



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

WRIT PETITION NO.5252/2023

Tawwakal Cooperative Housing Society Ltd. Nagpur and anr. .vs. Ludger C.P s/o
George Ambrose Monterio

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

Court's or Judge's orders

Mr. S. S. Joshi, Advocate for petitioners.
Mr. S. B. Mohta, Advocate for respondent.

CORAM : **ANIL L. PANSARE, J.**

DATE : **APRIL 3, 2025**

Heard.

2. The petitioners – original defendants have challenged order dated 04.01.2023 passed below Exh.-34, by Joint Civil Judge Junior Division, Nagpur in Regular Civil Suit No. 41/2019, permitting the respondent – plaintiff to amend the plaint. According to the petitioners, the amendment would permit material changes, that too subsequent to commencement of the trial.

3. Let me first take up the issue of commencement of trial because substantial time of argument was spent on this point. The counsel for respondent referred to judgment of the Coordinate Bench of this Court in *Anil s/o Ramsingh Bilawar and Ors. Vs. Anita w/o Gopal Kadam and another; [2022 (2) Mh.L.J. 345]*, which considered various authorities as also relevant provisions of the Civil Procedure Code, 1908 (for short the “CPC”) to take a view that the trial would commence from the date of filing affidavit in lieu of examination in chief of the witness(es).

4. As against, counsel for the petitioner submits that this order was challenged before the Supreme Court in Special Leave Petition (Civil) No.13691/2021 wherein the Court noticed divergence of judicial opinion on this point between the Bombay High Court and

the Calcutta High Court and accordingly on 13.09.2021 issued notice. Thus, according to him, the law on this point is not yet settled. To this, counsel for respondent submits that the Special Leave Petition has been dismissed on 03.02.2025.

5. It appears that the Supreme Court found no reason to interfere with the order passed by this Court. The aspect of divergent view appears to be not agitated before the Supreme Court. Nonetheless, the Supreme Court found no reason to interfere with the view taken by this Court and in a way certified that the trial shall commence on submitting affidavit in lieu of chief examination. One of the reasons why the Supreme Court must not have found reasons to interfere, could be that this Court has not only referred to the law laid down by the Supreme Court but also the view expressed by the Calcutta High Court.

6. Counsel for the petitioner has then invited my attention to yet another judgment of the Supreme Court in the case of *Ajendraprasadsaji N. Pandey and anr. .Vs. Swami Keshavprakeshdasji N. and Ors. [(2006) 12 SCC 1]*, wherein, by taking aid of its earlier decision in *Kailas .Vs. Nanku [(2005) 4 SCC 480]*, it held that the trial is deemed to commence when the issues are settled and the case is set out for recording of evidence. Counsel for the petitioner submits that once the issues are framed and the suit is adjourned for recording evidence, the trial shall be deemed to commence. He submits that if such an interpretation is not recognized and if the trial is deemed to commence from the date of filing of the affidavit in lieu of examination in chief of witness(es), the party may prolong the trial by seeking unnecessary adjournment after framing issues.

7. This argument is rightly dealt with by counsel for the respondents. He referred to judgment of Division Bench of this Court in the case of *Mahadeo s/o Maruti Bhanje .Vs. Balaji s/o Shivaji*

Pathade and anr. [2012 (7) ALL MR 564], wherein to substantiate the view that the trial would commence on the date of filing affidavit in lieu of examination in chief of a witness, the Court referred to the judgment of Single Judge of this Court in *Ajit Narsinha Talekar Vs. Smt. Nirmala Wamanrao Kakade and Ors. [2010 (5) Mh.L.J. 48]*, wherein the Single Judge noted that framing of issues is the first date of hearing but that does not mean that on framing of issues, the trial has commenced. The Court further observed that even if the issues are framed, suits often are adjourned several times because of the applications for adjournment made by either of the parties. Sometimes, the matter is not even called out because the Court remains busy in dealing with older matters which are on board. The Court, accordingly, held that though framing of issues is first date of hearing, the actual hearing commences only when the party files an affidavit of himself or his first witness in lieu of examination in chiefs, which is the commencement of the trial. This view has been approved by the Division Bench in *Mahadeo's* case (Supra).

8. Thus, the grounds put forth by counsel for the petitioner to argue that the trial shall be deemed to commence on the date of framing of issues is, in fact, the ground on which the Supreme Court held that the trial would commence when a party files an affidavit in lieu of examination in chief of its witness.

9. Counsel for the petitioner then invited my attention to the latter part of the judgment of *Vidyabai and Ors. .Vs. Padmalatha and anr; [2009 (1) ALL MR 471 (SC)]*, wherein the Supreme Court held thus.

“19. It is the primal duty of the court to decide as to whether such an amendment is necessary to decide the real dispute between the parties. Only if such a condition is fulfilled, the amendment is to be allowed. However, proviso appended to Order VI, Rule 17 of the Code restricts the power of the court. It puts an embargo on exercise of its jurisdiction. The court's jurisdiction, in a

case of this nature is limited. Thus, unless the jurisdictional fact, as envisaged therein, is found to be existing, the court will have no jurisdiction at all to allow the amendment of the plaint.”

10. This part of the judgment is cited to contend that once the trial has commenced, the Trial Court is precluded from permitting amendment in the pleadings unless due diligence is shown as required under proviso to Rule 17 of Order VI of the CPC.

11. This principle of law is well recognized. However, what has been held by the Supreme Court is the primal duty of the Court is to decide as to whether the amendment is necessary to decide the real dispute between the parties and only if such a condition is fulfilled, the amendment should be allowed.

12. Thus, what is essential is nature of amendment. There is no absolute bar that once the trial has commenced, the Trial Court is precluded from entertaining the application seeking amendment. The law is that the Trial Court should permit amendment even post trial, if it is necessary to decide real dispute,

13. In the present case, the respondent – original plaintiff filed application for amendment after framing issues but before tendering affidavit in lieu of examination in chief and, therefore, the application seeking amendment will have to be considered keeping in mind the aforesaid stage of the proceedings where none of the witnesses have been examined.

14. The first amendment relates to the status of defendant No.2 (petitioner No.2 herein). It appears that the petitioners had earlier filed Special Civil Suit No. 96/2002 in the court of Civil Judge Senior Division, Nagpur. Petitioner No.2 was referred to as Secretary, Pruthvi Gruha Nirman Sahakari Sanstha, Saoner. This status was accorded by virtue of amendment. It appears that the order permitting the amendment was challenged before this Court, which

was pleased to set aside the order granting amendment. Consequently, the status accorded to the petitioner No.2 as Secretary to the Society was set aside.

15. The respondents, on the basis of earlier suit, described petitioner No.2 herein as Secretary of the society. However, realizing the mistake, the respondent sought to correct name of the petitioner No.2 by deleting status of Secretary. In other words, the respondent intended to join petitioner No.2 in individual capacity. This amendment is allowed by the Trial Court on the ground that no prejudice will be caused to petitioner No.2 as he will get opportunity to file fresh written statement in the individual capacity.

16. The second amendment sought was in respect of area of the suit property. The Trial Court was of the view that the amendment would bring clarity in description of the suit property and will be thus necessary for proper adjudication of the controversy. What is sought to be added is declaration in respect of the agreement to sell dated 22.06.2001.

17. To my mind, to understand the necessity of amendment, quoting here few facts of the suit will be helpful. The respondent has sought declaration that petitioner No.1 has no right or title in the land admeasuring 0.40 Acre and to alienate or transfer the same to the third person including petitioner No.2, on the basis of agreements to sell dated 19.09.2000 and 22.06.2001.

18. I am informed that there were two agreements and accordingly these two dates were mentioned. Pleadings to that effect find place in the suit, more particularly, in paragraph 9 and 10.

19. However, it appears that at some place, the date '22.06.2001' is missing and accordingly the respondent sought to amend the 7th line from the top in paragraph 10 by incorporating the date '22.06.2001' after the date '19.09.2000' as also to have such

correction in the second prayer. The Trial Court found that this amendment will be necessary because it would bring complete clarity on the point of description of the suit property.

20. On the point of due diligence the Trial Court was of the view that though issues are framed, the Trial Court is yet to commence and since the proposed amendment will bring clarity in pleadings and will help to determine the real controversy on merit, it should be allowed.

21. I find this approach of the Trial Court to be in consonance with the material placed before it as also law on the point. The argument that such amendment will amount to material change is wholly misconceived inasmuch as the plaint, if read as a whole, one would find dates of both the agreements in the plaint as also in the first prayer. The date of agreement dated 22.06.2001 is missing, only in one line of paragraph 10 and in the second prayer. This mistake being inadvertent was sought to be corrected and having found it to be necessary, the Trial Court has used its discretion, which this Court should refrain from interfering with, considering the limited scope under Article 227 of the Constitution of India.

22. As such, the counsel for the petitioner submits that the material change will be as regards status of the petitioner No.2 who was earlier acting in the capacity as Secretary and will be now prosecuted in individual capacity. This change, according to the counsel is substantial and, therefore, should not have been allowed without finding due diligence.

23. I do not find any substance in this argument as well. It appears that the respondent, on the basis of earlier suit has added petitioner No.2 as Secretary of the society, however, having realized the mistake, he thought it necessary to correct the same in the present suit as well. The Trial Court rightly held that defendant No.2

will be entitled to file written statement in individual capacity and, therefore, his right to defend will not be precluded. The Trial Court then noted that the evidence has not yet commenced and, therefore, the amendment could be allowed for bringing clarity. In other words, the Trial Court permitted the amendment in order to avoid further litigation, which was possible if the designation of petitioner No.2 is/was not corrected. Thus, the amendment was found to be necessary.

24. That being so, since the Trial Court has exercised its discretion judiciously, I do not find this case to be fit for interference under supervisory jurisdiction under Article 227 of the Constitution of India. The petition is dismissed accordingly. No order as to costs.

(Anil L. Pansare, J.)

Kahale