

IN THE HIGH COURT OF JUDICATURE AT MUMBAI
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.4536 OF 2015

Kisan Narayan Mavkar ... Petitioner
Vs.
Ravindra Anandrao Pantsachiv and others ... Respondents

Mr. Chetan G. Patil for Petitioner.

CORAM : R. G. KETKAR, J.
DATE : 13TH JULY, 2015

P.C. :

Heard Mr. Patil, learned Counsel for petitioner at length.

2. By this Petition under Article 227 of the Constitution of India, original plaintiff has challenged the judgment and order dated 04.02.2015 passed by the learned Joint Civil Judge, Senior Division, Pune below exhibits-50 and 54 in Special Civil Suit No.1293 of 2010. By that order, the learned trial Judge rejected the applications exhibits-50 and 54 filed by the petitioner, hereafter be referred to as plaintiff.

3. Plaintiff has instituted Suit for declaration and perpetual injunction against the respondents, hereinafter referred to as defendants. Plaintiff sought declaration that the termination of Memorandum of Understanding (for short 'MoU') dated 26.03.2009 is illegal and for perpetual injunction restraining the defendants, from taking forcible possession of the property, more particularly described in Schedule without following due process of law from the plaintiff.

4. During the pendency of the Suit, plaintiff filed application dated 05.02.2013 exhibit-50 under Order VI, Rule 17 of the Code of Civil Procedure, 1908 (for short 'C.P.C.') for adding following prayer clause in

the plaint and exhibit-5:

“Defendants may be permanently restrained from creating third party interest by any way into the suit premises.”

5. Defendant No.1 filed reply dated 18.02.2013 exhibit-53 opposing the application. Defendants No.2 to 6 also filed reply dated 20.06.2013 opposing the said application. Plaintiff also filed application dated 24.10.2013 exhibit-54 under Order VI, Rule 17 C.P.C. for adding paragraph 11A as also the prayer in the Suit. By paragraph 11A, plaintiff intends to add averment “that plaintiff is always ready and willing to act as per the MoU dated 26.03.2009 and also is ready and willing to pay balance consideration to the defendants in the event of execution of the sale deed in favour of the plaintiff in respect of the suit property. Defendants have jointly and severally violated and breached the very conditions of the MoU dated 26.03.2009 and not ready to act and perform their part. The defendants may be directed and ordered to execute sale deed pertaining to the suit property in favour of the plaintiff and if the defendants failed to do so, Court Commissioner may be appointed and sale deed pertaining to the suit property may be executed in favour of the plaintiff and that defendants be permanently restrained from creating third party interest in any way in the suit property. Defendant No.1 filed reply dated 21.02.2014 at exhibit-56 opposing the application exhibit-54. After hearing both sides, by the impugned order, the learned trial Judge rejected applications exhibits-50 and 54.

6. In support of this Petition, Mr. Patil strenuously contended that the learned trial Judge committed serious error in rejecting the applications. As far as the creation of third party interest is concerned, he submitted that in paragraph 10, plaintiff specifically asserted that defendants threatened the plaintiff by informing him that they are selling the suit property to some other party. In paragraph 12, plaintiff asserted

that if defendants sell the suit property to some other person, in that event, the plaintiff will suffer irreparable loss which cannot be compensated in terms of money. In other words, plaintiff had specifically asserted about his apprehension that defendants will create third party interest in the plaint itself. He further submitted that in the application exhibit-50, in paragraph 5, plaintiff specifically asserted that in view of the assertions made in paragraph 10 of the plaint, it is just and necessary to amend the pleadings in the form of additions into the prayer clause. It was further asserted that recently, plaintiff has got the information and knowledge in respect of the defendants' illegal attempts to create third party interest within the suit premises. In short, Mr. Patil submitted that the foundation for claiming relief of injunction restraining defendants from creating third party interest is already laid in the Suit itself as is evident from paragraphs 10 and 12.

7. He further submitted that the Apex Court has, time and again, held that the amendment at pre-trial stage is to be liberally considered. Applying the test laid down by the Apex Court, the learned trial Judge ought to have allowed the application at exhibit-50. As far as prayer for reliefs of specific performance is concerned, he submitted that clause 5 of the MoU clearly provides that the transaction is to be completed within 6 months from obtaining necessary permissions from Forest Department, Charity Commissioner and / or any other permission required to transfer the land in the name of the purchaser and after clearing any Suit pending in any Civil Court from the date of execution of MoU. He submitted that perusal of clause 5 of MoU clearly shows that date was fixed for performance of contract. As the defendants have not complied clause 5 by obtaining the necessary permissions, it cannot be said that the proposed amendment is time barred. Even in cases where the amendment is time barred, the Apex Court has permitted

amendment by ordering that the amendment shall be deemed to have been brought before the Court on the date on which application seeking amendment was filed. He, therefore, submitted that the impugned order requires interference. In support of his submissions, he relied upon the following decisions:

- a. *Sampath Kumar Vs. Ayyakannu*, **(2002) 7 SCC 559**, and in particular paragraphs 9 to 11;
- b. *Ragu Thilak D. John Vs. S. Rayappan*, **(2001) 2 SCC 472**;
- c. *Pankaja Vs. Yellappa*, **(2004) 6 SCC 415**, and in particular paragraphs 12 to 18;

8. I have considered the submissions advanced by Mr. Patil. I have also perused the material on record. As noted earlier, plaintiff filed application exhibit-50 for adding prayer for perpetual injunction restraining defendants from creating third party interest in any manner in the suit premises. In paragraph 10, plaintiff asserted that defendants threatened the plaintiff that they are selling the suit property to some other party and hence, plaintiff is approaching the Court for injunction restraining defendants from creating third party interest. In paragraph 12, plaintiff asserted that if defendants sell the suit property to some other person, he will suffer irreparable loss which cannot be compensated in terms of money. In paragraph 5 of the application exhibit-50, plaintiff asserted that recently, he got information and knowledge in respect of defendants' illegal attempts to create third party interest within the suit premises. Perusal of reply dated 18.02.2013 at exhibit-53 and in particular paragraph 2 thereof shows that defendant No.1 asserted that plaintiff has deliberately and very consciously not made any averments as regards he is being ready and willing to perform his part of contract, especially payment of the balance consideration of Rs. 3,25,00,000/- due to the defendants under the MoU dated

26.03.2009. Plaintiff is seeking a relief of simplicitor injunction of not being dispossessed from the suit property. In paragraph 3, defendant No.1 asserted that when plaintiff is not seeking relief of specific performance, it is immaterial whether the suit property is sold by the defendants to any third party whomsoever. In paragraph 4, it is averred that the Suit is instituted in June 2010. In paragraph 10 of the plaint, plaintiff made allegation about defendants creating third party interest. In spite of that knowledge, he did not pray for injunction at that time and the application is made on 05.02.2013. It is further contended that plaintiff has pleaded cause of action in paragraph 18 that it firstly arose on 03.12.2009 when the defendants issued notice terminating MoU dated 26.03.2009 and thus, all the reliefs claimed in respect of MoU were to be claimed within a period of 3 years i.e. upto 02.12.2012 and the application is filed on 05.02.2013, which is barred by limitation as per Article 53 of the Limitation Act, 1963 (for short 'Act'). It is material to note that it is only thereafter plaintiff filed application exhibit-54 on 24.10.2013 for adding paragraph 11A as also prayer for specific performance of contract.

9. The learned trial Judge while dealing with application exhibit-50 has observed in paragraph 9 that there are no specific averments which compelled the plaintiff to seek amendment in the prayer clause regarding creating third party interest. The learned trial Judge referred to paragraph 2 of the application and observed that averment in paragraph 2 itself shows that plaintiff is not sure whether defendants have created third party interest or are trying to create third party interest in the suit property. In short, the learned trial Judge observed that the assertions made by the plaintiff are vague and plaintiff has not laid proper foundation to seek amendment regarding permanent injunction. After considering the assertions in paragraphs 10 and 12 of the plaint as

also the assertions made in exhibit-50, I do not find that the learned trial Judge has committed any error in disallowing the amendment in terms of exhibit-50. This is more so when the Suit is instituted in 2010. In paragraphs 10 and 12, plaintiff apprehended that defendants are likely to create third party interest. The application for amendment is made on 05.02.2013. That apart, no prayer for relief of specific performance was made.

10. Apart from that, as noted earlier, plaintiff filed application exhibit-54 on 24.10.2013 for incorporating paragraph 11-A as regards readiness and willingness to perform his part of contract as also adding prayer for relief of specific performance. It is in that regard, necessary to consider averments in paragraph 18 of the plaint. In paragraph 18, the plaintiff asserted that cause of action accrued on or about 03.12.2009 when defendants issued notice to the plaintiff informing him that they have terminated MoU dated 26.03.2009. In June 2010, plaintiff instituted the present Suit. The application for amendment exhibit-54 is made on 24.10.2013. If the MoU dated 26.03.2009 is terminated on 03.12.2009, in view of Article 54 of the Act, plaintiff ought to have instituted Suit for relief of specific performance within 3 years when he had notice that the performance is refused. Article 54 reads as under:

	<i>Description of Suit</i>	<i>Period of limitation</i>	<i>Time from which period begins to run</i>
54	For specific performance of a contract	Three years	The date fixed for the performance, or, if no such date is fixed, when the plaintiff has notice that performance is refused.

11. The plaintiff should have asked for relief of specific performance in the original Suit itself. On the face of it, prayer made by the plaintiff for relief of specific performance is clearly time barred. Grant of the

amendment would defeat the valuable right of limitation accrued to the respondents. The view that I have taken is supported by the decision of the Apex Court in the case of *K. Raheja Constructions Limited Vs. Alliance Ministries*, **1995 Supp (3) SCC 17**. In that case, the Apex Court reproduced paragraph 13 of the plaint as also referred to paragraph 28 thereof. In paragraph 4, it was observed thus,

“4. ... The petitioners having expressly admitted that the respondents have refused to abide by the terms of the contract, they should have asked for the relief for specific performance in the original suit itself. Having allowed the period of seven years to elapse from the date of filing of the suit, and the period of limitation being three years under Article 54 of the Schedule to the Limitation Act, 1963, any amendment on the grounds set out, would defeat the valuable right of limitation accruing to the respondent.”

12. Mr. Patil further relied upon clause 5 of the MoU and submitted that the time-limit is fixed for performing the contract and that time is yet to get over. Clause 5 provides that the transaction is to be completed within 6 months from obtaining necessary permissions from - (i) Forest Department, (ii) Charity Commissioner and / or (iii) any other permission required to transfer the land in the name of the purchaser and after clearing any Suit pending in any Civil Court from the date of execution of this MoU. As noted earlier, in paragraph 18, plaintiff specifically asserted that cause of action accrued on or about 03.12.2009 when defendants issued notice to the plaintiff informing him that they have terminated MoU dated 26.03.2009. In my opinion, the period of 3 years will start running from 03.12.2009 and will expire on 02.12.2012. Admittedly, application for amendment is made on 24.10.2013 for adding prayer for relief of specific performance which on the face of it is clearly time barred. In the case of *Rewajeetu Builders and Developers Vs. Narayanswamy and Sons and others*, **2009 (10) SCC 84**, the Apex Court has laid down factors to be taken into consideration

while while dealing with applications for amendments in paragraph 63, which reads as under:

“63. On critically analyzing both the English and Indian cases, some basic principles emerge which ought to be taken into consideration while 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 *bona fide* or *mala fide*;

(3) the 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 the proposed amendment constitutionally or fundamentally changes the nature and character of the case, and

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

These are some of the important factors which may be kept in mind while dealing with application filed under Order VI Rule 17. These are only illustrative and not exhaustive.”

In view thereof, I am of the opinion that proposed amendment is not bonafide and is barred by limitation on the date of application.

13. Mr. Patil relied upon decision of the Apex Court in the case of **Sampath Kumar** (*supra*), and in particular paragraphs 9 to 11 thereof. In paragraph 11, the Apex Court specifically observed that plaintiff was not debarred from instituting a new suit seeking relief of declaration of title and recovery of possession on the same basic facts as are pleaded in the plaint seeking relief of issuance of permanent prohibitory injunction and which is pending. As observed earlier, in the present case, on face of it, the relief of specific performance is barred by limitation. In view thereof, reliance placed by Mr. Patil on the decision of **Sampath Kumar** (*supra*) does not advance the case of the plaintiff.

14. As far as the decision in the case of **Ragu Thilak** (*supra*) is concerned, it was held by the Apex Court that where the plea that amendment is barred by time is arguable, in the circumstances of the case, the same is required to be allowed. The plea of limitation being disputed could be made a subject matter of the issue after allowing the amendment prayed for. For the reasons already indicated, I am of the opinion that this decision does not advance the case of the plaintiff as the plea of limitation is not arguable in the present case.

15. As far as the decision of the Apex Court in the case of **Pankaja** (*supra*) is concerned, in paragraph 14, it was observed thus,

“14. The law in this regard is also quite clear and consistent that there is no absolute rule that in every case where a relief is barred because of limitation an amendment should not be allowed. Discretion in such cases depends on the facts and circumstances of the case. The jurisdiction to allow or not allow an amendment being discretionary, the same will have to be exercised on a judicious evaluation of the facts and circumstances in which the amendment is sought. If the granting of an amendment really subserves the ultimate cause of justice and avoids further litigation the same should be allowed. There can be no straitjacket formula for allowing or disallowing an amendment of pleadings. Each case depends on the factual background of that case.”

16. Perusal of paragraph 14 extracted hereinabove shows that jurisdiction to allow or not to allow amendment being discretionary, the same will have to be exercised on a judicious evaluation of the facts and circumstances in which the amendment is sought. After considering the material on record, I do not find that the learned trial Judge has committed any error while exercising the discretion. It cannot be said that the discretion exercised by the learned trial Judge is either arbitrary, capricious or perverse. In view thereof, no case is made out for invocation of powers under Article 227 of the Constitution of India.

Petition fails and the same is dismissed. It is, however, expressly made clear that where a decree is appealed from by the petitioner, any error, defect or irregularity in the impugned orders, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of appeal as contemplated by Section 105(1) C.P.C.

17. Liberty is reserved to the plaintiff to apply for expeditious disposal of the Suit. If such application is taken out, the learned trial Judge will pass appropriate order in accordance with law.

(R. G. KETKAR, J.)

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