

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR

WRIT PETITION NO.6553 OF 2017

(SANJAY GUNWANT BAND....VS.. KRUNAL RAJENDRA LADIKAR & OTH.)

Office Notes, Office Memoranda of Coram,
appearances, Court's orders of directions
and Registrar's orders

Court's or Judge's orders

Shri R.R.Srivastava, Advocate for Petitioner.
Shri M.P.Tote, Advocate for Respondent Nos.1 to 4.

CORAM : Z.A.HAQ, J.

DATED : JULY 02, 2019.

Office notes shows that respondent No.8 is not served. The petitioner has filed affidavit sworn on 29th June 2019 pointing out that the envelope containing notice of the petition sent by Registered Post Acknowledgment Due is delivered to the addressee on 4th May 2019. The consignment track report is also placed on record along with affidavit. The respondent No.8 is original defendant No.5. The contesting parties are respondent Nos. 1 to 4 (plaintiffs).

In these facts, the petition is taken up for hearing.

Heard Shri R.R.Srivastava, Advocate for the petitioner (defendant No.4) and Shri M.P.Tote, Advocate for the respondent Nos. 1 to 4(plaintiffs).

The defendant No.4 has challenged the order passed by the trial Court by which the application (Exh.80) filed by the plaintiffs seeking permission to amend the plaint is allowed. By the proposed amendment, the plaintiffs seek to bring on record the details of payment alleged to have been made by them to the defendant No.4.

The application (Exh.80) is opposed by the defendant No.4 on the ground that it is filed after 9 years of filing of the civil suit and after commencement of the trial. It is submitted that the affidavit in lieu of examination in chief of the plaintiffs' witness is filed and then application (Exh.80) came to be filed and the plaintiffs have not given any justification for not filing the application before the trial commenced. It is argued that as the plaintiffs have not shown due diligence in view of the bar created by proviso below Rule 17 of Order 6 of the Code of Civil Procedure, the application (Exh.80) is required to be dismissed. To support the submission, reliance is placed on the following judgments:

- i) Judgment given by the Hon'ble Supreme Court in the case of *C.C.Pvt. Ltd. Vs. Manohar Lal*, reported in **2017(5) Mh.L.J. 195** and
- ii) Judgment given by this Court in the case of *Chandrashekhar Vs. Dr. Balkrishna*, reported in **2016(4) Mh.L.J. 389**.

The learned Advocate for the respondent Nos. 1 to 4 (plaintiffs) has supported the impugned order.

The submission made on behalf of the petitioner, relying on the proviso below Rule 17 of Order 6 of the Code of Civil Procedure, is based on legal position and there cannot be any dispute that unless the party satisfies the Court that in spite of due diligence it was not possible for it to file amendment application earlier, the Court does not get jurisdiction to consider and allow the amendment application. The fact that the trial has commenced on filing of the affidavit

in lieu of examination-in-chief of the plaintiffs' witness also has to be accepted. However, looking to the nature of the proposed amendment and the fact that the cross-examination of the plaintiffs' witness is not yet conducted, in my view, the proposed amendment is rightly permitted by the trial Court. Already there are pleadings that the plaintiffs had repaid the amount to defendant No.4. By the proposed amendment, the plaintiffs are seeking to give details of the payment. The proposed amendment shows that according to the plaintiffs, the amount was paid to the defendant No.4 by cheque and details of the cheque are now being pleaded. I find that the learned trial Judge has rightly appreciated the controversy and has not committed any mistake or error of jurisdiction by allowing the plaintiff to amend the plaint. The judgments relied upon by the petitioner do not assist him in the facts of the case. Hence, I see no reason to interfere with the impugned order.

The writ petition is **dismissed**. In the circumstances, the parties to bear their own costs.

JUDGE