

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 23 OF 2015**

Shamrao Balwantrao Kedar	)	
Age 59 years, Occ business	)	
R/o 25, Ketan Co-op housing Society	)	
in front of old Gangapur	)	
Naka, Gangapur road, Nashik	)	..Petitioner

Versus

1 Suman Balu Thorat	)
Age 55 years Occ Agriculture	)
R/o Jaulake Dindori, Tal Dindori,	)
District Nashik	)

2 Dnyandeo Bhikaji Aher	)
Age Major Occ Business	)
R/o 426, Vakikwadi, Nashik	)

3 Sampat Lahuji Jadhav	)
Age Major, Occ Business,	)
R/o Ozar Mig Taluka Niphad, Nashik	)

4 Pyarasingh Ratansingh Ghatavade	)
Age Major Occ Business	)
R/o Ghatavade and Company	)
Aurangabad Road, Nashik	)

5 Gurudeosingh Guljar Ratan Shyam	)
Age Major, Occ Business	)
R/o Prakash Niwas, Mumbai Agra Road	)
Nashik	)

6 Nivrutti Fakira Patil	)
Age Major Occ Agriculture	)
R/o Malegaon Stand, Panchavati Nashik	)

7 Anit-Kaur Jaswindersingh Kir	)
Age 36 years Occ Business & Agriculture	)
R/o Keer Niwas Holaram Colony, Nashik	)

8 Mangesh Santosh Mavale)
Age 27 yrs. Occ agriculture)
r/o at post Ahurli, Tal Igatpuri, Nashik)

9 Jayesh Krishakant Parekh)
Age 44 years, Occ Agriculture & Business)
R/o Hotel Samrat, Old Agra Road, Nashik)

..Respondents

Mr. Suhas Oak i/b Mr. Sham Walve for the Petitioner
Mrs. Pratibha Nachankar a/w Mr. Ramesh Daibey-Patil i/b Ajay Misar &
Co. for the Respondent Nos.1, 7 to 9.

CORAM : R. M. SAVANT, J.
DATE : 16th FEBRUARY, 2015

ORAL JUDGMENT

1 At the outset, the Learned Counsel for the Petitioner seeks deletion of the Respondent Nos.2 to 6. The said Respondents are accordingly deleted at the risk of the Petitioner.

2 Rule. With the consent of the Learned Counsel for the parties made returnable forthwith and heard.

3 The Writ Jurisdiction of this Court is invoked against the order dated 8-10-2014, passed by the Learned District Judge-4, Nashik, by which order, the application Exhibit 36 seeking amendment of the Appeal Memo in Civil Appeal No.222 of 2012, came to be rejected.

4 Shorn of unnecessary details, a few facts can be stated thus. The

Appeal in question i.e. Civil Appeal No.222 of 2012 is directed against the decree passed in Special Civil Suit No.395 of 1989 for specific performance of the contract. The Suit in question was dismissed. Against the said decree of dismissal, First Appeal No.765 of 2006 came to be filed. Since at the relevant time in the year 2006 this Court had the jurisdiction, the said First Appeal was filed in this Court. The said First Appeal had come up for admission before a Learned Single Judge of this court on 12-4-2006 when the same came to be admitted and interim reliefs were thereafter granted on 17-11-2006 by allowing the Civil Application filed in the said First Appeal. It seems that the First Appeal came to be dismissed for default on account of non compliance of the order dated 12-4-2006 in the matter of filing of the paper book. It appears that after the First Appeal was dismissed for default that a Sale Deed came to be executed by the Respondent No.1 in favour of the persons who are joined as the Respondent Nos.7 to 9 in the Appeal. In view of the said transaction the Petitioner moved an application in this Court for joining the said third party purchasers as party Respondents in the Appeal. The said third party purchasers were allowed to be impleaded as parties to the First Appeal on 8-2-2008, after the First Appeal had been restored to file on 29-11-2007. On the pecuniary jurisdiction of the District Courts being enhanced to Rs.10 lacs, that the First Appeal came to be transferred to the District Court, Nashik and now bears the aforesaid number being Civil Appeal No.222 of 2012. It is in the said Civil Appeal that the instant application Exhibit 36 came to be filed for amendment

of the Appeal Memo so as to incorporate two grounds which are to be incorporated as (Z-1) and (Z-2) which for the sake of ready reference are reproduced herein under:

“(Z-1) That the sale deed No.3308/2007 registered at the office of sub-Registrar, Dindori on 1-11-2007 is bogus, illegal and null and void and not binding upon the suit property as well as plaintiff and therefore requires to be cancelled.

(Z-2) That alleged sale deed is hit by lis pendence, and is prepared and executed only for the purpose of complications in the dispute pending between the appellant and the respondents.”

5 The said application has been rejected by the lower Appellate Court by the impugned order. The lower Appellate Court as the impugned order discloses has rejected the said application on the ground that under Order XLI Rule 2, the lower Appellate Court is within its powers to consider any such grounds of objection though otherwise it is not set out in the Memo of Appeal. The lower Appellate Court also observed that the application is unnecessary as the Respondent Nos.7 to 9 have already been joined as parties to the Appeal. It is the said order dated 8-10-2014, which is taken exception to by way of the above Petition.

6 The Learned Counsel appearing for the Petitioner Mr. Oak would contend that the lower Appellate Court has misinterpreted Order XLI Rule 2 of

the Civil Procedure Code. The Learned Counsel would contend that in so far as the first part of the said provision is concerned, the lower Appellate Court has not taken into consideration the said provision. The Learned Counsel would contend that if two grounds which are now sought to be incorporated are not so incorporated, it would cause prejudice to the Appellant i.e. the Petitioner herein if the matter were to go higher as then the higher court would not permit the Appellant / Petitioner to urged the grounds which were not urged before the lower Appellate Court. In support of his contention, the Learned Counsel sought to place reliance on the judgment of the Apex Court reported in the matter of State of Maharashtra Vs. Hindustan Construction Comp[any Ltd.¹ wherein the Apex Court has referred to the provisions of Order XLI Rule 2 of the Civil Procedure Code and has held that the said provisions leave no manner of doubt that the Appellate Court has power to grant leave to amend the Memo of Appeal. The Apex Court in the said judgment also referred to one of its earlier judgment in the matter of Harcharan Vs. State of Haryana² wherein the Apex Court has held that the Memo of Appeal is in the same position like the plaint in the Suit.

7 Per contra Mrs. Nachankar the Learned Counsel appearing for the Respondent Nos.1, 7 to 9 would support the impugned order. The Learned Counsel would contend that in view of the fact that the application Exhibit 36

1 (2010) 4 Supreme Court Cases 518

2 (1982) 3 SCC 408

is styled as one under Order VI Rule 17. The test for Order VI Rule 17 which has been laid down by the Apex Court would have to be satisfied. The Learned Counsel would contend that though the subsequent purchasers i.e. the Respondent Nos.7 to 9 have been joined as parties in the year 2008, the amendment sought vide the instant application is only in the year 2012, for which there is no explanation from the Petitioner / Appellant.

8 Having heard the Learned Counsel for the parties, I have considered the rival contentions. As indicated above, the transaction between the Respondent No.1 and the Respondent Nos.7 to 9 has taken place when the above Appeal stood dismissed for non prosecution on account of the non compliance of the order regarding furnishing of the paper books. The Appeal came to be thereafter restored on 29-11-2007 and the Respondent Nos.7 to 9 came to be impleaded as party Respondent to the Appeal in the year 2008. The impleadment was allowed on the ground that their presence was necessary for the adjudication of the Appeal which involved the issue of whether the Petitioner / Appellant is entitled to a decree of specific performance. The two grounds which are sought to be incorporated are those which are concerning the added Respondent Nos.7 to 9. If the Respondent Nos.7 to 9 were allowed to be impleaded as party Respondents to the Appeal, this Court does not see any reason to disallow the said two grounds from being incorporated in the Appeal Memo, application for which was rejected by the Lower Appellate

Court. The Lower Appellate Court as indicated above has rejected the application on the ground that the lower Appellate Court is entitled to take into consideration such grounds which are not specifically urged in the Appeal and in view of the fact that the Respondent Nos.7 to 9 are already before the Court, the amendment is unnecessary. In my view, the lower Appellate Court has tried to over simplify the matter. The learned Counsel appearing for the Petitioner / Appellant is right in his submission that if the Petitioner/Appellant is not allowed to raise the said two grounds, the same would militate against the Petitioner/Appellant if the matter were to go to the higher court, as then it would be held against the Petitioner/Appellant that no such ground was raised in the lower Appellate Court. In fact a reading of Order XLI Rule 2 itself indicates that a ground can be urged or the Appellant can be heard on such additional ground with the leave of the Court. The lower Appellate Court seems to have missed the said first part of Rule 2 of Order XLI. The lower Appellate Court also has not appreciated the fact that the inclusion of the said two grounds would not cause prejudice to the Respondent Nos.7 to 9 as they are already before the Court.

9 In my view, it was necessary to allow the said application so as to bring a clarity for the parties as to in respect of which matters they are litigating. The judgment of the Apex Court in State of Maharashtra Vs. Hindustan Construction Company Ltd. (supra) lends support to the case of the

Petitioner / Appellant as the Apex Court has held that under Order XLI Rule 2 the lower Appellate Court has the power to permit the amendment of the Memo of Appeal and in Harcharan's case (supra) the Apex Court held that Memo of Appeal stands on par with the plaint. The said observations of the Apex Court are in the context of Order XLI Rule 2 of the Civil Procedure Code. In that view of the matter, the impugned order dated 8-10-2014 is required to be quashed and set aside and is accordingly quashed and set aside. The application Exhibit 36 would stand allowed. The Petitioner /Appellant would be entitled to incorporate the two grounds which have been adverted to hereinabove as (Z-1) and (Z-2). However, since there is some delay in moving the application, the interest of justice would be served if the Petitioner/Appellant is directed to pay costs of Rs.3000/- to the Respondent Nos.7 to 9 to be paid within two weeks from date to the said Respondents through their Advocate in the Trial Court. The Petition is allowed to the aforesaid extent. Rule is accordingly made absolute in the aforesaid terms with parties to bear their respective costs of the Petition.

[R.M.SAVANT, J]