IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 1142 OF 2012

M/s. Shinde and Sons,
Engineers & Contractors,
Through its Partners

A. Sitaram s/o Budhaji Shinde,
Age: 51 Years,

B. Satish Budhaji Shinde,
Age 44 Years,
All Occu: Engineers & Contractors,

All R/o Opp. Bhairavnath Pata Sanstha,
Nagar Pune Road, Kedgaon Devi,
Tq. Dist. Ahmednagar. ...Petitioner

versus

1. Executive Director,
Maharashtra Krishna Valley Development
Corporation Pune.

2. Chief Engineer, Irrigation Department,
Sinchan Bhavan, Mangalwar Peth,
Pune.

3. Superintending Engineer,
Pune Sinchan Bhavan,
Baner Road, Pune.

4. Executive Engineer, Minor Irrigation
Dept. Ahmednagar.

5. Sub-Divisional Officer,
Sina Khairi Medium Project,
Sub-Divisional Kotul, Tq. Akole,
Dist. Ahmednagar. ...Respondents

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Mr. G. K. Naik Thigale, Advocate for petitioners
Mr. G. B. Rajale, Advocate for respondent Nos. 1 to 5

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CORAM : V. K. JADHAV, J.

Date of Reserving the Judgment : 21.09.2015

Date of pronouncing the Judgment : 23.10.2015

JUDGMENT :-

1. Rule. Rule returnable forthwith. By consent of parties, heard finally.

2. Being aggrieved by order dated 5.1.2012, below Exh.405 in Special Civil Suit 36 of 2008, passed by the learned Civil Judge, Senior Division, Ahmednagar, the petitioner-original plaintiff has filed the present writ petition.

Brief facts, giving rise to this writ petition, are as follow:-

3. The petitioner firm is the original plaintiff in Special Civil Suit No. 36 of 2008, instituted for grant of compensation, for declaration that the fraudulent action of imposing penalty, vide letter dated 8.10.2007 issued by the respondent-defendant, is null and void and also for injunction. The petitioner-plaintiff firm, being a successful bidder, was awarded a contract in the year 2004-2005 for construction of minor irrigation tank at Palsunde, Tq. Akole, District

Ahmednagar. Though the respondents-defendants issued work order on 26.10.2004, the drawing of work was not supplied to the petitioner-plaintiff alongwith the work order. Furthermore, joint measurement survey was also not carried out by the respondents-defendants. Consequently, the petitioner-plaintiff was unable to start work for the reasons beyond its control and it is alleged that it was only because of lapse on the part of respondents-defendants. It has also alleged in the plaint that labour and machinery was remained idle at the site and it was impossible to the petitioner-plaintiff to show progress in work. Furthermore, the villagers and representatives have also obstructed the project due to nonpayment of compensation to them. In addition to this, required sand of 25000 C.M. was not made available for the purpose of construction. It has also stated that the respondents-defendants though had handed over drawing in five copies to the petitioner-plaintiff in the year 2005-2006 itself, however, modified drawing of the work was not supplied in time. It is the contention of the petitioner-plaintiff that the respondents-defendants did not solve technical and administrative obstacles due to which it was impossible on the part of petitioner-plaintiff to carry out the work progressively. The delay was caused due to non co-operation by respondents-defendants. Consequently, the work could not complete during stipulated period of 24 calender months and it has got prolonged substantially. Meanwhile, petitioner-plaintiff had

carried out extra work and also demanded extra amount from the respondents-defendants. Furthermore, the petitioner-plaintiff had also demanded revised rate of amount for delay attributed to the respondents-defendants for the work carried out after scheduled period. The petitioner-plaintiff by issuing legal notice as per clause 30(1) of contract agreement on 12.10.2007 to respondent-defendant No.3 had placed his demand. The petitioner-plaintiff has sustained loss due to non performance of terms and conditions of contract agreement by respondents-defendants. It is the contention of petitioner-plaintiff that respondents-defendants have failed to discharge their obligations under the contract. However, respondents-defendants started making attempts to carry out measurement in absence of petitioner-plaintiff. Furthermore, the respondents-defendants fraudulently taken action against the petitioner-plaintiff by imposing penalty vide letter dated 18.12.2007 @ 1% per day during the period from 16.10.2006 to 17.4.2007 and Rs.5000/- per day illegally from 18.4.2007. The petitioner-plaintiff therefore, constrained to institute the suit for compensation, declaration with regard to imposing of penalty and decree of perpetual injunction in respect of action carrying out the measurement in absence of petitioner-plaintiff.

4. The respondents-defendants have strongly resisted the claim

of petitioner-plaintiff by filing a detail written statement. The respondents-defendants denied all allegations made by the petitioner-plaintiff. According to the respondents-defendants, the area, where the proposed tank was to be constructed, comes within tribal area and therefore, the Government as well as the respondents-defendants were to complete the said project within stipulated time limit. However, it is the petitioner-plaintiff, who could not complete the said work for this or that reason and is blaming the department for non completion of the said work. It has also contended that the defendants have given fullest co-operation by issuing letters to the concerned authorities. Furthermore, the farmers' agitations were minor in nature and it was set at right within 3/4 days. There is no fault on the part of respondents-defendants in delaying the work. It has been specifically averred that it is the petitioner-plaintiff, who had committed breach of conditions of the clause B-1 of tender agreement and is guilty for delaying the construction work. It is therefore, contended that the petitioner-plaintiff is not entitle for any compensation amount and the penalty was rightly imposed on the petitioner-plaintiff.

5. On the backdrop of these pleadings of the parties to the suit, the petitioner-plaintiff had also applied for issuance of order of temporary injunction, which was granted partially by order dated

27.3.2008, by the learned Judge of the trial court. The said order was challenged before this Court wherein the appeal was disposed of by directing the trial court to dispose of the suit expeditiously within certain period.

6. Thereafter, the respondents-defendants filed an application Exh.67 seeking permission of the Court for carrying out measurement of suit site. The learned Judge of the trial court, by order dated 30.4.2010, allowed the said application and respondents-defendants were permitted to carry out measurement with adequate notice to petitioner-plaintiff. It was also directed that respondents-defendants shall remove debris before measurement and also bear the cost of measurement. This order was further modified on the application Exh.75 whereby the Court Commissioner is directed to measure the material as stated in the application. The Court Commissioner is directed to do this work in addition to the previous commission.

7. Meanwhile, the petitioner-plaintiff adduced his oral and documentary evidence and vide pursis Exh. 377 dated 5.4.2011, closed his evidence. Thereafter, the respondents-defendants examined their witnesses by filing affidavit of evidence on 23.6.2001 at Exh.382. After closure of evidence of petitioner-plaintiff,

respondents-defendants had measured the suit site. According to the petitioner-plaintiff, respondents-defendants measured the suit site in gross disregard to the directions issued by learned Judge of Trial Court in the order passed below Exh. 67 and 75 respectively.

8. The respondents-defendants vide application Exh.388 on 18.8.2011, placed on record the documents indicating further action against petitioner-plaintiff. On noticing the same, the petitioner-plaintiff has filed an application at Exh.405 for amendment in the pleadings in view of subsequent developments of measurement of site and documents submitted alongwith application at Exh.388 by the respondents-defendants. The learned Judge of the trial court by impugned order dated 5.1.2012 rejected the said application at Exh.405. Hence, this writ petition.

9. Learned counsel for the petitioner submits that though the learned Judge of trial court has arrived at conclusion that the amendment is necessary for effective adjudication of the dispute, rejected the application on technical ground, such as, the proposed amendment would change the nature of suit etc. Learned counsel further submits that provisions of Order VI Rule 17 of C.P.C. are to be interpreted liberally to sub-serve the interest of justice. Learned counsel further submits that the proposed amendment, in no way,

transgress the realm of the suit, as the subsequent action impugned in the amendment application is arising out of the same contractual syllabi between the same parties and the petitioner-plaintiff is left with no other option than to raise challenge by filing amendment application or by institution of separate suit in accordance with law. Learned counsel further submits that during pendency of suit respondents-defendants have taken various coercive action as indicated in the list of documents and application at Exh.388 on 18.8.2011. Learned counsel further submits that respondents-defendants are not entitled to initiate action under clause 3 of the contract. Learned counsel further submits that by way of proposed amendment, petitioner-plaintiff is seeking declaration about impugned action under clause 3 of the contract as null and void and all consequential orders of forfeiture of security deposit, fine etc. be quashed and set aside, being illegal and contrary to the contractual covenants. Learned counsel submits that the aforesaid amendment is necessary for determining real question in controversy between the parties and since action is taken by respondents-defendants, the proposed amendment would not cause injustice or prejudice in any manner to the respondents-defendants. The learned counsel in support of his submissions, placed reliance on judgment of the Supreme Court in the case of ***Rajesh Kumar Aggarwal and others vs. K.K. Modi and others, reported in (2006) 4 SCC 385.***

10. On the other hand, learned counsel for the respondents-defendants submits that petitioner-plaintiff filed an application at Exh.405 at a very belated stage i.e. after commencement of trial. Learned counsel further submits that evidence of petitioner-plaintiff has been closed so also the evidence of respondents-defendants has almost been closed. Furthermore, this Court has directed the trial court to expedite the hearing of suit. Learned counsel further submits that proposed amendment would change the nature of entire suit, which ultimately cause serious prejudice to the respondents-defendants. Learned counsel further submits that the petitioner-plaintiff seeking to add reliefs and wants to fill up the lacuna in the pleadings. Learned counsel further submits that the learned Judge of trial court has rightly rejected the application Exh.405 and the writ petition is devoid of any merits and is liable to be dismissed with costs. Learned counsel for respondents-defendants in support of his submissions, placed reliance on the judgments of the Supreme Court in the cases of ***Revajeetu Builders and Developers vs. Narayanswamy and sons and others, reported in (2009) 10 SCC 84*** and ***J. Samuel and others vs. Gattu Mahesh and others, reported in 2012 (4) Mh.L.J. 40.***

11. On analysis of the cases relied upon by both the counsel, and

more particularly the case of **Revajeetu Builders & Developers** (supra), some basic considerations emerge for allowing or rejecting the application for amendment.

1] Whether the amendment sought is imperative for proper and effective adjudication of the case?

2] Whether the application for amendment is bonafide or mala fide?

3] Amendment should not cause such prejudice to the other side which cannot be compensated adequately in terms of money;

4] Refusing amendment would in fact lead to injustice or lead to multiple litigation;

5] Whether proposed amendment constitutionally or fundamentally changes the nature and character of the case? and

6] As a general rule, the court should decline the amendments if a fresh suit on the amended claims would be barred by limitation on the date of application.

12. It is well settled that, the Court must be liberal while granting prayer for amendment. It is always open to the Court to allow an amendment if the court is of the view that allowing of an amendment would really sub-serve ultimate cause of justice and avoid further litigation.

13. In the case of ***Rajesh Kumar Aggarwal and others vs. K.K. Modi and others (Supra),*** relied upon by the learned counsel for the petitioner-plaintiff, in para 16 to 19 of the judgment, the Apex Court has made following observations:-

"16. Order 6 Rule 17 consists of two parts. Whereas the first part is discretionary (may) and leaves it to the court to order amendment of pleading. The second part is imperative (shall) and enjoins the court to allow all amendments which are necessary for the purpose of determining the real question in controversy between the parties.

17. In our view, since the cause of action arose during the pendency of the suit, proposed amendment ought to have been granted because the basic structure of the suit has not changed and that there was merely change in the nature of relief claimed. We fail to understand if it is permissible for the appellants to file an independent suit, why the same relief which could be prayed for in the new suit cannot be permitted to be incorporated in the pending suit.

18. As discussed above, the real controversy test is the basic or cardinal test and it is the primary duty of the court to decide whether such an amendment is necessary to decide the real dispute between the parties. If it is, the amendment will be allowed; if it is not, the amendment will be refused. On the contrary, the learned Judges of the High Court without deciding whether such an amendment is necessary have expressed certain opinions and entered into a discussion on merits of the amendment. In cases like this, the court should also take notice of subsequent events in order to shorten the litigation, to preserve and safeguard the rights of both parties and to subserve the ends of justice. It is settled by a catena of decisions of this Court that the rule of amendment is essentially a rule of justice, equity and good conscience and the power of amendment should be exercised in the larger interest of doing full and complete justice to the parties before the court.

19. While considering whether an application for amendment should or should not be allowed, the court should not go into the

correctness or falsity of the case in the amendment. Likewise, it should not record a finding on the merits of the amendment and the merits of the amendment sought to be incorporated by way of amendment are not to be adjudged at the stage of allowing the prayer for amendment. This cardinal principle has not been followed by the High Court in the instant case."

14. In the case in hand, the petitioner-plaintiff instituted suit for compensation, declaration and injunction on various grounds and the prominent among them is that respondents-defendants did not solve technical and administrative obstacles due to which it was impossible on the part of petitioner-plaintiff to carry out the work progressively. It is also specifically pleaded that since the respondents-defendants were not performing their part of contract, the petitioner-plaintiff were constrained to issue notice as per provisions of Clause 30.1 of the contract agreement on 12.10.2007 to respondent-defendant No.3. The petitioner-plaintiff had placed his demand by letter dated 12.10.2007. However, respondent-defendant No.3 had not taken any action. It is further pleaded that petitioner-plaintiff had sustained loss due to non performance of terms and conditions of contract by respondent-defendant No.4. It is further pleaded that since respondents-defendants failed to discharge their obligations created by the contract, the petitioner-plaintiff is entitled to get compensation on account of breach of the contract.

15. The respondents-defendants have denied all allegations and obviously blamed the petitioner-plaintiff for delay in execution of work under agreement.

16. During pendency of suit and when the petitioner-plaintiff has closed his evidence, respondents-defendants have carried out measurement in terms of orders passed by the learned Judge of trial court below Exh.67 and 75 respectively. Furthermore, the respondents-defendants vide Exh.388 on 18.8.2011 placed on record the documents indicating further action against the petitioner-plaintiff. Whether the letter dated 31.1.2008 is served on the petitioner-plaintiff or not is a question of fact. However, it is clear that certain actions were initiated by respondents-defendants during pendency of suit and the same was brought to the notice of the Court by filing application Exh.388 on 18.8.2011.

17. In view of this, the trial court is required to take notice of subsequent events to preserve and safeguard the rights of both the parties and to sub-serve the ends of justice. The proposed amendment of plaint by adding new prayer is not in the manner, converting the suit in another different and inconsistent character. It appears that the subsequent action, during pendency of suit, impugned by way of proposed amendment is arising out of the same

contractual obligations between the same parties. It appears from the basic pleadings of the parties to the suit that they are blaming each others for performing the contractual obligations. Thus, the proposed amendment would not introduce totally different, new and inconsistent case. In my considered opinion, the proposed amendment would not cause any prejudice to the respondents-defendants in any manner. The proposed amendment is necessary for effective and complete adjudication of dispute between the parties. The respondent-defendants always at liberty to file additional written statement to the amended pleadings of the petitioner-plaintiff.

18. In view of the above observations, writ petition deserves to be allowed and the impugned order dated 05.01.2012, passed by the learned Judge deserves to be quashed and set aside. Hence, the following order:-

O R D E R

I. The writ petition is hereby allowed.

II. The impugned order dated 05.01.2012, passed by the learned Civil Judge, Senior Division, Ahmednagar, below Exh. 405 in Special Civil Suit No. 36 of 2008, is hereby quashed and set aside.

III. The application Exh.405 is hereby allowed.

IV. The petitioner-plaintiff shall carry out the necessary amendment within two weeks from the date of receipt of this judgment and order.

V. Rule is made absolute in the above terms. Writ petition is disposed of. In the circumstances, there shall be no order as to costs.

(V. K. JADHAV, J.)

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