

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 365 OF 2017

Prabhakar Sadashiv Gokhale and Another ..Petitioners

Vs.

Ramesh Shankar Ladkat and Others ..Respondents

Mr. R. V. Govilkar i/b Mr. Mihir Govilkar, for the Petitioners

Mr. S. G. Deshmukh a/w Mr. Rayrikar Sanjay Dhundiraj, for
Respondent No.1.

CORAM :- **B. P. COLABAWALLA, J.**

DATE :- **JUNE 30, 2017.**

ORAL JUDGMENT(PER B. P. COLABAWALLA,J.)

By this Writ Petition filed under Article 227 of the Constitution of India the Petitioners seek quashing and setting aside of the judgment and order dated 5th November, 2016 passed below Exhibit-17 by the Adhoc District Judge-1, Pune dismissing Exhibit-17 and confirming the order dated 29th August, 2016 passed by the 7th Additional Judge, Small Causes Court, Pune in Civil Suit No.371 of 2013.

2 The application (Exhibit-63) that was rejected by the

Trial Court was an application seeking amendment of the Written Statement of Defendant Nos.2 and 3. This application came to be filed on 19th July, 2016. The Trial Court as well as the Revisional Authority were of the opinion that since the amendment application was filed after the commencement of the trial as contemplated under the proviso to Order VI Rule 17, Defendant Nos.2 and 3 were duty bound to show that the amendments that were now sought, could not be raised before commencement of trial despite due diligence on the part of the said Defendants.

3 Very few facts need to be noted to decide the present controversy. The Suit was filed by Respondent No.1 herein (the Plaintiff) being Suit No.371 of 2013. This Suit came to be filed on 22nd November, 2013. After the writ of summons was served on the Defendants, the Petitioner herein (Defendant Nos.2 and 3 before the Trial Court) filed their Written Statement on 21st August, 2014. Thereafter, the Trial Court framed the issues on 9th December, 2015 and the Plaintiffs filed their affidavit of evidence before the Trial Court on 22nd January, 2016. Thereafter, the matter was adjourned for cross examination of the Plaintiff's witness. It is only thereafter, on 19th July, 2016, the

amendment application was filed (Exhibit-63) on behalf of Defendant Nos.2 and 3.

4 In this factual backdrop, Mr. Govilkar, the learned counsel appearing on behalf of Defendant Nos.2 and 3 submitted that the Trial court as well as the Revisional Authority have completely gone wrong in rejecting the amendment application filed by Defendant Nos.2 and 3. Mr. Govilkar submitted that as per Order VI Rule 17, the primary consideration is for the Court to see whether the amendment was necessary for the purpose of determining the real questions in controversy between the parties. Instead of examining the amendment application from this angle, the Courts below have rejected the amendment application only on the ground that since the trial had commenced, the amendment could not be allowed unless the Court came to the conclusion that in-spite of due diligence the parties seeking the amendment could not have raised the matter before the commencement of the trial. He submitted that this approach of the Courts below was contrary to the express language of Order VI Rule 17 of the CPC, and therefore, required interference by me under Article 227 of the Constitution of India.

5 On the other hand, Mr. Deshmukh, the learned counsel appearing on behalf of Respondent No.1 (original Plaintiff) submitted that both the authorities below have correctly interpreted Order VI Rule 17 and the proviso thereto to come to the conclusions that they have. He submitted that it is now well settled that if amendments are sought after the commencement of the trial, the Court would have no jurisdiction to allow such an amendment unless it is satisfied that despite due diligence the matters which forms the subject matter of the amendment could not be brought on record prior to the commencement of the trial. This being the case, Mr. Deshmukh submitted that there is absolutely no infirmity in the impugned orders, and therefore, the Writ Petition ought to be dismissed.

6 I have heard the learned counsel for the parties at length and have perused the papers and proceedings in the Writ Petition. I have also given my anxious consideration to both the impugned orders. As can be seen the sequence of events set out earlier, it is not in dispute that the amendment application filed by Defendant Nos.2 and 3 was after the commencement of the trial.

This is clear from the fact that issues were framed as far back as on 9th December, 2015 and the affidavit of evidence of the Plaintiffs was also filed on 22nd January, 2016. It is only thereafter that the amendment application was filed on 19th July, 2016. This being the factual position, it cannot be disputed, and in fact Mr. Govilkar fairly conceded, that the amendment application has been filed after the commencement of the trial. This being the factual position, I now have to consider what would be the effect of this factual position on the amendment application filed by Defendant Nos.2 and 3. Amendment of pleadings is dealt with in Order VI Rule 17 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 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."***

7 Order VI Rule 17 clearly stipulates that the Court may at any stage of the proceedings allow either party to alter or amend these 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 question in

controversy between the parties. In 2002, a proviso was added to Rule 17 which clearly states 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 seeking amendment could not have raised the matter before the commencement of trial. What the proviso clearly stipulates and what the Legislature clearly intended was to curtail the discretion that was granted to the Court to grant the amendment in the main part of the Rule. The effect of the proviso is clearly mandatory. It clearly stipulates that no application for amendment “shall” be allowed after the trial had commenced unless the condition as set out in the said proviso is fulfilled. In other words, what the proviso stipulates is that the Court is barred from allowing any amendment after the trial has commenced unless the condition set out in Order VI Rule 17 is satisfied.

8 The view that I have taken is now well settled by a catena of decisions of the Supreme Court. However, for the sake of clarity, a reference to a decision of the Apex Court in the case of **Vidyabai and Others v/s Padmalatha and Another reported in (2009) 2 SCC 409**, would be apposite. The Supreme Court has in fact considered this very proviso and

thereafter in clear and unambiguous terms stated that it is in a mandatory form and the Court's jurisdiction to allow an amendment application is taken away unless the condition precedent as set out in the said proviso is satisfied. Paragraphs 10 and 19 of this decision are relevant for our purpose and read thus:

"10. By reason of the Civil Procedure Code (Amendment) Act, 2002 (Act 22 of 2002), the Parliament inter alia inserted a proviso to Order VI Rule 17 of the Code, which reads as under:

"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."

It 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, viz., it 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."

"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."

(emphasis supplied)

9 This decision of the Supreme Court has also been followed by a Single Judge of this Court in the case of **Chhabubai**

Haribhau Badakh v/s S. H. Khatod and Sons and Another
reported in 2009 (6) Mh L. J. 760. This Court, after relying
upon the decision of the Supreme Court in the case of Vidyabai
(supra), held as under:-

“It is thus clear that if the amendment is sought after the commencement of trial, unless the court comes to the conclusion that in spite of exercise of due diligence, the party could not have raised the matter before the commencement of trial, the amendment cannot be allowed. In the present case, leave aside any averment regarding due diligence, there is not even a whisper in the written statement about same. The only statement is that while filing the written statement the fact regarding said Mr. Parik being General Power of Attorney Holder could not be mentioned due to inadvertence. In that view of the matter, I am of the considered view that the learned trial court had no jurisdiction to entertain the amendment as there is nothing on record to show that the matter which was sought to be brought on record could not have been brought on record before the commencement of trial in spite of exercise of due diligence by the respondents/defendants.”

(emphasis supplied)

10 This being the clear position in law, the only thing that I have to now examine is whether Defendant Nos.2 and 3 had exercised due diligence and despite that they could not bring the subject matter of the amendment on record of the Trial Court before the commencement of the trial. In this regard the observations of the Revisional Authority are quite germane. The Revisional Authority has categorically recorded that *in paragraph 2 of the application (Exhibit-63) in last 4 to 5 lines, the only averment made is that all this information was received by the*

Defendants after filing their Written Statement. There is nothing in the application as to from whom they got information and from whom they collected documents which are sought to be brought on record and filed along with the amendment application (Exhibit-63). All these documents are of the year 2010 and 2013. In fact on going through the application, I find that the averments therein are as vague as they can be. There is no date mentioned at all as to when all these documents have come to the knowledge of Defendant Nos.2 and 3. It is in this light that the Courts below came to the conclusion that Defendant Nos. 2 and 3 had failed to demonstrate that despite due diligence, Defendant Nos.2 and 3 could not bring these documents on record before commencement of the trial. I find that this finding is not only in consonance with the facts on record but certainly does not suffer from any perversity and/or error apparent on the face of the record that would warrant my interference under Article 227 of the Constitution of India.

11 Before parting, it would only be appropriate to deal with the three decisions cited by Mr. Govilkar which are as follows:-

- (i) **Pradeep Singhvi and Another v/s Heero Dhankani and Others** reported in (2004)13 SCC 432.
- (ii) **Abdul Rehman and Another v/s Ruldu and Others** reported in (2012) 11 SCC 341.
- (iii) Unreported decision of a Single Judge of this Court (Goa Bench) in the case of **Mr. Robert Lobo and Another v/s Mr. Alwyn Rodrigues and Others**(Writ Petition No.413 of 2015 decided on 9th June,2015).

12 As far as the first decision of the Supreme Court is concerned, namely **Pradeep Singhvi(supra)**, I find that this decision does not lay down any law as is sought to be contended by Mr. Govilkar. It is merely a one page order and does not lay down any ratio. I, therefore, find that the reliance placed on this decision is of no use to the Petitioners.

13 As far as the decision of the Supreme Court in the case of **Abdul Rehman (supra)** is concerned, the fact situation before the Supreme Court in that case was totally different from the factual matrix before me. In fact, the Supreme Court has not held that despite commencement of the trial and despite the party seeking amendment demonstrating no due diligence, the

amendment could still be allowed. In fact, when I went through the facts of this case, it is clear that amendment was sought prior to the commencement of the trial as contemplated under the proviso to Order VI Rule 17 of the CPC. This judgment is therefore clearly distinguishable on facts and hence of no assistance to the Petitioners.

14 As far as the decision of a Single Judge of this Court in the case of **Mr. Robert Lobo(supra)** is concerned, I find that the learned Judge has clearly observed that the question of showing due diligence for not filing such an application for amendment before the commencement of trial would not arise in the facts of that case as it was the contention of the Petitioners that they had learned about such documents in April 2014 which was much after the trial had started and there was no material to the contrary. In other words, the learned Judge was of the view that the condition precedent as set out in the proviso to Order VI Rule 17 was clearly satisfied. I, therefore, find that even this decision has no application to the facts and circumstances of the present case and does not carry the case of Defendant Nos.2 and 3 any further.

15 For all the foregoing reasons I find no merit in this Writ Petition. It is accordingly dismissed. However, there shall be no order as to costs.

16 It is however clarified that during the cross examination of Plaintiffs, if Defendant Nos.2 and 3 wish to produce any documents to confront the Plaintiffs in cross examination, this order will not get in their way, if they are otherwise entitled to do so in law.

(B. P. COLABAWALLA, J.)