

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

**WRIT PETITION NO.93 OF 2019
WITH
INTERIM APPLICATION NO.1153 OF 2021**

Philomena Neeff ...Petitioner
Versus
Feroze Electricwala (deceased)
through legal heirs
1(a) Anita Feroze Electricwala & Ors. ...Respondents

Mr. Sangram Chinnappa a/w. Mr. Kartikeya Bahadur, for the
Petitioner.

Mr. Sudhir V. Sadavarte, for Respondent Nos. 2 and 3.

Ms. Dipti Bhuta, for Respondent No.9(a).

**CORAM : MADHAV J. JAMDAR, J.
DATED : 9th DECEMBER 2022**

P.C. :

1. Heard Mr. Sangram Chinappa, learned counsel appearing
for the Petitioner-Plaintiff, Mr. Sadavarte, learned counsel
appearing for Respondent Nos. 2 & 3 and Ms. Dipti Bhuta,
learned counsel appearing for Respondent No.9(a).

2. The Petitioner who is the original Plaintiff by way of
present Writ Petition filed under Article 227 of the Constitution
of India has challenged the legality and validity of order dated
23rd August 2018 passed by the learned District Judge 5, Pune

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in Civil Revision Application No.11 of 2017. By order dated 27th February 2017 passed below Exhibit 212 in Civil Suit No.117 of 2005 by the learned Judge, Small Causes Court, Pune said application bearing Exhibit 212 preferred in Civil Suit No.117 of 2005 seeking to amend the written statement filed by Defendant Nos. 2 to 8 was rejected. By the impugned order, said order dated 27th February 2017 was set aside and amendment was allowed.

3. It is the contention of the Petitioner that the amendment application is made at the fag-end of the trial with *mala fide* intention to protract the litigation. It is further submitted that by amendment certain admissions given in the written statement are sought to be withdrawn.

4. Ms. Dipti Bhuta, learned counsel appearing for Respondent No.9(a), who is Plaintiff No.1(a) supported the Petitioner. She relied on the decision of the Supreme Court in **Vidyabai & Ors. vs. Padmalatha & Anr.**¹ and the decision of this Court in **M/s. K.T. Kubal & Company vs. Mujibur Rehman Haji Israr Alam Siddiqui**². It is her submission that unless

1 2009 (2) SCC 409

2 2015 ALL MR 700

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jurisdictional fact as provided in proviso to Order VI Rule 17 is satisfied, the Court will have no jurisdiction to deal with amendment application.

5. Mr. Sadavarte, learned counsel appearing for the Respondents submitted that as far as the amendment application is concerned, what is sought to be brought on record is decree which has been passed in Civil Suit No.104 of 2005 against another tenant and the fact that the Appeal which another tenant filed against eviction decree has been withdrawn on 30th June 2014. Therefore, he submitted that these are the subsequent events which have taken place after filing of the written statement as well as after trial has begun. As far as other amendments are concerned, he submitted that those are only in the nature of clarifying the factual position and no admission is sought to be withdrawn by the amended paragraphs.

6. Before considering the rival submissions, it is necessary to set out certain factual aspects:-

(i) The suit i.e. Regular Civil Suit No.117 of 2005 has been filed by the Petitioner and other co-owners against

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Respondent Nos.2 to 8 for eviction on the ground of *bonafide* requirement, creation of illegal subtenancy and permanent construction.

(ii) Written statement has been filed in the said suit on 29th July 2006 by the Defendant Nos. 2 to 8.

(iii) Issues were framed either on 29th August 2009 or prior to that and evidence affidavit has been filed on 29th August 2009 of PW 1-Mrs. Mary D'Lima.

7. It is settled legal position that the date on which the issues are framed is the date of first hearing and filing of an affidavit in lieu of examination-in-chief of the witness is commencement of proceedings. Proviso to Order VI Rule 17 clearly provides that no application for amendment is to be allowed after the trial has commenced, unless Court comes to the conclusion that inspite of due diligence, parties could not raise the matter before commencement of the trial. Filing of affidavit in lieu of examination-in-chief of the witness that is in this particular case, 29th August 2009 is the date on which the evidence has commenced i.e. trial has commenced. In **Vidyabai** (supra), it has been held that filing of affidavit of examination-

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in-chief of the witness is the commencement of trial.

8. This Court in **K. T. Kubal & Co.**(supra) held as follows:

“18. The statements of law that can be deduced from the above discussion is that in a civil case, **the trial commences with filing of affidavit in lieu of examination-in-chief of the first witness.** An application for amendment of pleadings filed prior to commencement of proceedings will have the jurisdictional fact of necessity to determine the real question of the controversy between the parties. **But if the application is filed after commencement of trial, there would be one more jurisdictional fact to be established, which is exercise of due diligence.** The applicant must establish that despite due diligence, he could not have raised the matter before commencement of trial. This would be the first jurisdictional fact for such application. Unless this jurisdictional fact is established, the court cannot move to the second jurisdictional fact of the necessity for the purpose of determining the real controversy between the parties.”

(Emphasis added)

9. If factual position in this case is examined on the touchstone of above settled legal position then, it is clear that issues are framed on or before 28th August 2009 and Evidence Affidavit in lieu of Examination-in-Chief of the first witness has been filed on 29th August 2009 and therefore, trial has commenced at least with effect from 29th August 2009. The amendment application seeking to amend written statement

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has been filed on 2nd November 2016. Perusal of the amendment application shows that in paragraphs 2 to 5, by amendment, contentions are sought to be raised regarding decree passed in another suit which has been filed against other tenant being Civil Suit No.104 of 2005. The said suit was decreed on 26th October 2012 and therefore, Civil Appeal No.213 of 2013 was filed by said other tenant challenging the same. It appears that the Appellant in said Civil Appeal No.213 of 2013 i.e. said other tenant withdrew the Appeal on 30th June 2014. Therefore, it is clear that contentions raised in paragraph Nos. 2 to 5 of the amendment application are concerning subsequent events which have taken place after filing of the written statement by these Respondents as well as after evidence has commenced and therefore, there is no impediment in allowing the amendment application as far as paragraphs 2 to 5 are concerned.

10. Paragraph 6 of the amendment is concerning the factual position regarding residence of Plaintiffs when the suit was filed and certain other aspects. It is clear that the said factual aspects were available to these Respondents when the original

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written statement was filed and they could have been incorporated in the original written statement which was filed on 29th July 2006. The contentions raised in paragraphs 7 to 9 are also within the knowledge of these Respondents when the original written statement was filed and in any case, the contentions raised in paragraphs 6 to 9 could have been raised in the original written statement.

11. There is substance in the contentions of Mr. Sadavarte that amendment in paragraphs 2 to 5 is required to be allowed as the same is concerning subsequent events and said factual position is required to be brought on record as the suit has been filed on the ground on bonafide requirement. However, as far as other amendments which are amendments in paragraphs 6 to 9 are concerned, nothing is brought on record to show that despite due diligence, the Respondent Nos. 2 to 8 could not have raised the contentions in those paragraphs before the commencement of trial. Thus, the Defendant Nos. 2 to 8 failed to aver and prove jurisdictional fact as contemplated by proviso to Order VI Rule 17 of CPC. Learned Advocate appearing for the Petitioner and Respondent No.9(a) are right in contending that

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unless the jurisdictional fact as envisaged by proviso under Order VI Rule 17 is established, the Court will have no jurisdiction to allow the amendment.

12. For the above reasons, I set aside the order dated 23rd August 2018 partly, by which *inter alia* said Exhibit 212 application filed in Civil Suit No.117 of 2005 is allowed in toto. However, amendments sought to be made as set out in paragraphs 2 to 5 in said Exhibit 212 application are allowed and other amendments are disallowed. Exhibit 212 application in Civil Suit No.117 of 2005 is accordingly allowed partly. Amendment to be carried out on or before 5th January 2023.

13. As the suit is of the year 2005 and parties are senior citizen, the learned Trial Court is requested to dispose of the said suit before 31st December 2023.

14. The Writ Petition is disposed of in above terms with no order as to costs.

15. As the Writ Petition is disposed of, nothing survives in the Interim Application No.1153 of 2021 and the same is disposed of accordingly.

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[MADHAV J. JAMDAR, J.]