

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

WRIT PETITION NO.2139 OF 2019

Raju Kesheorao Katkar

Vs.

Tejrao Dagduba Katkar

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

Court's or Judge's orders

Mr. Atharva Manohar, Advocate for petitioner.
Mr. N. B. Kalwaghe, Advocate for respondent.

CORAM : AVINASH G. GHAROTE, J.

DATE : 23/08/2022

1. Heard Mr. Atharva Manohar, learned counsel for the petitioner and Mr. Kalwaghe, learned counsel for the respondent.

2. The petition challenges the order dated 14.11.2018 whereby the application filed by the defendant seeking permission to examine witness in respect of certain transactions in respect of the suit property, which application came to be filed after closure of his side, has been rejected.

3. Mr. Manohar, learned counsel for the petitioner submits that the only reason given for rejection of the application is that the defendant has already examined sufficient number of witnesses on his behalf and the examination of further witnesses indicates

that the averments in the application for amendment of written statement which was rejected are sought to be proved by the examination of the witnesses. It is also held that the allowing of the amendment would cause delay in disposal of old matters. It is contended that the basic plea regarding the absence of right in the property is already contained in para 14 (page 22) of the written statement and though the amendment application has been rejected that should not prevent the defendant from bringing the correct position on record by examination of witnesses to prove the sale deed/s. It is merely an opportunity to bring the correct position on record which cannot be denied on the basis of delay, as the Court is expected to decide the matter on the correct factual position and if the same is not permitted to be done, the same would prejudice the trial of the suit.

4. Mr. Kalwaghe, learned counsel for the respondent opposes, by relying upon *K. K. Velusamy Vs. N. Palanisamy 2011 (11) SCC 275* and submits that consequent to the deletion of Order 18 Rule 17-A of CPC by the Amendment Act of 2002, such a course of action is permissible only in exceptional cases and the case of the petitioner does not fall under such exceptions.

5. A perusal of the written statement indicates that in para 14 (page 22), it has been specifically averred that Dagduba Maroti Katkar and others had no right

remaining in the land of Gut No.9, in spite of which they have dealt with the land of Gut No.9 which was clearly illegal. It is in order to demonstrate the correctness of this plea as already raised in written statement, the additional evidence is sought to be led. The deletion of Order 18 Rule 17-A does not *ipso facto* create an embargo upon the right of a party to lead additional evidence. **K. K. Velusamy** (supra) also enunciates this position and holds that the power to permit to lead additional evidence could also relate to Order 18 Rule 17 of CPC. However, such power cannot be used routinely and has to be used where the application is found to be *bona fide* and where the additional evidence, oral or documentary will assist the Court to clarify the evidence on the issues and will assist in rendering justice. That apart, it is trite position of law that the Court is enjoined to decide the lis on a correct factual position which would indicate discretion being vested in the Court to let in evidence to bring the correct factual position on record.

6. This being the position, considering that the plea regarding absence of right to deal with the land of Gut No.9 was already in existence in the written statement, it was permissible for the defendant to bring additional evidence to demonstrate the correctness of this position. Mere delay in filing of the application did not deter from the fact that the plea which is raised in

written statement is required to be proved by giving reasonable opportunity, in light of which, the impugned order cannot be sustained, the same is here by quashed and set aside and the application below Exh.65 is allowed.

7. Needless to say that the defendant / petitioner shall make all endeavour in leading additional evidence and in any case within a period of one month from 29.8.2022.

8. The parties shall place the copy of this order before the learned trial Court to apprise it of the same.

JUDGE

Sarkate