

IN THE HIGH COURT OF JUDICATURE AT MUMBAI
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.2369 OF 2015

M/s. Malas Fruti Products through its Proprietor
Tayyab Azarali Mala ... Petitioner
Vs.
Suketu Himmatlal Trivedi and others ... Respondents

Mr. P. J. Thorat i/b. S. Mahomedbhai and Co. for Petitioner.
Mr. S. T. Bhosale i/b. Mr. Dilip Bodake for Respondents No.1 to 3.

CORAM : R. G. KETKAR, J.
DATE : APRIL 11, 2016

P.C. :

Heard Mr. Thorat, learned Counsel for petitioner and Mr. Bhosale, learned Counsel for respondents No.1 to 3 at length. Rule. Mr. Bodake waives service for respondents. At the request and by consent of the parties, Rule is made returnable forthwith and the Petition is taken up for final hearing.

2. Mr. Bhosale has raised preliminary objection of maintainability of the Petition on the ground of one petition challenging two orders. He, however, could not point out any provision or judgment in support of his objection. Even otherwise, I do not find any merit in this submission. Hence, objection overruled. Petition is maintainable.

3. By this Petition under Article 227 of the Constitution of India, petitioner has challenged the judgment and order dated 10.12.2014 below exhibit-183 as also the judgment and order dated 11.12.2014 below exhibit-182 in Special Civil Suit No.253 of 2008 passed by the learned Civil Judge, Senior Division, Satara. By order dated 10.12.2014 below exhibit-183, the learned trial Judge allowed the application made by the plaintiff under Order VI, Rule 17 of the Code of Civil Procedure,

1908 (for short 'C.P.C.') for amending the plaint. By order dated 11.12.2014 below exhibit-182, the learned trial Judge recast the issues framed below exhibit-50.

4. Respondent No.1, hereinafter referred to as plaintiff, instituted Suit inter alia for declaration that he is the owner of land bearing Revisional Survey No.26/3 admeasuring 1 Hectare 85 Ares situate at Mauje Bhose, Taluka Mahabaleshwar, District Satara (for short 'suit property'); for mandatory injunction directing the defendant to remove the shed unauthorizedly constructed; for mandatory injunction for removal of temporary construction made in addition to shed described in paragraph 5 of the plaint; for perpetual injunction restraining the defendant from causing obstruction to the plaintiff's possession; for cancellation of Sale Deed dated 03.10.1980 executed by Shankar Gole in favour of the defendant and for declaration that the Sale Deed is not binding on the plaintiff.

5. Mr. Thorat submitted that plaintiff took out application for amendment for incorporating paragraph 17-A after paragraph 17 and for adding prayer clause (bb). Amendment application was allowed on 27.11.2000. Plaintiff thereafter took out second application for amendment for incorporating paragraph 20-A and for adding prayer clause 21(b). That application was allowed on 28.04.2008. The Suit was transferred to the Court of Civil Judge, Junior Division, Wai. Plaintiff thereafter filed third application for amendment for increasing Suit valuation. That was allowed on 06.08.2008 and the Suit was transferred to the Court of Civil Judge, Senior Division, Satara.

6. Plaintiff took out application on 08.10.2014 at exhibit-182 for recasting the issues and framing additional issues. By order dated

11.12.2014, the learned trial Judge allowed the application and recast issues framed below exhibit-50. On the same day, plaintiff has filed application at exhibit-183 for adding prayer 21(d) so as to challenge proceedings under Section 32-G and certificate issued under Section 32-M of the Bombay Tenancy and Agricultural Lands Act, 1948 (for short 'Act'). By the order dated 10.12.2014, the learned trial Judge allowed the application exhibit-183 and directed defendants to file additional written statement within 15 days. The learned trial Judge also gave liberty to the parties to lead further evidence.

7. Mr. Thorat submitted that this was the fourth amendment application made by the plaintiff when the matter was kept for judgment. He submitted that parties finished their evidence and the arguments were also completed. Matter was posted for judgment and at that stage, plaintiff filed applications exhibits-182 and 183 for recasting issues and amending the plaint respectively. He submitted that the learned trial Judge was not justified in allowing the application for amendment and in recasting the issues.

8. Mr. Thorat submitted that by application exhibit-182, plaintiff prayed for framing additional issue as regards validity of proceedings under Section 32-G and certificate issued under Section 32-M of the Act. He submitted that initially, on 04.12.1995, the learned trial Judge framed as many as 7 issues. Subsequently, on 23.06.2009, the learned trial Judge framed three additional issues at Serial No.4A to 4C. On 25.03.2010, the learned trial Judge framed additional issue No.8 as regards whether the Suit is barred by limitation. In other words, as on 25.03.2010, the learned trial Judge framed as many as 11 issues. By application exhibit-182, plaintiff prayed for framing additional issue. However, by the impugned order below exhibit-182, the learned trial

Judge has recast the issues and framed as many as 19 issues on 11.12.2014. Upon taking instructions, he states that defendant does not want to file additional written statement as also does not want to lead further evidence.

9. On the other hand, Mr. Bhosale supported the impugned orders. He submitted that the Suit is instituted in the year 1991 and is therefore, governed by the provisions of unamended Order VI, Rule 17 of C.P.C. He further submitted that perusal of the plaint, and in particular paragraphs 6 and 7 shows that the challenge to the proceedings under Section 32-G and 32-M certificate is already raised in the unamended Suit. However, inadvertently, prayer in terms of these paragraphs was not made. He further submitted that defendant is not taken by surprise as the case was already made out in the original plaint.

10. Mr. Bhosale submitted that in paragraph 6 of the order below exhibit-182, the learned trial Judge has observed that the issues are to be framed consistent with the pleadings and if there is mistake on the part of the Court in framing the issues, the same are required to be rectified in the interest of justice.

11. He relied upon the decision of the Apex Court in the case of ***Abdul Rehman Vs. Mohd. Ruldu*, (2012) 11 SCC 341**. In any case, in the application, plaintiff has specifically averred that no additional evidence is required for deciding the prayer clause.

12. For all these reasons, he submitted that no case is made out for interfering with the impugned orders.

13. I have considered the rival submissions advanced by the learned

Counsel appearing for the parties. I have also perused the material on record. It is no doubt true that in the past, plaintiff had applied for amendment on 3 occasions by filing applications under Order VI, Rule 17 of C.P.C. and the said applications were allowed. By the present application for amendment, plaintiff wants to add prayer clause (d) so as to challenge proceedings under Section 32-G as also certificate under Section 32-M of the Act. As noted earlier, the Suit is instituted in the year 1991 and therefore, is obviously governed by the provisions of unamended Order VI, Rule 17 of C.P.C. That apart, perusal of paragraphs 6 and 7 of the original plaint shows that plaintiff has challenged proceedings under Section 32-G as also certificate under Section 32-M of the Act. In view thereof, it cannot be said that the defendant is taken by surprise. In the case of **Abdul Rehman** (*supra*), the Apex Court has observed that the Court should allow all amendments that will be necessary for determining real question in controversy between the parties, provided it does not cause injustice or prejudice to the other side. The main purpose of allowing amendment is to minimise litigation. It was further observed that making clear and explicit what was already implicit in the plaint does not change the nature of the Suit.

14. That apart, in the application for amendment, plaintiff has specifically averred that it is not necessary to lead additional evidence and the application is only for adding prayer clause raising challenge to proceedings under Section 32-G and certificate under Section 32-M of the Act.

15. In view thereof, I do not find any merit in challenge to order allowing the application for amendment. It is also material to note that plaintiff filed application exhibit-182 on 08.10.2014 for framing

additional issue. Perusal of this application shows that plaintiff prayed for framing issue as to whether the proceedings under Section 32-G and consequent certificate under Section 32-M of the Act issued in favour of predecessor in title of the defendants since inception is null and void ab initio and whether plaintiff is entitled to possession of the suit property. On the same day, he also filed application exhibit-183 under Order VI, Rule 17 of C.P.C. for amending the plaint. Thus, the plaintiff was aware of framing of issues earlier as also issues proposed by him in application exhibit-182. In paragraph 1 of the application, plaintiff specifically asserted that it is not necessary to lead additional evidence. In the application exhibit-182, plaintiff did not pray for framing additional issues except issue as regards validity of proceedings under Section 32-G of the Act and 32-M certificate as also about possession of the suit property. As far as issue pertaining to possession is concerned, on 04.12.1995, the learned trial Judge has already framed issue No.2. Thus, the only issue, required to be framed, is about validity of proceedings under Section 32-G and certificate issued under Section 32-M of the Act. Apart from that, plaintiff is fully aware of pleadings of the parties and also issues framed by the learned trial Judge.

16. As noted earlier, in application exhibit-183 under Order VI, Rule 17 of C.P.C., plaintiff specifically averred that for adding prayer clause (d), it is not necessary to lead additional evidence. By application below exhibit-182, plaintiff wants to incorporate issues as regards validity of proceedings under Section 32-G and certificate under Section 32-M of the Act as also about possession of the suit property. In my opinion, the learned trial Judge was not justified in recasting the issues as per the impugned order. The learned trial Judge should have added issues pertaining to the validity of proceedings under Section 32-G and issue of certificate under Section 32-M of the Act in addition to issues, which are

already framed as on 04.12.1995, 23.06.2009 and 25.03.2010. Hence, the following issue shall be added to the issues already framed :

“Whether plaintiff proves that the proceedings under Section 32-G of the Bombay Tenancy and Agricultural Lands Act, 1948 are null and void and consequently, whether Section 32-M certificate also deserves to be set aside being null and void?”

17. The order dated 11.12.2014 passed below exhibit-182 stands modified in the above terms.

18. Rule is partly made absolute in the aforesaid terms with no order as to cost.

(R. G. KETKAR, J.)

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