

MHCO120000172011



IN THE COURT OF HON'BLE JUDGE CO-OPERATIVE
COURT NO.2 PUNE, AT. PUNE

Dispute No.96/2011

Shri. Kantilal Chandrakant Bankar & Others ----- Disputants

V/s.

Mahesh Gole & Others ----- Opponents

ORDER BELOW EXH.143

(Dictated and pronounced on 26/04/2024)

1] This is an application filed by the disputant for permission to file on record the amended plaint, signed and verified by the disputants along with supporting affidavit. On the grounds more specifically mentioned in the application, mainly on the ground that, the disputant had filed amended application in this dispute, which came to be allowed by this court. Accordingly, the disputant carried out the amendment and filed amended plaint at Exh-77, which is signed by the advocate of the disputant which was taken on record by this court on 01/02/2018. The opponent society has filed written statement to the amended plaint on 08/06/2018 at Exh-80. The opponent society has not raise any objection pertaining to any defect in the said amended plaint and now at the time of final argument opponent No.2 society has raised objection that, the amended plaint is not properly signed and verified hence, amendment cannot take effect.

2] The filing of amendment plaint is a procedural matter and it can be filed through authorized pleader but with abandoned precaution disputant is filing the amended plaint signed and verified by the disputant along with the affidavit.

3] This application is objected by the opponent No.2 society, on the grounds more specifically mentioned in its reply which is at Exh-145. Mainly on the ground that, during cross examination of disputant below Exh-87 on 27/06/2019, advocate for opponent specifically brought the said defect to notice of disputant as well as court. However, disputant failed and neglected to show due diligence and promptness to cure the said dispute. So also, disputant failed and neglected to cure said defect till 07/02/2024. It is pertinent to note that disputants advocate have started final argument on 17/01/2024 and completed their final argument on 18/01/2024. Thereafter advocate for this opponent started his final argument on 18/01/2024 and completed his final argument on 23/01/2024. The date for reply to final argument of opponent was fixed on 07/02/2024 and on that date disputant has filed application under reply.

4] The provisions of Order 6 Rule 17 of C.P.C. i.e. amendment of pleadings are applicable to present issue of non verification of plaint and non filing of supporting affidavit. The application under reply is not filed by any stretch of imagination under Order 6 Rule 17 of C.P.C. Hence, application under reply is liable to be rejected on this count only.

5] As per amended proviso of provisions of Order 6 Rule 17 of C.P.C. which states that, provided that no application for amendment shall be allowed after trial has commenced, unless the court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before commencement of trial.

6] The aforesaid proviso is couched in a mandatory form. The court's jurisdiction to allow such an application is taken away unless the conditions precedent therefore are satisfied, viz., court must come to a conclusion that in spite of due diligence the parties could not have raised the matter before the commencement of the trial.

7] Thus, entire burden of proof is on disputants to prove that in spite of due diligence the parties could not have raised the matter before the commencement of the trial.

8] The court's discretion to grant permission for a party to amend his pleading is curtailed after commencement of trial. If permission is granted it will cause injustice to this opponent without any fault attributable to opponent. Hence, to balance the interests of the parties in pursuit of doing justice, the proviso has been added which clearly states that, no application for amendment shall be allowed after the trial has commenced, unless the court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial.

9] Entire burden of proof is on disputants to prove that in spite of due diligence the parties could not have raised the matter before the commencement of the trial. Due diligence is the idea that reasonable investigation is necessary before certain kinds of relief are requested. Duly diligent efforts are a requirement for a party seeking to use the adjudicatory mechanism to attain an anticipated relief. An advocate representing someone must engage in due diligence to determine that the representations made are factually accurate and sufficient. The term 'Due diligence' is specifically used in the code so as to provide a test for determining whether to exercise the discretion in situations of requested amendment after the commencement of trial. Hence, party requesting a trial stemming out of a claim is required to exercise due diligence and is a requirement which cannot be dispensed with.

10] The filing of amended plaint is procedural matter and it can be filed through authorized pleader. Non signing of the amended plaint by the disputants cannot be ground to not to consider the amendment carried out in the plaint so also to non suit the disputants on the said ground at the stage of final argument. In any case, the copy signed by advocate and

filed on record of the amended plaint be and can be treated to have been signed and verified by disputants.

11] In the given facts, in para No.7 of the application the disputant states that, the disputant maintains that there is no defect in filing there is no defect in filing of amended plaint. In para No.8 disputants states that, in the circumstances, to avoid any bar of technicalities, the disputants are ready to file amended plaint duly signed by disputants, verified and supported by affidavit in the matter.

12] Thus, disputants have miserably failed and neglected to plead any reason that can be considered as in spite of due diligence the disputants could not have raised the matter before the commencement of the trial.

13] So also contentions of disputants in application under reply clearly show a clear lack of due diligence and the mistake committed certainly does not come within the preview of a procedural defect. The act of neglecting to perform an action which one has an obligation to do cannot be called as a procedural defect. As a consequence the plea of procedural defect cannot be entertained in this regard since the situation is of lack of due diligence wherein such amendment is impliedly barred under the code.

14] It is pertinent to note that in the application under reply disputant failed and neglected to plead any circumstances which can show that disputant in spite of due diligence, disputants could not have raised the matter before commencement of trial. On the contrary it is plea of disputants that non signing, non verification and non filing supporting affidavit is merely procedural defect and there is no defect in filing amended plaint. Therefore, application under reply is liable to be rejected.

15] Heard Ld. Adv. For the disputant and Ld. Adv. For opponent No.2 at length.

16] Ld. Adv. For the opponent No.2 relied upon the case laws as per pursis Exh-146. (i) Rohit Surfactants V. Kanodia Salt Company LAWS

(ALL) 2022 4 93. (ii) Vidyabai V. Padmalatha AIR (SC) 2009 1433. (iii) J. Samuel and Other V. Gattu Mahesh (2012) 2 SCC 300. (iv) Pandit Mahale V. Monika Mahale (2020) 11 SCC 549. (v) M. Revanna V. Anjanamma LAWS (SC) 2019 2 59. (vi) Regu Mahesh V. Rajendra Paratap LAWS (SC) 2003 10 93. (vii) R P Moidutty V. P T Kunj LAWS (SC) 1999 9 116.

17] Ld. Adv. For the disputant relied upon the case law reported in 2004 SCC Online Bom 818 and 1959 SCC Online Bom 152.

18] I have gone through the case laws relied upon by the Ld. Adv. For the disputant and opponent.

19] Ld. Adv. For the opponent No.2 has filed on record written arguments at Exh-147. I have gone through the written arguments.

20] In the case reported in LAWS (All) 2022 4 93. The question for consideration before there lordship was whether the amendment in the verification clause can be allow after commencement of trial there lordship held that, the defect in the verification clause being a clerical defect can be cured on the application moved by the plaintiff under Order 6 Rule 17 of the C.P.C.

21] In the case reported in LAWS (SC) 2008 12 15. The question for consideration before there lordship was whether pleadings can be directed to be amended after the hearing of the case begins.

In the case in hand the question of permission to amend is not involved.

22] In the case reported in LAWS (SC) 2012 1 27. The question of permission to amend the pleading after commencement of trial was involved.

In the case in hand disputant had not filed the amendment application.

23] In the case reported in LAWS (SC) 2020 1 111, LAWS (SC) 2019 2 59, LAWS (SC) 2003 10 93 The question of permission to amend the pleading after commencement of the trial was involved.

24] In the case reported in LAWS (SC) 1999 9 116. It was held that, in the election petition the defect in the verification if not cured then, the petition should not proceed on merit and in absence of material particulars of corrupt practices could not have been enquired into and tried at all.

With due respect to the ratio it is held that, this ratio is not helpful to the opponent as this dispute is not election petition and the strict provisions of Representation Of People Act, 1951 are not applicable to the proceeding under Sec.91 of the M. C. S. Act, 1960.

25] In the case of *Pushpalata Parshuram Borukar v. Madhavlal N. Pittie Esquire*, 2004 SCC OnLine Bom 818 : (2005) 3 Bom CR 458 : (2006) 1 AIR Kant R (NOC 158) 64 : 2005 AIHC 1084 at page 460 it is observed that,

7. It was also sought to be contended that the plea regarding defect in the verification goes to the root of the case and can be raised at any stage of the proceedings, and in that regard, reliance is sought to be placed in the decision of the Apex Court in *(The State of Rajasthan v. Rao Raja Kalyan Singh, by his legal representatives)*⁵, reported in (1972) 4 SCC 165 : A.I.R. 1971 S.C. 2018. In the said case before the Apex Court, plea which was sought to be raised was regarding non-maintainability of the suit on account of absence of right to claim the cess amount by the plaintiff District Board from the defendant Thikanedar and not in relation to any procedural defect, which could be allowed to be cured at the discretion of the Court. It is well settled that in case of any defect in the verification, if brought to the notice of the Court at the earliest stage, certainly the Court can take appropriate decision in that regard at that stage itself. However, mere defect in the pleadings cannot be a justification to non suit the plaintiff at the stage when not only the

proceedings before the trial Court have been concluded after recording of the evidence but the proceedings at the appellate stage have also been concluded.

26] In the case of *All India Reporter Ltd. v. Ramchandra Dhondo Datar*, 1959 SCC OnLine Bom 152 : (1960) 62 Bom LR 251 : AIR 1961 Bom 292 at page 255 It is observed that,

12. *The question is whether the provisions contained in O. VI relating to signing, verification and presentation of the plaint relate merely to procedure or whether a plaint which does not strictly comply with the requirements of O. VI would cease to be a valid plaint and would be a nullity because of such defects or irregularities. It is true that when a plaint is presented to the Court or to such officer as the Court appoints, it is open to the Court or to the officer to point out the defects or irregularities to the person presenting the suit and to require him to rectify the defects or irregularities. But can it be said that the defects or irregularities would make the presentation of the suit itself invalid although the plaint is admitted and particulars of the plaint are entered in a register of suits as provided by O. IV, r. 2? In this connection it is necessary to note that O. VII, r. 11, which refers to the rejection of a plaint, enumerates only four cases in which a plaint has to be rejected, but it does not enumerate any of the defects or irregularities referred to in O. VI, r. 14, O. VI, r. 15, or O. VI, r. 2. It is clear from the provisions contained in O. VI that these rules relate only to procedure, and the better view would be to regard them as mere matters of procedure and to hold that if a plaint is not properly signed or verified but is admitted and entered in the register of suits it does not cease to be a plaint and the suit cannot be said not to have been instituted merely because of the existence of some defects or irregularities in the matter of signing and verification of the plaint.*

27] The non singing of the amended plaint and verification and non filing the supporting affidavit to the amended plaint is a procedural irregularities and the substantive justice cannot be denied due to the unintentional curable procedural defects. Accordingly, I proceed to pass following order.

ORDER

- 1] Application Exh-143 is allowed.
- 2] The amended plaint signed and verified by the disputant filed along with this application and affidavit of amended plaint is taken on record.
- 3] In the light of this order if, opponent thinks it is necessary to file additional w.s., additional evidence or additional cross examination then, opponents may apply for permission, if such application is filed then, that will be decided on its own merits. This permission of filing application shall not be considered as itself sufficient ground for filing such application.
- 4] No order as to cost.

Date:26/04/2024
Place: Pune .

(A.S.Wanve)
Judge,
Co-operative Court No.2,Pune