

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

WRIT PETITION NO. 1048 OF 2015

Narendra s/o Vishwanathrao Jadhav ... Petitioner

Versus

Chhallani Ginning & Pressing Factory,
Partur, Taluka Partur, District Jalna,
Through its partner ... Respondent

.....
Mr. N.K. Kakade, Advocate holding for
Mr. A.N. Kakade, Advocate for petitioner
Mr. P.F. Patni, Advocate for respondent

.....

CORAM : RAVINDRA V. GHUGE, J.

DATED : 9th MARCH, 2015

PER COURT :

1. I have heard the learned Advocates Shri N.K. Kakade, on behalf of the petitioner and Shri P.F. Patni, on behalf of the respondent, for quite some time.

2. The respondent plaintiff has preferred Special Civil Suit No. 201 of 2013 seeking specific performance of contract against the petitioner defendant. Written Statement was filed by the petitioner on 11-02-2014. Issues have been cast on 13-07-2014.

3. An application Exhibit 41 seeking amendment under Order VI Rule 17 read with Order I rule 10 was filed by the respondent plaintiff on 04-08-2014. The petitioner opposed the said application by filing a reply on 16-08-2014. By the impugned order dated 07-10-2014, application Exhibit 41 was allowed.

4. By the impugned order, the respondent is permitted to array an industry/ Company by name Yog Industries Ltd. as defendant No. 2. Paragraph 4 (A) is the proposed amendment.

5. Grievance of the petitioner is that the Trial has commenced and as such the amendment is prohibited by the proviso below Rule 17. The petitioner has relied upon the judgment of the Apex Court in the matter of *Vidyabai and Ors. V. Padmalatha and Anr.*, reported at AIR 2009 SC 1433.

6. The petitioner has also relied upon an unreported order of this Court dated 01-08-2013 passed in Writ petition No. 9553 of 2012 in the matter of *Durreshwqr Begum W/o Mubashir Hussain (Late) Vs. Abdul Tayyab s/o Mulla Mumtaz Hussaiun* (died legal heirs) and a reported judgment of this Court in the matter of *Gangubai Baban Kadam and another Vs. Dr. Vidyabai Vijay Joshi* reported 2015 (2) Mh.L.J. 444.

7. The contention of the petitioner therefore is that the stage for amendment has passed by, justifiable grounds are not set out in support of the proposed amendment and an unnecessary party is allowed to be added as defendant No. 2. The petitioner defendant No. 1 therefore, prays for quashing of the impugned order.

8. Shri Patni, learned Advocate for the respondent submits that the petitioner defendant No. 1 is the Managing Director of the newly added defendant No. 2 Yog Industries Limited. Though the suit for specific performance was filed by the respondent against the petitioner, the latter has revealed certain startling events in his written statement due to which the addition of defendant No. 2 and the proposed paragraph 4 (A) became imminently necessary for the proper adjudication of the suit. He therefore supports the impugned order.

9. Having considered the submissions of the learned Advocates, I have gone through the petition paper book and have considered the reports cited.

10. The suit is as regards specific performance of contract and involves payments of substantial amounts. In paragraph 3 of the written statement dated 11-02-2014, the petitioner has categorically averred as under :-

- a) The amount of Rs. 1.45 Crore has been paid by the plaintiff to the defendant as a business transaction of investment from one businesses house to another business house.
- b) An amount of Rs. 3.75 lakhs was paid by the plaintiff firm in favour of Yog Industries Limited, a corporate division headed by the defendant as its Managing Director.
- c) The earnest amount as is alleged in the plaint is paid in favour of Yog industries limited.
- d) Out of the total amount of Rs. 3.65 Crores an amount of Rs. 1.20 Crore is repaid to the plaintiff vide cheque No. 73221 by Yog Industries Limited, towards refund of advance given by the plaintiff.
- e) In the absence of Yog Industries being made a party defendant, this controversy shall remain un-adjudicated.

11. It is thus, apparent from the pleadings of the petitioner that a substantial amount of payment made by the plaintiff was purportedly made to Yog Industries Limited. The petitioner himself has contended in the written statement that unless Yog Industries was made party defendant, the controversy in the suit shall remain un-adjudicated. There are several other contentions indicating the involvement of Yog Industries in the transaction covered by the suit, according to the petitioner.

12. In so far as due diligence is concerned, the Apex Court in the case of *Vidyabai* (supra) has considered the back drop in which the proviso to Rule 17 was introduced. It was then concluded that the proviso would restrict the power of the Court to grant an amendment. It would create an embargo on the exercise of its jurisdiction and unless an amendment is not permissible in law and within the ambit of the proviso, same ought not to be granted.

13. In the *Gangubai Baban* case (supra), this Court has considered in paragraph Nos. 21, 25 and 28 that due diligence was not established by the petitioners. The petition was therefore, dismissed noting the facts of the case and observing that the party seeking an amendment is under an obligation to establish due diligence. In the *Gangaubai* case (supra), the concerned petitioner was unable to establish that the proposed defendants were either necessary or proper parties to the proceedings.

14. In the instant case, the petitioner himself has brought on record such salient aspects of the money transaction between the plaintiff and the defendant which would indicate that defendant

No. 2 was required to be added for deciding the controversy between the parties.

15. I, however, agree with the submissions of Shri Kakade to the extent that the impugned order has not dealt with all the contentions of the parties while allowing application Exhibit 41. Nevertheless, the Trial Court has recorded that the petitioner has brought out through its written statement the real transaction and as such, was convinced that Exhibit 41 deserved to be allowed.

16. The Hon'ble Supreme Court in the matter of *Rajesh Kumar Aggrawal & Ors. Vs. K.K. Modi and Ors.*, reported at 2006 (4) SCC 385 has laid down the law that the scope of order VI Rule 17 consists of a discretion to be exercised by the Court in passing an order of amendment. It also vests a jurisdiction in the Court to consider whether the amendment would assist in determining the real question in controversy. The object of the Rule is that the Courts should allow such amendments which would determine the real controversy and would not cause injustice to the other side.

17. The observations of the Apex Court in paragraph Nos. 15 to 20 read as under :-

15. This rule declares that the Court may, at any stage of the proceedings, allow either party to alter or amend his pleadings in such a manner and on such, terms as may be just. It also states that such amendments should be necessary for the purpose of determining the real question in controversy between the parties. The proviso enacts that no application for amendment should 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 for which amendment is sought before the commencement of the trial.

16. The object of the rule is that Courts should try the merits of the case that come before them and should, consequently, allow all amendments that may be necessary for determining the real question in controversy between the parties provided it does not cause injustice or prejudice to the other side.

17. Order VI 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.

18. 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.

19. 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 has expressed certain opinion 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 rights of both parties and to sub-serve the ends of justice. It is settled by 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.

20. 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 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.

18. In the light of the above, I do not find that the impugned order could be termed as perverse or erroneous so as to cause injustice to the petitioner. In this view of the matter, the Writ Petition is devoid of merit and is, therefore, dismissed.

(**RAVINDRA V. GHUGE, J.**)