

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
BENCH AT AURANGABAD**

WRIT PETITION NO.6759 OF 2014

Satish s/o Mahaveerprasad Mishra,
Age 51 years, Occu.Agriculture,
R/o Lakhmapur, Taluka Mahur,
District Nanded

.. Petitioner
(Original Plaintiff)

Versus

Sachin s/o Subhash Chadawar,
Age 34 years, Occu.Business,
R/o Rajendra Nagar, Nanded

.. Respondent
(Original Defendant)

Mr V.D.Gunale, Advocate for petitioner
Mr D.M.Shinde, Advocate for respondent

CORAM : N.W. SAMBRE, J.

DATE : 10th March 2015

PER COURT

1. Petitioner-plaintiff questions order dated 1st April 2014 passed below Exh.61 an application moved under Order XIX, Rule 5 of the Code of Civil Procedure for alteration and deletion of the issues.

2. Learned Court below by an order dated 1st April 2014 has allowed the application and has ordered that issue Nos.2, 6 and 7 be struck out and ordered alteration of issue No.3 which after alteration reads thus :

“ Does plaintiff prove that defendant issued cheque bearing No.217683 of Rs.50,00,000/- towards remaining consideration of the land ?”

3. The original issue Nos.2, 3, 6 and 7 read thus :

“2. Does plaintiff prove that he has sold the suit land to the defendant for the consideration of Rs.50,00,000/-?”

3. Does plaintiff prove that the defendant issued cheque bearing No.217683 towards consideration of the land ?

6. Does the defendant prove that he had issued cheque bearing No.217683 towards development agreement ?

7. Does defendant prove that there is material alteration in the disputed cheque bearing No.217683 ?”

4. Mr Gunale, learned Counsel for the petitioner-plaintiff would urge that the stage at which the powers are exercised, is not permissible to the trial Court and thus burden shifts on the defendant to prove qua to strike out issue Nos.2, 6 and 7 at the behest of defendant. In support of his contention, he has tried to rely upon the scheme of Order XIV of the Code of Civil Procedure.

5. While countering the above referred contentions, the learned Counsel for respondent-defendant would urge that what has prompted the defendant to move an application Exh.61, was the claim put forth by the petitioner-plaintiff in the plaint for an amount of Rs.50 lacs through cheque No.217683 issued towards consideration of the suit property of said amount.

6. Once the plaintiff has come out with a case that the cheque was passed on towards the consideration of property, it is for the plaintiff to establish the same. In view thereof, in my opinion, the learned trial Court was right in recasting the issue No.3 and deleting issue No.2, as the issue No.2 and the modified issue No.3 deal with the similar aspect of the matter, i.e. the claim put forth by the plaintiff as regards the issuance of cheque of Rs.50 lacs by the defendant bearing No.217683.

7. Learned Court below was alive of the fact as regards the stand taken by the defendant as regards the alleged development agreement and as such, cast burden on the defendant to prove the said issue by recasting original issue Nos.6 and 7, however, has proceeded to delete the same at the behest of the defendant. The said deletion though in law is permissible under Order XIV, Rule 5 of the Code of Civil Procedure, however, the stage at which the same is exercised, though is sought to be objected by learned Counsel for the petitioner, Code of Civil Procedure in express terms provides for exercise of such powers by the trial Court and in my opinion, was rightly exercised by the Court below. While passing the order in exercise of powers under Order XIV, Rule 5 of the Code of Civil Procedure learned trial Court has taken into account the pleadings of the parties.

8. Learned trial Court while passing order, has given cogent reasons, particularly after having analysing the pleadings of the parties.

9. In view thereof, no case is made out for interference. The petition being sans merits, stands rejected.

(N.W. SAMBRE, J.)

vvr