

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

WRIT PETITION NO. 1031 OF 2018

Shri. Pyara @ Bage s/o. Idumiya Sheikh and others

vs.

Sheikh Israil s/o. Ibrahim Miya Sheikh and others

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

Court's or Judge's orders

Shri. Gulam Mohd. Sayed Shahid and Shri. Navjat Soni, counsel
for petitioners.

Shri. E. N. Quazi and Shri. V. R. Thote, counsel for respondents
No.1 to 4, 6, 8 to 11, 13, 14, 16, 17 & 18.

CORAM : MANISH PITALE J.

DATED : 07/01/2020

The present writ petition is filed by original defendants No. 1, 2, 4, 16 and 17 to challenge order dated 14/08/2017 passed by the Court of Judicial Magistrate First Class, Katol, whereby an application (Exh.94) seeking amendment of Written Statement filed by the petitioners herein was rejected.

2. The respondents No.1 to 6 herein (original plaintiffs) filed suit for declaration, partition and separate possession, as also permanent injunction against the petitioners herein and other defendants. Specific pleadings were raised in the plaint on behalf of the aforesaid plaintiffs in respect of the property in question and as to its nature in the hands of the rival parties.

3. In response to the suit filed by the said respondent, on 18/03/2013, the petitioners herein filed their written statement in which they admitted to the pleadings in paragraph Nos. 2 to 4 of the plaint. Thereafter, in paragraph 14 of the written statement, specific pleadings were made on behalf of the petitioners, which upon bare reading appear to be contrary to the admissions given in paragraph 2 to 4 of the written statement. In these specific pleadings a theory pertaining to existence of a family arrangement was propounded on behalf of the petitioners and it was pleaded that a verbal gift i.e. HIBA was made by Dadamiya in favour of the legal heirs of his brother Idumiya. These pleadings being in a particular context, in view of the claims made by the rival parties, on 06/07/2015, the Court below framed issues and on 13/10/2015 the affidavit in evidence / chief examination of the original plaintiffs was conducted. Thereafter, cross-examination and further cross-examination of the plaintiffs was undertaken on behalf of the petitioners. It is relevant to note here that on 11/08/2016, a new counsel was engaged by the petitioners who conducted cross-examination on 27/09/2016 and further cross-examination on 11/11/2016 of the witness of the plaintiffs.

4. Thereafter, on 29/11/2016, an application for amendment of the written statement (Exh.94) was filed on behalf of the petitioner wherein extensive

amendment of the written statement was sought, particularly of paragraphs No.2, 3, 4, 11 and 14. The said application was opposed by the original plaintiffs and by the impugned order dated 14/08/2017, the application stood rejected.

5. The Court below found that the application fell foul of the proviso to Order 6 Rule 17 of the Civil Procedure Code (C.P.C.), particularly in the light of law laid down by the Hon'ble Supreme Court in the case of **Vidyabai vs. Padmalata (2009) 2 SC 409**, to the effect that even though the Court is supposed to take liberal approach while considering applications for amendment and the real question in controversy between the parties needs to be decided, in the facts and circumstances of the present case, the petitioners had failed to make a case for grant of amendment.

6. Mr. Sayed Shahid learned counsel appearing for the petitioners submitted that in the present case the petitioners had pleaded in the application for amendment that after a new counsel was engaged on their behalf it came to light that certain pleadings made in the written statement were required to be amended and that certain portions of the pleadings in the original written statement were required to be elaborated. It was submitted that in this situation, the said application for amendment was moved and that considering the law laid down by Hon'ble Supreme Court and proviso to Order 6 Rule 17 of the C.P.C. the Court was required to consider

the question of amendment in the context of the real question in controversy between the parties, and further that the application for amendment ought to have been allowed.

7. It was submitted that as per settled law mutually contradictory pleas could be taken by the defendants and that therefore, the impugned order deserved to be set aside. It was submitted that the Court below adopted a pedantic approach and that the law laid down by the Hon'ble Supreme Court in the case of **Baldeo Singh vs. Manohar Singh and anr. 2006(5)Mh.L.J. page 634** regarding commencement of trial ought to have been taken into consideration by the Court below. It was submitted that since allowing the amendment would assist the Court in determining the real question in controversy between the parties, the amendment application ought to have been allowed.

8. On the other hand, Mr. E. N. Quazi learned counsel appearing for the original plaintiffs i.e. respondents herein in the present case submitted that admittedly the trial had commenced and that the petitioners were required to satisfy the condition of proviso to Order 6 Rule 17 of the C.P.C. by demonstrating that despite due diligence they could not have raised the proposed pleadings before the commencement of trial. It was submitted that as per the law laid down by the Hon'ble Supreme Court in the case of **Vidyabai vs. Padmalata** (supra), the burden was on the

petitioners to satisfy the requirement of the said proviso and in the present case there was total absence of any reasons pleaded on behalf of the petitioners regarding due diligence. It was further submitted that by the proposed amendment the petitioners were seeking to wriggle out a situation that they found themselves in, due to the pleadings already on record. It was submitted that the entire nature of defence of the petitioners was sought to be changed after the evidence of the original plaintiffs had commenced. It was submitted that the new counsel was engaged by the petitioners on 11/08/2016, who had himself cross-examined the witness of the original plaintiffs on two occasions and thereafter the application was moved, thereby showing that the reasons stated in the application were wholly unacceptable. On this basis it was submitted that the writ petition deserved to be dismissed.

9. Heard learned counsel for the rival parties and perused the material on record. In the present case it is undisputed that the suit was filed in the year 2012 and written statement was filed on behalf of the petitioner as far back as on 18/03/2013. There is no doubt about the fact that issues were framed as far back on 06/07/2015 and trial had evidently commenced, since the recording of evidence of witness on behalf of the original plaintiffs had already commenced. The application for amendment was filed on 29/11/2016, after the newly appointed advocate for the petitioners

had already cross-examined and further cross-examined the witness on behalf of the original plaintiffs.

10. In such a situation as per the amended proviso to Order 6 Rule 17 of the C.P.C. the petitioners were expected to place on record specific reason as to why pleadings proposed by them by way of amendment could not have been brought on record despite due diligence before the commencement of trial. The mandatory nature of the proviso to Order 6 Rule 17 of the C.P.C. has been recognized by the Hon'ble Supreme Court in the case of **Vidyabai vs. Padmalata** (supra). After quoting the said proviso it has been specifically held by the Hon'ble Supreme Court as follows :-

10. By reason of the Civil Procedure Code (Amendment) Act, 2002 (Act 22 of 2002), Parliament inter alia inserted a proviso to Order 6 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. to 18.

19. It is the primal duty of the court to decide as to whether such an amendment is

necessary to decide the real dispute between the parties. Only if such a condition is fulfilled, the amendment is to be allowed. However, proviso appended to Order 6 Rule 17 of the Code restricts the power of the court. It puts an embargo on exercise of its jurisdiction. The court's jurisdiction, in a case of this nature is limited. Thus, unless the jurisdictional fact, as envisaged therein, is found to be existing, the court will have no jurisdiction at all to allow the amendment of the plaint.

11. Thus, as per the said position of law, although the Court is required to consider whether the proposed amendment would be necessary to decide the real dispute between the parties and such consideration would follow the initial finding that the applicants seeking amendment satisfy the requirement of the aforesaid proviso to Order 6 Rule 17 of the C.P.C. It has been specifically held that finding on the same is a jurisdictional fact and only if it is found to be existing that the Court can proceed to consider the proposed amendment. In the case of Revajeetu Builders and Developers vs. Narayanswami and sons and others (2009) 10 SCC 84, the Hon'ble Supreme Court had occasion to consider the judgments under English Law and the law of this country on the approach to be adopted while considering applications for amendment. After considering various judgments, the Hon'ble Supreme Court held as follows :-

“ Factors to be taken into consideration while dealing with applications for amendments :

63. On critically analyzing 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.

64. The decision on an application made under Order 6 Rule 17 is a very serious judicial exercise and the said exercise should never be undertaken in a casual manner. We can conclude our discussion by observing that while deciding applications for amendments the courts must not refuse bona fide, legitimate, honest and necessary amendments and should never permit mala fide, worthless and/or dishonest amendments.”

12. The position of law that emerges from the said judgment of the Hon’ble Supreme Court is that an application for amendment of pleadings cannot be

decided casually and that it is a serious judicial exercise to be undertaken strictly in terms of Order 6 Rule 17 of the C.P.C. It has been emphasized that malafide worthless and dishonest amendments ought not to be permitted.

13. Applying the said parameters to the facts of the present case, it becomes clear that the Court below has not committed any error in passing the impugned order. A perusal of the written statement filed on behalf of the petitioners, as far back on 18/03/2013, shows that although in paragraph 2 to 4, the contents of paragraphs 2 to 4 of the plaint have been admitted, in para 14 consisting of specific pleadings, certain stand has been taken on behalf of the petitioners which appears to be contradictory to the initial admissions. Although a defendant may take mutually contradictory pleas in defence, what is sought by the proposed amendment is an attempt to wriggle out the admissions already made and the specific pleadings already placed on record.

14. It is significant that in the present case the application for amendment was moved on 29/11/2016. By way of amendment not only were the admissions given in the initial written statement sought to be revoked, but major changes were sought to be introduced in the paragraph pertaining to specific pleadings in paragraph 14. The learned counsel appearing for the contesting respondents is justified in contending that the amendments sought to be

introduced, particularly in the specific pleadings in the written statement amounts to changing the very nature of the stand taken by the petitioner and it is clearly an attempt to wriggle out the situation in which the petitioners find themselves, in the face of the original written statement and the evidence being placed on record by the plaintiffs.

15. Thus, apart from the fact that the application for amendment filed on behalf of the petitioners in the present case fails the test laid down by the Hon'ble Supreme Court in the case of **Vidayabai vs. Padmalata** (supra), it is found that the amendment sought by the petitioners is not bonafide and it is attempt to wriggle out specific pleadings already placed on record on their behalf.

16. In view of above, it is found that no error can be attributed to the Court below in passing the impugned order. Accordingly, writ petition is without any merits and it is dismissed.

17. Considering the fact that the suit was filed in the year 2012 and the trial has already commenced, the Court below is expected to dispose of the suit as expeditiously possible and in any case within a period of **six months** from today.

JUDGE