

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Writ Petition (ST) NO. 29773 OF 2018

Jimmy William Almeida

And another

...Petitioners

Versus

Dr. Ness Faram Irani

And another

...Respondents

WITH

Writ Petition NO. 11921 OF 2018

WITH

Writ Petition NO. 11935 OF 2018

WITH

Writ Petition NO. 11936 OF 2018

WITH

Writ Petition NO. 11937 OF 2018

WITH

Writ Petition NO. 11951 OF 2018

WITH

Writ Petition (ST.) NO. 29771 OF 2018

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Mr. Arif Bookwala i/b. O.A. Das, Advocate for the Petitioner in WP(St.) No.29773/2018.

Mr. O.A. Das, Advocate for the Petitioners in WP No.11921/2018, W.P. No. 11935/2018, W.P. No.11936/2018, W.P. No.11937/2018, W.P. No.11951/2018 and W.P. (St.) No.29771/2018

Mr. Gaurav Srivastava a/w. Ms. Gayatri Sharma i/b. S.K. Srivastava & Co. for the Respondents in all the Petitions.

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CORAM : R. G. KETKAR, J.

DATE : 30th OCTOBER, 2018

P.C.

1. Heard Mr.Arif Bookwala, learned Senior Counsel for the petitioners in W.P. (St.) No.29773/2018, Mr. O.A. Das, learned Counsel appearing for the petitioners in rest of the writ petitions and Mr.Gaurav Srivastava, learned counsel for the respondents in all the Petitions, at length.

2. By these Petitions under Article 227 of the Constitution of India, the petitioners, hereinafter referred to as the 'defendants', have challenged the orders dated 19.9.2018 passed by the Appellate Bench of the Small Causes Court at Mumbai in Revision Applications. By these orders, the Appellate Court allowed the Revision Applications and set aside the orders dated 16.4.2018 passed by the trial Court rejecting the applications made by the respondents, hereinafter referred to as the 'plaintiffs', under Order VI Rule 17 of the Code of Civil Procedure, 1908 (for short, 'C.P.C.') for amending the plaint. The Appellate Court allowed the applications made by the plaintiffs and permitted them to carry out the amendment as per the schedule of proposed amendment appended along with the applications.

3. Since common question of law and facts arise in these petitions, the same can conveniently be disposed of by this common order. In order to appreciate the controversy raised between the parties,

facts from W.P. (St.) No.29773/2018 are taken into consideration. The fate of other Writ Petitions will be governed by the decision rendered in W.P. (St.) No.29773/2018.

4. In support of this petition, Mr. Bookwala submitted that in the proposed amendment the plaintiffs have referred to the documents of the year 2011, 2013 and 2014. These are the Public Documents and are the subject matter of challenge in Writ Petition instituted in this Court. He submitted that the issues were framed on 7.7.2017. The Rozanama dated 28.8.2017 records that the suit was adjourned to 21.9.2017 for filing evidence of PW-1. Application for amendment is made on 9.10.2017. As the plaintiffs were aware of the developments right from 2011, 2013 and 2014, the very fact that the application is made in 2017 shows lack of due diligence.

5. Mr. Bookwala heavily relied upon the decision of Apex Court in the case of **Kailash V. Nankhu, (2005) 4 SCC 480** and in particular paragraph-13. In paragraph-13, the Apex Court observed that in a civil suit, the trial begins when issues are framed and the case is set down for recording of evidence.

6. He also relied upon the decision of **Ajendraprasadji N. Pandey and another V. Swami Keshavprakeshdasji N. and others, (2006) 12 SCC 1**. In paragraph-60 thereof, the Apex Court referred to

the decision in **Kailash's** case (supra) and reiterated that the trial is deemed to commence when the issues are settled and the case is set down for recording of evidence.

7. Mr. Bookwala submitted that in the case of **Vidyabai V. Padmalatha, (2009) 2 SCC 409**, undoubtedly the decisions in **Kailash'**(supra) and **Ajendraprasadji N. Pandey** (supra) have been referred. The Apex Court held in paragraph-11 that the date on which the issues are framed is the date of first hearing. Filing of an affidavit in lieu of examination-in-chief of the witness amounts to 'commencement of proceeding'.

8. Mr. Bookwala also relied upon the decision of Division Bench of this Court in the case of **Vijay Agarwal and others V. Harinarayan G. Bajaj and others, 2013 (4) Mh. L.J. 298**. In paragraph-8 after referring to Section 153 of C.P.C. and extracting the amended the provisions of Order VI Rule 17 of C.P.C., the Division Bench observed thus :

“By the amendment, a proviso has been introduced, by which the power of the Court to allow an amendment after the trial has commenced has been restricted. An amendment after the trial has commenced can be allowed only if 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. In the present case, admittedly, the trial has not commenced since issues are yet to be framed.”

9. Relying upon this part of paragraph-8, Mr. Bookwala submitted that this indicates that after the issues are framed and the case is set down for recording of evidence, the trial is said to have commenced.

10. Mr. Bookwala relied upon the decision of Division Bench of this Court (Coram: Naresh H. Patil, as the learned Chief Justice then was, & U.D. Salvi, JJ.) dated 4.9.2012 in W.P. NO.9659/2010 (**Mahadeo Maruti Bhanje V. Balaji Shivaji Pathade**). He submitted that the Division Bench considered the decisions in (1) Ajit Narsinha Talekar V. Smt. Nirmala Wamanrao Kakade and others, 2010 (5) Mh.L.J. 481, (2) Bhagwandas Kanhaiyyalal Bubna V. Shyamsundar Wasudeo Bubna and others, 2010 (1) Bom.C.R. 218, (3) Vinod Khimji Lodaya and another V. The Chief Executive Officer and others passed in C.R.A. No.123/2009, (4) **Vidyabai** (supra), (5) **Kailash** (supra) (6) Union of India and others V. Major General Madan Lal Yadav (Retd.), AIR 1996 SC 1340, as also **Ajendraprasadji N. Pandey** (supra).

11. After considering various decisions, in paragraph-12 the Division Bench observed that the observations in paragraph-11 of **Vidyabai's** case (supra) are directly on the point in issue. These observations cannot be regarded as *obiter dicta*, but need to be seen as *ratio decidendi*. Ultimately in paragraph-16, the Division Bench held

that the trial in the Civil Suit commences from the date of filing of affidavits in lieu of the examination-in-chief of the witnesses. He invited my attention to Section 153 of C.P.C. to contend that said decision is *per incuriam*.

12. Mr. Bookwala also relied upon paragraphs-22, 23 and 24 of the decision of Apex Court in **Mohinder Kumar Mehra V. Roop Rani Mehra and others, (2018) 2 SCC 132** to contend that the trial commences when the date is fixed for leading evidence by the plaintiff. In other words the view of **Kailash's** case (supra) and **Ajendraprasadji N. Pandey's** case (supra) is reiterated.

13. Mr. O.A. Das adopted the submissions made by Mr. Bookwala and submitted that the impugned orders deserve to be set aside.

14. On the other hand, Mr. Srivastava relied upon paragraphs-22, 23 and 24 of **Mohinder Kumar Mehra's** case. He submitted that in paragraph-22, the Apex Court observed that the proviso to Order VI Rule 17 of C.P.C. prohibited entertainment of amendment application after commencement of the trial with the object and purpose that once parties proceed with the leading of evidence, no new pleading be permitted to be introduced. In paragraph-23, reference is made to the decision in **Chander Kanta Bansal V. Rajinder Singh Anand, (2008) 5**

SCC 117. Paragraph-13 of that decision is extracted. In paragraph-13 of **Chander Kanta Bansal's** case (supra), it is observed that the entire object of the said amendment is to stall filing of applications for amending a pleading subsequent to the commencement of trial, to avoid surprises and the parties had sufficient knowledge of the other's case.

15. In paragraph-24 of **Mohinder Kumar Mehra's** case, it is observed that having regard to the object and purpose by which limitation was put on permitting amendment of the pleadings, in substance, in the present case, no prejudice will be caused to the defendants as the evidence would be adduced by the parties subsequent to filing of the application for amendment. He, therefore, submitted that no case is made out for interfering with the impugned orders.

16. I have considered the rival submissions advanced by the learned Counsel appearing for the parties. I have also perused the material on record. Order VI Rule 17 of C.P.C. prior to amendment of 2002 reads thus :

**“ORDER VI
PLEADINGS GENERALLY**

“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.

17. After the 2002 amendment proviso is added to Order VI Rule 17. The amended provision of Order VI Rule 17 reads thus :

**“ORDER VI
PLEADINGS GENERALLY**

“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.”

18. In the case of **Kailash** (supra), the questions that fell for consideration before the Apex Court are reproduced in paragraph-5, which is to the following effect:

- (1) Whether Order 8 Rule 1 of CPC is applicable to the trial of an election petition under Chapter II of the Act ?
- (2) Whether the rules framed by the High Court governing the trial of election petitions would override the provisions of CPC and permit a written statement being filed beyond the period prescribed by Order 8 Rule 1 CPC ?
- (3) Whether the time-limit of 90 days as prescribed by the proviso appended to Rule 1 of Order 8 CPC is mandatory or directory in nature ?

19. In paragraph-13 of **Kailash's** case (supra), it was observed thus :

“Trial' of election petition, when it commences?

13. At this point the question arises : When does the trial of an election petition commence or what is the meaning to be assigned to the word 'trial' in the context of an election petition? In a civil suit, the trial begins when issues are framed and the case is set down for recording of evidence. All the proceedings before that stage are treated as proceedings preliminary to trial or for making the case ready for trial. As held by this Court in several decided cases, this general rule is not applicable to the trial of election petitions as in the case of election petitions, all the proceedings commencing with the presentation of the election petition and upto the date of decision therein are included within the meaning of the word 'trial'.”

20. A perusal of **Kailash's** case (supra) shows that said decision essentially arose out of election petition instituted under Section 80 of the Representation of the People Act, 1951. A perusal of three questions reproduced in paragraph-5, extracted hereinabove, do not indicate that the Apex Court was considering amended provisions of Order VI Rule 17 of C.P.C. This decision is referred in the case of **Ajendraprasadji N. Pandey's** case (supra).

21. In the case of **Ajendraprasadji N. Pandey** (supra), the issues were framed on 28.9.2005. Application for recasting the issues was rejected on 21.10.2005. The respondent/plaintiff had filed affidavit in examination-in-chief of PW-1 on 21.11.2005. Application Exhibit-95

for leave to amend the written statement was filed on 24.11.2005. In paragraph-18, the submissions on behalf of the appellant were recorded. It was submitted on behalf of the appellant that the observations made in **Kailash's** case (supra) to the effect that in ordinary litigation trial commences when the issues are framed and the suit is placed for hearing is a passing observation and the same would not constitute any precedence as observed in **Saiyada Mossarrat V. Hindustan Steel Ltd., (1989) 1 SCC 272**. In paragraph-44, the Apex Court reproduced the dates and events and in particular noted that on 21.11.2005 the evidence of affidavit of plaintiff No.1 was filed and thus recording of evidence had began. After considering the sequence of events, the Apex Court observed in paragraph-54 that the facts mentioned from paragraphs-44 to 53 go to show that the appellants are lacking in *bonafides* in filing Special Leave Petition before the Apex Court. In paragraph-60, reference was made to **Kailash's** case (supra) where it is observed that the trial is deemed to commence when the issues are settled and the case is set down for recording of evidence.

22. In the case of **Vidyabai** (supra), the Apex Court considered the decisions of **Kailash** (supra), **Baldev Singh V Manohar Singh, (2006) 6 SCC 498** as also **Ajendraprasadji N. Pandey** (supra). In paragraphs-10 and 11, it is observed thus:

- “10. By reason of the civil Procedure Code (Amendment) Act, 2002 (Act 22 of 2002), the Parliament inter alia inserted a proviso to Order VI 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 therefore 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.

11. From the order passed by the learned Trial Judge, it is evident that the respondents had not been able to fulfill the said pre-condition. 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’.”

23. In paragraph-12, reference was made to the decision in **Major General Madan Lal Yadav's case** (supra) and paragraph-19 was extracted. In paragraphs-14 and 15, reference was made to **Ajendraprasadji N. Pandey's case** (supra). In paragraph-14, paragraph-13 of **Kailash's case** (supra) was reproduced. In paragraph-15,

paragraphs-35 and 36 were reproduced as also paragraphs-41 to 43 of **Salem Advocate Bar Association V. Union of India, (2005) 6 SCC 344** were reproduced. It was thereafter observed that the ratio in **Kailash's** case (supra) was reiterated stating that the trial is deemed to commence when the issues are settled and the case is set down for recording of evidence.

24. In the case of **Mahadeo Bhanje's** case (supra), the Division Bench of this Court considered all the judgments referred hereinabove. In paragraph-12, paragraph-11 of **Vidyabai's** case was reproduced and thereafter it was observed thus :

“These observations are directly on the point in issue in the said case and offer reason for decision in the said case in clear terms. These observations, therefore, cannot be regarded as obiter dicta, but need to be seen as ratio decidendi. These observations, supports the view taken by us.”

25. Ultimately in paragraph-16, the Division Bench held that the trial in a civil suit commences from the date of filing of affidavits in lieu of the examination in chief of the witnesses.

26. Mr. Bookwala relied upon the decisions in **Kailash** (supra) and **Ajendraprasadji N. Pandey's** case (supra) to contend that the trial in the Civil Suit commences when the issues are framed and the case is set down for recording of evidence.

27. As against this, Mr. Srivastava relied upon paragraphs-22 to

24 of **Mohinder Kumar Mehra's** case which read thus:

“22. The Proviso to Order VI Rule 17 prohibited entertainment of amendment application after commencement of the trial with the object and purpose that once parties proceed with the leading of evidence, no new pleading be permitted to be introduced. The present is a case where actually before parties could led evidence, the amendment application has been filed and from the order dated 14.02.2014, it is clear that the Plaintiff's case is that parties has led evidence even on the amended pleadings and Plaintiff's cases was that in view of the fact that the parties led evidence on amended pleadings, the allowing the amendment was mere formality. The Defendant in no manner can be said to be prejudiced by the amendments since Plaintiff led his evidence on amended pleadings also as claimed by him.

23. This Court in Chander Kanta Bansal v. Rajinder Singh Anand, (2008) 5 SCC 117 has noted the object and purpose of amendment made in 2002. In Para 13, following has been held:

“13. The entire object of the said amendment is to stall filing of applications for amending a pleading subsequent to the commencement of trial, to avoid surprises and the parties had sufficient knowledge of the other's case. It also helps in checking the delays in filing the applications. Once, the trial commences on the known pleas, it will be very difficult for any side to reconcile. In spite of the same, an exception is made in the newly inserted proviso where it is shown that in spite of due diligence, he could not raise a plea, it is for the court to consider the same. Therefore, it is not a complete bar nor shuts out entertaining

of any later application. As stated earlier, the reason for adding proviso is to curtail delay and expedite hearing of cases.”

24. Looking to the object and purpose by which limitation was put on permitting amendment of the pleadings, in substance, in the present case no prejudice can be said to have caused to the Defendant since the evidence was led subsequent to the filing of the amendment application. We thus are of the view that looking to the purpose and object of the Proviso, present was a case where it cannot be held that amendment application filed by the Plaintiff could not be considered due to bar of the Proviso.”

28. A perusal of the above extracted paragraphs shows that the Apex Court considered the object and purpose of amending Order VI Rule 17 of C.P.C. In paragraph-22, it was observed that the provisions of Order VI Rule 17 of C.P.C. were amended with object and purpose that once the parties proceed with the leading of evidence, no new pleading be permitted to be introduced. In paragraph-23, paragraph-13 of **Chander Kanta Bansal's** case (supra) was reproduced. In paragraph-13 of **Chander Kanta Bansal's** case (supra) reference was made to the object of amendment to Order VI Rule 17 of C.P.C. is to stall filing of applications for amending a pleading subsequent to the commencement of trial to avoid surprises and the parties must have sufficient knowledge of the other's case. In paragraph-24, the facts were considered and after considering the facts, it was observed that no prejudice can be said to

have caused to the defendant since the evidence was led subsequent to the filing of the amendment application.

29. Mr. Bookwala heavily relied upon **Kailash's** case (supra) as also **Ajendraprasadji N. Pandey's** case (supra). As mentioned earlier the case of **Kailash** arose from an election petition filed under the Representation of the People Act, 1951. I have already reproduced three questions in the earlier part of the decision. The question which fell for consideration before the Apex Court did not include interpretation of the amended provisions of Order VI Rule 17 of C.P.C.

30. In view of the decision of **Vidyabai** (supra), which considered the decisions of **Kailash'**(supra) as also **Ajendraprasadji N. Pandey** (supra), it has to be considered that the date of framing of issues is the first date of hearing and filing of affidavit in lieu of examination-in-chief of the witness amounts to commencement of the proceedings. In fact the Division Bench of this Court in **Mahadeo Bhanje** (supra) has also taken the same view. I do not find any merit in this submission.

31. In the present case the issues are framed on 7.7.2017 and on 28.8.2017 suit was adjourned to 21.9.2017 for filing evidence of PW-1. It is not in dispute that till filing of the application on 9.10.2017 under Order VI Rule 17 of C.P.C. evidence of affidavit is not filed. In

view thereof, it has to be concluded that in the present case the trial is not commenced.

32. Mr. Bookwala submitted that in any case the plaintiffs are relying upon the documents of the years 2011, 2013 and 2014 and said documents are subject matter of challenge in the Writ Petition instituted in this Court. Thus the plaintiffs were aware of these developments and still the application for amendment is filed in October, 2017 which itself shows lack of due diligence. I do not find any merit in this submission as basically the plaintiffs will be required to establish due diligence if the trial has commenced. As in the present case the trial has not yet commenced, proviso to Order VI Rule 17 of C.P.C. will not be applicable.

33. That apart, a perusal of the plaint originally instituted by the plaintiffs shows that one of the grounds raised by the plaintiffs is about additions and alterations of permanent nature without written permission of the plaintiffs covered by Section 16(1)(b) of the Act.

34. A perusal of the schedule of the amendment shows that the plaintiffs have referred to the documents in support of their contention of the ground of additions and alterations under Section 16(1)(b) of the Act. In other words by way of the proposed amendment, the plaintiffs have not introduced new ground of eviction. In the case of **Abdul Rehman and another V. Mohd. Ruldu and others, (2012) 11 SCC**

341, the Apex Court has observed in paragraph 13 as under:

“13. Next, we have to see whether the proposed amendments would alter the claim/cause of action of the plaintiffs. In view of the same, we verified the averments in the unamended plaint. As rightly pointed out by Ms. Manmeet Arora, learned counsel for the appellants that the entire factual matrix for the relief sought for under the proposed amendment had already been set out in the unamended plaint. We are satisfied that the challenge to the voidness of those sale deeds was implicit in the factual matrix set out in the unamended plaint and, therefore, the relief of cancellation of sale deeds as sought by the amendment does not change the nature of the suit as alleged. It is settled law that if necessary factual basis for amendment is already contained in the plaint, the relief sought on the said basis would not change the nature of the suit. In view of the same, the contrary view expressed by the trial court and the High Court cannot be sustained. It is not in dispute that the relief sought by way of amendment by the appellants could also be claimed by them by way of a separate suit on the date of filing of the application. Considering the date of the sale deeds and the date on which the application was filed for amendment on the plaint, we are satisfied that the reliefs claimed are not barred in law and no prejudice should (sic would) have been caused to Respondents 13 (Defendants 13 therein) if the amendments were allowed and would in fact avoid multiplicity of litigation.”

35. It is well settled law that if necessary factual basis for amendment is already contained in the plaint, the relief sought on the said basis would not change nature of the suit as noted earlier. Making clear and explicit what was already implicit in the plaint will not change the nature of the suit. All amendments which are necessary for the

purpose of determining real questions in controversy between the parties should be allowed if it does not change basic nature of the suit. On facts, as noted earlier, ground of additions and alterations was implicit in factual matrix set out in unamended plaint and the proposed amendment does not change nature of the suit.

36. Even on this ground, I do not find that any case is made out for interfering with the impugned orders. Hence, petitions fail and the same are dismissed.

37. It is made clear that where a decree is appealed from by the petitioners, any error, defect or irregularity in any order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of appeal/s as contemplated by section 105(1) of C.P.C.

38. At this stage, Mr. Bookwala seeks six weeks time for filing additional written statement restricted to the amended plaint. Time as prayed for is granted. Order accordingly.

(R. G. KETKAR, J.)

Deshmane (PS)