

IN THE HIGH COURT OF JUDICATURE OF BOMBAY,

BENCH AT AURANGABAD

WRIT PETITION NO. 9659 OF 2010

Mahadeo S/o Maruti Bhanje,
Age-50 years, Occu. Service,
R/o-Murud, Tq. & District-Latur

... PETITIONER
(Original Plaintiff)

VERSUS

1. Balaji S/o Shivaji Pathade
Age : 38 years, Occu. Business & Agri.
R/o Murud, Tq. & District-Latur.

2. Rajendra S/o Maruti Bhanje,
Age- 49 years, Occu-Business,
R/o Murud, Tq. & District-Latur

... RESPONDENTS
(Original Defendants)

.....
Shri A.P. Bhandari, Advocate for petitioner
Shri A.D. Shinde, Advocate for respondent No. 2
.....

CORAM : NARESH H. PATIL AND
U.D. SALVI, JJ.

DATED : 4th September, 2012

Date of Reserving Order : 24/7/2012
Date of Pronouncing Order : 4/9/2012.

ORDER : (Per U.D. Salvi, J.)

1. This Writ Petition has been referred to us to answer the following questions of law;

i] Whether the view taken by learned Single Judge of this Court in “ *Ajit Narsinha Talekar Vs. Smt.*

Nirmala Wamanrao Kakade and others” 2010 (5) Mah.L.J. 481, “ *Bhagwandas Kanhaiyyalal Bubna Vs. Shyamsundar Wasudeo Bubna and others*” (2010 (1) Bom.C.R. 218, and “ *Vinod s/o Khimji Lodaya and another V. The Chief Executive Officer and others* (Civil Revision Application No. 123/2009), is legal and proper and the trial in civil suit commences on the date of the framing of the issues or that it commences from the date of filing of affidavit in lieu of examination-in-chief?

ii] Whether proviso appended to Order-VI Rule-17 of the Code of Civil Procedure is attracted after framing of the issues or it will come into play only after stage of filing of affidavit/s in lieu of examination-in-chief of witness/ es?

2. Proviso to Order-VI Rule-17 of the Code of Civil Procedure, 1973 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 mandates that no application for amendment shall be allowed after commencement of trial, 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. When the trial in a civil Suit commences, whether on the date of framing of issues or on the date of filing of affidavit in lieu of examination-in-chief of witness/ es, is the question which needs to be answered in the present proceedings to answer the questions posed.

3. Learned Single Judge of this Court while examining the controversy arising out of rejection of amendment application moved by the petitioner/ plaintiff by learned Trial Judge on the ground that it was belatedly filed, more particularly after the settlement of issues, found himself not in agreement with the view taken by the coordinate benches of this Court in the cases referred to in question No. 1 above in light of the judicial precedents cited by the rival parties; and of necessity to rule out the differences of opinion between the benches has made the present reference vide order dated 6/1/2011.

4. A perusal of the order dated 6/1/2011 passed in the present petition reveals that the petitioner placed reliance on the following judgments :

i] *Ajit Narsinha Talekar Vs. Smt. Nirmala Wamanrao Kakade and others*" 2010 (5) Mah.L.J. 481,

ii] *Bhagwandas Kanhaiyyalal Bubna Vs. Shyamsundar Wasudeo Bubna and others*" (2010 (1) Bom.C.R. 218, and

iii] *Vinod s/o Khimji Lodaya and another V. The Chief Executive Officer and others* (Civil Revision Application No. 123/2009)

It is in this context, learned Single Judge brought under judicial scanner the following judgments delivered by the Hon'ble Apex Court :

i] *Vidyabai and others V. Padmalatha and another*; (2009 AIR SCW 899),

ii] *Kailash V. Nanhku and others*; (2005) 4 SCC 480

iii] *Ajendraprasadji N. Pande and another V. Swami Keshavprakeshdasji N. & others*; (2007 AIR SCW 513)

5. Learned Single judge reasoned that the stage of framing of the issues is after completion of the pleadings and the other procedural formalities including the amendment of pleadings; and the issues are framed in order to navigate the direction in which the trial shall proceed and the direction of the

trial is settled on the date on which the issues are finalized and framed. Learned Single Judge for a moment also reflected on the phenomenon of commencement of trial in a criminal case in an effort to draw analogy between framing of charge in a criminal case and framing of issues in civil case. Learned Single Judge was ultimately of the opinion that the position is made crystal clear in a case of Kailash V. Nanhku and others (supra), and the law laid down therein is not off set by the judgment delivered by Hon'ble Apex Court in a case of Vidyabai and others V. Padmalatha and another (supra).

6. Learned Advocate Mr. A.P. Bhandari for the petitioner submitted that the key to resolution of the controversy before this Court lies in understanding of the words "commencement of trial in a civil case. He invited our attention to para Nos.13 to 19 of the judgment delivered by the Hon'ble Apex Court in Madan Lal Yadav's case [Union of India & others Vs. Major general Madan Lal Yadav (Retd.) : AIR 1996 SC 1340 (Larger)], which laid bare the meaning of words 'commencement of trial' He submitted that the Hon'ble Apex Court gainfully borrowed this meaning of words "commencement of trial" in answering the identical issue in Vidyabai's case [Vidyabai & others Vs. Padmalatha & another : AIR 2009 SC 1433]. He pointed out therefrom that performance of the

first act or steps necessary or essential to proceed with the trial i.e. the act of proving or judicial examination or determination of the issues including its own jurisdiction or authority in accordance with law constitutes commencement of trial in a civil case. He further submitted that the Division Bench of the Hon'ble Apex Court had clearly opined that filing of an affidavit in lieu of examination-in-chief of the witness would amount to commencement of proceedings. In his view, the Hon'ble Apex Court made a passing reference to Kailas's case in para 11 of the judgment in Vidyabai's case in relation to the submission made by the counsel and this submission did not weigh with the Hon'ble Apex Court to conclude anything contrary to the opinion expressed regarding commencement of proceedings in the said case. Such a reference made in Kailas's case, he submitted, cannot be regarded as ratio decidendi in Vidyabai's case but as obiter dicta. According to learned Advocate for the petitioner, the learned Single Judge of this Court made error in holding a contrary view as regards a decisive opinion expressed in Vidyabai's case. As regards the observations made by the Hon'ble Apex Court in Kailas's case (supra), he submitted that the same cannot be regarded as a ratio decidendi more particularly for the reason that the Hon'ble Apex Court, while delivering the judgment in Kailas's case, was answering the issue of commencement of trial in election petition and not

commencement of trial in a civil case alike the issue in Vidyabai's case (supra). He submitted that the phenomenon of framing of issues did not involve exercise of its determination and, therefore, the act of framing of issues cannot be regarded as a trial in a civil case. Drawing of analogy between framing of charges in a criminal case and framing of issues in a civil case, in the opinion of the learned Advocate Mr. Bhandari for the petitioner, is an erroneous approach for resolution of the present controversy. According to him, finalising the direction of the trial or narrowing the controversy in a civil case by framing of issues is not a commencement of the trial. Learned Advocate for the petitioner, besides inviting our attention to the cases referred to in the first question posed by the learned Single Judge drew our attention to the view expressed by the Division Bench of the High Court of Delhi in the judgment delivered in F.A.O. (O.S.) No.59/2009 (Man Mohan Singh Vs. Veena Sehdev) on 16.2.2009. He further submitted that Section 153 of the Code of Civil Procedure, which is substantive provision of law governing the amendments in a suit, conferred discretion on the Court to permit amendments at any time to cure defect or error in any proceedings or the suit and further mandated all necessary amendments for the purpose of determining the real question or issue raised by or depending on such proceedings. He, thus, urged us to answer the questions in light of the submissions made

by him.

7. Mr. A.D. Shinde, learned Advocate for the respondent No.2 supported the view of the learned Single Judge expressed while referring the questions for our answers. He invited our attention to the view expressed by the Hon'ble Apex Court in para No.13 of the judgment in Kailas's case (supra). He submitted that the Hon'ble Apex Court, in no uncertain terms, had expressed that in a civil suit the trial begins when issues are framed and the case is set down for recording of evidence. He submitted that, this view was not unsettled in Vidyabai's case and, therefore, it would be wise to answer the questions accordingly. He invited our attention to the judgment deliserved by the Hon'ble Supreme Court in Ajendraprasadji's case [Ajendraprasadji N. Pande & anr. Vs. Swami Keshavprakashdasji N. & ors. : 2007 AIR (SC) 806].

8. In Ajendraprasadji N. Pande's Case (Supra), a Division Bench of the Hon'ble Apex Court after considering the object of the introduction of proviso to Order 6 Rule-17 of the Code by amending Act, 22 of 2002 as well as the observations made in Kailash's case (Supra), was of the opinion that there was lack of diligence on the part of the appellants/ defendants in moving the application for amendment of the pleadings after filing of an affidavit in

examination-in-chief and the appeal arising out of the rejection of the application for leave to amend the written statement deserves to be dismissed. It was in this context, the Hon'ble Apex Court while making reference to the submissions made therein observed thus :

“ It is submitted that the date of settlement of issues is the date of commencement of trial [Kailash V. Nankhu & Ors. (Supra)] Either treating the date of settlement of issues as date of commencement of trial or treating the filing of affidavit which is treated as examination in chief as date of commencement of trial, the matter will fall under proviso to order 6 Rule 17 CPC. The defendant has, therefore, to prove that in spite of due diligence, he could not have raised the matter before the commencement of trial. We have already referred to the dates and events very elaborately mentioned in the counter affidavit which proves lack of due diligence on the part of the defendant Nos. 1 & 2 (appellants).....

The above averment, in our opinion, does not satisfy the requirement of Order VI Rule 17 without giving the particulars which would satisfy the requirement of law that the matters now sought to be introduced by the amendment could not have been raised earlier in respect of due diligence. As held by this Court in Kailash

V. Nankhu & Ors. (Supra), the trial is deemed to commence when the issues are settled and the case is set down for recording of evidence.”

These observations, therefore, invite our attention to the pronouncement of the Hon'ble Apex Court in Kailash's case (Supra).

9. In Kailash's case (Supra), the Hon'ble Apex Court dealt with specific issue as to the commencement of “Trial of election petition”. The Hon'ble Apex Court took into consideration not only the provisions of the Civil Procedure but also the rules framed by the Allahabad High Court governing the trial of election petition along with the provisions of Representation of the People Act, 1951, namely Sections 86 and 87 of the said Act. It is in this context, the Hon'ble Apex Court made the following observations :

“ 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 the 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 elections petitions, all the proceedings commencing with the presentation of the election petition and upto the date of decision therein are included within the meaning of the word 'trial'".

It can very well be seen from these observations that they were made while answering the issue of commencement of trial in election petition. To understand full import of these observations it would be worthwhile to delve into the relevant provisions of law and read them in light of the observations made in Major General Madan Lal Yadav (Retd.)'s case (supra).

10. Order XIV Rule-1 of the Civil Procedure Code, which deals with framing of issues, reads as under :

“ 1. Framing of issues :-

(1) Issues arise when a material proposition of fact or law is affirmed by the one party and denied by the other.

(2) Material propositions are those propositions of law or fact which a plaintiff must allege in order to show a right to sue or a defendant must allege in order to constitute his defence.

(3) Each material proposition affirmed by one party and denied by the other shall form the subject of a distinct issue.

(4) Issues are of two kinds :

- (a) issues of fact,
- (b) issues of law.

(5) At the first hearing of the suit the Court shall, after reading the plaint and the written statements, if any, and [after examination under rule 2 of Order X and after hearing the parties or their pleaders], ascertain upon what material propositions of fact or of law the parties are at variance, and shall thereupon proceed to frame and record the issues on which the right decision of the case appears to depend.

(6) Nothing in this rule requires the Court to frame and record issues where the defendant at the first hearing of the suit makes no defence.”

Thus, it can be seen that when the issues are framed there is no engagement of judicial mind in the exercise of weighing the material before it in order to assess its worth. What is actually

done is to narrow down area of dispute and pin-point the points required to be determined by the Court. In the words of the learned Single Judge the issues are framed in order to navigate the direction in which the trial shall proceed so as to give clear idea to the parties regarding the burden of proof each one will have to bear and consequently about the right to begin with trial.

11. The Hon'ble Apex Court in Madanlal Yadav's case (Supra), enriched our understanding regarding the commencement of a trial in the following words.

“ 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 performance of the first act or steps necessary or essential to proceed with trial.”

Thus, the quest for answers to the questions-what is 'proved' or 'disproved' or 'not proved', constitutes the trial. A glance at Section 3 of the Indian Evidence Act, 1872 affords the meaning of terms 'proved', 'disproved', or 'not proved' as follows :-

“ “Proved”, A fact is said to be proved when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists.

“Disproved”, A fact is said to be disproved when, after considering the matters before it, the Court either believes that it does not exist, or considers its non-existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it does not exist.

“ Not Proved”, A fact is said not to be proved when it is neither proved nor disproved.”

A first act or step taken to prove, or disprove the facts in a suit, therefore, can be seen as the commencement of trial in a civil suit. Unmistakably, therefore, filing of an affidavit in lieu of examination in chief by the plaintiff can be regarded as first act or step taken by the plaintiff to prove his case, and consequently it can be regarded as commencement of a trial.

12. The Division Bench of the Hon'ble Apex Court in Vidyabai's case (Supra), while answering identical issue observed thus :-

“ 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”,

These observations are directly on the point in issue in the said case and offer reason for decision in the said case in clear terms. These observations, therefore, cannot be regarded as *obiter dicta*, but need to be seen as ratio decidendi. These observations, supports the view taken by us.

13. Drawing analogy between framing of charges in a criminal case and framing of issues in civil suit is anomalous in a sense that two involve essentially different exercise though both look alike in its purpose. If one goes through the relevant provisions of Criminal Procedure Code governing the framing of charges, it will not be difficult to perceive therefrom that a criminal

Court while framing charges has to judicially examine and weigh the material before it, viz. charge sheet and papers of investigation or evidence led before framing of charges, in order to ascertain whether there is ground for presuming that the accused had committed an offence. Thus, a criminal Court acts or takes steps to weigh the material before it in course of judicial examination for framing of charges. Thus, framing of the charges can be regarded as commencement of trial in a criminal case.

14. As regards Section 153 of the Code of Civil Procedure, 1908, it needs only to be observed that it being body of the Code it is to be read in more general terms in conjunction with the proviso to the Rule 17 of Order 6 of the Code framed to regulate the procedure, but in case of conflict between them the provisions in Section 153 of the Code must prevail.

15. In Ajit Narsinha Talekar's case (Supra), learned Single Bench of this Court with reference to the observations made by Hon'ble Apex Court in Vidyabai's case commented as follows :-

“ Relying upon a decision of the Supreme Court in Vidyabai V. Padmalatha, AIR 2009 SC 1433, counsel for the respondents submitted that the trial commence on issues being framed.

He invited my attention to paragraph 8 of the said decision which reads thus :

“ 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”

placing strong reliance on the sentence “the date on which the issues are framed is the date of first hearing”, counsel submitted that the moment the issues are framed the trial commences. In my view, this is misreading of the judgment. It is a settled principle of law that judgments of Courts are not to be read as a statute. A sentence in the judgment cannot be read in isolation. It must be read in the context in which it appears and cannot be read as a provision of a statute. The expression “ the date of first hearing” appearing in second sentence of the above quoted paragraph is to be read in the context of subsequent sentence which reads “ Filing of an affidavit in lieu of examination in chief of the witness, in our opinion, would amount to commencement of proceeding.” The Supreme Court has only said :

“framing of issues is the first date of hearing” but that does not mean that on framing of issues the trial has commences. Even after issues are framed, suits often are adjourned several times because of applications for adjournment made by either of the parties. Some times the matter is not even called out because the Court remains busy in dealing with older matters which are on board. Though the framing of issues is the first date of hearing, the actual hearing commences only when a party files an affidavit of himself or his first witness in lieu of examination in chief. That is commencement of the trial.”

No different view is taken by other single benches of this Court in Bhagwandas Bubna's case and Vinod s/o Khimji Lodaya's case (Supra).

16. In view of the aforesaid discussion, the view expressed by learned Single Judges of this Court in “*Ajit Narsinha Talekar Vs. Smt. Nirmala Wamanrao Kakade and others*” 2010 (5) Mah.L.J. 481, “ *Bhagwandas Kanhaiyyalal Bubna Vs. Shyamsundar Wasudeo Bubna and others*” (2010 (1) Bom.C.R. 218, and “ *Vinod s/o Khimji Lodaya and another V. The Chief Executive Officer and others* (Civil Revision Application No. 123/2009)”, needs to be endorsed as legal and proper. In our considered view, the trial in a

civil suit commences from the date of filing of affidavits in lieu of the examination in chief of the witness/ es and the proviso to order 6 Rule 17 of the Code of Civil Procedure, 1908 will come into play only after stage of filing of affidavits in lieu of examination in chief of witness/ es.

17. Reference is answered accordingly.

(U.D. SALVI, J.)

(NARESH H.PATIL, J.)

SDM* July/ August-2012