

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 8773 OF 2017

Shri Asgharkhan A. Pathan and Others ..Petitioners

Vs.

Union of India and Others ..Respondents

Mr. C. M. Korde, Senior Counsel a/w Mr. Milind N. Jadhav, Pranav S. Nair I/b Sasikumar T. C. , for the Petitioners.

Mr. N. R. Bubna, for Respondent Nos. 1 to 6.

Mr. R. P. Kadam, AGP, for Respondent Nos. 7 and 8.

CORAM :- **B.P.COLABAWALLA, J.**
DATE :- **DECEMBER 19, 2018.**

P. C.:

Rule. Rule made returnable forthwith and heard finally. Respondent Nos.1 to 6 and who are the only contesting Respondents waive service.

2 This Writ Petition challenges the order passed by the Trial Court dated 23rd February, 2017 below Exhibit-82 in Special Civil Suit No. 401 of 2006. Exhibit-82 was an application filed by the Defendants for amending their Written Statement by deleting

paragraph 26(a) and substituting the same by adding paragraph Nos. 26 (aa) and 26 (ab).

3 This application of the Defendants was opposed by the Plaintiffs by filing their affidavit in reply dated 20th October, 2016. In this affidavit, a specific contention was taken by the Plaintiffs that the amendment could not be allowed because the trial had already commenced and there was not a whisper in the amendment application as to why the facts that were sought to be brought on record by virtue of the amendment, could not have been incorporated earlier, namely, prior to the commencement of the trial. After hearing the parties, the Trial Court allowed the amendment application and that is how the present Writ Petition has been filed challenging the said order.

4 Mr. Korde, the learned Senior Counsel appearing on behalf of the Petitioners (original Plaintiffs) submitted that the order passed by the Trial Court was wholly without jurisdiction. He submitted that in the facts of the present case, the issues were framed on 11th June, 2013. Thereafter, on 15th April, 2014, affidavit of evidence of Plaintiff No.1 was filed. The cross-examination of Plaintiff No.1 was started on 16th July, 2016 and

completed on 20th July, 2016. After this, the evidence of the Plaintiffs was closed. It is only thereafter that the amendment application was filed on 7th October, 2016. He submitted that this being the case, clearly the amendment application was filed much after the commencement of the trial and the Defendants, not having fulfilled the per-condition as set out in the proviso to Order VI Rule 17 of the Code of Civil Procedure, 1908, the Trial Court had no jurisdiction to allow the amendment. According to Mr. Korde, the trial commenced on 15th April, 2014 which is the date on which the affidavit of evidence of Plaintiff No. 1 was filed before the Trial Court. Mr. Korde relied on a decision of the Supreme Court in the case of **Vidyabai and Others v/s Padmalatha and Another** reported in (2009) 2 SCC 409 and a decision of the **Single Judge of this Court in Writ Petition No. 10922 of 2009 (Ajit N. Talekar v/s Smt. Nirmala W. Kekade and Others** decided on 15th July, 2010).

5 On the other hand, Mr. Bubna, the learned counsel appearing on behalf of Respondent Nos.1 to 6 and who are the real contesting Respondents, submitted that the trial had not commenced on 15th April, 2014 as contended by Mr. Korde, but

earlier, namely, on 11th June, 2013 (the date on which the issues were framed). He submitted that what was sought to be brought on record was a Notification that came to be issued only on 9th October, 2013 and which was after the date of the commencement of the trial, and therefore, clearly the amendment application was not barred as subsequent developments after the commencement of the trial were sought to be brought on record.

6 Without prejudice to the aforesaid submission, Mr. Bubna submitted that in any event, the Petitioners have an alternate remedy as set out in Section 105 read with Order 43 Rule 1A of the CPC. Relying upon these provisions of the CPC, Mr. Bubna submitted that if the Plaintiffs were to suffer a decree, then whilst challenging the said decree, they could even challenge the order impugned in this Writ Petition. This being the case, there was no necessity to entertain this Writ Petition.

7 Lastly, Mr. Bubna submitted that this is a Petition that is filed under Article 227 of the Constitution of India. This Court is not sitting in appeal over the order of the Trial Court. He submitted that this Court can interfere with the order of the Trial Court only if it is wholly perverse and not every error noticed in

the impugned order requires interference under Article 227 of the Constitution of India. In support of this proposition, Mr. Bubna relied upon two decisions of the Supreme Court in the case of **Mohd. Yunus v/s. Mohd. Mustaqim and Others reported in (1983) 4 SCC 566** and in the case of **Mohinder Kumar Mehra v/s Roop Rani Mehra and Others reported in (2018) 2 SCC 132**.

8 I have heard the learned counsel for the parties at length and have perused the papers and proceedings in the Writ Petition as well the impugned order. At the out set, I must mention that the Petitioners have specifically raised a ground that the amendment application was barred by virtue of the proviso to Order VI Rule 17 of the CPC. This was for the simple reason because the Plaintiffs were of the view that the trial had already commenced, and therefore, clearly the proviso was attracted.

9 On going through the impugned order, I find that this issue has not even been touched upon by the Trial Court. There is not a whisper in the impugned order as to whether the trial has commenced or otherwise. This being the case, I think that the impugned order could be set aside on this ground alone. However,

since both parties have addressed me on this issue, and they called upon me to decide this issue, I am not remanding the matter back to the Trial Court and have heard the parties on this issue myself.

10 It is now well settled that once the trial has commenced, the Court has no jurisdiction to allow amendment of the pleadings 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. This is *ex-facie* clear from a plain reading of the proviso appended to Order VI Rule 17 of the CPC. This has also been held by the Supreme Court in the case of **Vidyabai (supra)** and more particularly in paragraphs 10 and 19 thereof. The Supreme Court has held in the aforesaid decision that it is the primary 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, the proviso appended to Order VI Rule 17 of the CPC restricts the power of the Court. It puts an embargo on exercise of its jurisdiction. The Court's jurisdiction in such a case is limited. Thus, unless the jurisdictional fact as envisaged in the proviso appended to Order

VI Rule 17 of the CPC is found to be existing, the Court will have no jurisdiction at all to allow the amendment of the plaint.

Paragraphs 10 and 19 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 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 6, 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."

11 In the facts before me, what has been argued on behalf of the Respondents is that the trial had commenced prior to the Notification which was sought to be brought on record and hence they have complied with the jurisdictional fact as envisaged under the proviso to Order VI Rule 17 of the CPC. This argument I am unable to accept. As narrated from the dates mentioned earlier,

the issues were framed on 11th June, 2013 . Thereafter, the affidavit of evidence of Plaintiff No.1 was filed on 15th April, 2014. The amendment application was filed on 7th October, 2016. The Supreme Court in the case of **Vidyabai (supra)** has clearly held in paragraph 11 that filing of an affidavit in lieu of examination in chief of the witnesses would amount to “commencement of proceeding”. Paragraph 11 reads thus:-

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’. ”

12 This being the case, in the facts before me the trial commenced on 15th April, 2014 and not 11th June, 2013, as contended by Mr. Bubna. I must mention that decision of the Supreme Court in the case of **Vidyabai (supra)** came up for consideration before another learned Single Judge of this Court in the case of **Ajit N. Talekar (supra)**. The question framed by this Court was whether the trial commences on framing of the issues or whether it commences when an affidavit of any witness in lieu of examination in chief is filed after framing of the issues. This question was answered by this Court by relying upon paragraph

11 in the case of **Vidyabai (supra)**. This Court clearly held that though the framing of issues is the first date of hearing, the actual hearing commences only when a party files an affidavit of himself or his first witness in lieu of examination in chief. That is the commencement of the trial.

13 Looking to these two decisions, clearly I am of the view that the trial commences not on the date when the issues are framed but when either party has filed its affidavit of evidence in lieu of examination in chief. Once I have come to this conclusion, then, it is clear that this Notification was to the knowledge of the Respondents prior to the commencement of the trial. Yet, the same was not sought to be brought on record till 7th October, 2016 and which is more than two and half years after the commencement of the trial. There is not a whisper in the amendment application as to why this could not be brought on record prior to the commencement of the trial. This being the case, the Trial Court could not have permitted the amendment without first satisfying itself that the conditions as set out in the proviso to Order VI Rule 17 of the CPC have been fulfilled. As held by the Supreme Court in the case of **Vidyabai (supra)**, the Court does not get jurisdiction to allow amendment of the pleadings

after the commencement of the trial, unless the Court comes to the conclusion that inspite of due diligence, the party could not have raised the matter before the commencement of the trial. This being the case, the impugned order cannot be sustained.

14 As far as the argument of Mr. Bubna that the Petitioners have an alternate remedy, I find that the said argument is stated only to be rejected. It is true that under Article 227 of the Constitution of India, the High Court will not interfere with every erroneous order passed by the Lower Courts. However, that is not the case here. In the facts of the present case, the Trial Court has exercised jurisdiction which it did not possess. In fact, the Trial Court has not even referred to the proviso to Order VI Rule 17 of the CPC before allowing the amendment application. This being the case, there is no question of the Respondents contending that the Petitioners have an alternate remedy under Order 43 Rule 1A read with Section 105 of the CPC.

15 Before parting it would be only fair to refer to the decision of the Supreme Court in the case of **Mohinder Mehra**

(supra) which was relied upon by Mr. Bubna. The facts of this case reveal that the Appellant filed a suit against the Respondents seeking partition of the suit property. The Written Statement was filed by the Respondent and on 17th May, 2010 the issues were framed by the Court. The date fixed for recording evidence of the Plaintiff was 10th August, 2010. The Plaintiff prayed for time for producing the evidence. Instead of producing the evidence, on 17th January, 2011, the Plaintiff filed an application under Order VI Rule 17 of the CPC praying for amendment of the plaint. By this amendment application, the Plaintiff sought to add certain pleadings and a prayer claiming a share in the sale proceeds received by Defendant No.1, from the sale of the property of Nizamuddin. This amendment application was objected by the Defendants on several grounds. The amendment application was thereafter rejected. A Writ Petition under Article 227 of the Constitution of India was thereafter filed by the Plaintiff assailing the said order which also came to be dismissed. It is in these circumstances that the matter reached the Supreme Court. Whilst allowing the Appeal, the Supreme Court held that though technically the trial had commenced when the date was fixed for leading the evidence by the Plaintiff, the amendment application

was filed before the evidence was led by the Plaintiff. In fact, the parties led evidence after the amendment application was filed and the evidence led by the Plaintiff was even on the amended pleadings. It is in these facts that the Supreme Court held that looking to the purpose and object of the proviso to Order VI Rule 17 of the CPC, the case before it could not be held to be hit by the bar under the proviso to Order VI Rule 17 of the CPC.

16 I do not think that This decision in any way supports the contention of Mr. Bubna that the trial commences on the framing of the issues. In fact, when one goes through this judgment, I find that it is more in favour of the Petitioners than it is in favour of the Respondents. This decision, therefore, does not carry the case of the Respondents any further.

17 For all the foregoing reasons, the Writ Petition succeeds and the impugned order dated 23rd February, 2017 is quashed and set aside. Rule is made absolute in the aforesaid terms. There shall be no order as to costs.

18 It is made clear that by setting aside the amendment

allowed by the Trial Court will not preclude the Respondents from relying upon the Notification dated 9th October, 2013, if they are otherwise entitled to in law.

19 Considering that the Suit is of the year 2006, the Trial Court is requested to hear the Suit as expeditiously as possible and in any event within a period of one year from today.

(B. P. COLABAWALLA, J.)