

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.5066 OF 2011

Mrs. Deepti Dilip Ambavane and Anr.] ... Petitioners

Versus

Shri Vikas Manohar Nakhwa and Anr.] ... Respondents

Mr. K. K. Malpathak for Petitioners.

Ms. Sandhya Mailagir h/f Mr. Anil D. Joshi for Respondent No.1.

CORAM :- M. S. SONAK, J.

DATE :- MARCH 31, 2015

P. C. :-

1. This petition challenges the Order dated 21/12/2010 made by the Ad-hoc District Judge-1, Thane, dismissing the Petitioners' application for amendment to the Written Statement at the stage when Appeal against Decree made in Special Civil Suit No.413/2002 is pending.

2. Respondent No.1 instituted the Special Civil Suit No.413/2002 contending, *inter alia*, that the Agreement dated 19/07/1995 was vitiated by undue influence exercised by the Petitioners. At the time of institution of the suit, the Agreement dated 19/07/1995 was admittedly unregistered. The suit was partly

decreed on 12/01/2006. The Judgment and Decree of declared that Respondent Nos.1 and 2 (original Plaintiffs) are the co-owners in respect of the suit property and though the Agreement dated 19/07/1995 is not false, based upon the same, the Petitioners (original Defendants) have not obtained any ownership rights to the suit property. The Petitioners were directed to restore possession of the suit property in favour of the Respondents within a period of two months from the date of Judgment and Decree.

3. The Petitioners instituted Appeal against the aforesaid Judgment and Decree which came to be numbered as Civil Appeal No.11/2007. Further, on or about 06/02/2007, the Petitioners obtained registration of the Agreement dated 19/07/1995. The Petitioners, by application dated 28/07/2010, applied for production of the registered Agreement dated 19/07/1995 on record in the Appeal proceedings. By Order dated 21/12/2010, the learned Ad-hoc District Judge-1, Thane, permitted the production of the registered Agreement dated 19/07/1995 on record in the Appeal proceedings. This Order was made after obtaining the say of the Respondents and after affording opportunity to hear to the Respondents. The Respondents have not chosen to challenge the Order dated 21/12/2010.

4. On 28/07/2010 itself, the Petitioners applied for amendment to the Written Statement to incorporate the circumstance that on 06/02/2007, the Agreement dated 19/07/1995 has been

registered. This amendment application (Ex.15) has been rejected by the impugned order dated 21/12/2010.

5. Mr. K. K. Malpathak, learned Counsel for Petitioners, submitted that the Appeal Court, by Order dated 21/12/2010, having allowed the production of registered Agreement dated 19/07/1995 on record, there was no justification in declining leave to amend, particularly since the amendment was only for the purposes of placing on record the factum of registration of Agreement dated 19/07/1995. Mr. Malpathak submitted that the so called delay in the present case was no delay at all, particularly since the amendment relates to the subsequent event of registration of the Agreement dated 19/07/1995. Mr. Malpathak submitted that the prejudice, if any, to the Respondents can always be compensated by way of costs. Mr. Malpathak, upon taking instructions from the Petitioners who are present in the Court, made a statement that the Petitioners would be willing to pay costs to the extent of Rs.50,000/- in the matter.

6. Ms. Sandhya Mailagir, learned Counsel for Respondent No.1, defended the impugned order and submitted that the Petitioners in the present case have not at all been diligent in the matter. Ms.Mailagir pointed out that the Agreement dated 19/07/1995 was always in the possession of the Petitioners and there is no explanation as to why the same was not registered up to 06/02/2007. Ms.Mailagir submitted that in terms of the proviso to Order 6 Rule 17 of the CPC, amendment cannot be permitted once the trial has

commenced, unless the party seeking amendment demonstrates that despite due diligence, it was not possible to apply for amendment before the trial commenced. Ms.Sandhya submitted that in the present case, the trial has concluded, the suit has been decreed and the matter is pending in Appeal. Therefore, the learned District Judge was entirely right in rejecting the application seeking leave to amend.

7. Rival contentions now call for my determination.

8. In this case, the Decree which has been appealed in Civil Appeal No.11/2007, was not made on the ground that the Agreement dated 19/07/1995 was not registered. The Decree has been made on the ground that the Respondents were only the co-owners in respect of the suit property and therefore, the Petitioners cannot claim to have acquired any title to the suit property from the Respondents. Factually, the Agreement in question has been registered only on 06/02/2007. The amendment seeks to incorporate this fact in the Written Statement. At the stage when the trial in the suit commenced, since the Agreement dated 19/07/1995 had not been registered, there was no question of adverting to this fact at that stage. In these circumstances, it cannot be said that the proviso to Order 6 Rule 17 of the CPC is directly attracted in the matter.

9. There is, however, some delay on the part of the Petitioners in applying for amendment. The registration of the Agreement dated 19/07/1995 was effected on 06/02/2007. The

amendment has been applied for on 28/07/2010. Notwithstanding such delay however, it is to be noted that the Petitioners' application for production of the registered Agreement dated 19/07/1995 came to be allowed on 21/12/2010. This order, as noted earlier, has not been challenged by the Respondents.

10. Therefore, a situation has arisen whereby the registered Agreement dated 19/07/1995 has been permitted to be produced on record but corresponding amendment to the Written Statement has been declined. This will really not serve the purpose of the Petitioners. The impugned order does not take into consideration the circumstance that the production of this document at the Appeal stage has already been permitted.

11. In the aforesaid circumstances, the proper course to be followed would be to permit the amendment subject to payment of costs of Rs.50,000/- by the Petitioners. Further, the learned Counsel for Petitioners, upon taking instructions from the Petitioners who are present in Court, has made a solemn statement that the Petitioners, on the basis of amendment to the Written Statement, will not seek remand of proceedings for the purpose of leading evidence. Instead, the Petitioners will be satisfied if they are permitted to adduce additional evidence before the Appeal Court on the limited aspect of the registered Agreement dated 19/07/1995. Such statement is noted and accepted. Accordingly, the learned District Judge, consequent to the allowing of the application for amendment, may permit the

Petitioners to lead evidence at the Appeal stage on the limited issue of registered Agreement dated 19/07/1995 and no further.

12. The Appeal has been pending since the year 2007. Accordingly, at the request of the learned Counsel for Respondent No.1, directions are issued to the learned District Judge to dispose of the Appeal finally as expeditiously as possible and in any case, within a period of six months from today.

13. The impugned order dated 21/12/2010 dismissing application at Ex.15 is hereby set aside. The prayers in Ex.15 are allowed. The Petitioners to carry out the necessary amendment within a period of four weeks from today. As undertaken, the Petitioners to pay costs of Rs.50,000/- (Rupees Fifty Thousand Only) within a period of four weeks from today. Such costs may be paid directly to the Respondent No.1 or may be deposited in the Court of the learned District Judge, wherefrom the Respondent No.1 would be at liberty to unconditionally withdraw the same. In case the costs are not paid within a period of four weeks as aforesaid, then this petition shall be deemed to have been dismissed.

14. Rule is made absolute to the aforesaid extent. There shall be no order as to costs.

15. It is clarified that this Court has not gone into the merits of the controversy between the parties and accordingly it shall be for the

learned District Judge to hear and decide the Appeal on its own merits and in accordance with law.

(M. S. SONAK, J.)