperative Societies Act is mandatory. However, the facts of the said case are at variance with the facts of the present case. In the said case, Mohan Meakin Ltd. had filed suit against the cooperative society who is carrying on business, inter alia of manufacturing and sale of alcoholic drinks and beverages including whisky. The plaintiffs were also in the production of alcoholic and non-alcoholic beverages including whisky. According to the plaintiffs, they are the registered proprietors of the Trade Mark consisting of the device of a Knight riding on a horse and words "Black Knight". It is urged by the Mohan Meakin Ltd. that the respondents therein i.e. Cooperative Society was marketing the Whisky in the name of Royal Knight and that would create confusion among the purchaser. The conduct of the business of the society was directly involved and therefore, notice under section 164 wa

mandatory.

10 In the present case, the suit revolves around the sale deed executed in favour of the defendant No. 1 by the father of the plaintiff and has no concerned with the nature of the business conducted by the society. In view of this, the order dated 3/5/2014 calls for no interference. The Petition is dismissed. Rule is discharged with no order as to costs.

(SMT. SADHANA S. JADHAV,J)