

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

WRIT PETITION NO. 13411 OF 2016

Smt. Sundari Baburao Desai and
Ors

..Petitioners.

Vs

Shri Ladu Laxman Jadhav, since
deceased, through his heirs and
L.Rs Smt. Prabahvati Ladu
Jadhav and Ors.

.. Respondent

Mr.Rajesh B. Parab, Advocate for Petitioners.

CORAM : R.G.KETKAR,J.
DATE : 06/01/2017

PC:

1. Heard Mr. Rajesh Parab, learned counsel for the petitioners at length.
2. By this Petition under Article 227 of the Constitution of India, the petitioners, hereinafter referred to as 'plaintiffs', have challenged the Judgment and order dated 13.7.2016 passed by the learned Civil Judge Jr. Dn., Dodamarg below Exhibit-97 in Regular Civil Suit no.26 of 2015. By that order, the learned trial Judge rejected the application made by the plaintiffs under Order VI, Rule 17 of C.P.C for amending the plaint.
3. In support of this petition, Mr. Parab submitted that the learned trial Judge rejected the application on two grounds, namely, (i) by the proposed amendment, the plaintiffs want to incorporate something which is referred by the defendants in their written statement. The plaintiffs can lead evidence to bring

the fact on record and for that purpose amendment is not necessary. (ii) the learned trial Judge also rejected the application on the ground that the suit is at the stage of cross examination by the plaintiffs of D.W. 1. In other words, the trial has commenced. Mr. Parab has submitted that basically the learned trial Judge did not frame issues as initially the suit was fixed for 'No W.S.' hearing. Thereafter, the defendants filed written statement at Exhibit-66. The learned trial Judge, however, did not frame issues after written statement at Exhibit-66 was filed. The plaintiffs completed their evidence as Advocates appearing for the parties did not bring this fact to the notice of the Court. He submitted that issues were framed on 16.7.2016 at Exhibit-99. The plaintiffs filed application for amendment on 4.7.2016. As the issues were not framed, it cannot be said that the trial has commenced.

4. I have considered the submissions advanced by Mr. Parab. I have also perused the material on record. The learned trial Judge rejected the application on two grounds: firstly, by the proposed amendment the plaintiffs want to incorporate in reply to the assertions made by the defendants in the written statement. The learned trial Judge observed that the plaintiffs can lead evidence in that regard and for that purpose amendment is not necessary. Secondly, the trial has commenced.

5. In the case of Vidyabai Vs Padmalatha, 2009 (2) SCC 409,

the Apex Court has held that framing of issues is the first date of hearing and filing of affidavit of evidence is the commencement of trial. As the plaintiffs have completed their evidence and the suit is at the stage of cross examination of D.W.1, I do not find that the learned trial Judge has committed any error in holding that the trial has commenced. The learned trial Judge was also justified in observing that the plaintiffs can lead evidence to deal with the averments made in the written statement. Hence, Petition fails and the same is dismissed. It is, however, expressly made clear that where a decree is appealed from 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 appeal as contemplated by Section 105(1) of C.P.C.

(R.G.KETKAR, J.)