

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.6528/2018

Kolhapur District Central Coop. Bank Ltd. ... Petitioner

V/s.

Jay Hanuman High School &
Balkrishna V. Vader Jr. College,
Isapurli & Anr. ... Respondents

Mr. Tejpal Ingale for the Petitioner
Mr. S. R. Ganbavale for Respondent Nos.1 and 2.

CORAM: K.K. TATED, J.

DATED : MARCH 4, 2019

P.C. :

1 Heard. By this petition under Article 227 of the Constitution of India, the Petitioner - Plaintiff challenges the order dated 31.01.2018 passed by the 3rd Jt. Civil Judge, Senior Division, Kolhapur below Exhibit- 51 in Special Civil Suit No. 258/2012 rejecting their Application under order 6 rule 17 as well as Order 1 Rule 10 of the Code of Civil Procedure, 1908 for joining Respondent No.2 as party Defendant in the suit.

2 The learned counsel for the Petitioner - Plaintiff submits that they filed Special Civil Suit No. 258/2012 for an order of injunction and possession of the suit property from Defendant No.1. He submits that during the pendency of the suit, Defendant No.1 filed written statement in January 2013. At that time, the Plaintiff learnt that Respondent No.2 Society was running

Respondent No.1 school. Hence, the Plaintiff made an Application below Exhibit- 51 under order 1 rule 10 of the Code of Civil Procedure, 1908 for carrying out amendment in the plaint on 02.11.2017.

3 The learned counsel for the Petitioner submits that the court below erred in coming to the conclusion that the Plaintiff failed to make out any case for allowing the Application made by them and carry out amendment for joining Respondent No.2 as Defendant No.2 in the suit. He submits that in para 6 of the impugned order, the Trial Court has observed that, the trial had commenced and thereafter the Plaintiff has made Application for amendment. Hence, same was rejected. He submits that the Trial Court has failed to consider the fact that Respondent No.2 is a necessary party to decide the dispute between the parties. He submits that the Trial Court has erred in coming to the conclusion that despite having knowledge of non joinder, the Plaintiff has failed and neglected to make an Application immediately for joining Respondent No.2 as party Defendant.

4 The learned counsel for the Petitioner submits that to avoid multiplicity of litigation, the Trial Court ought to have allowed their Application for joining Respondent No.2 as Defendant. In support of his contention, he relies on ***Pankajbhai Rameshbhai Zalvadiya Vs. Jethabhai Kalabhai Zalavadiya (deceased) 2018(2) Mh.L.J., Raj Kumar Bhatia Vs. Subhash Chander Bhatia (2018) 2 SCC 87*** and ***Chakreshwari Construction Pvt. Ltd. Vs. Manohar Lal 2017(5) SCC 212***. On the basis of this authority, the learned counsel for the

Petitioner submits that the impugned order is liable to be set aside and allow the Petitioner's Application below Exhibit- 51.

5 It is to be noted that admittedly in the present proceedings the Plaintiff had filed the said suit on 06.10.2012. Thereafter the Defendant Respondent No.1 filed written statement in January 2013 raising objection of non joinder of parties. In spite of that the Plaintiff has failed and neglected to take appropriate steps immediately for filing the Application for joining Respondent No.2 as party Defendant in the suit. The Application was made by the Plaintiff below Exhibit- 51 on 02.11.2017 i.e. more than 4 years from the date of filing the written statement. Not only that the trial had commenced and the Defendant had adduced their evidence and he was under cross-examination. At that time the Plaintiff made Application below Exhibit- 51. It is to be noted that the apex court in the matter of Pankajbhai (supra) held that the Application under order 1 rule 10 of the Code of Civil Procedure, 1908 can be allowed at any time to avoid multiplicity of the proceedings. It is to be noted that in that case the court held that if Application under order 22 Rule 4 of the Code of Civil Procedure, 1908 stands dismissed as not maintainable, then also Application under order 1 rule 10 of the Code of Civil Procedure, 1908 is maintainable. Hence, this authority is not applicable in the facts of the present case.

The second authority cited by the Petitioner in the case of Raj Kumar Bhatia (supra) is also not applicable. Because in that case, the Application was made for amendment under order 6 rule 17 of the Code of Civil Procedure, 1908 to elaborate what is

stated in the written statement. That is not the case in hand.

The third authority relied on by the Petitioner is in the matter of Chakreshwari Construction Pvt. Ltd. (supra). In that case, the supreme court has observed some basic principles for Application under order 6 Rule 17 of the Code of Civil Procedure, 1908, as under:

“13. The principle applicable for deciding the application made for amendment in the pleadings remains no more res integra and is laid down in several cases. In the case of Revajeetu Builders and Developers v. Narayanaswamy & Sons and Ors. (2009) 10 SCC 84, this Court, after examining the entire previous case law on the subject, culled out the following principle in Para 63 of the judgment which reads as under:

63. On critically analysing 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 6 Rule 17. These are only illustrative and not exhaustive.

6 In the present case, the Plaintiff, at his own, filed the suit against Defendant No.1 for injunction and possession. Not only that, it is specifically stated in the written statement filed by the Respondent that, they have authority to defend the suit on behalf of the society also. Therefore, this authority is not applicable to the case in hand.

7 Considering the above mentioned facts and as there was delay on the part of the Plaintiff to make an Application for amendment, which was filed when the trial had begun, I do not find any substance in the Writ Petition.

8 Hence, the following order is passed:

- a. The Writ Petition stands rejected.
- b. No order as to costs.
- c. At this stage, the learned counsel for the Petitioner submits that as per order dated 27.06.2018 passed by this court, they had deposited a sum of Rs.30,000/- in the Registry of this court. In view of rejection of the Writ Petition, the Registry may be directed to refund the same along with the accrued interest, if any. Same is permitted.

d. Hence, the Petitioner is entitled to withdraw the said amount along with accrued interest, if any, unconditionally.

(K. K. TATED, J.)