

ORDER BELOW EXH.52

(Order passed on 28th day of September, 2018)

[01] This is an application filed by the defendant no.1 to carry out the amendment in his written statement Exh.48 dt.10.11.2017.

[02] Perused application and the say given by plaintiff. Heard both sides at considerable length. The suit is for specific performance of contract dt.24.07.2008. The suit claim was instituted in the year 2010. It is the case of the plaintiff that during existence of the contract with him the defendant no.1 on 08.12.2008 has executed the sale deed of suit property in favour of the defendant no.2. After institution of the suit despite of appearing before the court, defendant no.1 and 2 had not filed their written statements and hence the suit was proceeded without written statements against both defendants. Thereafter as per judgment and decree dt.17.06.2014 the suit claim instituted by the plaintiff was decreed. Thereafter the defendant no.2 the purchaser of the suit property had prepared R.C.A. No.610/2015 before the Hon'ble District Court Nagpur. Hon'ble District Court Nagpur as per judgment dt. 10.02.2017 by allowing the appeal has set aside the judgment and decree dt.17.06.2014. While allowing the appeal Hon'ble District Court remanded the matter with direction to permit the defendants for filing their written statements subject to costs of Rs.10,000/-. Thereafter, as per directions of the Hon'ble

Appellate Court the defendant no.2 deposited the costs amount and submitted her written statement at Exh.38.

[03] Present applicant i.e. defendant no.1, despite of the knowledge of the order of Hon'ble Appellate Court had not submitted his written statement within stipulated time and hence once again the suit was proceeded without written statement against defendant no.1. Thereafter vide application Exh.41 defendant no.1 once again requested the court for permitting him to submit his written statement on record. In view of the order of Hon'ble Appellate Court and for deciding the matter on merit vide order below Exh.41 the defendant no.1 was permitted to submit his written statement. Accordingly on 11/10/2017 the defendant no.1 submitted his written statement at Exh.48.

[04] Now by way of this amendment application it has been contended by the defendant no.1 that, while submitting his written statement Exh.48, he failed to mention certain material facts. It is submitted that said facts are about F.I.R. bearing no.122/2009 dt.28.05.2009 lodged at Pratap Nagar Police Station Nagpur by one Ravindra @ Aakash S/o. Aatmaram Chute against plaintiff, defendant no.1 and six others for the offences punishable under sections 365, 384, and 385 R/w. Sec.34 of the I.P.C. It is averred that by virtue of aforesaid F.I.R., charge sheet for aforesaid offences has been submitted before J.M.F.C. court no.9 Nagpur against plaintiff, defendant no.1 and six others. It is alleged that for taking revenge of aforesaid criminal litigation

the plaintiff has fabricated the document of agreement to sale. It is averred that the defendant no.1 wants to put forth the material regarding the crime bearing no.122/2009 in his pleading. According to the defendant no.1 the proposed amendment is necessary to show that the agreement to sale dt.24.07.2008 is fabricated one. Thus defendant no.1 prayed for allowing the amendment application.

[05] On the other hand plaintiff vide his say Exh.55 has strongly opposed the application by submitting that the application for amendment is not tenable under law as the trial is already commenced. It is averred that by way of proposed amendment the defendant no.1 is trying to put forth new story. It is averred that by way of proposed amendment the defendant no.1 is trying to put forth inconsistency story with F.I.R. No.122/2009. According to the plaintiff, defendant no.1 is one of the co-accused in aforesaid criminal matter and thus he was fully aware about said proceeding. However, since the date of institution of the suit i.e. since 2010 the defendant no.1 has not paid any heed to state all these facts before the court. The proposed amendment is not relevant and necessary for the proper and effective adjudication of the matter and is hit by the proviso to Order VI Rule 17 of the Code of Civil Procedure. Thus, plaintiff prayed for rejection of the application.

[06] Considering the rival contention raised by the both sides, following points arise for my determination to which I have recorded my findings for the reasons to follow.

Sr.No.	Points	Reasons
1	Whether the proposed amendment is necessary for determination of the real question in controversy and for effective adjudication of the case ?	In the Negative
2	Whether the proposed amendment is liable to be allowed ?	In the Negative
3	What Order ?	Application (Exh.52) is hereby rejected.

REASONS

As to point no.1 and 2 :-

[07] The Ld. Counsel for the defendant no.1 in support of his application has relied upon the case of *T. Raja Reddy Vs. C. Srinivasa Reddy and others of Hon'ble Madras High Court in Civil Revision Petition No.1324/2010*. On the other hand the counsel for plaintiff for opposing amendment has relied on the following authorities of Hon'ble Appex Court and Hon'ble Bombay High Courts.

[01] *Vidyabai and others Vs. Padmalatha and another, reported in 2009(4) Mh.L.J.30 of Hon'ble Supreme Court.*

[02] *Chhabubai Vs. S.H.Khatod and sons and another, reported in 2009(6) Mh.L.J.760 of Hon'ble Bombay High Court.*

[03] *Conception Fernandes and another Vs. Tasneem Shaikh and others, reported in 2014(5)Mh.L.J. 494 of Hon'ble Bombay High Court.*

- [04] *Prakash Ratanlal @ Ratansa Kasari Vs. Bhika S/o. Banda Dhage and another, reported in 2010(1) Mh.L.J. 810 of Hon'ble Bombay High Court.*
- [05] *N.C.Banerjee and company Vs. Manoj Balkrishna Shah and others, reported in 2011(6) Mh.L.J.55 of Hon'ble Bombay High Court.*
- [06] *Chakreshwari Construction Pvt. Ltd. Vs. Manohar Lal, reported in 2017(5) Mh.L.J.195 of Hon'ble Supreme Court.*

[08] I have thoroughly gone through the cited authorities relied on by the applicant defendant no.1 and non-applicant plaintiff. In the authority of Hon'ble Madras High Court relied on by applicant defendant no.1, it has been guided that belated amendment cannot be refused if it is found that for deciding the real controversy between the parties it can be allowed on payment of costs. In authority no.1 of Hon'ble Apex Court relied by plaintiff it has been observed that the proviso to Order VI Rule 17 of the Code of Civil Procedure is couched in a mandatory form. The courts jurisdiction to allow an application for amendment is taken away unless the condition precedent therefor satisfied viz. it 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. Only if such a condition is fulfilled, the amendment is to be allowed.

[09] Authority no.2 to 4 of Hon'ble Bombay High Court is on same point i.e. the proviso to Order VI Rule 17 of the Code of Civil Procedure. In authority no.3 it has been observed that the due diligence prescribed by the proviso is of parties and of nobody else including the advocate on

record. In authority no.5 of Hon'ble Bombay High Court it has been observed that the test for grant of amendment application is as to whether such an amendment is necessary for determination of the real question in controversy or for proper and effective adjudication of the case. In authority no.6 of Hon'ble Apex, it has been observed that parties are permitted to amend their pleadings at any stage not only during pendency of the trial but also at first and second appellate stage with leave of court provided amendment proposed is bona fied, relevant and necessary for deciding rights of parties involved in lis.

[10] Considering the submissions given by both parties and the valuable guidelines given in cited authorities relied on by applicant and non-applicant, if we see the material provision of Order VI Rule 17 of the Code of Civil Procedure, it has been observed 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.”

[11] In view of the proviso to Order VI Rule 17 of the Code of Civil Procedure the plaintiff by relying the guidelines given in authority no.1 to 4 of Hon'ble Apex Court and Hon'ble Bombay High Court argued that here in case at hand even though on two occasions no written statement order was passed against defendant no.1, however for deciding the matter on merit as per directions given by the Hon'ble Appellate court the opportunity for filing written statement Exh.48 was given to the

defendant no.1. It is argued that the defendant no.1 ought to have raised all his defenses stated in proposed amendment during written statement Exh.48 dt.10.11.2017. Here in case at hand it is the fact on record that the suit is old one of the year 2010, the trial is already commenced, no cross order was already passed against defendant no.1. Likewise vide order below Exh.50 dt.18.08.2018 the defendant no.1 was permitted to cross examine P.W.No.1 and 2. However insted of cross examining the witnesses the defendant no.1 has applied to carry out the aforesaid amendment.

[12] Moreover, here in case at hand there is nothing with defendant no.1 to show that since the date of institution of the suit, and till filing his written statement Exh.48, despite of due diligence he could not have raised the defense stated in the proposed amendment. Here in case at hand it is not the contention of defendant no.1 that he was not aware about the crime no.122/2009 dt.28.05.2009 because admittedly defendant no.1 is one of the co accused in the said crime. Thus, defendant no.1 failed to bring his case within the explanation given in the proviso to Order VI Rule 17 of the Code of Civil Procedure.

[13] Again, admittedly defendant no.1 is not the victim of crime no.122/2009, admittedly said crime is seen to have been registered on the basis of complaint lodged by one Ravindra Aatmaram Chute. Admittedly present defendant no.1 is one of the co accused in said crime. Likewise, even though it has been alleged that for taking revenge of crime

no.122/2009 the plaintiff has fabricated the agreement to sale dt.24.07.2008, however admittedly the alleged agreement is of July 2008 and the registration of the crime is subsequent i.e. of the year May 2009. From the face of record it goes to show that said crime has no concern with civil litigation pending between plaintiff and defendant no.1.

[14] As observed in the authority of Hon'ble Apex Court in case of *Chakreshwari Construction Pvt. Ltd. Vs. Manohar Lal* given supra, it is for defendant no.1 to show that the proposed amendment is bona fide, relevant and necessary for deciding the rights of parties involved in lis. However as discussed above there is nothing on record to show that the proposed amendment claimed by defendant no.1 has any relevancy with the agreement to sale dt.24.07.2008. Thus, the proposed amendment is not seen to be necessary to decide the real question in controversy between the parties. Thus, considering the discussion given supra I have no hesitation to hold that the amendment proposed by defendant no.1 is not liable to be allowed. Accordingly, I answer point no.1 and 2 in the negative and as to point no.3, pass the following order.

ORDER

[01] The application (Exh.52) is hereby rejected.

[02] Costs in cause.

Umrer.
Date : 28/09/2018

(S. K. Fokmare)
Civil Judge Senior Division, Umrer.

Certificate

"I affirm that the contents of this P.D.F. file order are word to word same as per original order".

Name of Stenographer : **Mr. Mahendranath D. Nagpure.**
Stenographer (Lr.Gr.)
Court Name : Civil Judge Senior Division, Umrer
Order dictated on : 28/09/2018
Transcription ready on : 28/09/2018
Order checked and signed on : 28/09/2018

/home/ubuntu/1-C.J.S.D./ORDERS/5-ORDER ON AMENDMENT APPLICATION./

DISTRICT COURT
NAGPUR