

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 5811 OF 2015

Harun K. Patel and Others ..Petitioners

Vs.

Dilshad Abdul Ajji Shaikh and Others ..Respondents

Mr. Pravartak Pathak, for the Petitioners.

Mr. Pandit Kasar, for Respondent No.1.

CORAM :- B.P.COLABAWALLA, J.
DATE :- NOVEMBER 22, 2018.

P. C.:

This Writ Petition has been filed challenging the order dated 23rd February, 2015 passed by the Joint Civil Judge, Junior Division, Yeola by which the amendment application filed by the Petitioners herein was dismissed.

2 The learned counsel appearing on behalf of the Petitioners submitted that the amendments that were sought were necessary for deciding the controversy in the suit and the Trial Court was in gross error in not allowing the amendment application. He submitted that this is more-so when an

amendment ought to be allowed at any stage of the proceeding and also to ensure that multiplicity of proceedings is avoided. The learned counsel further submitted that the facts that were sought to be brought on record by virtue of the amendment application were not incorporated in the Written Statement as originally filed because the Defendant was an illiterate person and his advocate who he trusted, ought to have incorporated the same in the Written Statement. For all these reasons, the learned counsel submitted that the impugned order be set aside.

3 On the other hand, the learned counsel appearing on behalf of Respondent No.1 brought to my attention the reasoning given by the Trial Court and more particularly in paragraphs 6,8 and 11 thereof. He submitted that this application for amendment was clearly barred by virtue of the proviso to Order VI Rule 17 of the Code of Civil Procedure, 1908 as the same was filed after the trial had commenced. He submitted that once the trial had commenced, then, 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 the trial, the amendment cannot be allowed. He submitted that the proviso is couched in a mandatory

form and the Court's jurisdiction to allow such an amendment is taken away unless the condition precedent as set out in the proviso to Order VI Rule 17 is satisfied (namely it must come to a conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of the trial). He, therefore, submitted that the Trial Court correctly rejected the application for amendment of the Written Statement.

4 I have heard both sides and have perused the papers and proceedings in the present Writ Petition as well as the impugned order dated 23rd February, 2015. I find considerable force in the arguments canvassed on behalf of the Respondent. It is not in dispute that the facts that were sought to be brought on record by the amendment proposed by the Petitioners were within the knowledge of the Petitioners long before the commencement of the trial. It is an admitted position that in the facts of the present case the trial has already commenced as the original Plaintiffs (Respondents herein) have already filed their affidavit in lieu of evidence. This position is not disputed by the Petitioners. The Supreme Court in the case of **Vidyabai and Others v/s Padmalatha and Another** reported in (2009) 2

SCC 409 has clearly held that filing of an affidavit in lieu of examination in chief of the witness would amount to commencement of trial. Paragraphs 10 and 11 of this decision read thus:-

“10)By reason of the Civil Procedure Code (Amendment) Act, 2002 (Act 22 of 2002), Parliament inter alia inserted a proviso to Order 6 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 therefore 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.

11) From the order passed by the learned trial Judge, it is evident that the respondents had not been able to fulfill the said precondition. The question, therefore, which arises for consideration is as to whether the trial had commenced or not. In our opinion, it did. The date on which the 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”.

5 I must mention that this decision of the Supreme Court has thereafter been followed by a Division Bench of this Court in the case of **Mahadeo Maruti Bhanje v/s Balaji Shivaji Pathade and Another** reported in **2012 (5) BCR 777**.

6 In the facts of the present case, it is the admitted fact that the amendment application was preferred after the affidavit

in lieu of examination in chief was filed by the original Plaintiffs. This clearly goes to show that the amendment application was filed after the commencement of trial. It is also an admitted fact that the facts sought to be brought on record by virtue of the amendment were well within the knowledge of the Defendants (the Petitioners herein) long before even the filing of the suit. Despite that, the same were neither incorporated in the Written Statement nor any amendment application was filed prior to the commencement of the trial. In these circumstances, I do not find that the order passed by the Trial Court rejecting the amendment application of the Defendants suffers from any perversity or is vitiated by any error apparent on the face of the record requiring my interference under Article 227 of the Constitution of India.

7 In view of the aforesaid discussion, I find no merit in this Writ Petition. It is accordingly dismissed. However, in the facts of the case, there shall be no order as to costs.

(B. P. COLABAWALLA, J.)