

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

WRIT PETITION NO. 1009 OF 2014

Shri Ashok Ratiram Agarwal

Petitioner

Vs

Shri Narendra Haribhau
Chandvadkar

.. Respondent

Mr. Tushar Sonawane h/f Mr. Nitin A. Mulye, Advocate for
Petitioner.

Mr. Lakshyaved Odhekar, Advocate for Respondent.

CORAM : R.G.KETKAR,J.
DATE : 09/06/2015

PC:

1. Heard Mr. Tushar Sonawane, learned counsel for the petitioner and Mr. Lakshyaved Odhekar, learned counsel for the respondent at length.
2. Rule. Mr. Odhekar waives service on behalf of the respondent. At the request and by consent of the parties, Rule is made returnable forthwith and Petition is taken up finally.
3. By this Petition under Article 227 of the Constitution of India, the original plaintiff has challenged the order dated 06.09.2013 passed by the learned 4th Joint Civil Judge, Senior Division, Nashik below Exhibit-38 in Special Civil Suit No.381 of 2010. By that order, the learned trial Judge rejected the application Exhibit-38 made by the petitioner under Order VI Rule 17 of the Code of Civil Procedure, 1908 (for short, "C.P.C.")

for amending the Plaint.

4. In support of this Petition, Mr. Sonawane submitted that the petitioner instituted suit against the respondent for specific performance of Agreement of Sale dated 28.4.1992. He invited my attention to the prayers made in the suit. By prayer clause (a), the petitioner prayed for direction to the respondent-defendant to execute the sale deed as also hand over possession. By prayer clause (b), the petitioner prayed for injunction restraining the respondent-defendant from creating third party interest. By prayer clause (c), in the alternate, the petitioner claimed compensation of Rs. one crore.

5. During the pendency of the suit, the petitioner filed application-Exhibit 38 on 15.6.2013. Instead of claiming compensation of Rs. One crore, by the proposed amendment the petitioner claimed compensation to the tune of Rs. Fifteen crores. The respondent resisted the application by filing reply Exhibit 51. By the impugned order, the learned trial Judge rejected the application substantially on the ground that the Issues at Exh.17 were framed on 18.1.2010. Affidavit of evidence of the petitioner-plaintiff was filed on 15.12.2012. The trial of the suit has, therefore, commenced. The matter was posted for cross-examination of the petitioner-plaintiff. It is, at that stage, the petitioner has filed the application for amendment. In view of proviso to Order VI Rule 17 as also the decision of the Apex Court

in the case of Vidyabai Vs. Padmalatha, AIR 2009 SC 1433, the learned trial Judge rejected the application.

6. Mr. Sonawane submitted that the petitioner has essentially instituted suit for specific performance of Agreement of Sale dated 28.4.1992. In the alternative to that prayer, he has claimed compensation of Rs. One crore. He submitted that having regard to the sharp increase in prices, the petitioner had filed application for amendment claiming compensation of Rs. Fifteen crores in the event of the Court declining to grant relief of specific performance. He submitted that the nature of the suit has not altered. The proposed amendment is absolutely necessary for deciding the controversy between the parties and in order to avoid multiplicity of proceedings, the same deserves to be allowed though the trial has commenced as held by the trial Court.

7. On the other hand, Mr. Odhekar invited my attention to paragraph 8 of the impugned order and submitted that the trial has commenced. He also relied upon the proviso to Order VII Rule 17 and the decision of the Apex Court in the case of Vidyabai (supra) and in particular paragraph 7 thereof. In paragraph 7, the Apex Court held that proviso to Order VI Rule 17 is couched in a mandatory form. The court's jurisdiction to allow such an application is taken away unless the conditions precedent therefor are satisfied, namely, it must come to a conclusion that

inspite of due diligence the parties could not have raised the matter before commencement of the trial. He submitted that the learned trial Judge in paragraph 8 has observed that no satisfactory explanation is given by the plaintiff for not claiming proposed compensation at the time of institution of the suit.

8. I have considered the rival submissions made by the learned counsel appearing for the parties. I have also perused the material on record. Order VI Rule 17 of C.P.C. reads as under:

“17. Amendment of Pleadings.- The Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties:

Provided that no application for amendment shall be allowed after the trial has commenced, unless the Court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial.”

9. Perusal of the above provision shows that the Court may, at any stage of the proceedings, allow either party to alter or amend his pleadings provided all such amendments are necessary for the purpose of determining the real questions in controversy between the parties. The proviso introduced by amendment to C.P.C. curtails discretion of the Court and it lays down that no application for amendment shall be allowed after the trial has commenced, unless the Court comes to the

conclusion that inspite of due diligence the party could not have raised the matter before th commencement of trial. In the present case, it is not disputed that the trial has commenced.

10. As noted earlier, the petitioner has instituted suit essentially for relief of specific performance. In the alternative, by prayer clause (c), the petitioner has claimed compensation of Rs. One crore. By the proposed amendment, the petitioner has claimed compensation to the tune of Rs. Fifteen crores. In the event of the petitioner succeeding in getting relief of specific performance, obviously, the Court will have no occasion to consider alternate relief. However, if the petitioner fails in obtaining relief of specific performance, in that event, the Court will have to consider relief (c) by which the petitioner has claimed compensation.

11. With the assistance of the learned counsel appearing for the parties, I have perused the record and in particular Exhibit-38. By application at Exh.38, the petitioner has sought amendment mainly on the ground that on account of sharp increase in the prices, he is claiming compensation of Rs. Fifteen crores, instead of Rs. One crore. Perusal of paragraph 4 of that application also shows that the petitioner specifically asserted that the proposed amendment does not change the nature of the suit and the same is necessary for deciding the controversy between the parties. Now, whether there is increase in the

prices after institution of the suit, is matter of evidence. What is significant is that it could not have been pleaded at the time of institution of the suit because these are developments which have taken place during the pendency of the suit. Understood thus, I am of the opinion that the petitioner has satisfied the test, namely, despite exercise of due diligence the petitioner could not have raised the matter before commencement of trial. The proposed amendment also does not change the nature of the suit. In view thereof, the reliance placed by Mr Odhekar on the basis of Vidyabai case (supra) does not advance the case of the respondent. Hence, the Petition succeeds. The impugned order is set aside and the application at Exh.38 stands allowed. The petitioner shall carry out amendment within 14 days from today. Rule is made absolute in the aforesaid terms, however, there shall be no order as to costs.

(R.G.KETKAR, J.)