

**R.C.S.No. 19/2016**

Ganesh Raghunath Rege etc.3

Vs.

Shantaram Manohar Yadav etc.5

CNR:MHSI05-0000782016

**ORDER BELOW EXH. 40**

The present application is moved by the defendants for amendment in the written statement under Order VI Rule 17 of the Code of Civil Procedure, 1908 (in short 'C.P.C.')

2) It is the case of the defendants that, the plaintiffs have filed the present suit for declaration, permanent injunction and alternatively for recovery of possession in respect of the suit property. The suit is pending for hearing. The matter is scheduled for cross examination of the plaintiffs. The defendants have filed their written statement and denied the case of the plaintiffs. According to the defendants, some important and relevant contents not written in the written statement mistakenly. The subject of civil suit bearing R.C.S.No. 28/2014 is similar with the subject of the present suit. Also, some wrong words have been written in written statement mistakenly. The defendants want to file counter-claim in the present suit proceeding. Accordingly, the defendants want to amend written statement. The defendants have sought amendment in para No. 12 and 16 of the written statement. Also, defendants want to add para No.17A to 17F into written statement of after para No.17 as a counter-claim. The proposed amendment is of formal nature. It will not change the very nature of the written statement. It will not affect the merit of the case. The proposed amendment helps the Court to decide the matter on merit. The present application is not filed in order to delay the suit proceeding. Hence, they prayed to allow the application.

3) The plaintiffs have contested the application by filing their say at Exhibit 41. They contested the application on ground that contentions in the application are false and imaginary. The defendants have no objection with respect to proposed amendment sought in para No. 12 and 16 of the written statement. According to the defendants, proposed amendment sought in para No. 12 and 16 of the written statement is of technical nature. They strongly object to proposed amendment sought by the defendants in para No.17 of the written statement. According to the defendants, proposed amendment is not of formal nature. By way of amendment, the defendants are trying to wash out their admissions in written statement. By way of proposed amendment, the defendants want to add counter-claim into written statement. The said proposed amendment is hit by Law of Limitation. The defendants have to file counter-claim along with written statement. The defendants have already filed written statement. The plaintiffs have filed affidavit-in-lieu of examination on 14.02.2018. But, in order to delay the suit proceeding, the defendants have not taken cross-examination of the plaintiffs till now. There is delay of about one and half year. Hence, the application is not tenable in the eyes of law. Hence, they prayed to reject the application.

4) Heard learned advocate for the defendants Shri. S.K.Marathe and learned advocate for the plaintiffs Shri.S.N.Bhanage at length.

5) Following points arise for my determination and I have given my findings thereon with reasons are as under:-

**POINTS**

**FINDINGS**

1) Whether the proposed amendment is necessary for the purpose of determining the real question in controversy between the parties?

Yes.

2) What order?

The application is partly allowed.

### **REASONS**

#### **AS TO POINT NO. 1:-**

6) Perused the application and say. I have gone through the record and documents filed on it. Plaintiffs have filed present suit for seeking relief of declaration, permanent injunction and alternatively for recovery of possession in respect of the suit property. The subject matter of the suit is agricultural land bearing S.No.54/4 situated within limits of village Aarvali, Tal. Vengurla i.e. the suit property. The written statement filed by the defendants which is at Exhibit 17. The defendants want to add counter-claim in the suit proceeding by way of amendment. The defendants have sought the proposed amendment in para no.12, 16 and 17 of the written statement. Here, I want to quote provision under O.VI R.17 of C.P.C. which can be read as :-

#### **O.VI.R.17 of C.P.C.-Amendment of pleadings.**

“The court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real question in controversy between the parties.

Provided that, no application for amendment shall be allowed after the trial has commenced, unless the courts comes to the conclusion that, in spite of due diligence, the party could not have raised the matter before the commencement of trial. “

7) Perused the record. It reveals that issues framed at Exhibit 23 on 22.11.2017. The Plaintiffs have filed affidavit in-lieu of examination at Exhibit 26. The defendants have filed present application after the commencement of trial.

8) It is settled law that framing of issues is not commencement of trial. The trial commences when party filed an affidavit of examination in-chief on the record. In the case at hand, an affidavit of examination in-chief is filed at Exhibit 26. Hence, trial is commenced. In such circumstances, proviso to Order VI Rule 17 of C.P.C. is came into play. The term 'due diligence' is having important place in O.VI. R.17 itself.

9) The term "Due diligence" is discussed in the writ petition No.3555/2014 between Gangubai Baban Kadam and another Vs. Dr. Vidya Vijay Joshi(High Court of Judicature of Bombay,banch at Aurangabad, decided on 23/09/2014).Para no.23 of the said judgment is about due diligence. The said para is reproduced as under-

**Para 23.** Considering the reported judgments cited, this court in Jayashri's case(supra) has held in paragraph no.9 as follows:-

"In the judgment delivered in W.P.No. 722/2012 and connected matters on 25.09.2013, after taking into consideration the various decisions of the Apex Court and of this Court, the law on due diligence has been summarized in paragraph 87 as under:

**Para 87.** The law on "due diligence" developed till this date is summarized as under:

a) "Due diligence" means careful and persistent application and effort. It means the diligence as a prudent man would exercise in the conduct of his own affairs. Unless the party takes prompt steps, mere action cannot be accepted after the commencement of the trial. The due diligence determines the scope of party's constructive knowledge of the claim. It is a kind of reasonable investigation, which is necessary before claiming the relief.

b) The due diligence is distinct from ignorance. In spite of knowledge, ignorance by a party or an Advocate cannot be a matter of due diligence. The neglect to perform an action, which one has an obligation to do cannot be called as a mistake.

c) The degree of prejudice to the other side by an amendment after the commencement of the trial is greater than one at pre-trial stage.

d) Without recording finding on the question of due diligence, the court shall not get jurisdiction either to allow or disallow an amendment in the pleadings after the commencement of the trial.

e) The court while allowing an amendment must record a finding that in spite of due diligence, the party could not have raised the matter before the commencement of the trial or that the events sought to be brought on record by way of an amendment have occurred subsequent to the commencement of trial.

f) The facts and grounds in the application for amendment must be clearly stated to bring out a case that the delay caused was beyond the control and diligence of the party proposing amendment.

g) Where a party had acted with due diligence or not, would depend upon the facts and circumstances of the case and no hard and fast rule or strait-jacket formula can be laid down.”

10) During the argument the learned advocate for the plaintiffs, in support of his contentions relied upon following case

laws :-

**1. Damu Maruti Dadhe and another Vs. Limba Maruti Dadhe and another [2011(5) Mh.L.J.738].**

Held - Admission given in written statement cannot be allowed to be obliterated by said amendment.

**2. Kailash Anupam Khimsiya Vs. Shamji Enterprises and Others [2019 (2)Mh.L.J.]**

Held- On date of filing application for amendment, even filing of fresh suit was barred by limitation. Consequently, rejection of application seeking amendment in plaint, justified.

11. I have carefully gone through the case laws (*Supra*) put up by learned advocate for the plaintiffs on the record. The facts of the case at hand and cited cases are alike. Hence, the observations enunciated in the above said case laws will be helpful to the plaintiffs.

12. During the argument the learned advocate for the defendants, in support of his contentions relied upon following case law :-

**Ashok Kumar Kalra Vs. Wing CDR Surendra Agnihotri and Ors. [2019 LawSuit (SC) 1878]**

Held - It is not mandatory for a counter-claim to be filed along with the written statement. The Court, in it's discretion, may allow a counter-claim to be filed after the filing of the written statement. However, propriety requires that such discretion should ordinarily be exercised to allow the filing of a counter-claim till the framing of issues for trial. In exceptional circumstances, a counter-claim may be permitted to be filed after a written statement till the stage of commencement of recording of the evidence on behalf of the plaintiff.

13. I have carefully gone through the case law filed by advocate for the defendants. In the said case law, time limit criteria for filing counter-claim is discussed. In the case at hand, defendants want to add counter-claim in written statement by way of amendment. The defendants have filed amendment application under Order VI Rule 17 of the C.P.C. The said application came after the commencement of trial. Hence, the word 'due negligence' has significant importance. Hence, the case law cited by advocate for defendants is not helpful to defendants.

14. It is matter of record that, present suit is filed for seeking relief of declaration, permanent injunction and alternatively for recovery of possession in respect of the suit property. It is brought on the record that trial is already commenced. The present application is filed after the commencement of trial. Perusal of application reveals that the defendants have never made any compliance of the term 'due diligence'. The defendants nowhere in their application uttered the single word about 'due diligence'. The defendants have not fully satisfied the criteria of 'due diligence'. There is much delay in filing of the present application. Delay is not properly explained. The defendants want to add counter claim in para no. 17 of the written statement by their amendment. For filing the counter-claim time is the essence. The case law cited by learned advocate for the defendants is self explanatory. Hence, amendment sought by the defendants in para no.17 of the written statement is not just and necessary for the purpose of determining the real questions in the controversy between the parties and for clarifying the true facts. Therefore, amendment sought in para no. 17 of the written statement as prayed in the application is not required for final adjudication of the matter on merit. Proposed amendment in para no. 17 of the written statement will change the very nature of the written statement. If

application is allowed, it will cause greater prejudice to the plaintiffs. Similarly, the defendants sought the amendment in para no. 12 and 16 of the written statement. The proposed amendment in para no. 12 and 16 of the written statement is of formal nature. It will not change the very nature of the written statement. The plaintiffs also have gave no objection to the said proposed amendment. Therefore, I do not found any hurdle to allow the proposed amendment in para no. 12 and 16 of the written statement. Therefore, application deserves to be partly allowed. Hence, I answer the point no.1 accordingly.

**AS TO POINT NO.2:-**

15) In view of the findings given to point no. 1, in answer to point no.2 , I pass the following order.

**ORDER**

1. Application (Exh. 40) is hereby partly allowed.
2. Defendants are directed to do the necessary proposed amendment in the written statement within next 14 days and provide amended copy of the written statement to the plaintiffs and produce the same on the record.

Vengurla.

(K.K.Patil)

Date : 28/06/2022.

Civil Judge, Jr.Dn., Vengurla.