

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.7191 OF 2018

Maheshkumar Himatlal Goda and another ... Petitioners
Vs.
Tushar Himmatlal Jani ... Respondent

Mr. Bhavin Gada i/b. Manoj & Ashok Asso. for Petitioners.
Mr. Pravin N. Shah for Respondent.

CORAM : R. G. KETKAR, J.
DATE : JULY 23, 2018

P.C. :

Heard Mr. Gada, learned Counsel for the petitioners and Mr. Shah, learned Counsel for the respondent at length.

2. By this Petition under Article 227 of the Constitution of India, petitioners, hereinafter referred to as 'defendants', have challenged the order dated 07.06.2018 passed by the learned Judge, Court Room No.23 of the Small Causes Court at Mumbai below exhibit-23 in T.E.&R. Suit No.76/92 of 2013. By that order, the learned trial Judge rejected the application filed by the defendant No.1 under Order VI, Rule 17 of the Code of Civil Procedure, 1908 (for short 'C.P.C.') for amending the written statement.

3. A perusal of the application exhibit-23 shows that the only reason given for not incorporating the proposed amendment in the written statement is that the defendants were earlier represented by Advocate to whom these facts were disclosed and discussed. However, they remained to be incorporated in the written statement. Defendants have recently appointed another Advocate. Defendants are laymen. After engaging the new Advocate, he made enquiries and asked the defendants to give details. After appraising him the correct facts, the present Advocate came to the conclusion that the stand taken by the earlier

Advocate in the written statement that the lease deed was executed only for the sake of convenience and was never intended to be acted upon was not correct.

4. The learned trial Judge has considered this aspect in paragraph 9 of the impugned order. In paragraph 8, the learned trial Judge noted that the trial has commenced and proviso to Order VI, Rule 17 of C.P.C. bars the Court to allow amendment after the trial has commenced unless due diligence is established by the party applying for amendment. For the reasons recorded in paragraphs 8 and 9 of the impugned order, I do not find that the learned trial Judge has committed any error. In the case of **Vidyabai Vs. Padmalatha, (2009) 2 SCC 409**, the Apex Court has observed in paragraph 7 that proviso to Order VI, Rule 17 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 namely, that 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. In paragraph 8, the Apex Court observed that the date on which the issues are framed is the date of first hearing. Provisions of C.P.C. envisage taking of various steps at different stages of the proceeding. Filing of an affidavit in lieu of examination-in-chief of a witness would amount to 'commencement of proceedings'.

5. In view thereof, no case is made out for invocation of powers under Article 227 of the Constitution of India. 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.)