

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

WRIT PETITION NO. 10408 OF 2016

Sandeep Nanka Kharat

... Petitioner

Versus

Ushabai Waman Pawar

... Respondent

....

Mr. S. H. Tripathi, Advocate for petitioner.

Mr. Girish Rane, Advocate for respondent.

....

CORAM : M. S. KARNIK, J.

DATED : 5th AUGUST, 2019

PER COURT :-

1. The challenge in this petition is to an order dated 16.09.2016 passed by the District Judge-4, Jalgaon, allowing the application exhibit-33 in Civil Appeal No.154 of 2014 for amendment in the written statement.

2. The petitioner is the original plaintiff who had filed suit for specific performance of agreement dated 11.12.2010. It was contended that the total consideration fixed was Rs.6,02,933/-. The earnest amount was paid at the time of agreement of sale.

3. Before the trial court, the defendant did not personally enter into the witness box. The son of the defendant was examined in the capacity

of her general power of attorney holder. The trial court was of the opinion that considering the evidence and materials on record, it could not be said that the defendant is very old and therefore not in a position to personally examine herself. The trial court while decreeing the suit, directed the defendant to execute the sale deed in respect of suit property after accepting balance amount of Rs.5,97,933/-.

4. The defendant preferred an appeal before the first appellate court bearing Civil Appeal No. 154 of 2014. During pendency of the appeal, an application was moved by the defendant on 12.08.2016 for amendment of written statement. By way of the said application the defendant prayed that he may be permitted to take the plea that the property in question was joint family property of the family. The further amendment was sought in the written statement that the plaintiff is working as a teacher with Zilla Parishad and that he has not taken permission of the competent authority before purchasing the suit property. The said application came to be allowed by the appellate court.

5. The learned counsel for the petitioner relied on the decision of the Hon'ble Apex Court in the case of Vidyabai and others Vs. Padmalatha and another reported in 2009(4) Mh.L.J. and in the case of J. Samuel and others Vs. Gattu Mahesh and others reported in (2012) 2.

SCC 300 and 2012 AIR SCW 1035 – more particularly in para 12, it is held thus :

12. *The primary aim of the court is to try the case on its merits and ensure that the rule of justice prevails. For this the need is for the true facts of the case to be placed before the court so that the court has access to all the relevant information in coming to its decision. Therefore, at times it is required to permit parties to amend their pleadings. The Court's discretion to grant permission for a party to amend his pleading lies on two conditions, firstly, no injustice must be done to the other side and secondly, the amendment must be necessary for the purpose of determining the real question in controversy between the parties. However, to balance the interests of the parties in pursuit of doing justice, the proviso has been added which clearly states 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."*

6. The learned counsel for the petitioner would thus submit that the amendment sought was very much to the knowledge of the defendant when the written statement was initially filed. According to him, unless the appellate court comes to a conclusion that in spite of due diligence the party could not raise the matter before commencement of the trial, grant of an application for amendment of the written statement would be impermissible.

7. According to the learned counsel, there has been a gross delay on the part of the defendant in applying for amendment and that to

when the Appeal is about to heard. All these facts were very much within the knowledge of the defendant when the trial commenced. The learned counsel for the petitioner would therefore submit that at this stage the appellate Court was not justified in allowing the application for amendment.

8. The learned counsel for the respondent on the other hand would submit that the appellate court is well justified in allowing the application for amendment of written statement. Moreover, he would submit that the proposed amendment does not change the context of the plea that is already raised by the defendant. According to him, by way of amendment, plea is sought to be raised that the property in question is the joint family property.

9. He would submit that in the written statement there already is a plea that the petitioner is a teacher. Now, by way of amendment, the defendant wants to bring on record that no permission of the Chief Executive Officer, Zilla Parishad was taken before the property in question is purchased. The learned counsel for the respondent relied upon the decision of the Hon'ble Apex Court in the case of Ishwardas Vs. The State of M.P And others reported in AIR 1979 SC 551. He has also relied upon the decision of the Hon'ble Apex Court in the case of

Usha Balasaheb Swami and others Vs. Kiran Appaso Swami and others reported in 2007 AIR SCW 2545. He would further submit that a liberal approach has to be adopted while allowing the amendment in the written statement.

10. I have gone through the order passed by the learned Appellate Court. No doubt, the amendment sought to be applied for, is at a belated stage. However, the proposed amendment does not change the stand as taken in the original written statement. The Appellate Court was of the opinion that the amendment could be allowed. The appellate court observed that dominant object to allow the amendment in the pleadings liberally is just to avoid multiplicity of the proceedings. From the order, I find that the appellate court has imposed costs of Rs.5,000/- payable to the petitioner. Moreover, the appellate court has observed that there would be no prejudice to the petitioner if amendment as sought for, is allowed, for he would have remedy to cross examine the respondent herein as well as, if required, can lead evidence in rebuttal, as per rule.

11. At this stage, learned counsel for the petitioner would contend that the trial court has already drawn adverse inference against the defendant as she did not enter into the witness box. He would submit that allowing the cross examination of the defendant in terms of the

order passed by the appellate court would amount filling in the lacuna. There is substance in the submission of the learned counsel for the petitioner.

12. It is therefore clarified that it would not be permissible for the defendant-Ushabai Waman Pawar to step into the witness box as she did not enter into the witness box during the suit proceedings. As regards amended plea in the written statement, the Appellate Court may deal with the same in accordance with law, but without permitting Ushabai Waman Pawar to step into the witness box if at all the occasion so arises.

13. Subject to what is observed above, the writ petition is dismissed.

[M. S. KARNIK, J.]

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