

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 6436 OF 2021

Rekha Santosh Salunkhe .. Petitioner
Vs.
Dilip Ramanlal Kabra .. Respondent

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Mr. Vaibhav V. Ugle, for the Petitioner.

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CORAM : SMT. BHARATI DANGRE, J.
DATED : 07TH OCTOBER, 2021.

P.C:-

1. The Petitioner is aggrieved by the impugned order passed by third Joint Civil Judge Senior Division, Vadgaon Maval, Pune, below Exhibit 30 on 2nd September 2021. By the said order, the application filed by the defendant to amend his written statement is allowed and permission is granted to carry out the said amendment within a period of 14 days. This necessarily indicates that the amendment in the written statement is already carried out.

2. The suit is filed by the plaintiff, who is the petitioner before this Court seeking a declaration that Sale deed executed in favour of the defendant is illegal and the claim is also set out for permanent injunction. The written statement was filed by the defendant on 27th October 2015. An application for amendment of

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the written statement is moved on 18th March 2021.

3. When the said application is perused, it can be seen that the defendant seeks permission to bring on record certain documents which are relevant for effective adjudication of the dispute between the parties. It is specifically include documents including permission for non agriculture use, application for measurement of the suit property, mutation entries etc. and therefore, the amendment is sought for bringing them on record.

The application was opposed on the ground that at this stage it cannot be granted since the trial has already commenced. The bar created under Order VI Rule 17 of the Criminal Procedure Code was sought to be invoked and it was also argued that there is no evidence to show that there was due diligence on the part of the defendant to procure said document at an earlier point of time.

4. The learned Judge considered plethora of citations placed before him. He recorded that the suit is pending since last 5 years. The sequence of events is also recorded in the impugned order. It is also recorded that the directions were issued by the Hon'ble High Court to dispose of the suit within period of 12 months, by an order dated 6th March 2020. The evidence affidavit of the plaintiff was taken on record on 14th October 2019. But it is recorded that on account of the covid pandemic, the documents were not exhibited and there was no progress in the suit inspite of filing of affidavit of evidence in the year 2019. On this count recording that, when the defendant is seeking an amendment, on

merits, the documents which are sought to be placed on record do not change nature of the defence and in any case, even though the initial burden lies on the plaintiff, but onus can be shifted on defendant and to substantiate his defence, it is necessary that the documents are placed on record. The Proviso to order VI Rule 17 of C.P.C., has been said to be directory in nature and considering the fact that the trial has not yet commenced, as such it would not create any hindrance, if the written statement is allowed to be amended at this stage by allowing the application.

5. Learned Counsel for the applicant placed reliance on the decision of the Apex Court in the case of **Vidyabai and Ors. Vs. Padmalatha and Anr.** reported in 2008 SCC On Line SC 1865. The said decision specifically deal with the proviso to Order VI Rule 17 of the C.P.C. It has referred to the three Judge Bench decision in case of **Union of India and others V/s. Major General Madan Lal Yadav** reported in (1996) 4 SCC 12, wherein the term “trial” and “commence” are elaborated in the following words:-

“19. It would, therefore, be clear that trial means act of proving of judicial examined of determination of the issues including its own jurisdiction or authority in accordance with law or adjudging guilt or innocence of the accused including all steps necessary thereto. The trial commences with the performance of the first act or steps necessary or essential to proceed with the trial.

The High Court, as noticed hereinbefore, opined that filing of an affidavit itself would not mean that the trial has commenced.

10. Order XVIII, Rule 4(1) of the Code

reads as under:

“4. Recording of evidence (1) In every case, the examination-in-chief of a witness shall be on affidavit and copies thereof shall be supplied to the opposite party by the party who calls him for evidence:

Provided that where documents are filed and the parties rely upon the documents, the proof and admissibility of such documents which are filed along with affidavit shall be subject to the orders of the Court.”

6. True it is, that a trial begins in a civil suit when the issues are framed and the case is set down for recording of evidence. All the proceedings before that stage are treated as preliminary so as to equip the learned judge to make case ready for trial. As far as the facts of the present case are to be noted, though the evidence affidavit is filed on 14th October 2019, learned Judge has recorded that the trial did not progress at all. By allowing the written statement to be amended, even at this stage would not deprive the plaintiff of an opportunity to deal with the documents, since the defendant has not stepped into witness box. Even the plaintiff is not yet cross examined nor his witnesses have stepped in the dock.

In such circumstances, by relying upon proviso appended to Rule 17 Order VI, right of the defendant cannot be negated. Order VI Rule 17, permit amendment of the pleadings at any stage if amendment is necessary for the purpose of determining the real question in controversy between the parties and amendment shall be allowed by adopting the liberal approach, at any stage of proceedings. The proviso, however, carve an exception that after

the trial has commenced, no application for amendment shall be allowed, unless the Court comes to the conclusion that inspite of due diligence, the party was not in a position to bring the material, before the commencement of the trial.

7. Though affidavit of evidence was filed, since the entire nation was grappling with the covid pandemic, and a situation has arisen where under the direction of the Hon'ble Apex Court all the interim orders were frozen from 15th March 2020, a judicial note can be taken of that fact the trial Courts were not proceeding with the evidence, and the trial in the present case did not move an inch further. This is a paramount factor which went into the reasoning of the learned Judge when the impugned order was passed. I concur with the said view, specifically when the technicality in the procedure cannot elude justice to the parties.

Necessarily the impugned order is upheld and challenge in the writ petition fails. Writ Petition is dismissed.

[SMT. BHARATI DANGRE, J.]