

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.341/2016

Satish Nandabhai Modi

... Petitioner

V/s.

The Society of the (ST). Peters
High School, Panchgani & Ors.

... Respondents

Mr. R. D. Soni i/b. Ram & Co. for the petitioner
Mr. Pankaj Sawant, Senior Advocate with Mikhil Behl with Mr. Levi
Rubena, Mr. Rajesh Kinnerkar with Amita Irani, Mr. Rushita Dave i/b.
Vigil Juris for the Respondent No.1.

CORAM: K.K. TATED, J.
DATED : JULY 26, 2016

PC. :

1. Heard the learned counsel for the parties. By this petition under Article 227 of the Constitution of India, the petitioner defendant No.3 challenges order dated 11.09.2015 passed by the Jt. Civil Judge, Senior Division, Satara in special civil suit No. 141/2002 allowing the application made by respondent No.1 plaintiff under Order VI Rule 17 of the Code of Civil Procedure, 1908 for carrying out amendment in the plaint.

2. For the sake of brevity, the parties will be referred to as per their nomenclature in the suit i.e. petitioner as defendant No.3, respondent No.1 as plaintiff, respondent No.2 as defendant No.1, respondent No.3 as defendant No.2, respondent No.4 as defendant No.4, respondent No.5 as defendant No.5 and respondent No.6 as defendant No.6.

3. In the present proceedings, the plaintiff filed special civil suit No.141/2002 in the court of Civil Judge, Senior Division, Satara at Satara for declaration of their ownership in respect of the suit property i.e. plot No.502 and 520 situated in T. P. Scheme No.III at Panchgani, Dist. Satara.

4. In that proceedings, the plaintiff made an application below exhibit 6 for an order and injunction restraining the defendant from disturbing their possession and/or carrying out any development activities. That application was dismissed by the 2nd Jt. Civil Judge, Senior Division, Satara on 08.09.2008.

5. Thereafter the plaintiff preferred Appeal from Order No.1271/2008, which was dismissed by order dated 16.08.2010 passed by this court (Coram : R. C. Chavan,J.).

6. Thereafter the plaintiff preferred SLP (Civil) No.32587/2010. The Apex Court, by order dated 10.12.2010 dismissed the SLP. The plaintiff preferred an application under Order VI Rule 17 read with section 151 of the Code of Civil Procedure, 1908 below exhibit 129 for carrying out amendment in the plaint. By the said amendment, the plaintiff wanted to bring on record the facts in which they purchased the suit property in the name of defendant No.1 and how defendant No.1 created third party right, title and interest in favour of defendant No.3 by executing the development agreement. The said application was filed by the plaintiff after dismissal of SLP on the basis of legal

advice from their legal adviser. That application was opposed by defendant No.3 by filing say on 25.03.2011. The Jt. Civil Judge, Senior Division, Satara by impugned order allowed the application made by the plaintiff for carrying out amendment with cost of Rs.2000/-. Hence, the present petition.

7. The learned counsel for the defendant No.3 submits that the trial court, at the time of passing the impugned order dated 11.09.2015 failed to take into consideration that once the trial begins, the court should not allow the amendment as per Order VI Rule 17 of the Code of Civil Procedure, 1908. He submits that in the present proceedings, though the plaintiff filed suit on 08.08.2002 by carrying out amendment, they want to challenge the development agreement dated 23.04.2001 which was executed between defendant No.1 and 3 for development of the suit property i.e. plot No.502, 519 and 520 at Panchgani. He submits that the trial court in para 15 of the impugned order held that just filing an affidavit in lieu of evidence cannot be said that the trial begins. He submits that the said finding is contrary to the law. He submits that when the matter appeared before the trial court on 25.09.2009, the affidavit in lieu of evidence filed by the plaintiff was taken on record by trial court at exhibit 110 with remark "taken on S.A. and R & R". He submits that thereafter the matter was adjourned on several occasions i.e. 11.06.2010, 23.07.2010, 04.08.2010, 21.08.2010 and 08.09.2010 etc. for cross-examination of the plaintiff. In stead of attending the court for cross-examination, the plaintiff had made an application under Order VI Rule 17 of the Code of Civil Procedure, 1908 on 15.02.2011. He submits that once the affidavit in lieu of

evidence is filed, it shows that the trial begins. In support of this contention, he relies of judgment of the Apex Court in the matter of *Vidyabai and Ors. Vs. Padmalatha and Anr. (2009) 2 SCC 409* (para 11 and 12).

8. On the basis of this submission, the learned counsel for the defendant No.3 submits that the reasons given by the trial court for allowing the application made by the plaintiff for carrying out amendment in the plaint is contrary to the provisions of law. Hence, same is liable to be set aside.

9. The learned counsel for the defendant No.3 further submits that in the present proceedings the plaintiff made application for amendment on 15.02.2011 to incorporate the facts and the documents which were available with the plaintiff at the time of filing the suit. He submits that the plaintiff had knowledge about the development agreement executed between defendant Nos.1 and 3 dated 23.04.2001. Though the plaintiff added defendant No.3 as a party in the suit, they failed and neglected to challenge the development agreement dated 23.04.2001. After more than 8 years, they made application for carrying out amendment in the plaint without disclosing any sufficient cause. The main reason given by the plaintiff in the application for carrying out amendment in the plaint is that after disposal of the SLP on 10.12.2010, as per legal advice, they made an application for amendment. The learned counsel for the defendant No.3 submits that unless and until due diligence is shown by the party, the court should not allow the amendment, once the trial begins. In support of this

contention, he relies on judgment of this court in the matter of **Jayashree Subhash Kalbande & Anr. Vs. Shri Bhaurao Nagorao Derkar & Ors. 2014 BCI 168**. Paragraph 9 of the said judgment reads thus:

“9. In the judgment delivered in W.P. No. 722/2012 and connected matters on 25.09.2013, after taking into consideration the various decisions of the Apex Court and of this Court, the law on due diligence has been summarized in paragraph 87 as under;

87. The law on "due diligence" developed till this date is summarized as under:

(a) "Due diligence" means careful and persistent application and effort. It means the diligence as a prudent man would exercise in the conduct of his own affairs. Unless the party takes prompt steps, mere action cannot be accepted after the commencement of the trial. The due diligence determines the scope of party's constructive knowledge of the claim. It is a kind of reasonable investigation, which is necessary before claiming the relief.

(b) The due diligence is distinct from ignorance. In spite of knowledge, ignorance by a party or an Advocate cannot be a matter of due diligence. The neglect to perform an action, which one has an obligation to do, cannot be called as a mistake.

(c) The degree of prejudice to the other side by an amendment after the commencement of the trial is greater than one at pre-trial stage.

(d) Without recording finding on the question of due diligence, the Court shall not get jurisdiction either to allow or disallow an amendment in the pleadings after the commencement of the trial.

(e) The Court while allowing an amendment must

record a finding that in spite of due diligence, the party could not have raised the matter before the commencement of the trial or that the events sought to be brought on record by way of an amendment have occurred subsequent to the commencement of trial.

(f) The facts and grounds in the application for amendment must be clearly stated to bring out a case that the delay caused was beyond the control and diligence of the party proposing amendment.

(g) Where a party had acted with due diligence or not, would depend upon the facts and circumstances of the case and no hard and fast rule or strait-jacket formula can be laid down.”

10. The learned counsel for defendant No.3 submits that as the plaintiff failed and neglected to show due diligence in making an application for amendment after trial begins, the trial court ought to have dismissed their application. On the basis of these submissions and the law laid down by the court, the learned counsel for the defendant No.3 submits that in the interest of justice, this Hon'ble Court be pleased to set aside the impugned order dated 11.09.2015 passed by the trial court below exhibit 129. He submits that if present petition is not allowed, irreparable loss and injury will be caused to the defendant No.3.

11. On the other hand, the learned senior counsel for the plaintiff vehemently opposed the Writ Petition. He submits that the trial court, after considering the documents on record and the reasons disclosed by the plaintiff in their application for carrying out amendment in the plaint, passed the impugned order. Hence, there is no question of

interfering with the well reasoned impugned order. He submits that though the defendant No.3 was added in the suit, they learnt about the execution of development agreement when they carried out search of the old papers. Hence, there was delay on their part to make appropriate application for carrying out amendment. He further submits that because of dispute between the trustees of defendant No.1 they learnt about the development agreement dated 23.04.2001 recently. Hence, there was delay on their part to make application. He further submits that the delay cannot be considered as a ground for rejection of the application for carrying out amendment.

12. The learned senior counsel for the plaintiff submits that the plaintiff filed Writ Petition No.9725/2011 in this court challenging the permission granted by the Charity Commissioner under section 36 of the Maharashtra Public Trust Act, 1970 in favour of defendant No.3 for suit property. He submits that the said Writ Petition is pending for hearing and final disposal. He submits that in that Writ Petition the Division Bench of this court, by order dated 20.02.2013 directed the legal Advisor cum Jt. Secretary to initiate an inquiry inter alia in respect of the orders passed by the office of the Charity Commissioner u/s.36 (1)(a) of the Maharashtra Public Trust Act from 1970 till December 2008 and to take legal steps to restore the properties. He submits that in any case, the suit property was purchased in the name of defendant No.1 by the plaintiff out of their own pocket. Hence, if the present Writ Petition is allowed, irreparable loss and injury will be caused to them. On the basis of this submission, the learned senior counsel for the plaintiff submits that there is no substance in the Writ Petition. Same to be dismissed with costs.

13. Heard both sides at length. The issue involved in the present petition is whether the order passed by the trial court dated 11.09.2015 below exhibit 129 allowing the application made by the plaintiff under Order VI Rule 17 of the Code of Civil Procedure, 1908 to carry out amendment in the plaint is sustainable in law.

14. It is to be noted that, though the plaintiff filed the suit on 08.08.2002, they failed and neglected to challenge the development agreement between the defendant Nos.1 and 3 dated 23.04.2001. There is no explanation in their application for amendment as to why they took more than 10 years to make an application for amendment. This shows that though they had knowledge about the agreement, the plaintiff failed to take appropriate steps for challenging the same. The reasons given by the plaintiff in the application for amendment that after disposal of the SLP on 10.12.2010, on legal advice they made the application for amendment. That cannot be a ground for considering the plaintiff's application after belated period. Apart from that the plaintiff filed affidavit in lieu of evidence in the trial court. Same was accepted and marked exhibit 110. This itself shows that the trial of the suit was begun. The Apex Court, in the matter of Vidyabai (supra) taken a view that once affidavit of evidence is filed and trial begins, thereafter there is no question of allowing the parties to carry out amendment in the pleadings. In spite of these facts, the trial court in para 15 of the impugned order recorded that the trial has not begun though the affidavit of evidence was filed by the plaintiff. On this ground also, the impugned order is liable to be set aside.

15. Considering the above mentioned facts that the plaintiff failed to

disclose the sufficient cause for carrying out amendment after filing of affidavit of evidence and disclose due diligence and law declared by the Apex Court in the matter of Vidyabai (supra), I am of the opinion that the impugned order passed by the trial court dated 11.09.2015 is liable to be set aside.

16. Hence, following order is passed:

- a. Writ Petition is allowed.
- b. Impugned order dated 11.09.2015 passed by the Jt. Civil Judge, Senior Division, Satara below application exhibit No.129 in special civil suit No. 141/2002 is set aside.
- c. The application made by the plaintiff below exhibit 129 is dismissed/rejected.
- d. The plaintiff is directed to carry out appropriate amendment in the plaint within 12 weeks from today.
- e. If plaintiff fails to carry out amendment within stipulated time as stated hereinabove, liberty granted to defendant No.3 to carry out amendment in the plaint thereafter.
- f. Writ Petition stands disposed of accordingly.

(K.K. TATED, J.)