

Shailaja

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE SIDE JURISDICTION
WRIT PETITION NO. 8543 OF 2018

Ranjit Ratnakar Karekar	]	Petitioner
Vs.		
Vijay Vishnupant Karekar	]	Respondent

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Mr. Amit B. Borkar, for Petitioner.
Mr. Girish R. Agrawal, for Respondent.

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CORAM : R.G. KETKAR, J.

DATE : 1st October, 2018.

P.C:

Heard Mr. Borkar, learned Counsel for the petitioner and Mr. Agrawal, learned Counsel for the respondent at length.

2. This Petition takes exception to the order dated 15th January, 2018 passed by the learned District Judge-1, Kolhapur below Exhibit 22 in Regular Civil Appeal No.39 of 2015. By that order, the learned District Judge allowed the application filed by the respondent, hereinafter referred to as 'defendant' under Order-VI, Rule-17 of the Code of Civil Procedure, 1908 (for short 'C.P.C') for amending the written statement. The petitioner, hereinafter referred to as "plaintiff" has also challenged the order dated 16th July, 2018 passed on the application Exhibit 23 dated 19th March, 2016 filed under Order-XLI, Rule-27 of C.P.C. By that order, the learned District Judge has allowed production of additional evidence.

3. Rule. Mr. Agrawal waives service. Having regard to the narrow controversy raised in this Petition as also at the request and by consent of the learned Counsel for the parties, Rule is made returnable forthwith and the Petition is taken up for final hearing.

4. In support of this Petition, Mr. Borkar submitted that the plaintiff has instituted Regular Civil No.887 of 2009 on 2nd December, 2009. The defendant has filed written statement on 15th March, 2006. By order dated 6th January, 2015, the learned 5th Joint Civil Judge, Junior Division, Kolhapur has decreed the suit. Aggrieved by that decision, the defendant preferred appeal. During pendency of the appeal, the defendant took out application Exhibit 22 for amending the written statement. He invited my attention to paragraph 3 of the application where the defendant intends to introduce paragraph 12-A after paragraph 12 of the written statement. He submitted that the proposed amendment is not based upon any subsequent development. He has also invited my attention to paragraph 4 of the application where explanation is given to the effect that information contained in paragraph 12-A which is proposed to be added was not with the defendant during the pendency of the suit and the information was received only after decision of the suit and, therefore, no reference could be made in the written statement. The documents were made recently available and, therefore, amendment is necessary so as to bring on record true facts. No prejudice will be caused to the plaintiff if such amendment is allowed.

5. Mr. Borkar has also invited my attention to paragraph 15 of the impugned order and submitted that the learned District Judge has failed to apply the principles laid down in the decision of **Vidyabai and others Vs. Padmalatha and another, 2009 (4) Mh. L.J, 30** as also failed to consider whether the defendant has satisfied condition stipulated in proviso to Order-

VI, Rule-17 of the C.P.C. Mr. Borkar submitted that the order dated 16th July, 2018 allowing application Exhibit 23 for production of additional evidence is consequential order and the same also deserves to be set aside.

6. On the other hand, Mr. Agrawal supported the impugned orders. He has invited my attention to proposed amendment and submitted that when the suit is instituted by the plaintiff invoking ground of bona fide requirement, it is for the plaintiff to disclose all the premises that are available to him. If the plaintiff fails to disclose the properties available to him, this ground itself is sufficient to dismiss the suit. He further submitted that information contained in para-12-A i.e proposed amendment was not available during pendency of the suit and the said information was made available to the defendant only after decision of the suit and, therefore, case averred in the proposed amendment could not be made in the written statement. Apart from that, the documents were also not available with the defendant. In any case, he submitted that a perusal of paragraph 3 of the reply Exhibit 33 filed by the plaintiff shows that the plaintiff also contended that all the information which is sought to be produced by the proposed amendment was within the knowledge of the defendant as the plaintiff was confronted during the cross-examination. Mr. Agrawal further submitted that approach of the Court while considering the amendment in the plaint and amendment in the written statement is different. While considering application for amendment of written statement, the Court has to adopt liberal approach. He submitted that no case is made out for interfering with the impugned orders.

7. I have considered rival submissions advanced by learned Counsel for the parties. I have also perused the material on record. It is not in dispute that the suit is instituted in the year 2009 i.e after amendment of C.P.C in the year 2002. Order-VI, Rule-17 post amendment reads thus;

“Order-VI-Pleading._

Rule-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.

8. A perusal of proviso to Order-VI, Rule-17 shows 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. The Apex Court has considered phrase “commencement of trial” in the case of **Vidyabai** (supra). In paragraph 7, the Apex Court has observed thus;

“7.....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”.

9. A perusal of decision in the case of **Vidyabai** (supra) shows that a person applying for amendment has to satisfy conditions stipulated in Order-VI, Rule-17. It is condition precedent while allowing the application for amendment. Applying tests laid down in the decision of **Vidyabai** (supra) to the facts of the present case, it cannot be said that the averments in paragraph 4 make out a case of due diligence at all. The contentions raised in paragraph 4 are bereft of any particulars and are totally vague.

10. A perusal of paragraph 3 of the reply Exhibit 33 filed by the plaintiff shows that the plaintiff contended that during course of cross-examination of the plaintiff, information which is sought to be brought on record by the proposed amendment was within the knowledge of the defendant. Thus, though the defendant was aware of these facts even at that stage, he did not apply for amendment of the written statement. In short, the defendant has not made out a case of due diligence. A perusal of the impugned order does not indicate that the learned District Judge has considered satisfaction of conditions stipulated in proviso to Order-VI, Rule-17 of C.P.C as also whether the defendant has made out a case of due diligence. It is no doubt true that approach while considering the application for amendment of the plaint and amendment of the written statement has to be different. Amendment of the written statement has to be considered liberally. However, that does not mean that the defendant without making out a case of due diligence can be permitted to amend the written statement. This more so, when the defendant has filed application at the appellate stage.

11. In view thereof, order dated 15th January, 2018 below Exhibit 22 requires to be modified to the extent of setting aside clauses (i) and (ii). As the order dated 16th July, 2018 passed on the application-Exhibit 23 filed by the defendant under Order-XLI, Rule-27 is a consequential order, the same also deserves to be set aside. Hence, the following order.

: O R D E R :

[1] Clauses (i) and (ii) of the order dated 15th January, 2018 which are to the following effect;

- (i) Application is allowed subject to costs of Rs.2,000/- to be deposited by the appellant within seven days from the date of this order.
 - (ii) On depositing the cost amount, appellant is allowed to effect the proposed amendment in para 12-A of the W.S.”
- are set aside.

- [2] Rest of the order is maintained.
- [3] The order dated 16th July, 2018 is set aside and application Exhibit 23 filed by the defendant is rejected.
- [4] Rule is made absolute in the aforesaid terms with no order as to costs.

[R.G. KETKAR, J.]