

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 7029 OF 2015

RAJBAHADDUR JIYARAM YADAV
VERSUS
PRAKASH @ PAPPU JIYARAM YADAV AND OTHERS

...
Advocate for Petitioner : Shri Karpe Rahul R.
Advocate for Respondent 2 : Shri Badakh V.S.

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CORAM : RAVINDRA V. GHUGE, J.
Dated: July 29, 2015
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PER COURT :-

1. The petitioner is aggrieved by the order dated 5.5.2015, delivered by the trial Court, below Exhibit 89 in Special Civil Suit No.24 of 2011, which has resulted in the rejection of an application seeking amendment to the plaint under Order VI Rule 17 of the Code of Civil Procedure ("CPC").
2. The petitioner contends that Special Civil Suit No.24 of 2011 has been filed for seeking declaration, partition, separate possession and perpetual injunction. Respondent Nos.1 and 2 are the original defendants, who are real brothers of the petitioner / plaintiff. Respondent Nos.3 and 4 are the real sisters of the petitioner.
3. The father of the petitioner, who originally hails from Jaunpur, in Uttar Pradesh has migrated to Shrirampur in 1972, where he has started his business.

4. In the suit preferred by the petitioner, defendant Nos.3 and 6 have not caused an appearance despite service and hence the suit has proceeded ex parte against these two defendants by order dated 11.10.2011. Defendant No.1 did not prefer filing a Written Statement and hence the matter has proceeded without his Written Statement by order dated 8.11.2011. Shri Karpe, therefore, submits that defendant No.2 / respondent No.2 herein, is the contesting defendant.

5. It is undisputed that the petitioner has preferred application Exhibit 89 before the trial Court on 27.4.2015. The matter was in the midst of final arguments before the trial Court. The petitioner has indicated through the application such immovable properties which are situated at Jaunpur and which have been inadvertently left out from the suit. It was, therefore, prayed before the trial Court that the suit would suffer an irreparable damage for not including these properties, especially when the suit has been filed for partition and separate possession. It was, therefore, submitted that the amendment be permitted.

6. The petitioner assails the impugned order on the ground that the trial Court should have allowed the application keeping in view that the suit would virtually stand rejected if all the properties are not included. Shri Karpe, therefore, submits that notwithstanding the stage in the

matter, it would not have been too late to permit the plaintiff to include the properties so as to enable the trial Court to decide the suit in accordance with law. He submits that the rejection of Exhibit 89 has virtually rendered the plaintiff remediless.

7. Shri Badakh, learned Advocate appearing on behalf of the second respondent / original defendant No.2 has vehemently opposed this petition. He submits that this petition cannot be entertained unless the petitioner establishes perversity in the findings of the trial Court.

8. He has pointed out material aspects from the case, which are as follows:-

- (a) The suit preferred by the petitioner is based on the contention that ancestral properties are involved.
- (b) Defendant No.2 filed his written statement on 11.10.2011, clearly making out a case of non-inclusion of certain properties.
- (c) Certain documents were also placed on record and the petitioner was made aware of these objections through the written statement and the documents.
- (d) Issues had been cast long ago, whereby the petitioner got a clear idea that he has failed to include all the properties in the suit.
- (e) The petitioner was confronted on non-inclusion of

properties in his cross-examination.

(f) After the final arguments had commenced, by way of an after thought, the petitioner has moved Exhibit 89 in order to rescue his suit from being dismissed, apparently, on account of non-inclusion of all the properties.

(g) In response to application Exhibit 89, respondent No.2, has filed his detailed Say, dated 13.4.2015, highlighting the above factors and also indicating to the trial Court that some properties are self acquired properties of the second defendant.

(h) The petition is devoid of merits and should be dismissed.

9. Shri Badakh has relied upon two judgments, delivered by this Court in the matter of Dnyandeo Ramlal Patil Vs. Sanjeev Bhavlal Patil [2014 (6) Mh. L.J. 400] and Girish Bapusaheb Bhor Vs. Ambadas Chandrabhan Perne [2015 (1) Mh.L.J. 916].

10. I have considered the submissions of the learned Advocates, who have taken me through the petition paper book.

11. It is not in dispute that a suit for partition and separate possession, with regard to ancestral property involves all such blood relations, who could have a legal share in the property. It is also not in dispute that such a suit could be dismissed on account of non-inclusion of all the properties since the suit cannot be entertained for partial

partition. Issue as to whether some of the properties included in the suit are self acquired properties of any of the defendants or plaintiffs can be gone into by the trial Court.

12. I do find from this case that the petitioner was made aware of the non-inclusion of the properties through the Written Statement, where the objection has already been taken that the suit suffers from non-inclusion of all properties. This issue was made prominently known to the petitioner during his cross-examination. This has been admitted by the petitioner. Yet, an application for amendment was not filed with the promptitude that is normally expected from a diligent litigant.

13. The explanation offered by Shri Karpe is that these properties are situated in Uttar Pradesh. The petitioner was about two years' old when he came to Shrirampur owing to the migration of his father. Since then he has been staying in Maharashtra and he took time to collect the details of the ancestral properties situated in Jaunpur (U.P.). He further submits that he could not have filed an application for amendment on the basis of hear say information or inaccurate information. It is for these reasons that some time was consumed.

14. It is apparent that if the suit continues in the form in which it stands today before the trial Court, the same is most likely to result in the rejection of the suit only on the ground of non-inclusion of all the

properties. Keeping this aspect in view, notwithstanding that the proviso to Order VI Rule 17 of the CPC imposes certain restrictions, this case has to be looked at differently.

15. I have extensively considered the law on amendment in the judgment dated 25.11.2014, Sanjay Suganchand Kasliwal Vs. Jugalkishor Chaganlal Tapadia [2015 (3) Mh.L.J. 121], as follows:-

“33. In the 2010 Apex Court Judgment in case of Hindustan Construction Company (supra), paragraph Nos. 16 to 21 are of assistance and as such, I find it necessary to reproduce the said paragraphs herein below:-

“16. Pleadings and particulars are required to enable the court to decide true rights of the parties in trial. Amendment in the pleadings is a matter of procedure. Grant or refusal thereof is in the discretion of the court. But like any other discretion, such discretion has to be exercised consistent with settled legal principles. In Ganesh Trading Co. v. Moji Ram, this Court stated : (SCC p.93, para 2)

“2. Procedural law is intended to facilitate and not to obstruct the course of substantive justice. Provisions relating to pleading in civil cases are meant to give to each side intimation of the case of the other so that it may be met, to enable Courts to determine what is really at issue between parties, and to prevent deviations from the course

which litigation on particular causes of action must take."

17. *Insofar as Code of Civil Procedure, 1908 (for short 'CPC') is concerned, Order VI Rule 17 provides for amendment of pleadings. It says that 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.*

18. *The matters relating to amendment of pleadings have come up for consideration before courts from time to time. As far back as in 1884 in Clarapede & Company v. Commercial Union Association¹¹ - an appeal that came up before Court of Appeal, Brett M.R. stated :*

".....The rule of conduct of the court in such a case is that, however negligent or careless may have been the first omission, and, however late the proposed amendment, the amendment should be allowed if it can be made without injustice to the other side. There is no injustice if the other side can be compensated by costs; but, if the amendment will put them into such a position that they must be injured, it ought not to be made....."

19. *In Charan Das and Others v. Amir Khan and Others,*

Privy Council exposited the legal position that 11 Vol XXXII The Weekly Reporter 262 12 (1920) LR 47 IA 255 1 although power of a Court to amend the plaint in a suit should not as a rule be exercised where the effect is to take away from the defendant a legal right which has accrued to him by lapse of time, yet there are cases in which that consideration is outweighed by the special circumstances of the case.

20. A four-Judge Bench of this Court in L.J. Leach and Company Ltd., v. Jardine Skinner and Co. while dealing with the prayer for amendment of the plaint made before this Court whereby plaintiff sought to raise, in the alternative, a claim for damages for breach of contract for non-delivery of the goods relied upon the decision of Privy Council in *Charan Das & Others* 12; granted leave at that stage and held :

"16. It is no doubt true that courts would, as a rule, decline to allow amendments, if a fresh suit on the amended claim would be barred by limitation on the date of the application. But that is a factor to be taken into account in exercise of the discretion as to whether amendment should be ordered, and does not affect the power of the court to order it, if that is required in the interests of justice."

"36. The Apex Court in *Rajeshkumar Aggrawal* case (*supra*) has observed in paragraph Nos. 18 and 19 as follows:-

"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 sub serve 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.”*

“49. *In Revajeetu Builders & Developers' case (supra), the Apex*

Court, while dealing with the case of amendment has considered the law almost from 1884 onwards. Paragraph Nos. 27 to 47 read as under:-

“33. The general principle is that courts at any stage of the proceedings may allow either party to alter or amend the pleadings in such manner and on such terms as may be just and all those amendments must be allowed which are imperative for determining the real question in controversy between the parties. The basic principles of grant or refusal of amendment articulated almost 125 years ago are still considered to be correct statement of law and our courts have been following the basic principles laid down in those cases.

34. In the leading English case of Cropper v. Smith⁶, the object underlying amendment of pleadings has been laid down by Browne, L.J. in the following words:

"It is a well established principle that the object of the courts is to decide the rights of the parties and not punish them for mistakes they make in the conduct in their cases by deciding otherwise than in accordance with their rights ... I know of no kind of error or mistake which, if not fraudulent or intended to overreach, the court ought not to correct if it can be done without injustice to the other party. Courts do not exist for the sake of discipline but for the sake of deciding matters in controversy, and I do not regard such amendment as a matter of favour or grace ... it seems to me that as soon as it appears that the way in which a party has framed his case will not lead to a decision of

the real matter in controversy, it is as much a matter of right on his part to have it corrected if it can be done without injustice, as anything else in the case is a matter of right."

35. *In Tildersley v. Harper*⁷ which was decided by the English Court even earlier than the Cropper's case (*supra*), in an action against a lessee for setting aside a lease, in the statement of claim it was alleged that the power of attorney of donee had received specified sum as a bribe. In the statement of defence, each circumstance was denied but there was no general denial of a bribe having been 6 (1884) 29 Ch D 700 7 (1878) 10 Ch. D 393 given. A prayer for amendment of the defence statement was refused.

36. *The Court of Appeal held that the amendment ought to have been allowed. Bramwell, L.J. made the following pertinent observations:*

"I have had much to do in Chambers with applications for leave to amend, and I may perhaps be allowed to say that this humble branch of learning is very familiar to me. My practice has always been to give leave to amend unless I have been satisfied that the party applying was acting mala fide, or that, by his blunder he had done some injury to his opponent which could not be compensated for by costs or otherwise." (Emphasis added)

38. *The rule, however, is not a universal one and under certain circumstances, such an amendment may be allowed by the court notwithstanding the law of limitation. The fact that the claim is barred by law of limitation is but one of 8 (1880) 19 QBD 394: 56 LJ QB 621 the factors to be taken into account by the court in exercising the discretion as to whether the amendment should be allowed or refused, but it does not affect the power of the court if the amendment is required in the interests of justice.*

42. *In a concurring judgment ((1909) 33 Bom 644), Beaman, J. observed:*

"The practice is to allow all amendments, whether introducing fresh claims or not, so long as they do not put the other party at a disadvantage for which he cannot be compensated by costs."

His Lordship proceeded to state:

"In my opinion two simple tests, and two only, need to be applied, in order to ascertain whether a given case is within the principle. First, could the party asking to amend obtain the same quantity of relief without the amendment? If not, then it follows necessarily that the proposed amendment places the other party at a disadvantage, it allows his opponent to obtain more from him than he would have been able to obtain but for the amendment. Second, in those circumstances, can the party thus placed at a

disadvantage be compensated for it by costs? If not, then the amendment ought not, unless the case is so peculiar as to be taken out of the scope of the rule, to be allowed."

16. It is, therefore, to be considered as to whether the suit of the petitioner should be permitted to proceed under such legal defects or whether the said defects could be done away with before it is too late. As has been held by the Apex Court in the above referred judgments, appropriate costs could be imposed on the petitioner, to be awarded to the respondent so as to reduce the rigors of litigation and the hardships that are caused to the respondent.

17. Shri Badakh has placed reliance on the Dnyandeo's judgment (supra). In the said matter, the issue was with regard to a property, which was in the possession of the defendants and the petitioner could have amended his plaint only after gathering the knowledge which was acquired from the 7/12 extracts and subsequent events. However, this Court had noticed that the petitioner had a remedy available and could resort to the said remedy despite the rejection of his application for amendment. This Court, therefore, has observed in paragraph No.25 as under:-

"25. In the light of the above, no doubt, the petitioner, by the rejection of his application for amendment, will have to take recourse to law and avail of such a remedy as may be available

to him in law. There is a possibility that he would have to initiate a suit for redressal of his grievance. However, the ratio laid down by this Court in the cases of Dela and Shakuntala (supra) is based on altogether different set of facts. In the instant case, laxity, negligence and lack of due diligence on the part of the petitioner have, therefore, led to the passing of the impugned order, which I do not find to be perverse and unsustainable in law.”

18. Shri Badakh has further relied upon the judgment of this Court in the case of Girish (supra). This Court had considered the aspect that the proposed amendment was in the nature of setting forth argumentative issues. The prayers in tune with the same were already available as they were set out by the petitioner in its written statement. In that backdrop, this Court came to a conclusion that since the prayers are available, the amendment may not be strictly required. The observations of this Court are found in paragraph No.28, which reads as under:-

“28. In the light of the above, I find that this petition is devoid of merit. However, in the light of the prayers in paragraph 6-B of the written statement, an amendment may not be strictly required. As such, while disposing of this petition without causing interference in the impugned order, ends of justice could be met by observing that prayer clause 6-B can be pressed into service in so far as the reliefs that the petitioner is seeking from the Court.”

19. In the light of the same, I find that the ends of justice would be met by permitting the petitioner to amend the plaint so as to include all the properties which have been left out and which are situated in Uttar Pradesh. The second respondent is at liberty to file an Additional Written Statement, if felt necessary. Pursuant to the amendment, the trial Court would deal with the suit in accordance with law, since fresh notices will have to be issued to the defendants after the properties are included in the suit.

20. As such, this Writ Petition is partly allowed. The impugned order dated 5.5.2015 is quashed and set aside. Application Exhibit 89 stands allowed by imposing cost of Rs.25,000/- (Rs. Twenty Five Thousand only/-) on the petitioner which shall be deposited before the trial Court within a period of four weeks from today. Since respondent No.2 herein has caused an appearance and contested the petition and since the suit has proceeded ex parte against defendants 1 and 3 to 6, the costs will be withdrawn by the second defendant alone, who has contested the suit as well as this petition.

21. Needless to state, the trial Court will have to issue fresh notices after the amendment is carried out and which shall be carried out within a period of four weeks from today. Respondent No.2 as well as the other defendants would be at liberty to participate in the proceedings if they so desire and so also liberty to the second

respondent to file an Additional Written Statement.

(RAVINDRA V. GHUGE, J.)

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