

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR.

WRIT PETITION NO.605 OF 2019

Anand s/o Shankarlal Tiwari

-vs-

Ashok s/o Shankarlal Tiwari and ors.

Office notes, Office Memoranda of
Coram, appearances, Court's orders
or directions and Registrar's orders.

Court's or Judge's Orders.

Shri S. P. Kshirsagar, Advocate for petitioner.

Shri I. A. Fidvi, Advocate with Shri S. T. Madnani,
Advocate for respondent No.1.

CORAM : A.S.CHANDURKAR, J.

DATE : April 02, 2019

The petitioner who is the original plaintiff is aggrieved by the order passed by the trial Court below Exhibit-42 rejecting the application as filed under provisions of Order VI Rule 17 of the Code of Civil Procedure, 1908.

The plaintiff has filed suit for partition and separate possession. After the issues were framed, he filed his affidavit-in-lieu of evidence on 07/11/2017. On 10/10/2018 an application for amendment to the plaint came to be filed. In the application it was stated that the amendment as sought was clarificatory in nature and it was necessary for complete adjudication of the case. The trial Court rejected the said application on the ground that the trial had commenced and there were no averments made to indicate exercise of due diligence on the part of the plaintiff.

2. Shri S. P. Kshirsagar, learned counsel for the petitioner by relying upon the decisions in *Abdul Rehman and Anr. Vs. Mohd. Ruldu and ors.* AIR 2012 SC 5419 and *State of A.P. and others vs. Pioneer Builders, A.P.* 2007(2) ALL MR 435 submitted that as the amendment sought was merely seeking to clarify the pleadings on record, the same ought to have been allowed. He referred to the averments in the plaint as well as proposed amendment in that regard. According to him after the affidavit-in-lieu of evidence was filed, the aspect of impounding two documents was considered by the trial Court which consumed some time. It is thereafter that the present application for amendment came to be filed. It was submitted that the trial Court ought to have allowed the application in question.

3. On the other hand Shri I. A. Fidvi, learned counsel for the respondent supported the impugned order. According to him the trial had commenced with the filing of affidavit by the plaintiff. There were no averments to indicate exercise of due diligence on the part of the plaintiff while seeking the amendment. He referred to the conduct of the plaintiff to indicate that there was absence of due diligence and that the trial Court was justified in rejecting the said application and referred to the decision in *Vidyabai and ors. vs. Padmalatha and anr.* 2009(1) ALL MR 471. He also submitted that the pleadings in the

plaint were sufficient and that the clarification as sought to be brought on record was already pleaded therein.

4. After hearing the learned counsel for the parties it is seen that with the filing of affidavit of plaintiff on 07/11/2017 the trial had commenced as held in *Vidyabai and ors.* (supra). It was therefore necessary for the plaintiff to have indicated exercise of due diligence for seeking the amendment. In the application except for stating that the amendment was clarificatory in nature nothing further has been stated. The consideration of the aspect of impounding certain documents did not preclude the plaintiff from seeking such amendment even at that stage. The application being totally silent in that regard, the trial Court was justified in refusing to entertain that application. I do not find any jurisdictional error on the part of the trial Court in rejecting the application below Exhibit-42. Hence there is no reason to interfere in writ jurisdiction. The writ petition is dismissed with no order as to costs.

Needless to state that it is open for the petitioner to agitate the aspect of rejection of the amendment application in appeal if the same is permissible in law.

JUDGE