

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 12123 OF 2018

Aziz S. Shaikh and anr. .. Petitioners
vs.
Shamimbano Imamdin Masood .. Respondent

Mr. S.A. Inamdar for the Petitioner.
Mr. A.B.Tajane for the Respondent.

CORAM : M. S. SONAK, J.
DATE : 03 MAY 2019.

P.C. :-

1] Heard Mr. Inamdar, learned counsel for the petitioners and Mr. Tajane, learned counsel for the respondent.

2] The challenge in this petition is to the order dated 31st July 2018 by which learned Appeal Judge has dismissed the petitioners' application seeking leave to amend the appeal memo.

3] Mr. Inamdar, learned counsel for the petitioners, submits that the Courts have to be liberal while allowing amendment to the appeal memo. He points out that in the present case, the petitioners only wanted to raise a legal contention based upon the facts on record. He submits that the petitioners do not wish to lead any further evidence at

the belated stage in support of the ground which was to be raised by way of amendment. He submits that in such circumstances, the amendment was required to be allowed.

4] Mr. Tajane, learned counsel for the respondent, points out to the grounds in the appeal memo as well as the observations in paragraph 11 of the impugned order and submits that the Appeal Court has held that the grounds of attack are already mentioned in the appeal memo and the same are also covered in the points for determination framed by the Appeal Court. He submits that it is in this context that the Appeal Court has held that the proposed amendment is quite unnecessary. He submits that the proposed amendment was applied for after two years and in that sense was lacking in *bonafides*. For all these reasons, he submits that this petition may be dismissed.

5] From the perusal of the application seeking amendment of the appeal memo, it appears that the petitioners were only seeking to add some grounds to challenge the impugned judgment and decree. However, if according to both

Mr.Tajane, learned counsel for the respondent, as well as the Appeal Court, the grounds which are originally included in the appeal memo including the grounds of attack which the petitioners seek to raise by amending the appeal memo, then this aspect can only be noted and clarified without necessity of interfering with the impugned order or granting any leave to amend.

6] Accordingly, it is noted and clarified that the grounds in the appeal memo are quite sufficient and entitled the petitioners to raise the grounds which the petitioners now seek to raise by amending the appeal memo. With this clarification, there is no necessity of carrying out any formal amendment to the appeal memo and consequently, there is no necessity of interfering with the impugned order. However, it is necessary to clarify that the observations of the learned Appeal Court on the question of *bonafides* cannot prevail and will have to be set aside. This is because if according to the Appeal Court such grounds are already existing in the appeal memo, it cannot be said that there was any *mala fides* involved on the part of the petitioners in seeking to amend

the appeal memo. The petitioners could have gained nothing by this and perhaps had applied for amendment only by way of abandon caution. Accordingly, the observations of lack of *bonafides* are set aside.

7] Further it appears that the Appeal Court has sought to make some observations on the merits of the grounds proposed to be raised. At this stage, such observations were also entirely premature and the same shall be excluded from the consideration whilst deciding the appeal on its own merits and in accordance with law.

8] However, as requested by Mr. Tajane, it is clarified that all the defences of the respondents on the merits of the matter are expressly left open. In fact, all contentions of all parties are expressly kept open.

9] This petition is accordingly partly allowed in the aforesaid terms. There shall be no order as to costs.

10] The Appeal Court is requested to expeditiously dispose of the appeal and if possible, proceed with the arguments on the next date, which is fixed in the appeal. Both parties to cooperate with the Appeal Court in the matter of expeditious disposal of the appeal and not seek any unnecessary adjournment.

(M. S. SONAK, J.)