

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO. 5588 OF 2015

Mangal Gopichand Raut and Ors	Petitioners
Vs	
Shri Tukaram Genuji Satav and Ors	.. Respondents

Mr. Vaibhav A. Sugdare, Advocate for the petitioners.

Mr. Uday P. Warunjikar, Advocate for respondents no.1 to 5 and 11.

CORAM : R.G.KETKAR,J.
DATE : 10/08/2015

PC:

1. Heard Mr. Vaibhav.Sugdare, learned counsel for the petitioners and Mr. Uday Warunjikar, learned counsel for respondents no.1 to 5 and 11 at length. Mr. Warunjikar states that he has instructions to accept and waive service for respondents no.2 to 5 and 11. He assures that within two weeks from today, he will file apearance on behalf of respondents 2 to 5 and 11.

2. Mr.Sugdare orally applies for deleting respondents no.6 to 10 from this Petition. Leave to delete respondents no. 6 to 10 from this Petition is granted. Amendment shall be carried out forthwith.

3. Rule. Mr. Warunjikar waives service for respondents no. 1 to 5 and 11 (now respondent no.6). At the request and by consent of the parties, Rule is made returnable forthwith and Petition is

taken up for final hearing.

4. By this Petition under Article 227 of the Constitution of India, original plaintiffs have challenged the Judgment and order dated 4.2.2015 passed by the learned Civil Judge, Sr.Dn., Pune below Exhibit 110 in Spl. Civil Suit No.81 of 2011. By that order, the learned trial Judge rejected the application taken out by the plaintiffs under Order VI, Rule 17 of C.P.C. for amending Plaint.

5. During the course of hearing, Mr. Sugdare submitted that he is deleting paragraph 7, property bearing Survey No.66/3/12/1 as also averments made against defendants no. 6 to 10 in paragraph 10A. He is also deleting paragraphs 10B, 10C and prayer clause B(1) of the application for amendment at Exh.110. In short, he is restricting application for amendment qua suit property bearing Survey No.66, Hissa No.3/14 and prayer clause B(2) of the application at Exh.110.

6. Mr. Sugdare submitted that by the application the plaintiffs want to implead respondent no.6 herein-M/s Dreams Estate on the ground that on 31.1.2007 defendants 1, 3 and 4 executed Development Agreement in favour of respondent no.6 - M/s Dreams Estate. The plaintiff got knowledge about this Development Agreement on 10.12.2014. He submitted that M/s Dreams Estate filed application Exh.151 in the suit for impleading them as party defendants. By order dated 1.4.2015, learned trial Judge allowed the application and impleaded them as defendants

in the suit. However, as far as present application is concerned, the learned trial Judge has rejected the application on the ground that trial is at advanced stage. Suit is for partition. Pleadings and evidence on record are sufficient for deciding the suit. However, the same yardstick was not applied by the learned trial Judge while allowing application Exhibit-151 filed by respondent no.6 herein. The learned trial Judge has passed inconsistent orders, namely impugned order and the order dated 1.4.2015 below Exhibit-151. He, therefore submitted that amendment now as proposed in paragraph 10A, subject to deleting Survey no. 66/3/12/1 as also deleting averments qua defendants no. 6 to 10 in terms of paragraph 10A may be allowed. Likewise, prayer clause B(2) may also be allowed to be incorporated in the suit.

7. On the other hand, Mr. Warunjikar strenuously opposed the submissions. He submitted that the plaintiffs have filed application Exhibit-47 in the trial Court. In paragraph 2 of that application, the plaintiffs asserted that the defendants are illegally carrying out development over the suit property with the intention of changing the nature of the suit property as also with the intention of creating third party interest so as to frustrate final decree. The said application was filed on 2.12.2011. In other words, he submitted that the plaintiffs were very well aware of construction being carried out in the suit property. By order dated 6.7.2013, the learned trial Judge rejected the

application. Aggrieved by that decision, the plaintiffs preferred Appeal from Order No. 923 of 2013 in this Court. By order dated 30.1.2014, this Court dismissed the Appeal. Aggrieved by these orders, the plaintiffs carried the matter before Apex Court. By order dated 9.5.2014, the Apex Court dismissed Special Leave Petition and directed the trial Court to dispose of the suit preferably within a period of six months from the date of receipt of copy of the order.

8. Mr. Warunjikar submitted that on 17.12.2014 on behalf of the plaintiffs, Purshish Exh.105 was filed closing the evidence. He further submitted that respondent no.6-M/s Dreams Estate have filed their Written Statement and also cross examined P.W.1, examined by the plaintiffs. He submitted that registered Development Agreement was entered into by and between defendants no.1, 3 and 4 with respondent no.6 on 31.1.2007. The plaintiffs, therefore, have constructive knowledge of the said instrument. In any case, in 2011 when the plaintiffs filed application Exh.47, they were aware of development activities being carried on over the suit property. PW 1 has filed his affidavit of evidence in lieu of examination-in chief and is cross examined by respondent no.6. In other words, the plaintiffs have not satisfied due diligence as contemplated by proviso to Order VI Rule 17. In any case, he submitted that if the Court is inclined to allow the amendment, issue of limitation may be expressly

kept open giving opportunity to the parties to lead evidence on that point.

9. I have heard learned counsel appearing for the parties I have also perused the material on record. As noted earlier, respondent no.6 herein filed application Exh.151 for impleading them as party defendants. By order dated 1.4.2015, the learned trial Judge has allowed that application. The said order is not challenged either by the plaintiffs or the defendants till date. In short, now respondent no.6 herein is added as defendant in the suit.

10. As noted earlier, Mr. Sugdare has deleted defendants no. 6 to 10 from the suit as also has deleted property bearing Survey No.66/3/12/1 as also averments qua defendants no.6 to 10 in paragraph 10A of the application for amendment. Plaintiffs have also deleted paragraphs 10B and 10C and prayer clause B-1 in the application for amendment. In other words, the plaintiffs have restricted application for amendment in respect of paragraph 10A minus Survey No.66/3/12/1 as also have deleted averments qua defendants no.6 to 10. The plaintiffs have also restricted the application for amendment qua prayer clause B-2.

11. It is now doubt true that the trial has commenced and in view of proviso to Order VI Rule 17 of C.P.C. the plaintiffs have to satisfy that notwithstanding exercise of due diligence they could not have raised the matter before commencement of the trial. It

is at the same time relevant to note that the learned trial Judge has allowed application Exh.151 filed by respondent no.6. It is in that context, one has to consider the application filed by the plaintiffs for amending the Plaint. Perusal of paragraph 10A read with prayer clause B-2 shows that the plaintiffs have challenged the Development Agreement dated 31.1.2007 on the ground that they acquired knowledge about the same on 10.12.2014. In the absence of material averments against respondent no.6, mere impleadment will not serve any purpose. At the same time, the contentions advanced on behalf of respondents 1 to 6 that the plaintiffs were aware of or in any case they have constructive knowledge about registered Development Agreement executed on 31.1.2007 and in any case, they were aware of development being carried out over the suit property, are required to be borne in mind. While allowing the application, the Court has to ensure that no prejudice is caused to other side. In view thereof, issue of limitation is expressly kept open. In other words, the amendment will not relate back to the date of filing of the suit and will relate to the date of application Exhibit-110, i.e. 22.1.2015.

12. In the case of Usha Devi Vs rijwan Ahmad, 2008(5) Mh.L.J.82, the Apex Court has held in paragraph 11 that in order to allow the prayer for amendment, the merit of the amendment is hardly a relevant consideration and it will be open to the other side to raise their objection in regard to the amended plaint by

making any corresponding averments in the written statement.

13. In view thereof, in my opinion, the ends of justice will be served by permitting the plaintiffs to amend the Plaint in terms of paragraph 10A subject to deletion of property bearing 66/3/12/1 as also deleting averments qua defendants no. 6 to 10. The plaintiffs are also willing to delete paragraphs 10B and 10C and prayer clause B-1. In short, the application for amendment in respect of paragraph 10A and prayer clause B-2 is allowed subject to deletion as mentioned herein above. Having regard to the fact that by order dated 9.5.2014 the Apex Court has directed the trial Court to dispose of the suit within six months from the date of receipt of copy of the order, parties assure that they will extend the fullest cooperation for early disposal of the suit so as to comply directions given by the Apex Court.

14. In the light of above discussion, Rule is made absolute in the aforesaid terms with no order as to costs. The petitioners shall carry out amendment within one week from today. Defendants shall file additional written statement in reply to amended plaint within one week of receipt of the amended plaint. Order accordingly.

(R.G.KETKAR, J.)