

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.10958 OF 2018

Bharat Haridas Shroff	...	Petitioner
Vs.		
Sunil Narayan Wagh	...	Respondent

Mr. Shashank Mangle a/w. Mr. Harshad A. Sathe for Petitioner.

CORAM : R. G. KETKAR, J.
DATE : SEPTEMBER 27, 2018

P.C. :

Not on Board. At the request of Mr. Mangle, learned Counsel for the petitioner, taken up for admission.

2. This Petition takes exception to the order dated 23.07.2018 passed by the learned 6th Additional Judge, Small Causes Court, Pune below exhibit-45 in Civil Suit No.369 of 2016. By that order, the learned trial Judge rejected the application made by the petitioner, 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.

3. In support of this Petition, Mr. Mangle invited my attention to the written statement filed by the defendant as also the order dated 09.04.2018 passed by this Court in Writ Petition No.4404 of 2018. He also invited my attention to the application exhibit-45 filed by the defendant under Order VI, Rule 17 of C.P.C. He submitted that in paragraph 5 of the application, the defendant has made out a case of due diligence and has thus, satisfied the conditions stipulated in proviso to Order VI, Rule 17 of C.P.C. He submitted that in paragraph 9 of the impugned order, the learned trial Judge noted that the order passed by the trial Court on 09.03.2018 rejecting the application made by the

defendant for recasting the issues was upheld by the High Court. By order dated 09.03.2018, the trial Court had held that the defendant did not deny that the plaintiff is the co-owner and landlord of the suit property and by the proposed amendment, defendant seeks to withdraw the admission, which is not permissible. He submitted that the said finding is clearly contrary to the record. In the written statement originally filed, no such denial was pleaded by the defendant. He also relied upon paragraphs 8 to 10 of the decision of the Apex Court in ***Sushil Kumar Jain Vs. Manoj Kumar*, (2009) 14 SCC 38** and submitted that the Petition requires consideration.

4. I have considered the submissions advanced by Mr. Mangle. I have also perused the material on record. As mentioned earlier, the defendant had filed application exhibit-39 for recasting the issues. By order dated 09.03.2018, the learned trial Judge rejected that application. Aggrieved by that decision, defendant instituted Writ Petition in this Court. That Petition was dismissed on 09.04.2018. In paragraph 3 of that order, contention of the defendant that he denied the case of the respondent-plaintiff that he is the co-owner or landlord of the suit premises was noted. Attention of the Court was invited to paragraph 5 of the reply dated 24.12.2016 given by the defendant to the notice dated 27.10.2016. After considering the material on record, in paragraph 6, it was specifically observed that the learned trial Judge held that the defendant did not deny the assertions made by the plaintiff that he is neither co-owner nor landlord. In paragraph 7 of the order dated 09.03.2018, the learned trial Judge dealt with the notice dated 27.10.2016 and reply dated 24.12.2016 and held that the defendant has not denied that the plaintiff is the co-owner and landlord of the suit premises. After perusing paragraphs 5 and 12 of the reply dated 24.12.2016 as also paragraphs 6 and 9 of the written statement filed by the defendant, this Court recorded a finding that no error was committed

by the learned trial Judge.

5. A perusal of paragraph 5 of the application exhibit-45 filed by the defendant does not make out a case contemplated by the proviso to Order VI, Rule 17 of C.P.C. It is not in dispute that the first witness of the plaintiff has filed affidavit in examination-in-chief. In the case of **Vidyabai Vs. Padmalatha, (2009) 2 SCC 409**, in paragraph 8, the Apex Court has observed thus,

“8. ... 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'.”

6. Mr. Mangle relied upon paragraphs 8 to 10 of **Sushil Kumar Jain** (*supra*) as also decision in **Baldev Singh Vs. Manohar Singh, AIR 2006 SC 2832**. In the case of **Sushil Kumar Jain** (*supra*), appellant / defendant-tenant had filed application under Order VI, Rule 17 of C.P.C. for amending the written statement. The controversy between the parties centered around paragraph 2 of the written statement. In paragraph 2 of the written statement, defendant contended that he is occupying other areas of 771 Industrial Area, Phase II, Chandigarh as well “under different tenancies”. By filing application for amendment of the written statement, defendant sought deletion of the words “under different tenancies”, among other amendments. It is in that context, in paragraphs 8 and 9, the Apex Court observed that the averments made in the application for amendment of the written statement do not seek to withdraw the admission made by the defendant in the written statement. Even assuming that there was admission in the original written statement then also such admission can be explained by amendment of

his written statement even by taking inconsistent pleas or substituting or altering his defence. In paragraph 10, the Apex Court observed that the law is well settled that an amendment of a plaint and amendment of the written statement are not governed by exactly the same principle. In my opinion, the said decision has no application to the facts of the present case.

7. In so far as the reliance on the decision of **Baldev Singh** (*supra*) is concerned, in paragraph 17, the Apex Court observed that commencement of trial as used in proviso to Order VI, Rule 17 must be understood in the limited sense as meaning the final hearing of the suit, examination of witnesses, filing of documents and addressing of arguments. The decision in **Baldev Singh** (*supra*) was considered in paragraph 12 of **Vidyabai** (*supra*). After considering that decision, it was observed thus,

“... It is not an authority for the proposition that the trial would not deemed to have commenced on the date of first hearing. In that case, as noticed hereinbefore, the documents were yet to be filed and, therefore, it was held that the trial did not comence.”

8. In view thereof, decisions in **Sushil Kumar Jain** (*supra*) and **Baldev Singh** (*supra*) relied by Mr. Mangle do not advance the case of the defendant.

9. In the present case, it is not in dispute that the first witness of the plaintiff has filed affidavit in examination-in-chief. In view thereof, it has to be concluded that the trial has commenced. In my opinion, the present application for amendment is not bona fide and is filed with a view to getting over the finding recorded in the order dated 09.04.2018 passed by this Court in Writ Petition No.4404 of 2018. In paragraph 63 of **Revajeetu Builders Vs. Narayanaswamy and Sons**, (2009) 10 SCC

84, after considering the entire law on the subject of amendment, the Apex Court has laid down the principles that apply for considering application for amendment. Paragraph 63 reads thus,

“63. On critically analyzing both the English and Indian cases, some basic principles emerge which ought to be taken into consideration while allowing or rejecting the application for amendment:

- (1) whether the amendment sought is imperative for proper and effective adjudication of the case?
- (2) whether the application for amendment is bona fide or mala fide?
- (3) The amendment should not cause such prejudice to the other side which cannot be compensated adequately in terms of money;
- (4) refusing amendment would in fact lead to injustice or lead to multiple litigation;
- (5) whether the proposed amendment constitutionally or fundamentally changes the nature and character of the case? and
- (6) as a general rule, the court should decline amendments if a fresh suit on the amended claims would be barred by limitation on the date of application.

These are some of the important factors which may be kept in mind while dealing with application filed under Order VI Rule 17. These are only illustrative and not exhaustive.”

10. Applying the tests laid down in paragraph 63 of **Revajeetu Builders** (*supra*), I am satisfied that the application made by the defendant is not bona fide. Hence, Petition fails and the same is dismissed. It is, however, expressly made clear that where a decree is appealed from by the petitioner, 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.)