

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

WRIT PETITION NO. 13296 OF 2017

Surekha Suresh Jadhav	...	Petitioner
V/s.		
Shobha Mahesh Jadhav & Ors.	...	Respondents

- Mr.Samir Kumbhakoni for the Petitioner.
- None for the Respondents.

CORAM : DR.SHALINI PHANSALKAR-JOSHI, J.

DATE : 4th JANUARY, 2018.

ORAL JUDGMENT :-

1] Heard learned counsel for the Petitioner, finally at the stage of admission itself.

2] By this petition filed under Article 227 of the Constitution of India, the Petitioner is challenging the order dated 20th September, 2017 passed by 2nd Joint Civil Judge Senior Division, Solapur below Exhibit 165 in Special Civil Suit No.172 of 2012. The said application at Exhibit 165 was preferred by the Petitioner, who is Defendant No.1 before the trial Court seeking amendment in the written statement under Order-VI Rule-17 of the Civil Procedure Code (for short "C.P.C.").

3] It was submitted that at the time of filing the written statement, the Petitioner has mentioned in the written statement that some properties are her self acquired properties; however the details of the self acquired properties were not given in the written statement, therefore, by way of amendment, the Petitioner wants to introduce those details and hence, it was requested that amendment application be allowed.

4] The trial Court, however, after hearing learned counsel for the parties was pleased to reject the said application on two counts. Firstly, the amendment application is filed at the belated stage and secondly, the proposed amendment is not necessary at all.

5] While challenging this order of the trial Court, the submission of learned counsel for the Petitioner is that the proposed amendment does not change the nature of the suit or the defence raised by the Petitioner. On the contrary, it is merely of a clarification nature giving further details and clarifying certain facts; proposed amendment is also necessary for deciding real controversy between the parties and hence, such amendment should have been allowed by the trial Court.

6] However, the undisputed facts of this case reveal that the Respondent/Plaintiff has filed this suit for partition and separate possession of her share in the suit property. The said suit was decreed. Thereafter, the appeal was preferred bearing Regular Civil Appeal No.94 of 2015 by Defendant No.3. The said appeal was allowed and the matter was remanded to the trial Court for fresh decision on merits on the additional issues framed by the Appellate Court. The order of remand of the matter was passed by the Appellate Court on 25th January, 2017. In the Appellate Court itself, the additional issues were specifically framed and both the parties were given an opportunity to lead additional evidence on those issues. Thereafter, on 3rd August, 2017, the Petitioner has preferred this application for amendment in the written statement.

7] In my considered opinion, in view thereof, the Proviso to Order-VI Rule-17 of C.P.C., clearly becomes applicable in the present case, as a clear embargo is laid down in the said Proviso to the effect that, once the trial has commenced, no amendment in the pleading shall be allowed, unless the party makes out a case that despite due diligence, he could not have sought such amendment earlier. As held by the Apex Court in the case of *Vidyabai & Ors. Vs. Padmalatha & Anr. [(2009) 2 SCC 409]*, the Proviso to Order-VI Rule-17 is couched in

a mandatory form. Hence the Court's jurisdiction to allow such an application is taken away unless the conditions precedent laid down therein therefor are satisfied viz. Court must come to a conclusion that inspite of due diligence the party could not have raised the matter before the commencement of the trial.

8] In the present case, entire application filed before the trial Court seeking amendment in the written statement is conspicuously silent as to why the Petitioner has not given these details about the self acquired properties at the time of filing written statement. Merely stating that those details remained to be stated in the written statement and therefore, now the Petitioner should be permitted to do so is not sufficient; especially in the facts of the present case, when admittedly the suit was of the year 2012 and at that time Defendant No.1 has filed a written statement. The suit was also decreed. Only because Defendant No.3's contentions were not considered and issues to that effect were not framed, the Appellate Court has remanded the matter. Thereafter also for 7 months, no further steps were taken by the Petitioner and the application is thus filed after the trial has commenced. The issues were framed in the decision of the Appellate Court itself. Hence, it was incumbent upon the Petitioner to satisfy the Court to come to its decision that despite due diligence, the Petitioner

could not have earlier raised this proposed amendment. The Petitioner has failed to do so and, in such situation, the Proviso which is couched in mandatory form as the word of “shall” indicates, definitely comes in the way of the Petitioner getting the required relief. As held by the Apex Court in the case of *Vidyabai & Ors. Vs. Padmalatha & Anr. (supra)*, the Proviso appended to Order-VI Rule-17 C.P.C. restricts the power of the Court. It puts an embargo on exercise of its jurisdiction. The Court's jurisdiction in a case of this nature is limited. Thus, unless the jurisdictional fact, as envisaged therein, is found to be existing, the Court will have no jurisdiction at all to allow the amendment of the plaint. Hence, the trial Court has rightly rejected this application on this ground.

9] Secondly, on merits also, if one considers the application given by the Petitioner before the trial Court, it is apparent and crystal clear that the Petitioner is introducing many additional facts by way of amendment and it is not merely a clarificatory or consequential amendment. All these facts were very much in the knowledge of the Petitioner. It is not the case of the Petitioner that he came to know these facts subsequently or they occurred after filing of the written statement. Moreover, these facts which are sought to be introduced by way of amendment are not merely of a clarificatory

nature also but they are to some extent changing the defence raised by the Petitioner, as observed by the trial Court.

10] In such situation, the trial Court has on this count also rightly rejected the said application. The impugned order passed by the trial Court therefore being just, legal and correct; no interference is warranted therein.

11] Writ Petition hence stands dismissed.

[DR.SHALINI PHANSALKAR-JOSHI, J.]