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IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.8984 OF 2022

Bhalchandra Ramdas Shimpi
Age – 63 years, Occ – Agriculture
R/o Near Well, At Post Anrad,
Taluka – Shahada,
District – Nandurbar

PETITIONER

VERSUS

1. Shaikh Mehboob Shaikh Shabbir Pinjari RESPONDENTS
Age – 55 years, Occ – Driver
2. Shaikh Sadik Shaikh Shabbir Pinjari
Age – 44 years, occ – Driver
3. Shaikh Sharif Shabbir Pinjari
Age – 35 years, Occ – Driver
4. Afshanbi Shaikh Shabbir Pinjari
Age – 71 years, Occ – Household

1 to 4 R/o Dondaicha,
Taluka – Shindkheda, District – Dhule
5. Anisa Chirag Pinjari
(Deceased through LRs)

5A) Chirag Hussain Pinjari
Age – 56 years, Occ – Labour,

5B) Imran Chirag Mansoor
Age – 28 years, Occ – Labour

5C) Jaabaz Chirag Mansoori
Age – 22 years, Occ – Labour

5D) Maleka Chirag Mansoori
Age – 24 years, Occ – Household
6. Jarinabi RazzakPinjari

Age – 46 years, Occ – Agriculture
5A to 5D and 6 R/o Near MadinaMashid
Udhana, Surat, Taluka – Surat
District – Surat (Gujrath)

7. Maherajabi Amjad Mansoori
Age – 38 years, Occ – Household
R/o Behind Awal Gazi Dargah,
Nandurbar, District – Nandurbar
8. Sattar Bhikkan Pinjari,
Age – 69 years, Occ – Household
R/o Behind Gaushiya Nagar Kabrastan,
Shahada, Taluka – Shahada,
District – Nandurbar
9. Afroz Bhikkan @ Afroz Habib Mansoor
Age – 55 years, Occ – Household
R/o Hussain Nagar
Narola Patiyaa, Narola
Ahmedabad City, Saijapur Boga
district – Ahmedabad (Gujrath)
10. Tairaj Bhikkan Pinjari
@ Tahera Yakub Pinjari
Age – 50 years, Occ – Household
R/o Meeranagar, Shahada
Taluka – Shahada, District – Nandurbar

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Mr. Amit S. Savale, Advocate for the petitioner
Mr. Ruchir S. Wani, Advocate for respondents No.1 and 8

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[CORAM : NITIN B. SURYAWANSHI, J.]

DATE : 21st JUNE, 2023

ORDER :

1. By this petition, filed under Article 227 of the Constitution of India, the petitioner challenges order dated 29th July, 2022 passed by learned Civil Judge, Senior Division, Shahada below

Exhibit-46 in Regular Civil Suit No. 72 of 2019, thereby rejecting the application filed by the petitioner – defendant, for amendment of the written statement.

2. The Suit is filed by the respondents – plaintiffs for declaration of ownership and possession. The suit is resisted by the defendants by filing written statement. By order dated 25th January, 2022 passed below Exhibit-38, the application filed by the plaintiffs for amendment of the plaint was allowed by the Trial Court. Pursuant to the amendment in the plaint, the petitioner defendant No.1 filed a *purshis* stating that he does not want to file additional written statement to the amended plaint. The plaintiffs, thereafter filed their evidence affidavit on 18th February, 2022 and the matter was posted for cross-examination by the defendant on 11th March, 2022. On 8th July, 2022, defendant No.1 filed application Exhibit-46 seeking amendment in the written statement. The said application is rejected by the Trial Court, by placing reliance on the proviso to Order VI, Rule 17 of the Civil Procedure Code. It is also held that registration of Mutation Entry No. 576 dated 11th November, 1986 was within the knowledge of defendant No.1, before the plaintiff filed his evidence affidavit. Hence, defendant No.1 is not diligent in moving the application. The petitioner is aggrieved by this order.

3. Heard learned advocate for the petitioner and the learned advocate for the respondents. Perused the memo of writ petition, documents annexed along with the same, the impugned order and the citation relied on by the learned advocate for the respondents.

4. Learned advocate for the petitioner submits that as there are relevant averments in the written statement in respect of the adverse possession, foundation for the proposed amendment is already laid. The proposed amendment is only by way of explanation of the averments made in the written statement and the Trial Court has erred in rejecting the said prayer. He submits that for lack of due diligence, the plaintiff can be adequately compensated. He, therefore, requested to quash and set aside the impugned order and allow application Exhibit-46.

5. Per contra, learned advocate for the respondents opposes the petition by relying on "***Ashok Kumar Kalra V/s Wing Cdr. Surendra Agnihotri and Others***" (2020) 2 SCC 394. He submits that as per the ratio in this judgment, counter claim can be filed till framing of issues and not thereafter. Hence, there is no merit in the writ petition and the writ petition is liable to be dismissed.

6. Admittedly, in the present case, the application Exhibit-46,

seeking amendment in the written statement is moved after the plaintiff has filed his evidence affidavit. Opportunity to file additional written statement, after plaintiff amended the plaint was not availed by the defendant. In "**Ashok Kumar Kalra**" (*supra*), question before the Apex Court was -

“6.1 (i) Whether Order 8 Rule 6-A CPC mandates an embargo on filing the counterclaim after filing the written statement?

6.2 (ii) If the answer to the aforesaid question is in negative, then what are the restrictions on filing the counterclaim after filing of the written statement?”

7. It is answered in the following terms-

“21 We sum up our findings, that Order 8 Rule 6-A CPC does not put an embargo on filing the counterclaim after filing the written statement, rather the restriction is only with respect to the accrual of the cause or action. Having said so, this does not give absolute right to the defendant to file the counterclaim with substantive delay, even if the limitation period prescribed has not elapsed. The court has to take into consideration the outer limit for filing the counterclaim, which is pegged till the issues are framed. The court in such cases have the discretion to entertain filing of the counterclaim, after taking into consideration and evaluating inclusive factors provided below which are only illustrative, though not not exhaustive :

(i)

(ii)

(iii)

....

(x) *In any case, not after framing of the issues”*

8. In the light of the above ratio, the Trial Court is right in rejecting the application filed by the petitioner. No case is made out by the petitioner to warrant interference in the impugned order, in extraordinary writ jurisdiction. Writ petition being devoid of merit, is dismissed.

[NITIN B. SURYAWANSHI]
JUDGE

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