REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 7251 OF 2008
[Arising out of SLP (Civil) No. 4740 of 2008]

Vidyabai & Ors. …Appellants

Versus

Padmalatha & Anr. . …Respondents

J U D G M E N T

S.B. SINHA, J :

1. Leave granted.

2. Whether pleadings can be directed to be amended after the hearing of a case begins is the question involved in this appeal which arises out of a judgment and order dated 24.10.2007 passed by the High Court of Karnataka at Bangalore in Writ Petition No. 14013 of 2007.

3. On or about 16.12.2003, the plaintiffs – appellants filed a suit for specific performance of an agreement of sale. According to the plaintiffs, one Prashant Sooji (since deceased) executed an agreement of sale on 15.01.2001 in respect of the suit property for a sum of Rs. 21 lakhs. Defendants – Respondents are the predecessors in interest of the said Prashant Sooji.

A written statement was filed on 17.04.2004. An application for amendment of the written statement was filed on 8.11.2006. In between the period 17.04.2004 and 8.11.2006, however, indisputably issues were framed and parties filed their respective affidavits by way of evidence. Dates had been fixed for cross-examination of the said witnesses.

On or about 8.11.2006, an application had been filed under Order VI Rule 17 of the Code of Civil Procedure (for short "the Code"), which was marked as IA 9 of 2006, seeking amendment to the written statement. On the same day, another application, which was marked as IA 10 of 2006, had also been filed purported to be under Order VIII Rule 1A of the Code for production of additional documents.

By reason of an order dated 18.07.2007, the learned Principal Civil Judge (Sr. Dn.) Hubli dismissed the said applications holding that an entirely new case is sought to be made out. The contention that they had no knowledge of the facts stated therein and the respondents could not gather the materials and information necessary for drafting proper written statement earlier was rejected, stating:

> "…However, this contention cannot be accepted. Because according to proposed amendment sought by defendants at para 3(a) will is dated 18.3.94. Therefore, naturally same would have been in the knowledge of defendants right from the date and moreover when they say that mother-in-law of defendant No. 1 is also necessary party and she is also got right and interest in the suit property and that she is alive, then through her defendants would have known about will right from beginning and hence it cannot be said that defendant No. 1 required time to gather information regarding will and further as details of will would have been within the knowledge of defendants and/ or could have been given by mother-in-law of defendant No. 1 i.e. Subhadrabai, then it was not necessary for defendant No. 1 to have any social activities or have knowledge of business to know about the will and hence proposed amendment regarding will cannot said to be not within the knowledge of defendants at the time of filing of written statement. Further regarding husband of defendant No. 1 being addicted to bad vices like womanizing, drinking etc again this would have been within the personal knowledge of defendant No. 1 as she is wife of

> deceased Prashant against whom whose allegations are made and this would have been in here knowledge right from the beginning and to have said knowledge again she need not have any knowledge of business or social activities and thus she also did not require any time to gather that the information which are well within her own knowledge…"

4. A writ petition was filed thereagainst. By reason of the impugned judgment, the High Court noticed the defence of the appellants in the following terms:

> "There is no retracting of statement made in written statement already filed by the defendants".

It, however, took into consideration the fact that the said IAs were filed after the affidavit of evidence had been filed by the plaintiffs – appellants. Despite noticing the proviso appended to Order VI, Rule 17 of the Code, it was held;

> "…According to Order 6 Rule 17, an amendment application can be filed at any stage of the proceeding. Filing of affidavit by way of evidence itself is not a good ground to reject the application filed seeking amendment of written statement. It is not out of place to mention that the parties must

> be allowed to plea. Such a valuable right cannot be curtailed in the absence of good ground."

I.A. 10 was also directed to be allowed.

5. Mr. S.K. Kulkarni, learned counsel appearing on behalf of the appellants, would submit that in view of the proviso appended to Order VI Rule 17 of the Code, the High Court committed a serious illegality in passing the impugned judgment.

6. Ms. Kiran Suri, learned counsel appearing on behalf of the respondents, on the other hand, would contend that the proviso appended to Order VI Rule 17 of the Code is not attracted in the instant case as by reason of the amendment to the written statement, no new case has been made out. It was submitted that 'leave' to amend the written statement was filed for the purpose of elaborating the defence which had already been taken by the defendants and in that view of the matter, this Court should not exercise its jurisdiction under Article 136 of the Constitution of India particularly when it is well-known that an application for amendment of written statement should be dealt with liberally.

7. By reason of the Civil Procedure Code (Amendment) Act, 2002 (Act 22 of 2002), the Parliament inter alia inserted a proviso to Order VI Rule 17 of the Code, which reads as under:

> "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."

It is couched in a mandatory form. The court's jurisdiction to allow such an application is taken away unless the conditions precedent therefor are 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.

8. From the order passed by the learned Trial Judge, it is evident that the respondents had not been able to fulfill the said pre-condition.

The question, therefore, which arises for consideration is as to whether the trial had commenced or not. In our opinion, it did. The date on which the issues are framed is the date of first hearing. Provisions of the

Code of Civil Procedure envisage taking of various steps at different stages of the proceeding. Filing of an affidavit in lieu of examination in chief of the witness, in our opinion, would amount to 'commencement of proceeding'.

9. Although in a different context, a Three-Judge Bench of this Court in Union of India and Others v. Major General Madan Lal Yadav (Retd.) [(1996) 4 SCC 127] took note of the dictionary meaning of the terms "trial" and "commence" to opine:

> 19. It would, therefore, be clear that trial means act of proving or judicial examination or determination of the issues including its own jurisdiction or authority in accordance with law or adjudging guilt or innocence of the accused including all steps necessary thereto. The trial commences with the performance of the first act or steps necessary or essential to proceed with the trial.

The High Court, as noticed hereinbefore, opined that filing of an affidavit itself would not mean that the trial has commenced.

10. Order XVIII, Rule 4(1) of the Code reads as under:

> "4. Recording of evidence
> (1) In every case, the examination-in-chief of a witness shall be on affidavit and copies thereof shall be supplied to the opposite party by the party who calls him for evidence:
> Provided that where documents are filed and the parties rely upon the documents, the proof and admissibility of such documents which are filed along with affidavit shall be subject to the orders of the Court."

11. This aspect of the matter has been considered by this Court in Ameer Trading Corpn. Ltd. v. Shapoorji Data Processing Ltd. [(2004) 1 SCC 702] in the following terms:

> "15. The examination of a witness would include evidence-in-chief, cross-examination or re-examination. Rule 4 of Order 18 speaks of examination-in-chief. The unamended rule provided for the manner in which "evidence" is to be taken. Such examination-in-chief of a witness in every case shall be on affidavit.
> 16. The aforementioned provision has been made to curtail the time taken by the court in examining a witness-in-chief. Sub-rule (2) of Rule 4 of Order 18 of the Code of Civil Procedure provides for cross-examination and re-examination of a witness which shall be taken by the court or the Commissioner appointed by it."

In Kailash v. Nanhku [(2005) 4 SCC 480], this Court held:

> "13. At this point the question arises: when does the trial of an election petition commence or what is the meaning to be assigned to the word "trial" in the context of an election petition? In a civil suit, the trial begins when issues are framed and the case is set down for recording of evidence. All the proceedings before that stage are treated as proceedings preliminary to trial or for making the case ready for trial. As held by this Court in several decided cases, this general rule is not applicable to the trial of election petitions as in the case of election petitions, all the proceedings commencing with the presentation of the election petition and up to the date of decision therein are included within the meaning of the word "trial"."

We may notice that in Ajendraprasadji N. Pandey and Another v. Swami Keshavprakeshdasji N. and Others [(2006) 12 SCC 1], this Court noticed the decision of this Court in Kailash (supra) to hold:

> "35. By Act 46 of 1999, there was a sweeping amendment by which Rules 17 and 18 were wholly omitted so that an amendment itself was not permissible, although sometimes effort was made to rely on Section 148 for extension of time for any purpose.
> 36. Ultimately, to strike a balance the legislature applied its mind and reintroduced Rule 17 by Act

> 22 of 2002 w.e.f. 1-7-2002. It had a provision permitting amendment in the first part which said that the court may at any stage permit amendment as described therein. But it also had a total bar introduced by a proviso which prevented any application for amendment to be allowed after the trial had commenced unless the court came to the conclusion that in spite of due diligence the party could not have raised the matter before the commencement of the trial. It is this proviso which falls for consideration."

This Court also noticed Salem Advocate Bar Assn. v. Union of India [(2005) 6 SCC 344] to hold:

> "41. We have carefully considered the submissions made by the respective Senior Counsel appearing for the respective parties. We have also carefully perused the pleadings, annexures, various orders passed by the courts below, the High Court and of this Court. In the counter-affidavit filed by Respondent 1, various dates of hearing with reference to the proceedings taken before the Court has been elaborately spelt out which in our opinion, would show that the appellant is precluded by the proviso to rule in question from seeking relief by asking for amendment of his pleadings.
> 42. It is to be noted that the provisions of Order 6 Rule 17 CPC have been substantially amended by the CPC (Amendment) Act, 2002.
> 43. Under the proviso no application for amendment shall be allowed after the trial has commenced, unless in spite of due diligence, the

> matter could not be raised before the commencement of trial. It is submitted, that after the trial of the case has commenced, no application of pleading shall be allowed unless the above requirement is satisfied. The amended Order 6 Rule 17 was due to the recommendation of the Law Commission since Order (sic Rule) 17, as it existed prior to the amendment, was invoked by parties interested in delaying the trial. That to shorten the litigation and speed up disposal of suits, amendment was made by the amending Act, 1999, deleting Rule 17 from the Code. This evoked much controversy/hesitation all over the country and also leading to boycott of courts and, therefore, by the Civil Procedure Code (Amendment) Act, 2002, provision has been restored by recognising the power of the court to grant amendment, however, with certain limitation which is contained in the new proviso added to the rule. The details furnished below will go to show as to how the facts of the present case show that the matters which are sought to be raised by way of amendment by the appellants were well within their knowledge on their court case, and manifests the absence of due diligence on the part of the appellants disentitling them to relief."

The ratio in Kailash (supra) was reiterated stating that the trial is deemed to commence when the issues are settled and the case is set down for recording of evidence.

12. Reliance, however, has been placed by Ms. Suri on Baldev Singh and Others v. Manohar Singh and Another [(2006) 6 SCC 498], wherein it was opined:

> "17. Before we part with this order, we may also notice that proviso to Order 6 Rule 17 CPC provides that amendment of pleadings shall not be allowed when the trial of the suit has already commenced. For this reason, we have examined the records and find that, in fact, the trial has not yet commenced. It appears from the records that the parties have yet to file their documentary evidence in the suit. From the record, it also appears that the suit was not on the verge of conclusion as found by the High Court and the trial court. That apart, commencement of trial as used in proviso to Order 6 Rule 17 in the Code of Civil Procedure must be understood in the limited sense as meaning the final hearing of the suit, examination of witnesses, filing of documents and addressing of arguments. As noted hereinbefore, parties are yet to file their documents, we do not find any reason to reject the application for amendment of the written statement in view of proviso to Order 6 Rule 17 CPC which confers wide power and unfettered discretion to the court to allow an amendment of the written statement at any stage of the proceedings.

It is not an authority for the proposition that the trial would not deemed to have commenced on the date of first hearing. In that case, as

noticed hereinbefore, the documents were yet to be filed and, therefore, it was held that the trial did not commence.

13. Reliance has also been placed by Ms. Suri on Pradeep Singhvi and Another v. Heero Dhankani and Others [(2004) 13 SCC 432]. Therein, the suit was filed in the year 1995 and, therefore, the proviso appended to Order VI, Rule 17 of the Code of Civil Procedure had no application.

Reliance has also been placed by Ms. Suri on Rajesh Kumar Aggarwal and Others v. K.K. Modi and Others [(2006) 4 SCC 385]. No doubt, as has been held by this Court therein that the court should allow amendments that would be necessary to determine the real question of the controversy between the parties but the same indisputably would be subject to the condition that no prejudice is caused to the other side.

14. 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.

15. In Salem Advocate Bar Assn (supra), this Court has upheld the validity of the said proviso. In any event, the constitutionality of the said provision is not in question before us nor we in this appeal are required to go into the said question.

16. Furthermore, the judgment of the High Court does not satisfy the test of judicial review. It has not been found that the learned Trial Judge exceeded its jurisdiction in passing the order impugned before it. It has also not been found that any error of law has been committed by it.

The High Court did not deal with the contentions raised before it. It has not applied its mind on the jurisdictional issue. The impugned judgment, therefore, cannot be sustained, which is set aside accordingly.

17. However, we may observe that the question as to whether the documents should have been called for or not by the court without there being the amended written statement before it may be considered afresh.

18. The appeal is allowed. However, in the facts and circumstances of the case, there shall be no order as to costs.

…….J.
[S.B. Sinha]

..……J.
[Cyriac Joseph]

New Delhi;
December 12, 2008