

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO.10734 OF 2018

Vijay Chiranjilal Agarwal .. Petitioner
Vs.
Tulsidas Chunilal Lala (since deceased)
through his legal heirs
1.1 Amit Tulsidas Agarwal & Ors. .. Respondents

**ALONG WITH
WRIT PETITION (ST.) NO.22920 OF 2018**

Vijay Chiranjilal Agarwal .. Petitioner
Vs.
Tulsidas Chunilal Lala (since deceased)
through his legal heirs
1.1 Amit Tulsidas Agarwal & Ors. .. Respondents

Mr.I.Z. Merchant for the petitioner.
Mr.Vishal Ghosalkar for the respondent nos.1 & 2.

**CORAM : R.D. DHANUKA, J.
DATE : 9th October 2018**

P.C.:

. Leave to amend is granted to implead the defendant nos.4 to 6 in the Special Civil Suit No.874 of 1996 as respondent nos.6 to 8 in this writ petition. Amendment to be carried out within one week from today. Re-verification is dispensed with.

2. By these two petitions filed under Article 227 of the Constitution of India, the petitioner (original defendant no.1/1) has impugned the order dated 10th August 2018 passed below Exhibit-230 and the order dated 6th July 2018 passed below Exhibit-217.

3. Admittedly the original plaintiffs was granted liberty to amend the plaint. Pursuant to such liberty by the trial Court, the amendment was carried out to the plaint by the original plaintiffs and pursuant to the liberty granted by the the original defendant no.1/1, the original defendant no.1/1 filed additional written statement.

4. It is however the case of the plaintiffs that certain paragraphs in the additional written statement were in addition to the case of the plaintiffs in the amended plaint and thus were not permissible. The plaintiffs had accordingly filed an application inter alia for deletion of certain paragraphs in the additional written statement filed by the defendant no.1/1. It was also the case of the plaintiffs that the additional paragraphs which were beyond the pleadings of the plaintiffs in the amended plaint were inserted without obtaining leave of the Court. Learned trial Judge has accepted the said plea of the plaintiffs and has passed an order dated 6th July 2018 directing the defendant no.1/1 to delete the paragraph nos.1 to 7 and 9 in the additional written statement. The defendant no.1/1 impugned the said order by filing a writ petition bearing No.10734 of 2018.

5. The defendant no.1/1 also filed a separate application inter alia praying for permission to amend the provisional written statement and to add paragraphs which were directed to be deleted by the learned trial Judge by an order dated 6th July 2018. The said application also came to be rejected on the ground that various admissions made in the original written statement were sought to be taken away by the defendant no.1/1 in the additional written statement and the defendant no.1/1 had sought to bring the new case in the written statement. Learned

trial Judge rejected the said application filed by the defendant no.1/1 by an order dated 10th August 2018 which order is the subject matter of the writ petition bearing No.10734 of 2018.

6. Learned counsel appearing for the petitioner (original defendant no.1/1) invited my attention to the averments made by the original plaintiffs in the plaint, averments made in the original written statement, additional written statement and the application filed by both the parties respectively.

7. It is submitted by the learned counsel that since the plaintiffs were allowed to amend the plaint, the defendant no.1/1 was entitled to file additional written statement. He submits that there was no additional facts introduced by the defendant no.1/1 in the additional written statement. The learned trial Judge has, however, passed an erroneous order to the effect that the additional pleas were raised in the additional written statement which were in addition to the reply to the amended copy of the plaint. He submits that since the additional written statement containing some of such paragraphs were directed to be deleted without prejudice to the rights and contentions of the petitioner, the petitioner had filed a separate application for seeking amendment to the original written statement and to insert those paragraphs which the defendant no.1/1 was entitled to include. He submits that there was no change in cause of action. No counter-claim was sought to be filed along with the additional written statement or by seeking amendment to the original written statement.

8. Learned counsel placed reliance on the judgment of the Supreme Court in the case of ***Usha Balashaheb Swami & Ors. Vs. Kiran Appaso Swami & Ors., (2007) 5 SCC 602*** and the judgment of this Court in the case of ***Mohammed Abdul Wahid Vs. Niloger wd/o Dr. Mohammad Abdul Salim, 2017 (2) Mh.L.J. 402.***

9. A perusal of the additional written statement does not indicate that the defendant no.1/1 had sought to bring any new facts on record. There was admittedly no counter-claim made along with the additional written statement. However in view of the objection raised by the plaintiffs that those additional pleas were inserted without leave of the Court, the defendant no.1/1 filed a separate application for seeking leave to amend to the original written statement. The learned trial Judge has allowed the application filed by the plaintiffs for striking off the paragraph nos.1 to 7 and 9 in the additional written statement and at the same time, by passing a separate order rejected the application seeking amendment to the original written statement. In my view, both the orders could not have been passed by the learned trial Judge in favour of the plaintiffs.

10. In so far as the judgment of the Hon'ble Supreme Court in the case of ***B.K. Narayana Pillai Vs. Parameswaran Pillai & Ors., (2000) 1 SCC 712*** relied upon by the learned counsel for the plaintiffs is concerned, in my view, if according to the plaintiffs, there is any inconsistency, the plaintiffs can confront the witnesses of the defendant no.1/1 with such alleged inconsistency, if any. In my view, the said judgment of the Hon'ble Supreme Court in the case of ***B.K. Narayana***

Pillai (supra) thus would not assist the case of the plaintiffs.

11. In paragraph 19 of the judgment of the Hon'ble Supreme Court in the case of **Usha Balashaheb Swami (supra)**, it is held by the Hon'ble Supreme Court that addition of a new ground of defence or substituting or altering a defence or taking inconsistent pleas in the written statement would not be objectionable while adding, altering or substituting a new cause of action in the plaint may be objectionable. In my view, the principles of law laid down by the Hon'ble Supreme Court in the case of **Usha Balashaheb Swami (supra)** would squarely apply to the facts of this case. I am respectfully bound by the aforesaid two judgments.

12. I therefore pass the following order :-

- (i) Writ Petition No.10734 of 2018 is made absolute in terms of prayer clause (a).
- (ii) In view of this Court having allowed the Writ Petition No.10734 of 2018, Writ Petition (St.) No.22920 of 2018 does not survive and is accordingly disposed of. No order as to costs.
- (iii) Hearing of the suit is expedited.

R.D. DHANUKA, J.