

MHST060007242015

Order below exhibit 47 in R.C.S. 192/15

1. This is an application made by the plaintiff for seeking the permission to amend the plaint.

Brief facts:

2. Plaintiff has filed the suit for partition. Issues were framed on 30/12/2019. Plaintiff filed an affidavit of examination in chief in lieu of oral evidence. Matter is posted for the cross examination. After that instead of being subject to the cross examination, the plaintiff chose to file this application for amendment as prayed in this application. According to the plaintiff, the proposed amendment is necessary as he realized after taking note of the objection raised by defendants in their written statement.

3. Defendant number 1 filed his objection below exhibit 48. According to him, this application is filed by the plaintiff at a belated stage. He averred in their say that this application is not maintainable on the ground trial has commenced.

Arguments

4. Learned advocate for the plaintiff argued that defendants

have taken objection in their written statement therefore the plaintiff has given this application. He argued that the proposed amendment is the objection raised by the defendants in their written statement. He argued that the proposed amendment does not change in the nature of the suit or its character will not be taken away. He argued that even issues are framed and the plaintiff has filed an affidavit of examination in chief, though this application can be allowed. For his submission he relied on the following judgments.

1. *Shri Rajaram Naik v/s The State of Goa & Others 2016(1) All MR 5*
2. *NTPC Ltd. V/s Reliance Industries Ltd. 2009 All MR 24*
3. *Bollepanda P. Poonacha & Anr. V/s K. M. Madapa 2008(6) All MR (NOC)-42.*
4. *Sucha Singh and others v/s chanan Singh and others AIR 1988 NOC 13 (PUNJ & HAR)*

5. On Contra Ld. Advocate for defendant no. 1 submitted that this application is filed afterthought. He contended that this application cannot be allowed because defendants had taken a defence in their written statement, so plaintiff cannot be permitted to fill up the lacuna in their plaint. He urged that application be rejected. He contended that already issues are framed and the plaintiff has filed an affidavit of examination chief, hence this application is liable to be rejected.

6. **Points for determination.**

Points	Findings
1. Whether this application	No

deserves to be allowed ?	
2. What Order ?	As per final order.

Reasons

As to Point No. 1

7. I have gone through the application and documents which are filed on record. Before commenting on the merit of the application it needs to see the provision for amendment of the pleading in civil suit , it has been laid down under order 6 rule 17 of CPC.

[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 questions in controversy between the parties :

Provided 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.]

8. In the year 2002 legislature introduced a proviso to rule 17 of CPC. The object behind an introduction of said proviso is only to prevent mala fide application at a belated stage that is after the commencement of trial.

Discussion on word “ Due diligence”

9. In said proviso a word “ Due diligence” has been used by the legislature. Thus, court needs to see after commencement of the

trial, whether party who is seeking amendment in the pleading were due diligent in their duty before commencement of the trial. A definition of 'diligence' has not been given in the C.P.C. According to Oxford dictionary the word 'diligence' means careful and persistent application or effort.

10. Hon'ble Supreme Court, in case of, **Chander kanta Bansal v/s Rajender Singh Anand AIR 2008 SC 2234**, has explained the words "due diligence" as under :

"11. -----, As discussed above, though first part of Rule 17 makes it clear that amendment of pleadings is permitted at any stage of proceeding, the proviso imposes certain restrictions. It makes it clear that after the commencement of trial, no application for amendment shall be allowed. However, if it is established that in spite of 'due diligence' the party could not have raised the matter before the commencement of trial depending on the circumstances, the court is free to order such applicaion. The words "due diligence" has not been defined in the code. According to Oxford Dictionary (Edition 2006), the word "diligence" means careful and persistent applicatin or effort. "Diligent" means careful and steady in application to one's work and duties, showing care and effort. As per Black's Law Dictionary (Eight Edition), "diligence" means a continual effort to accomplish something, care; caution; the attention and care required from a person in a given situation. "Due diligence" means the diligence reasonably expected form , and ordinarily exercised by , a person who seeks to satisfy a legal requirement or to discharge an obligation.

According to words and pharses by Drain- dyspnea (Permanent Edition 13 A) "due diligence", in law, means doing everything reasonable, not everything possible. "Due diligence" means reasonable diligence : it means such diligenece as a prudent man would exercise in the conduct of his own affairs. It is clear that unless the party takes prompt steps, mere action cannot be accepted and file a

petition after the commencement of trial.

11. Even Hon'ble Bombay High Court in recent judgment had an occasion to discuss similar fact which is placed before this court, in case of **Anil and Others V/s Anita and Others 2021 SCC online Bom 1593**, where discussed factors for consideration of 'due diligence'.

14. The issue of 'due diligence', cannot be encapsulated into a trait-jacketed formula, but has to be considered on a case to case basis. However some factors can definitely be considered, one side of the spectrum being:

- (a) Where the record indicates absence of knowledge regarding the proposed amendment which could not otherwise have been obtained by a prudent person.*
- (b) Where the information was within the knowledge of the other side, who in spite of a duty to disclose, deliberately, conceals the same, the other end of the spectrum being:*
- (c) Where the information was disclosed, but was not taken note of by an application within reasonable time. The above are some circumstances which would be pointers for application of the 'due diligence' position.*

12. If above referred judgments, in cases of Chander kanta Bansal; and Anil and Others delivered by Hon'ble Supreme Court and Hon'ble Bombay High Court respectively, taken into consideration, then it would reveal that the grant or refusal of a amendment does not depend on any singular factor but several factor needs to be taken into consideration and each having its own weightage.

13. In present fact as mentioned in earlier para of this order that matter was posted for the cross examination but Plaintiff instead of being subject to the cross examination chose to file this application.

Discussion on commencement of trial

14. If Roznama is perused then it would reveal that issues were framed on 30.12.2019. Plaintiff filed an affidavit of examination in chief and also proved its contents on 01/02/2020 by taking oath before the Court. Thus it is fact that plaintiff has filed affidavit of examination in chief and sworn before the court. It means trial has commenced.

15. There is judgment of Hon'ble Bombay High Court, which has discussed a question of commencement of trial in case of **Mahadeo Maruti Bhanje V/s Balaji shivaji Pathade 2012(7)All M R 546** in which it has been held that once affidavit of examination in chief is filed then it has to be said that a trial has commenced.

16. If a judgment of Hon'ble Bombay High Court in case of Mahadeo (cited supra) is perused then it reveals that the trial in a civil suit commence from the date of filing of affidavit in lue of examination in chief of witness and proviso to order VI Rule 17 of C.P.C. comes into play.

17. A case in hand already a affidavit of examination in chief has been filed by the plaintiff and he was also given an oath to prove its contents on 01.02.2020, therefore it has to be held that in present case already trial has commenced. Thus a yard-stick of 'due diligence' needs

to be applied and it is necessary to see whether plaintiff has exercised due diligence before commencement of trial.

18. For that purpose if the application is perused carefully then it reveals that plaintiff has mentioned that defendants no. 1 and 3 have taken objection in their written statement, hence he is compelled to seek proposed amendment in the pleading. Plaintiff has sought to add properties and parties in the present suit. Plaintiff has not stated any reason why he could not have raised the matter before the commencement of the trial. In other words it can be said that an application of the plaintiff is completely silent on point of 'due diligence'.

19. If sequences of action of Plaintiff is taken into consideration then it would reveal that what had happened before the commencement of trial. Defendants filed their say against the application of temporary injunction below exh. 17 on 21.10.2015, and a same say was adopted as a written statement by defendants No. 1 and 3 by filing Pursis at exh. 41. Thus it shows that plaintiff was well within knowledge about the objection since filing of the say of defendants at exh. 17 (from 21.10.2015) but plaintiff remained passive till the commencement of the trial.

20. Interesting to note that even plaintiff had also sought to amend the pleading of plaint prior to commencement of trial by filing application at exh. 27 and that application came to be allowed in the year 2016, but in that application proposed amendment was not sought. It means that plaintiff was well within a knowledge about the defence of defendants, but he did not take note of objection of defendants before

commencement of trial. Even defendants did not add or file additional written statements subsequent to the amendment in the plaint in the year 2016. It means defence of defendants has been same from the date of filing his say (exh. 17). But neither plaintiff was a diligent when the information was disclosed nor took a note of it by filing an amendment application before commencement of trial.

21. Even in earlier amendment which was also sought prior to commencement of trial plaintiff could have sought this proposed amendment but he failed to do so. Thus it shows mala fide conduct of plaintiff. In other words it can not be said that plaintiff's claim is bona fide in the present situation.

22. A observation of Hon'ble Bombay High Court rendered in case of Anil and others (cited supra) is squarely applicable to the present fact. A specially point mentioned in para 14(C) of the said judgment where it has been laid down as under.

(c) Where the information was disclosed, but was not taken note of by an application within reasonable time. The above are some circumstances which would be pointers for application of the 'due diligence' position.

23. A judgments which have been cited by the Ld. Advocate for the plaintiff are not helpful to the plaintiff because in case of Shri Rajaram naik and in case of N.T.P.S. Ltd.(cited supra) there were subsequent developments, hence, on account of subsequent developments, those amendment applications were allowed by the Hon'ble Bombay High Court. But in present case there is no such kind

of a fact of subsequent development after filing the suit.

24. But on contra, if properties, which are proposed to be added through amendment, seen through its documents filed below exh. 51 to 60 then it would reveal that a name of the plaintiff is reflecting in 7/12 extract of Gat no. 243, 263, 264 and in respect of Gat no. 786/1, a name of son of plaintiff is reflecting along with name of defendant no. 3. Thus this fact is sufficient to come to the conclusion that plaintiff concealed such information till the commencement of trial, thus it is a safe to say that plaintiff withheld information with him till the commencement of the trial. Hence in the present fact it is sufficient to arrive at the conclusion that plaintiff failed to show that he was "Due diligent" before the commencement of trial. In other words it can be said that plaintiff has failed to show that in spite of his "due diligence" he could not have raised proposed amendment before the commencement of trial.

25. Further a judgment of Hon'ble Supreme Court in case of Bollepanda (cited supra) Ld. Advocate of plaintiff is not much helpful to the plaintiff because in said judgment there was question of deciding amendment of Written Statement and in present fact it is question whether to permit amendment in plaint. It is settled principle of law that an amendment of pleading of the plaint and written statement stands on different footing. Thus an amendments in written Statement are required to be considered liberally than amendment in plaint. There is no dispute about the proposition laid down by Hon'ble Supreme Court in case of Bollepanda. In said judgment Hon'ble Supreme Court observed that amendment of written statement deserves more liberal

consideration than an application for amendment of plaint. And a present case is based on fact of proposed an amendment in the plaint hence said Judgment is not helpful to the plaintiff.

26. A judgment of Hon'ble Panjab and Haryana High Court in case of Sucha Singh and others (cited supra) by Ld. Advocate for plaintiff is not helpful to plaintiff because observation in such judgment is based on fact before introduction of proviso to rule 17 of order 6 of the C.P.C.

27. In view of above discussion, a present application is liable to be rejected. Accordingly I pass the following order.

ORDER

Application Exh. 47 is rejected.

Date: 11.10.2021
Dahiwadi

(R. R. Thorat)
Jt. Civil Judge Jr. Div, Dahiwadi.