

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.6067 OF 2014

Abdul Khalild Abdul Kadar Chataiwala]
Through Constituted Attorney]
Abdul Gaffar Abdul Kadar Chataiwala.] ... Petitioner/
(Orig. Plaintiff)

Versus

J. W. C. Logistics Park Pvt. Ltd. and Ors.] ... Respondents/
(Orig. Defendants)

And

State Bank of India and Anr.] ... Proposed Respondents/
(Proposed Orig. Defendants)

Mr. Mahesh H. Chandahshiv for Petitioner.

Mr. G. D. Utangale a/w Mr. Akhil Kupade i/b Utangale & Co. for Respondents.

CORAM :- M. S. SONAK, J.

DATE :- MARCH 20, 2015

P. C. :-

1. Rule. With the consent and at the request of the learned Advocates for parties, the rule is made returnable forthwith.

2. This petition impugns the order dated 25/04/2014 made by the Joint Civil Judge, Senior Division, Panvel, declining the Petitioner-Plaintiff leave to amend the plaint by way of challenge to Mortgage Deed dated 17/01/2013 by which the suit property came to be mortgaged by the Respondents in favour of State Bank of India, during the pendency of the suit.

3. The suit in the present case was instituted in the year 2007 and the main relief is a declaration in respect of the Sale Deed on basis of which the Respondents claim title to the suit property. The issues were cast on 09/11/2009. The Petitioner-Plaintiff filed Affidavit-in-evidence by way of examination-in-chief on 08/07/2010. for several reasons, with which we are not presently concerned, the cross-examination of the Petitioner-Plaintiff is yet to commence. On 25/10/2013, the Petitioner applied for leave to amend.

4. It is the case of the Petitioner that the Respondents mortgaged the suit property on 17/01/2013 and this fact came to the knowledge of the Petitioner on 13/09/2013, when by Advocate's notice, the same was intimated to the Petitioner. It is further the case of the Petitioner that as against the rejection of interim relief in the suit, the Petitioner has instituted Appeal from Order No.578 of 2008 which is pending. In the order dated 17/10/2008, this Court has recorded the statement made by and on behalf of the Respondents that they will not sell or dispose of the said property without giving the Petitioner's Advocate in trial Court, notice of at least four weeks. It is the case of the Petitioner that the mortgage of the property on 17/01/2013 is in violation of the statement recorded in the order dated 17/10/2008 in Appeal from Order No.578 of 2008.

5. By the impugned order, leave to amend was declined, *inter alia*, on the ground that the trial has already commenced and further any decision in the suit will ultimately bind the mortgagor or

the mortgagee and for that purpose, it is not necessary to carry out any amendment or implead any party to the suit. The impugned order also states that if the proposed amendment is allowed, it would change the nature of the suit.

6. The learned Counsel for Respondent No.2 has supported the impugned order, by placing reliance on the provisions of *lis pendens* contained in Section 52 of Transfer of Property Act, 1882. The learned Counsel submitted that there is absolutely no necessity for carrying out any amendment as all transfers during the pendency of the suit are always subject to the final decision of the suit. The learned Counsel pointed out that the Petitioner had attempted to seek a variation of the order dated 17/10/2008 in the aforesaid Appeal from Order, so as to include and therein restraint upon mortgage of the suit property, however, this Court, by its subsequent order dated 07/09/2009, rejected such an attempt. The learned Counsel further placed reliance upon the decision of the Hon'ble Apex Court in the case of ***Vidur Impex and Traders Pvt. Ltd. and Ors. vs. Tosh Apartments Pvt. Ltd. and Ors.***¹, and submitted that the State Bank of India was not at all a necessary or a proper party to this suit merely because the suit property may have been mortgaged to it during the pendency of the suit.

7. Having heard the learned Counsel for the parties and perused the record, in my judgment, the impugned order made by the

¹ 2012 (8) SCC 384

learned Civil Judge on 25/04/2014 is required to be set aside. Consequent upon the insertion of proviso to Order 6 Rule 17 of the CPC, applications seeking leave to amend made after the commencement of the trial, are required to be viewed differently. However, that does not mean that there is a total bar to seeking leave to amend. All that is required is that the satisfaction that in spite of due diligence, the parties could not have raised the matter before the commencement of trial.

8. In this case, the trial can be said to have commenced on 08/07/2010, on which date the Affidavit-in-evidence of the Petitioner-Plaintiff was filed. The suit property came to be mortgaged on 17/01/2013 whilst the case had not proceeded any further from the stage of filing of Affidavit-in-evidence on 08/07/2010. It is the case of the Petitioner that knowledge about such Mortgage Deed was obtained by the Petitioner only on 13/09/2013 and soon thereafter i.e. on 25/10/2013, the application seeking leave to amend came to be filed. In such a circumstance, it cannot be said that there was any lack of diligence on the part of Petitioner-Plaintiff in seeking leave to amend. In fact, the amendment is premised upon the event which has taken place consequent to the commencement of trial. The impugned order which rejects the application seeking leave to amend on the ground that the same has been made after the commencement of trial, is, therefore, unsustainable.

9. As noted earlier, the suit is for a declaration that the Sale

Deed on the basis of which the Respondent No.2 claims title to the suit property is itself vulnerable. During the pendency of such suit, Respondent No.2 has chosen to mortgage the property on 17/01/2013. If leave is granted to challenge such mortgage, which has been effected during the pendency of the suit, it cannot be said that the same will change the nature of the suit.

10. Further, the provision contained in Section 52 of the Transfer of Property Act, 1882, cannot be regarded as a bar to seek leave to amend in transfer or alienation that has taken place during the pendency of the suit. Provisions contained in Section 52 are basically for the protection of the Plaintiff and to obviate the necessity of filing repeated proceedings. However, that by itself does not preclude the Plaintiff from specifically challenging the alienation effected during the pendency of the suit. The decision in the case of ***Vidur Impex and Traders Pvt. Ltd. and Ors. vs. Tosh Apartments Pvt. Ltd. and Ors.*** (*supra*) in the context of joinder of the parties in a suit for specific performance of contract. Further, the said decision summarizes the position with regard to necessary and proper party. In the present case, if leave is to be granted to question the Mortgage Deed dated 17/01/2013, then the bank to which the suit property has been mortgaged, would certainly be a proper party at least. In fact, the decision in the case of ***Vidur Impex and Traders Pvt. Ltd. and Ors. vs. Tosh Apartments Pvt. Ltd. and Ors.*** (*supra*) lays down that a proper party is a person whose presence would enable the Court to completely and effectively and properly adjudicate all matters, though

he may not be a person in favour of or against whom a Decree is to be made.

11. For all the aforesaid reasons, the impugned order dated 25/04/2013 is set aside. The Petitioner to carry out amendment to the plaint within a period of two weeks from the date of production of authenticated copy of this order before the learned trial Judge. The Petitioner to pay costs of Rs.5,000/- to the Respondent NO.2. Rule is made absolute to the said extent.

12. The parties to appear before the learned trial Judge on 07/04/2015 at 3.00 p.m. and produce the authenticated copy of this order.

13. Considering that the suit is of the year 2007, it is only appropriate that the learned trial Judge disposes of the same as expeditiously as possible and in any case within a period of nine months from the date of production of authenticated copy of this order.

14. Upon amendment being carried out by the Petitioner, the Respondents, including the newly added Respondents, shall be entitled to file additional Written Statement within the time to be fixed by the learned trial Judge.

(M. S. SONAK, J.)