

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO. 6141 OF 2018

**GRAMPANCHAYAT ADGAON THROUGH ITS SARPANCH
SINDHUBAI SITARAM MALI MAHAJAN
VERSUS
KALPANABAI ATMARAM PATIL AND ANOTHER**

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Advocate for the Petitioner : Shri V. B. Patil
Advocate for Respondent No.1 : Shri U. S. Malte

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CORAM : RAVINDRA V. GHUGE, J.

DATED : 14th JANUARY, 2019.

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PER COURT :

1. None appears for respondent No.2 despite service of court notice.

2. The petitioner-original defendant in RCS No. 1/2009 is aggrieved by the order dated 28/03/2018, by which, the Trial Court has rejected application Exhibit 97 filed by the petitioner seeking leave to add grounds to the written statement in RCS No. 1/2009.

3. The petitioner places reliance upon the judgment of the Honourable Apex Court in the matter of *Usha Balasaheb*

Swami and others Vs. Kiran Appaso Swami and others, 2007 AIR (SC) 1663, to support his contention that an amendment to the written statement is to be considered liberally.

4. The learned Advocate for respondent No.1 has relied upon the following judgments :

(1) 2001 (3) ALL MR 573, Chandrashekhar Purushottam Rathi Vs. The State of Maharashtra & another.

(2) (1993) 4 SCC 6, Lohia Properties Private Limited, Vs. Atmaram Kumar.

(3) AIR 1998 SC 618 = (1998) 1 SCC 278, Heeralal Vs. Kalyan Mal and others.

(4) AIR 1977 SC 680 = (1976) 4 SCC 320, M/s. Modi Spinning and Weaving Mills Co. Ltd. and another Vs. M/s. Ladha Ram and Co.

(5) Delhi High Court 7 May, 2001, M/s. Orissa Industries Ltd. Vs. Sh. Hardayal and Sons.

(6) High Court Bombay at Aurangabad, W.P. No. 11833/2015, Abdul Gaffar s/o Abdul Kadar Vs. Kamlakar s/o Mukundrao Khairnar (Died through L.Rs.) Smt.

Vimalbai w/o Kamlakar Khairnar and others.

5. I have considered the submissions of the learned Advocates, have gone through the grounds formulated by the petitioner and have considered the impugned order. I have also considered the judgments cited.

6. In order to decide the controversy in this petition, it is necessary to record the sequence of events that have occurred. The plaintiff preferred RCS No.1/2009. The written statement was filed by the petitioner - defendant on 09/01/2009. The ground that, the suit is not maintainable as a notice under Section 180 of the Maharashtra Village Panchayats Act was not issued by the plaintiff to the petitioner- defendant, was not raised in the written statement. The suit was decreed on 18/04/2013.

7. The petitioner approached the First Appellate Court by filing an Appeal. An application for condonation of delay was also filed. No ground was raised in the Appeal that the suit was not maintainable as notice under Section 180 was not

issued. The First Appellate Court rejected the application for condonation of delay by order dated 28/07/2016.

8. The petitioner defendant approached this Court by filing a Second Appeal No. 599/2016. Even in the Second Appeal, there was no contention that the suit was untenable as the notice under Section 180 was not issued by the plaintiff. By judgment dated 30/11/2016, this Court allowed the Second Appeal. The order refusing condonation of delay was set aside and the Appeal was directed to be registered so as to be decided within six months. Pursuant thereto, the First Appellate Court registered the first appeal and by judgment dated 15/07/2017, quashed the ex-parte judgment of the Trial Court dated 18/04/2013 and remanded RCS No. 1/2009 by permitting the litigating sides to lead evidence.

9. The suit was, therefore, remanded at the stage of cross-examination of the plaintiff since it was that stage at which this petitioner had faltered.

10. Exhibit 97 is an application filed by this petitioner on

24/10/2017 which is practically after 8 (eight) years of the institution of the suit, seeking leave under Order VI Rule 17 of the Code of Civil Procedure to amend the written statement. I have perused application Exhibit 97 which is supposed to set out grounds for seeking an amendment and especially in the light of the proviso to Rule 17 under Order VI. I find that in the first two paragraphs in which the petitioner makes a request for seeking amendment, there is not a whisper as to why the petitioner did not plead in its written statement any aspect touching the notice under Section 180 of the Maharashtra Village Panchayats Act. In paragraphs 9 of the plaint, the plaintiff has contended that no prior notice is necessary, though Section 180 was not specifically mentioned.

11. I called upon the learned Advocate for the petitioner – defendant to indicate from Exhibit 97 as to what are the pleadings with regard to due diligence so as to enable him to introduce a new challenge of the maintainability of the suit. The learned Advocate has gone through Exhibit 97 more than once and could not point out any pleadings as regards due diligence. He kept on harping that the Honourable Apex Court

in *Usha Balasaheb Swami (supra)* has held that new grounds of defence or inconsistent pleas can be permitted while seeking amendment to the written statement. It is then frankly stated that the lawyer drafting the written statement was not aware of Section 180 and hence it did not strike the petitioner – defendant to take the plea of Section 180.

12. The learned Advocate for the original plaintiff relies upon on the judgment delivered by the Honourable Apex Court in *Heeralal (supra)* to support his contention that if a statement of the plaintiff is not disputed, the plaintiff's case cannot be displaced by allowing an amendment in the written statement. Further reliance is placed on the judgment of the Honourable Apex Court (Three Judges Bench) in *M/s. Modi Spinning and Weaving Mills Co.Ltd. (supra)* in which it was held that though inconsistent pleas could be taken in the written statement, an amendment to the written statement cannot be allowed if it displaces the plaintiff completely and the plaintiff will be irretrievably prejudiced.

13. The Trial Court has rejected the application for

amendment on the ground that there are no pleadings in support of the delayed attempt and that there are no grounds set out for setting up a new plea.

14. I find that the defendant has not opposed the contention of the plaintiff as set out in the plaint that no notice is necessary to be issued. When the ex-parte judgment was challenged before the First Appellate Court, the issue as regards Section 180 was not pleaded. That was the time when the petitioner - defendant could have raised the issue that non issuance of notice under Section 180 would be fatal to the suit. Even at that stage before the First Appellate Court, it is not so pleaded. A Second Appeal was preferred by this petitioner before this Court. Even then the said issue was not raised.

15. The legislature has introduced the proviso below Rule 17 under Order VI in 2002 after Rule 17 was deleted some time in 2001. While re-introducing the same, the proviso was introduced to ensure that no litigating sides could amend a suit belatedly. If a litigant could make out a case of not being able to set out an issue in the plaint or the written statement since

circumstances were beyond his control or that certain documents were not in his custody or that an event has occurred after the lodging of the suit etc, his case for amendment could be considered. In the instant case, there is no whisper in Exhibit 97 as regards due diligence.

16. In the light of the above, I do not find that the order of the Trial Court could be branded as being perverse or erroneous. This petition, being devoid of merit is, therefore, dismissed.

(RAVINDRA V. GHUGE, J.)

shp/-