

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 10380 OF 2015

VAISHALI ABHAY MANDALE AND OTHERS
VERSUS
SAKHARAM VITTHAL MANDALE AND OTHERS

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Advocate for Petitioners : Shri Badakh Vishal S.
Advocate for Respondent 6 : Shri Garud N.C.
Advocate for Respondents 1 to 4 : Served
Advocate for Respondent 5 : Deleted

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CORAM : RAVINDRA V. GHUGE, J.
Dated: April 13, 2016

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PER COURT :-

1. The petitioners / plaintiffs are aggrieved by the impugned order dated 20.7.2015, by which, application Exhibit 74 seeking addition of a party and an amendment to the pleadings, has been rejected.

2. The petitioners submit that plaintiffs 1 and 5 are ladies and are residing in their matrimonial homes. Plaintiffs 2, 4, 6 and 7 are minors. Special Civil Suit No.97 of 2008 was filed by the petitioners seeking partition and separate possession as well as a declaration that the sale deed dated 19.12.1995 and 15.11.1997 in between defendants 1 to 4 and 5 and 6 be held to be null and void and not binding upon the petitioners.

3. Shri Badakh, learned Advocate appearing on behalf of the petitioners submits that the two ladies are wholly dependent upon their Advocate. Rest being minors are dependent upon these two persons. By earlier two sale deeds of 1995 and 1997, defendants 1 to 4 sold a portion of the suit

property to defendant 6. By a sale deed dated 14.8.2008, during the pendency of the suit instituted on 10.4.2008, defendant No.6 sold out a portion of the suit property to a third person. This aspect was not within the knowledge of the plaintiffs.

4. He further submits that while recording the evidence of PW 1, the defendants have tried to bring the 2008 sale deed on record. Subsequently, when the plaintiffs realized that it was likely to affect the result of the suit inasmuch as the said sale would stand affected by the legal doctrine of "*lis pendence*", an application was moved on 30.1.2015 after obtaining a certified copy of the sale deed. He submits that the plaintiffs applied for the certified copy of the sale deed and after acquiring the same on 15.1.2015, moved application Exhibit 74 on 30.1.2015 seeking addition of party and seeking declaration that the 2008 sale deed would not be binding upon the plaintiffs.

5. He further submits that the trial Court has rejected the application only on the ground that effective steps were not taken for five years and hence the amendment could not be permitted. The trial Court lost sight of the fact that the two lady plaintiffs were handicapped on account of their social status and household affairs. With the assistance of their Advocate when they realized the effect of the sale deed, they have sought to seek an amendment. In such circumstances, the amendment should have been allowed considering the fact that the suit was for partition, separate possession and for declaration that the earlier two sale deeds are not

binding on the plaintiffs.

6. He relies upon the judgment of this Court in the matter of Sanjay Suganchand Kasliwal Vs. Jugalkishor Chhangalal Tapadia [2015 (3) Mah. L.J. 121] and Rajbahadur Jiyaram Yadav Vs. Prakash @ Pappu Jiyaram Yadav and others [2016 (1) All M.R. 550].

7. Shri Garud, learned Advocate appearing on behalf of respondent No.6, who is defendant No.6 in the suit, has strenuously defended the impugned order. Submission is that the suit involves four properties. Issue of sale is only with regard to one property. By seeking declaration as against the sale deed dated 14.8.2008 would change the nature of the suit.

8. He further submits that the proviso to Rule 17 below Order VI creates fetters on the jurisdiction of the Court in allowing an amendment after the trial has commenced. In 2010 the plaintiffs should have gathered knowledge about the said sale deed, when the 7/12 extract was produced. Though the plaintiffs are two ladies and rest are minors, it does not mean that they could move the amendment application at any stage in the suit.

9. He further states that the examination-in-chief and cross-examination of PW 1 is over. Defendant Nos.1 to 4 had sold one of the suit properties to respondent 6. Now that respondent 6 has sold it to a person sought to be added, the plaintiffs should have acted with due diligence. All said and done, considering that defendants 1 to 4 have a share in the

property, the result of the suit would bind the parties to the further transactions as well.

10. He relies on the judgment of the Honourable Supreme Court in the case of Vidyabai and others Vs. Padmalatha and another [(2009) 2 SCC 409] and the judgment of this Court in the matter of Gangubai Baban Kadam Vs. Dr. Vidya Vijay Joshi [2015 (2) MLJ 444]. In the alternative, he submits that if this Court is inclined to allow this petition, heavy costs may be imposed upon the plaintiffs, which shall be paid to defendant No.6 as he alone has appeared in this matter and is contesting the suit as well.

11. I have considered the submissions of the learned Advocates.

12. It cannot be ignored that the two ladies amongst the plaintiffs are married persons and living in their matrimonial homes. They are pitted against their own relatives who are all adult male persons. Barring the two, the four plaintiffs are minors and one has passed away.

13. In the suit for partition, separate possession and declaration that the sale deeds dated 19.12.1995 and 15.11.1997 be declared as not binding on the plaintiffs, four properties have been brought in question. By the 1995 and 1997 sale deeds, defendants 1 to 4 had entered into a sale transaction with defendants 5 and 6. Hence the prayer is for declaration that the sale deeds are not binding on the plaintiffs.

14. The moment the suit was instituted on 10.4.2008, respondent 6 created third party interest by selling out one portion of the suit property on 14.8.2008. Though this fact was tried to be brought on record in 2010, it appears that the two plaintiffs lost sight of the effect of the said sale deeds. Questions were put to PW 1 in the cross-examination with regard to the alienation of the property and she has pleaded ignorance about the same.

15. It needs to be noted that the certified copy of the said sale deed dated 14.8.2008 was received by the said plaintiffs in January 2015 and the application for amendment Exhibit 74 was filed on 30.1.2015.

16. The respondent 6 has relied upon the observations of the Honourable Supreme Court in the case of Vidyabai (supra), in paragraph Nos. 10, 11 and 19 which read as under:-

“10. By reason of the civil Procedure Code (Amendment) Act, 2002 (Act 22 of 2002), the Parliament inter alia inserted a proviso to Order VI Rule 17 of the Code, which reads as under:

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.

It is couched in a mandatory form. The court's jurisdiction to allow such an application is taken away unless the conditions

precedent therefore are satisfied, viz., it must come to a conclusion that in spite of due diligence the parties could not have raised the matter before the commencement of the trial.

11. From the order passed by the learned Trial Judge, it is evident that the respondents had not been able to fulfill the said pre-condition. The question, therefore, which arises for consideration is as to whether the trial had commenced or not. In our opinion, it did. The date on which the issues are framed is the date of first hearing. Provisions of the Code of civil Procedure envisage taking of various steps at different stages of the proceeding. Filing of an affidavit in lieu of examination in chief of the witness, in our opinion, would amount to 'commencement of proceeding'.

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19. It is the primal duty of the court to decide as to whether such an amendment is necessary to decide the real dispute between the parties. Only if such a condition is fulfilled, the amendment is to be allowed. However, proviso appended to Order VI, Rule 17 of the Code restricts the power of the court. It puts an embargo on exercise of its jurisdiction. The court's jurisdiction, in a case of this nature is limited. Thus, unless the jurisdictional fact, as envisaged therein, is found to be existing, the court will have no jurisdiction at all to allow the amendment of the plaint." (Emphasis supplied).

17. I am in respectful agreement with the view taken by the Honourable Supreme Court and especially the observations in paragraph No.19 that it is the primary duty of the Court to assess as to whether such an amendment is necessary to decide the real dispute between the parties. If this

requirement exists, the amendment could be allowed, is the view taken by the Honourable Supreme Court.

18. These plaintiffs are contesting the suit against practically all the male adults in the family. After the suit was instituted, third party interests were created which were not within the knowledge of these two ladies. They had already prayed for a declaration that the 1995 and 1997 sale deeds be declared as not binding on the plaintiffs. When the sixth defendant has systematically created a third party interest, which transaction no doubt would be affected by the Doctrine of "*lis pendence*", no loss or harm would be caused to the defendants if the subsequent event that has occurred is brought on record.

19. In the Gangubai's case (supra), the entire trial had concluded and the matter was posted for advancing oral submissions to be followed by the judgment of the Court. This Court noticed that the amendment sought was in the cause title and it found favour with the view taken by the trial Court that the addition of a party at the stage of advancing final submissions / judgment could not be allowed. In the instant case, one amongst the two lady plaintiffs have stepped into the witness box and the entire trial is yet to be concluded.

20. In the case of Sanjay (supra), this Court had placed reliance upon the view taken by the Honourable Supreme Court in the case of State of Maharashtra vs. Hindustan Construction Company Ltd. [(2010) 4 SCC 518].

that an amendment to the pleadings is a matter of procedure and discretion has to be exercised by the Court in order to facilitate the adjudication of the real dispute.

21. In the matter of Ganesh Trading Co. vs. Moji Ram[AIR 1978 SC 484], the Honourable Apex Court has concluded that the procedural law is intended to facilitate and not obstruct the course of substantive justice. If the issues before the Court could be better adjudicated upon and determined, it was advisable to prevent deviation from the course which litigation on the particular causes of action must take.

22. In the case of Rajeshkumar Agrawal Vs. K.K.Modi [(2006) 4 SCC 385], the Honourable Supreme Court had concluded that if the basic structure of the suit would not be changed and if there was merely a change in the nature of the relief sought, it would be permissible to amend the suit. Similar view has been taken by the Honourable Supreme Court in the matter of Revajeetu Builders and Developers Vs. Narayanaswamy and sons [(2009) 8 MLJ 907(SC)].

23. In the light of the above, if the amendment is allowed and if the defendants are compensated with costs for the rigors of litigation caused, in my view, the trial Court would be in a position to decide the controversy at issue with regard to all the suit properties, one out of which is sought to be alienated successively.

24. For the reasons recorded as above, I find that the trial Court has erred in not granting the leave to amend the suit. The impugned order dated 20.7.2015 is, therefore, quashed and set aside and the writ petition is allowed. Application Exhibit 74 is allowed by imposing costs of Rs.6,000/- on the petitioners, who shall deposit the said costs before the trial Court within three weeks from today. Amendment be carried out within three weeks from today.

25. Learned Advocate for defendant No.6 submits that he alone has contested Exhibit 74 as well as this petition. Rest of the defendants have chosen to be silent spectators and hence the costs be paid to defendant No.6. The petitioners have no objection.

26. As such, the said costs upon being deposited shall be withdrawn by defendant No. 6 without any condition.

(RAVINDRA V. GHUGE, J.)

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