

Ratan Singh Bhadauria ... Petitioner
Vs.
Bharti Singh ... Respondent

Mr. Tarun K. Sinha for Petitioner.
Mr. Roshan S. Tanna for Respondent.

CORAM : R. G. KETKAR, J.
DATE : 1ST JULY, 2015

P.C. :

Heard Mr. Sinha, learned Counsel for petitioner and Mr. Tanna, learned Counsel for respondent at length.

2. By this Petition under Article 227 of the Constitution of India, original defendant has challenged the judgment and order dated 25.03.2015 passed by the learned Joint Civil Judge, Senior Division, Thane below exhibit-102 in Special Civil Suit No.398 of 2013. By that order, the learned trial Judge allowed the application made by the respondent, hereinafter be referred to as the plaintiff, under Order VI, Rule 17 of the Code of Civil Procedure, 1908 (for short 'C.P.C.') for amending the plaint.

3. In support of this Petition, Mr. Sinha strenuously contended that plaintiff did not give any description whatsoever of the suit premises. He has taken me through the copy of the plaint in Special Civil Suit No.398 of 2013 wherein though plaintiff has prayed for declaration that she is the sole and exclusive owner of the suit premises, there is no description of the suit premises. He submitted that petitioner, hereinafter be referred

to as the defendant, filed written statement on 26.03.2014. In paragraph 2, defendant contended that plaintiff had not described the suit property sufficiently to identify the same in the plaint. Despite that, no efforts were made by the plaintiff for amending the plaint. He submitted that the parties have led the evidence as also concluded the arguments. The Suit is reserved for judgment. He further submitted that plaintiff filed application exhibit - 102 on 04.03.2015. The affidavit in support of that application was affirmed on 03.03.2015 i.e. one day prior to filing of the application on 04.03.2015. This is in violation of Order VI, Rule 15 read with Section 39 C.P.C. He submitted that the plaintiff has committed irregularities during the course of proceedings of the Suit. Even the copy of the affidavit was not served on the defendant. In short, Mr. Sinha submitted that since the matter is reserved for judgment, plaintiff has not satisfied the condition laid down in proviso to Order VI, Rule 17 C.P.C.

4. Mr. Sinha further submitted that plaintiff has contended in the application that there is no dispute as regards identity of the suit premises between the parties and the proposed amendment is with a view to avoiding any technical glitch. The proposed amendment is absolutely technical and purely of administrative nature not affecting the merits of the matter even remotely. He submitted that the defendant has denied this. He submitted that this is not the ground for permitting the plaintiff to amend the plaint. In support of these submissions, he relied upon decision of the Apex Court in the case of *J. Samuel Vs. Gattu Mahesh*, (2012) 2 SCC 300.

5. On the other hand, Mr. Tanna supported the impugned order. He submitted that by the proposed amendment, defendant is not taken by surprise. He has taken me through the written statement filed by the

defendant and submitted that defendant is all along aware of the dispute between the parties over the flat. He further states that the learned trial Judge has allowed the amendment application and plaintiff will not lead any evidence in support of this proposed amendment. The proposed amendment is only for the purpose of giving description of the suit property and the nature of the Suit does not change.

6. I have considered the rival submissions made by the learned Counsel appearing for the parties. I have also perused the material on record. By the proposed amendment, plaintiff has added in paragraph 3 at the end of the 10th line after the words “defendant as usual” - “being flat No.402, Building H-3, Green Acres Lokvruksha CHS Ltd., Lokupavan Phase-2, Thane (W) 400 610, which is hereinafter referred to as 'suit premises'.” The question is whether the learned trial Judge is justified in allowing the application for amendment. With the assistance of the learned Counsel appearing for the parties, I have perused the averments made in the Suit instituted by the plaintiff and in particular paragraphs 3, 8, 13 and 14. In paragraph 3, plaintiff submitted that she had only paid the required amount of consideration for purchasing the suit premises. In paragraph 8, plaintiff submitted that the defendant wrote a letter to the society in which the suit premises is situate inter alia informing that he is the co-owner having 50% shares in the suit premises. Defendant has also instituted Special Civil Suit No.367 of 2012 in the Court of Civil Judge, Senior Division, Thane claiming 50% ownership therein. In paragraph 13, plaintiff asserted that the suit premises is situate at Thane. In paragraph 14, plaintiff contended that the cause of action first arose when the defendant attempted to assert his rights of ownership over the suit premises by filing Special Civil Suit No.367 of 2012.

7. I have also perused a copy of the plaint in Special Civil Suit No.367 of 2012. In paragraph 3, defendant (plaintiff therein) asserted that in the year 2002, flat No. 403/B-1, Prayag Lokupavan, Phase 1, Pokhran Road No.2, Near Lok Hospital, Thane (W) 400 610 had been purchased by contribution of money by both the plaintiff and defendant. In paragraph 6 of the plaint, it is plaintiff therein, contended that in the year 2005, defendant (plaintiff therein) decided to book another flat and booked flat No.402, H-3 Building, Green Area Lokvriksha CHS Limited, Lokupavan Phase 2, Thane (W) 400 610 without the knowledge of the plaintiff (defendant herein) and registered the flat in her name. The description of the premises is given in subsequent paragraphs of the plaint as well. In paragraph 20, plaintiff therein asserted that the suit flat is flat No.402, H-3 Building, Green Area Lokvriksha CHS Limited, Lokupavan Phase 2, Thane (W) 400 610 (for short 'suit premises'). In paragraph 21, valuation is made by the plaintiff on the basis that market value of the suit premises is Rs.7 lacs. In paragraph 23-A, plaintiff sought declaration that he has 50% share in the suit premises. Thus, perusal of the plaints in the present Suit as also Special Civil Suit No.367 of 2012 shows that defendant herein is aware of the dispute between the parties over the suit premises. As noted earlier, in paragraph 14 of the plaint, respondent-plaintiff asserted that cause of action first arose when the petitioner-defendant attempted to assert his rights of ownership over the suit premises by filing Special Civil Suit No.367 of 2012. In this Suit, dispute between the parties is over the suit premises. It, therefore, cannot be said that defendant is not taken by surprise by the proposed amendment.

8. Mr. Sinha submitted that the affidavit in support of the application was verified on 03.03.2015 and the application exhibit-102 is dated 04.03.2015. He submitted that the plaintiff has committed

irregularities in verifying the application, which is contrary to Order VI, Rule 15 read with Section 39 C.P.C. I do not find any merit in this submission. Even accepting the submission advanced by Mr. Sinha, at the highest, it will amount to irregularity and not illegality.

9. Mr. Sinha relied upon the decision of the Apex Court in the case of **J. Samuel** (*supra*). In that case, the Suit was instituted for specific performance of agreement dated 27.09.1985. Written statement was filed pointing out the inherent defects, namely, absence of mandatory requirements of Section 16(c) of Specific Relief Act, 1963 (for short 'Act') and Form 47, Appendix 'A' of C.P.C. On 24.09.2010, application under Order VI, Rule 17 C.P.C. was filed by respondents No.1 and 2 to amend the plaint for incorporating specific pleading on the ground that the same was missed due to "typographical error". The learned District Judge dismissed the application. By order dated 08.02.2011, High Court allowed the amendment against which the matter was carried before the Apex Court. In paragraph 6, the Apex Court noted that the only reason given by the plaintiff praying for amendment and inclusion of averment in the plaint is 'type mistake'. In paragraph 7, it was observed thus:

"7) The above claim was resisted by the appellants herein by filing detailed counter affidavit. Apart from disputing the merits of the claim of the plaintiffs, with regard to the petition under Order VI Rule 17 they specifically stated that after passing several stages in the protracted trial, the final arguments of the plaintiff in the suit were heard on 20.09.2010. The defendants have also filed their written arguments on 22.09.2010 wherein the inherent defect of plaintiff i.e. absence of averments of mandatory requirements of Section 16(c) Explanation (ii) and Form 47 Appendix A of CPC was pointed out. Even after this, further argument was made by both the parties and the counsel for the plaintiff informed the court that no further time is required and the matter may be posted for judgment. In view of the same, the learned trial Judge posted the matter to 04.10.2010 for judgment. Only at this juncture i.e. on 24.09.2010, plaintiffs came up with the present petition seeking amendment to incorporate specific pleading in compliance with Section 16 (c) of the Specific Relief Act and Form 47 of Appendix A CPC on

the ground that the same was missed due to "type mistake" in spite of due diligence. Though the said claim was not acceptable by the trial Court, the High Court allowed the plaintiff to amend the plaint as prayed for."

9. The Apex Court also considered provisions of Section 16(c) of the Act and observed in paragraph 10 that the said provision contemplates that specific averment has to be made in the plaint that plaintiff has performed and has always been willing to perform the essential terms of the Act which he has to perform. The Apex Court thereafter considered proviso to Order VI, Rule 17 C.P.C. and observed that the explanation given by the plaintiff cannot be called as a 'typographical error'. As a consequence, the plea of typographical error cannot be entertained.

10. In the present case, I have already held that defendant has also instituted Suit wherein he is also claiming 50% share in the suit premises. I have already referred to averments made by the plaintiff in the present Suit. In my opinion, after considering the material on record, it cannot be said that the proposed amendment has taken the defendant by surprise and that it changes the nature of the Suit. Mr. Tanna has also made statement that plaintiff does not wish to lead evidence. Statement made by Mr. Tanna is recorded. The facts in the case of J. Samuel (supra) and the present case are materially different. In view thereof, the said decision does not assist the defendant.

11. In view thereof, I do not find that any case is made out for invoking powers under Article 227 of the Constitution of India. It is, however, expressly made clear that where a decree is appealed from by the petitioner, any error, defect or irregularity in the impugned order, 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.

12. In view of the dismissal of the Petition, nothing survives in Civil Application No.1398 of 2015 and the same is disposed of accordingly.

13. Mr. Tanna states that the trial Court had directed the plaintiff to deposit costs within 3 days. In pursuance thereof, Mr. Tanna has handed over a cheque of Rs.5,000/- in favour of the defendant to Mr. Sinha. Mr. Sinha acknowledges receipt of the said cheque. In view thereof, the time stipulated in the order passed by the learned trial Judge is extended upto and inclusive of 01.07.2015.

(R. G. KETKAR, J.)

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