

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

WRIT PETITION NO.7003 OF 2019

Pralhad s/o Bhika Chavan,
Aged 63 years, Occ: Cultivator,
At Post Gondegaon, Tah. Manora,
District Washim. **PETITIONER**

...V E R S U S...

1. Smt. Shilpabai wd/o Prithviraj Chavan,
Aged 31 years, Occupation: Household.
2. Ku. Prapti d/o Prithviraj Chavan,
Aged about 9 years, Minor by Guardian
Mother Smt. Shilpabai wd/o Prithviraj
Chavan at Post Forest Pipri, Tah. Karanja,
District Washim. **RESPONDENTS**

Mr. B. N. Mohta, Advocate for Petitioner.
Mr. D. N. Mudgale, Advocate for Respondents.

CORAM: **ROHIT B. DEO, J.**
DATE: **14th JANUARY, 2022.**

ORAL JUDGMENT:

Heard Mr. B. N. Mohta, the learned counsel for the petitioner and Mr. D. N. Mudgale, the learned counsel for the respondents.

2. The petitioner is the plaintiff in Regular Civil Suit

14/2011 which is instituted against the respondents – defendants seeking a decree of declaration of ownership and possession qua certain agricultural fields situated in Mouza Gondegaon, Tahsil Manora, District Washim.

3. In brief, the substratum of the claim is that the plaintiff purchased the suit fields in the name of his son Prithviraj, then a minor. Prithviraj expired on 14.01.2011 leaving behind Will bequeathing the suit fields in favour of his father – the plaintiff. The plaintiff alleges that the defendants, who are the widow and daughter of his deceased son mutated their names in the revenue record, which mutation is assailed in appeal.

4. The plaintiff contends that the learned trial Judge held the plaintiff in possession and temporarily restrained the defendants from disturbing the possession and at a later stage the issues are framed on 11.08.2015 and on 01.03.2016 the plaintiff filed affidavit in lieu of oral examination-in-chief which was proved by the plaintiff who stepped into the witness box. The cross-examination was deferred at the request of the learned counsel for the defendants. The plaintiff contends that notwithstanding the commencement of the trial, the defendants

preferred an application under Order VI, Rule 17 of the Civil Procedure Code, 1908 (Code) on 24.04.2018 seeking permission to amend the counter claim. The plaintiff opposed the prayer seeking amendment in the counter claim, *inter alia* contending that the trial has commenced and the claim in any event is beyond limitation. The plaintiff contends, that the learned trial Judge allowed the application preferred under Order VI, Rule 17 of the Code on the erroneous assumption that the trial has not commenced. It is this order which is impugned in the petition.

5. While several prayers are incorporated in the petition, the principal prayer is seeking quashment of the order permitting the defendant to amend the counter claim and the other prayers are consequential in nature.

6. I heard the learned counsel for the petitioner Mr. Mohta and the learned counsel for the respondents Mr. Mudgale.

7. Mr. Mohta would reiterate the submission, which did not find favour with the learned trial Judge, that since the trial had commenced, it was necessary for the defendant to establish

that in spite of due diligence, the defendant could not have raised the matter before the commencement of trial. Mr. Mohta would submit that in the amendment application, there is not even an attempt made to establish that despite due diligence the amendment could not have been sought before the commencement of the trial. In rebuttal, Mr. Mudgale would argue that the trial had not commenced, and therefore, the learned trial Judge committed no error in permitting the defendants to amend the counter claim.

8. Perusal of the application (Exhibit-71) preferred by the defendants under Order VI, Rule 17 of the Code reveals that Mr. Mohta is right in submitting that the application is framed assuming that the trial is yet to commence, and therefore, there is no attempt made to establish that the amendment could not have been sought earlier. Application Exhibit-71 dated 24.04.2018 seeks to incorporate a plea that the defendants were dispossessed on 07.12.2013. The amendment further seeks the relief of possession and declaration that the will deed executed by the husband of defendant 1 is false and fabricated. The learned trial Judge has held that the trial has not commenced. It is this finding which is seriously assailed by the plaintiff, and it would therefore

be necessary to examine the correctness of the said finding.

9. It is not in dispute that the affidavit in lieu of examination-in-chief is filed by the plaintiff and is proved. In *Vidyabai and others v. Padmalatha and another* 2009(4) Mh.L.J. 30, the Hon'ble Apex Court took a resume of several decisions and held that the trial is deemed to commence on the filing of an affidavit in lieu of examination-in-chief of the witness. Paragraph 8 of the said decision reads thus:

8. From the order passed by the learned Trial Judge, it is evident that the respondents had not been able to fulfil the said pre-condition. The question, therefore, which arises for consideration is as to whether the trial had commenced or not. In our opinion, it did. The date on which the issues are framed is the date of first hearing. Provisions of the Code of Civil Procedure envisage taking of various steps at different stages of the proceeding. Filing of an affidavit in lieu of examination-in-chief of the witness, in our opinion, would amount to 'commencement of proceeding'.

10. The learned trial Judge has relied on the decision of the Hon'ble Supreme Court in *Baldev Singh and others v. Manohar Singh and another* (2006) 6 SCC 498. The learned trial Judge observes that after tendering the affidavit in lieu of examination-in-chief, the plaintiff has not entered into the witness

box to verify the contents of the affidavit on oath and that the defendant is yet to adduce evidence in support of the counter claim.

11. The observation of the learned trial Judge that after tendering the affidavit in lieu of oral examination-in-chief, the plaintiff did not enter the witness box to verify the contents of the affidavit, is factually incorrect and contrary to record. The plaintiff has placed on record the certified copy of the evidence adduced by the plaintiff on 07.11.2017, during the course of which not only the contents of the affidavit, the documents filed on record were duly proved and exhibited. The certified copy reveals that it was pursuant to request Exhibit-64 made by the counsel for the defendants that the cross-examination of the plaintiff was adjourned. In so far as the decision in *Baldev Singh and others v. Manohar Singh and another* is concerned, as noted by the learned Judge himself, the said decision is duly considered in *Vidyabai and others v. Padmalatha and another*.

12. Following *Vidyabai and others v. Padmalatha and another*; the Hon'ble Supreme Court observes thus in ***Mohinder Kumar Mehra v. Roop Rani Mehra and others (2018) 2 SCC 132***.

Paragraphs 17 and 18 read thus:

17. Although Order 6 Rule 17 permits amendment in the pleadings “at any stage of the proceedings”, but a limitation has been engrafted by means of proviso to the effect that no application for amendment shall be allowed after the trial is commenced. Reserving the court’s jurisdiction to order for permitting the party to amend pleading on being satisfied that in spite of due diligence the parties could not have raised the matter before the commencement of trial. In a suit when trial commences? Order 18 CPC deals with ‘hearing of the suit and examination of witnesses’. Issues are framed under Order 14. At the first hearing of the suit, the court after reading the plaint and written statement and after examination under Rule 1 of Order 14 is to frame issues. Order 15 deals with ‘disposal of the suit at the first hearing’, when it appears that the parties are not in issue of any question of law or a fact. After issues are framed and case is fixed for hearing and the party having right to begin is to produce his evidence, the trial of suit commences.

18. This Court in Vidyabai v. Padmalatha held that filing of an affidavit in lieu of examination-in-chief of the witnesses amounts to commencement of proceedings. In para 11 of the judgment, the following has been held: (SCC p.413)

“11. From the order passed by the learned trial Judge, it is evident that the respondents had not been able to fulfil the said precondition. The question, therefore, which arises for consideration is as to whether the trial had commenced or not. In our opinion, it did. The date on which the issues are framed is the date of first hearing. Provisions of the Code of Civil Procedure envisage taking of various steps at different stages of the proceeding. Filing of an affidavit in lieu of

examination-in-chief of the witness, in our opinion, would amount to “commencement of proceeding”.

13. I am of the considered view that the order of the learned trial Judge permitting the amendment of the counter claim after the commencement of the trial, is illegal and deserves to be quashed. The said order is accordingly quashed and set aside with all consequential reliefs.

14. The petition is allowed in the aforestated terms.

JUDGE

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