

WRIT PETITION NO. 7326 OF 2016

Mr. P.B.Gujar for the Petitioners.
Mr. A.J. Kenjale i/by A.V. Kamble for Respondent No.1.

PC:

1. Heard learned counsel for the parties.
2. Rule.
3. Rule is made returnable forthwith with the consent of the parties and is taken up for final disposal.
4. By this petition, the petitioners have impugned the order dated 18.3.2016 passed by the learned District Judge-6, Satara below Exhibit 27 in Regular Civil Appeal No.226 of 2012, by which the respondent's application under Order VI Rule 17 of the Code of Civil Procedure, for amending the written statement came to be allowed.

5. Learned counsel submitted that the impugned order on the face of it, is unsustainable, inasmuch as, the respondent had shown no due diligence as required under Order VI Rule 17. He submitted that although the appeal challenging the Trial Court's Judgment and decree was filed by the respondent in 2012, it is only in February 2015 that the respondent filed an application seeking amendment of his written statement, for bringing on record watap yadi dated 31.1.19378. He submitted that, although there is a reference in the appeal memo of the said document i.e. watap yadi, the respondent filed an application only in the year 2015 and sought amendment of his written statement. Learned counsel relied on the Judgments of the Apex Court in the case of ***Vidyabai and others vs. Padmalatha and anr. reported in AIR 2009 SC 1433***, ***Jaswant Kaur and another vs. Subhash Paliwal and others reported in (2010) 2 SCC 124*** and ***Archana Ashok Amburle vs. Arpana Shankar Dudham and ors. reported in 2019 (2) Mah. L.J. 67*** in support of his submissions. He submitted that, the Apex Court in the case of ***Asrchana vs. Aparna reported in 2019 (2) Mah. L.J. 67*** has held that even if an application for amendment was made after commencement of the trial, the Court has to arrive at a conclusion that inspite of due diligence the plaintiff (therein), could not have raised the same before commencement of the trial. Learned counsel for the petitioners further submitted that at no point of time in the written statement the respondent had raised the said defence and/or mentioned the said document. He submitted that the defence taken by the petitioners was that he was entitled to the property in question, by succession/gift/ Will. He submitted that even the watap yadi submitted by

the respondent is similar to that submitted by the petitioners. He submitted that the application filed for amendment of the written statement is at a belated stage and as such, the learned Judge ought not to have allowed the said application.

6. Learned counsel for the respondent opposed the application and submitted that no interference was warranted in the impugned order. He submits that the document in question i.e. watapyadi was received by the respondent only in 2012 and therefore, the same was mentioned in the appeal memo. He submits that the respondent filed an application (Exhibit-20) under Order 41 Rule 17 for production of additional evidence i.e. watapyadi i.e. list of partition dated 31.1.1937 in 2014. He submits that, the respondent has shown due diligence in bringing the said document on record. According to him, the respondent cannot be faulted for filing the application belatedly for bringing the same on record. Learned counsel relied on the Judgment of the Apex Court in the case of ***Chakreshwari Construction Private Ltd. vs. Manohar Lal reported in 2017(5) SCC 212***. He submitted that amendment is permissible at any stage and not merely during the pendency of the trial, provided the amendment proposed is bonafide and relevant and necessary for deciding the partition between the parties.

7. Perused the papers as well as impugned order. The petitioners are the original plaintiffs and the respondent, the original defendant, in R.C.S. No. 151/2006 pending before the learned Civil Judge, S. D., Satara. The

petitioners had filed the said suit stating therein, that the suit properties were ancestral properties and as such sought injunction in respect of certain properties. The respondent appeared in the said suit and filed his written statement on 30.9.2006 denying all the contentions raised by the petitioners in the plaint. The defence as it appears from the written statement was that they had acquired the properties by succession/gift/Will. After evidence was led in the said suit, the Trial Court decreed the said suit vide Judgment and decree dated 4.5.2012.

8. Being aggrieved by the said Judgment and decree passed by the Trial Court, the respondent filed first appeal in the District Court, Satara, being Regular Civil Appeal No.226 of 2012. Pending the said first appeal, the respondent filed an application (Exhibit 20) in the said appeal under Order 41 Rule 27 of the C.P.C. for taking additional evidence. It appears that the said application was filed in 2014. In the said application, the respondent had stated that he had filed then watap yadi dated 31.1.1937 between Mahadu and his ancestors. The said averment is also reflected in the appeal memo filed by the respondent in the District Court, Satara. By the said application (Exhibit 20) the respondent prayed that the watap yadi be exhibited. The said application (Exhibit 20) was allowed by the learned District Judge by Judgment and Order dated 3.12.2014 and the document dated 31.1.1937 came to be exhibited. Being aggrieved by the said Judgment and order dated 3.12.2014 passed by the learned District Judge, Satara below Exhibit 20, the petitioners filed a Writ Petition being W. P. No. 5519 of 2015, in this Court.

This Court disposed of the said writ petition vide order dated 11.2.2016 by setting aside the order dated 3.12.2014 passed by the learned District Judge below (Exhibit 20) in Regular Civil Appeal No.226 of 2012 and as such restored the application (Exhibit 20) back to its original file. This Court directed the Appellate Court to decide the said application (Exhibit 20) along with the appeal. This court after observing that the respondent's application (Exh.27) seeking amendment of the written statement was pending, also directed the Appellate Court to decide the said application i.e. Exhibit 27 within four weeks. The said order dated 11.2.2016 passed by this court (Coram R.G. Ketkar, J.) in W.P. No.5519 of 2015 is at Page 59 of the aforesaid petition. The learned District Judge vide order dated 11.1.2016, allowed the respondent's application seeking amendment of the written statement. Hence, this petition.

9. Having perused the impugned order, I am of the opinion that the learned Judge has not considered whether the respondent has exercised due diligence, as contemplated under Order 6 Rule 17 of the C.P.C.

10. In the case of *Vidyabai and others (supra)* in Para 7 the Apex Court has observed as under;

“7. By reason of the Civil Procedure Code (Amendment) Act, 2002 (Act 22 of 2002) the Parliament inter alia inserted a proviso to Order VI Rule 17 of the Code, which reads as under:

Provided 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.

It is couched in a mandatory form. The court's jurisdiction to allow such an application is taken away unless the conditions precedent therefor are satisfied, viz., it must come to a conclusion that in spite of due diligence the parties could not have raised the matter before the commencement of the trial."

11. A perusal of the application (Exhibit 27) filed by the respondent nowhere mentions that despite due diligence the said document could not be produced earlier nor have any reasons been set out as to when the said document i.e. watap yadi came in respondent's possession. The application does not even give the details of the said document. Neither has the learned Judge considered the same in the impugned order. As noted above, the suit was decreed in 2012 and the appeal was filed in the year 2012. Although, the respondent has taken a ground in the appeal memo in respect of the watap yadi, a formal application was filed only in February 2015 seeking amendment of the written statement. It appears that even in 2013/2014 an application (Exhibit 20) was filed for giving additional evidence under Order

41 Rule 27 of the C.P.C., wherein there is a mention of watap yadi dated 31.1.1937 and a prayer for exhibiting the same, however, a formal application (Exh.27) was filed only in 2015. It is pertinent to note that there is no mention of any watap yadi in the written statement. The Judgment relied upon by the learned counsel for the respondent is clearly distinguishable. It was a case where the appellants therein had explained the delay but the same is not the case in the present petition. There is no mention that as to when the said document i.e. watap yadi came in respondent's possession. There is also no mention that inspite of due diligence, the said document could not be filed earlier.

12. Considering the aforesaid, the impugned order dated 18.3.2016 passed by the learned District Judge, Satara below Exhibit 27 in Regular Civil Appeal No.226 of 2012 is quashed and set aside. The learned Judge to proceed with the hearing of Regular Civil Appeal No.226 of 2012 alongwith (Exhibit 20) on its own merits, in accordance with law.

13. Rule is made absolute in the aforesaid terms.

14. Petition is disposed off in the aforesaid terms.

15. Parties to act on an authenticated copy of this order.

REVATI MOHITE DERE, J.