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IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.11317 OF 2018

Suresh Vitthalrao Shinde & Another

PETITIONERS

VERSUS

Mohammed Samdani Mohammed Rabbani
Banikar and Others

RESPONDENTS

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Mr. Mukul S. Kulkarni, Advocate for the petitioners

Mr. M. B. W. Khan, Advocate for the respondent No.1

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[CORAM : NITIN B. SURYAWANSHI, J.]

DATE : 8th DECEMBER, 2021

ORDER :

1. This petition is directed against the order dated 26th June, 2018 passed by District Judge-1, Latur below Exhibit-28 in Regular Civil Appeal No. 22 of 2012, thereby rejecting the application of the appellants - present petitioners, seeking amendment in the written statement.

2. The petitioners are original defendants No. 4 and 5 in Regular Civil Suit No. 61 of 2003 instituted by present respondent No. 1 – the plaintiff, seeking declaration of ownership and perpetual injunction for protecting his possession over land survey No. 24/2 and 23/2 admeasuring 3 Hectare, 94 Are and 2

Hectare, 10 Are, respectively, situated at village Somnathpur, Taluka – Udgir, District – Latur (for short “suit property”).

3. On an application filed by the plaintiff in the Regular Civil Suit No. 61 of 2003, the Trial Court had appointed Taluka Inspector of Land Records (for short “TILR”) as Court Commissioner for measurement of the said lands. Report was submitted by the TILR. The said report of the TILR was objected by defendant No.3, by filing application Exhibit-69. Said application Exhibit-69 was rejected by the trial court and the rejection was challenged in Writ Petition No. 4127 of 2006. This court dismissed the writ petition summarily by observing that-

“... at this stage it cannot be presumed as to whether the measurement is right or wrong and the said issue can only be considered after the report is proved and the witness is examined. It will be at that stage, that the court will consider the objection raised by the petitioners and decide the same in accordance with law.”

4. After the parties led evidence, the suit was decreed by the Trial Court on 10th April, 2012 thereby giving a declaration in favour of the plaintiff that he is owner of the suit property. A permanent injunction is clamped on defendants No.1 to 5 not to interfere in the peaceful possession of the original plaintiff – respondent No.1.

5. The judgment and decree passed by the Trial Court in Regular Civil Suit No.61 of 2003 is challenged before the District Court in Regular Civil Appeal No. 22 of 2012. In the said appeal, the petitioners – original defendants No. 4 and 5 (Appellants No. 2 and 3) filed application Exhibit-28 under Order VI, Rule 17 of the Civil Procedure Code (for short “the CPC”) seeking amendment in the written statement. The proposed amendment is mentioned in paragraph No. 3 of the said application Exhibit-28.

The application Exhibit-28 was resisted by the original plaintiff. The appellate court, by the impugned order rejected the application Exhibit-28. The petitioners being aggrieved by the said order of rejection, is before this court.

6. Heard learned advocate for the petitioners and learned advocate for respondent No.1.

7. Learned advocate for the petitioners contended that the appellate court was not justified in rejecting the application seeking amendment only on the ground that the application is filed after commencement of the trial. He contended that the appellate court has lost sight of the crucial aspect that subsequent events were sought to be brought on record by way

of amendment, which is necessary to decide the real dispute between the parties. According to him, the amendment should have been allowed by the appellate court in view of the proviso to Order II, Rule 17 of the CPC. In support of his contentions, he relied in *"Bharat Petroleum Corporation Ltd., V/s Precious Finance Investment Pvt. Ltd.," MANU/MH/0729/2006 : 2006 (6) ALL MR 771.*

8. Per contra, learned advocate for respondent No.1 vehemently opposed the petition contending that the ground on which the amendment application is filed by the petitioners, is stated to be happening of the subsequent events, however, there is no such subsequent event which has taken place and whatever the subsequent events, the petitioners seek to rely upon, are the creation of the petitioners themselves. He submits that the TILR had filed report in the Trial Court, which was objected by the present petitioners and the said objection was negatived by the Trial Court. This Court confirmed the said finding of the Trial Court by observing that at that stage said objection need not be considered as the TILR was to prove the measurement report on record and was to be cross-examined. In that view of the matter, the objection of the petitioners was turned down. Thereafter, the suit was decreed and thereafter, in the year 2012, present

Regular Civil Appeal No. 22 of 2012 was filed. At the time of filing the appeal, no such application was moved and after almost ten years, present application seeking amendment in the written statement is filed. The authorities below were pressurized by the petitioners herein by resorting to hunger strike to measure the lands. The report of the authorities is prepared behind the back of the respondent. The present application is not maintainable in view of the provisions of Order XII, Rule 27 of the CPC. There is no due diligence on the part of the petitioners in filing the present application and the petitioners are trying to play mischief by filing the application. He, therefore, submits that there is no substance in the petition and the petition deserves to be dismissed. In support of his submissions, he relied on "***Vidyabai and Others V/s Padmalatha and Another***" AIR 2009 SC 1433 and "***J. Samuel and Others V/s Gattu Mahesh and Others***" 2012 (4) Mh.L.J. 40.

9. Admittedly, during pendency of the suit, the TILR was appointed as the Court Commissioner and he submitted his report. Evidence was led to prove the said report by leading evidence of the TILR. Defendants No. 4 and 5 had objected to the report of the TILR. Said objection was overruled by the Trial Court. Trial Court's order was confirmed by this Court in the writ

petition by making certain observations, which are reproduced hereinabove.

10. After the TILR was examined in the suit, no application at that point of time was preferred by the petitioners or other defendants. After assessing the evidence on record, the suit was decreed in favour of respondent No. 1 – original plaintiff by the Trial Court.

11. The appeal was filed by the defendants in the year 2012. Even after filing of the appeal, no such application seeking amendment was moved, may be because, measurement was not done by the revenue authorities at that point of time. Fact remains that, after almost ten years' period after filing appeal, present application came to be filed seeking amendment in the written statement, by placing reliance on the measurement report of the District Inspector of Land Records. It appears that the petitioners by sitting on hunger strike pressurized the DILR to prepare report. Thus, it is prepared at the instance of the present petitioners. This cannot be said to be a subsequent event or development, necessary for determining the real question in controversy between the parties or for effective decision of the appeal. Since the report is prepared at the instance of the petitioners, during the pendency of the appeal,

the same cannot be permitted to be brought on record by way of amendment in the written statement in a decided suit. This Court is of the considered view that in the facts of the present case, the same is not permissible.

12. The Appellate Court has rejected the application observing that the application is filed after commencement of the trial, the rejection is justified in the facts of the present case, as the subsequent report is sought to be brought on record, which was prepared during the pendency of the appeal. The appeal will have to be decided on the basis of evidence led by the parties before the Trial Court and in the facts of this case no new material can be allowed to be brought on record at the appellate stage.

13. In "***Bharat Petroleum Corporation Ltd.,***" (*supra*), learned Single Judge of this Court, in paragraph No. 33, has laid down broad principles / guidelines in respect of amendment. In clause XVII, it is held that *"The court can allow amendment of pleadings even at the appellate stage for the purpose of determining the real question in controversy between the parties or if it is necessary for the effective decision of the case. However, the delay in seeking an amendment must be explained satisfactorily and that it should not cause injustice to the other side or it should not affect the right already accrued to the other side. At appellate stage none of the parties could be*

allowed to withdraw the admissions or pleadings, if the rights are accrued to the other side.” There can be no dispute about the above proposition. However, in the facts of the present case, this Court is of the opinion that the appellate court was right in rejecting the amendment application of the petitioners.

14. In “**J. Samuel**” (*supra*), the Hon’ble Supreme Court has held :

“12. The primary aim of the Court is to try the case on its merits and ensure that the rule of justice prevails. For this the need is for the true facts of the case to be placed before the Court so that the Court has access to all the relevant information in coming to its decision. Therefore, at times it is required to permit parties to amend their complaints. The Court’s discretion to grant permission for a party to amend his pleading lies on two conditions, firstly, no prejudice must be done to the other side and secondly, the amendment must be necessary for the purpose of determining the real question in controversy between the parties. However, to balance the interest of the parties in pursuit of doing justice, the proviso has been added which clearly states 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.

13. Due diligence is the idea that reasonable investigation is necessary before certain kinds of relief are requested. Duly diligent efforts are a requirement for a party seeking to use the adjudicatory mechanism to attain an anticipated relief. An

advocate representing someone must engage in due diligence to determine that the representations made are factually accurate and sufficient. The term “Due diligence” is specifically used in the Code so as to provide a test for determining whether to exercise the discretion in situations of requested amendment after the commencement of trial.

14. A party requesting a relief stemming out of a claim is required to exercise due diligence and is a requirement which cannot be dispensed with. The term “due diligence” determines the scope of a party’s constructive knowledge, claim and is very critical to the outcome of the suit.”

15. In “**Vidyabai**” (*supra*), the Hon’ble Apex Court has held:

“14. 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 VI, 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.

15. In Salem Advocate Bar Assn. (supra) this Court has upheld the validity of the said proviso. In any event, the constitutionality of the said provision is not in question before us nor we in this appeal are required to be into the said question.

16. Furthermore, the judgment of the High Court does not

satisfy the test of judicial review. It has not been found that the learned Trial Judge exceeded its jurisdiction in passing the order impugned before it. It has also not been found that any error of law has been committed by it.

The High Court did not deal with the contentions raised before it. It has not applied its mind on the jurisdictional issue. The impugned judgment, therefore, cannot be sustained, which is set aside accordingly.”

16. Taking into consideration the ratio, quoted above, the appellate court was right in rejecting the application filed by the petitioners.

17. For the aforestated reasons, no merit is found in the challenge raised in the present writ petition. The petition is, therefore, dismissed with no order as to costs.

18. Needless to mention that observations made in this judgment shall not influence the appellate court while deciding the appeal on merits.

**[NITIN B. SURYAWANSHI]
JUDGE**