



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

WRIT PETITION NO.1112/2024

Sonali w/o Nilesh Dhomne .Vs. Ashish Bhagwanj Kamble and Ors.

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

Court's or Judge's orders

Mr. Pritesh Bansod, Advocate for petitioner.

Mr. S. K. Mishra, Senior Advocate assisted by Mr. N. Nasare, Advocate
for respondent nos. 1 and 2.

CORAM : ANIL L. PANSARE, J.

DATE : 20.02.2024

Heard.

2. The petitioner – original defendant no.1 has assailed the order dated 23.01.2024 passed by 5th Jt. Civil Judge Senior Division, Nagpur, below Exhs.-328 and 329 in Special Civil Suit No.925/2023. By application Exh.-328, the petitioner sought to amend written statement under order VI Rule 17 of the Civil Procedure Code, 1908 (For short the, “Code”) and by application Exh.-329, she sought permission to file on record transcript of the audio call recording saved in a pen-drive.

3. Respondent nos. 1 and 2 – original plaintiffs have closed their evidence and the third witness of the defendant is/was in the witness box. Thereafter, these two applications came to be filed. As regards application under Order VI Rule 17 of the Code, the trial court noted that the defendants failed to show due diligence.

4. The case of the petitioner is that despite giving instructions to the earlier counsel, he has not incorporated in the pleadings the telephonic conversation dated 22.08.2013

between original plaintiff and the husband of petitioner-defendant no.1. The suit has been filed on 05.12.2013 i.e. subsequent to the aforesaid conversation. The conversation was recorded in mobile phone and was later on stored in the laptop. The trial court noted that subsequent counsel has been appointed in the year 2021. He has cross-examined the plaintiff and his witness. The defendant no.1 has then entered the witness box. The trial court observed that the petitioner-defendant no.1 and her husband ought to have disclosed the said fact to the subsequent advocate who was appointed in the year 2021. The expectation of the trial court is obvious, in the sense, had the conversation under question been so important, not only the petitioner would have instructed the earlier advocate of absence of pleadings in the written statement when she signed the written statement but she would have also disclosed the said fact to the subsequent advocate who has cross-examined the plaintiff and his witnesses. The case of the existence of the conversation was between plaintiff and husband of the petitioner is not put up to the plaintiff's witness. The applications have been filed at the fag end of trial. Accordingly, the trial court held, and rightly so, that mere allegation against the earlier counsel is not sufficient to establish due diligence on the part of the petitioner.

5. Mr. Mishra, learned Senior Counsel for the respondent nos.1 and 2 has rightly invited my attention to proviso to Order VI Rule 17 of the Code, which provides that no application for amendment shall be allowed after the trial has commenced unless the court comes to the conclusion that in spite of the due diligence, the party could not have raised the matter before the

commencement of the trial. The order passed by the trial court is in consonance with the said provision. I, therefore, do not find any illegality or perversity in the order rejecting the application Exh.-328.

6. So far as the application Exh.-329 is concerned, it relates to permitting the petitioner-defendant no.1 to rely upon transcript of audio recording saved in pen-drive. Once the order rejecting the request to amend the written statement is upheld, the defendant could not be permitted to lead evidence in absence of pleadings.

7. The learned counsel for the petitioner has relied upon Sub Rule (3) of Rule 1A of Order VIII of the Code to contend that the documents can be produced by the defendant with the leave of the court.

8. I do not find any merit in the submission. Learned Senior Counsel has rightly argued that in terms of Sub rule (1) of Rule 1A of Order VIII, the defendant has to incorporate in the list of documents all the documents, upon which the defendants have based their defence or upon which they intend to rely upon. Sub rule (3) provides that the document which ought to be produced in the court by defendant under Sub rule (1) of rule 1A of the Code, but is not so produced shall not, without leave of the court, be received in evidence on his behalf at the hearing of the suit. Thus, even these documents, though not produced, must find place in the list of documents annexed with the written statement.

9. In the present case, audio clip or its transcript has been neither pleaded nor is the document of transcript relied upon by the petitioner. She has not incorporated such a document in the list of documents. In the circumstance, once request for amendment in the written statement is declined and considering the scope of Rule 1A of Order VIII of the Code, it would be not permissible to the petitioner to rely upon such a document. The trial court has thus not committed any illegality in not permitting the petitioner to rely upon the said document.

10. I am, therefore, not inclined to interfere with the impugned order in the writ jurisdiction. The writ petition is, therefore, dismissed.

(Anil L. Pansare, J.)