

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

**WRIT PETITION NO.1727 OF 2016
WITH
WRIT PETITION NO.4210 OF 2016**

Shri Kesarinath Bhiva Patil

Petitioner

Vs

Shri Deepak Naran Chaudhari
and Ors

.. Respondents

Mr. Surel S. Shah a/w Mr. S.J.Chaurasia i/b Ashoka Law Firm for petitioner.

Mr. Vipinchandra R. Kastle, Advocate for respondent no.1.

Mr. R.D.Soni i/b Ravindra S. Palas , Advocate for Respondents no. 2 to 4.

CORAM : R.G.KETKAR,J.

DATE : 13/04/2016

PC:

1. Heard Mr. Surel Shah, learned counsel for the petitioner, Mr. V.R. Kastle, learned Counsel for respondent no.1, Mr. R.D.Soni, learned counsel for respondents no.2 to 4 in both the petitions at length. None appears for respondents no. 5, 6 and 7 in Writ Petition No.1727 of 2016, despite service. Mr. Shah applies for deleting respondents no. 5 to 7 in Writ Petition No. 4210 of 2016 on the ground that no relief is claimed against them. On the motion made by Mr. Shah, leave to delete respondents no. 5 to 7 in Writ Petition No.4210 of 2016 is granted. Amendment shall be carries out forthwith.

2. Rule. Learned counsel for the respective respondents

waive service. None appears for respondents no. 5 to 7 in Writ Petition No.1727 of 2016 despite service. In view of order dated 10.2.2016, this Petition is also disposed of finally along with the companion writ petition. At the request and by consent of the parties, Rule is made returnable forthwith and the petitions are taken up for final hearing.

3. Writ Petition No.1727 of 2016 is directed against (1) Judgments and orders dated 6.11.2015 below Exhibits-30 and 32 in Spl. Civil Suit No. 89 of 2015 passed by the learned Jt. Civil Judge, Senior Division, Panvel. By order dated 6.11.2015, the learned trial Judge rejected application-Exhibit-30 dated 9.7.2015 made by the petitioner, hereinafter referred to as plaintiff, under Order VI Rule 17 of C.P.C. for amending the plaint. By order dated 6.11.2015, the learned trial Judge rejected application Exh. 32 made by the plaintiff under section 151 of CPC on 9.7.2015.

4. Writ Petition No 4210 of 2016 is instituted by the plaintiff challenging the judgments and orders dated 4.2.2016 below Exhibits-47 and 49 in Special Civil Suit No. 89 of 2015 passed by the learned trial Judge. By order dated 4.2.2016 below Exh.47, the learned trial Judge rejected the application made by the plaintiff under Section 151 on 17.8.2015 for amending the plaint. By order dated 4.2.2016 below Exh.49, the learned trial Judge rejected the application made by the plaintiff on 17.8.2015 under

Order VI, Rule 17 of C.P.C.

5. As the common questions of law and facts arise in these petitions, the same can conveniently be disposed of by this common order. For appreciating the controversy raised in the petitions, facts from Writ Petition No.1727 of 2016 is taken into consideration.

6. The plaintiff has instituted suit for declaration that he is owner/lease holder and in possession of plot no. 5 in Sector no.24 admeasuring 4499.72 sq. meters, at Taloje Nod; for declaration that the Development Agreement dated 24.6.2010 entered into by and between the plaintiff and defendant no.1 stands cancelled permanently in view of violation of the terms and conditions; for declaration that the tripartite agreement entered into by and between defendant no.1 and defendants no. 2 and 3 is illegal as the same is executed in breach of terms and conditions of the Development Agreement dated 24.6.2010; for declaration that the Development Agreement dated 6.8.2012 entered into by and between defendant no.1 with defendants no.2 and 3 is not binding on the plaintiff in view of violation of terms and conditions of the Development Agreement dated 24.6.2010 by defendant no.1, among other prayers.

7. During pendency of the suit, the plaintiff took out application for temporary injunction on 9.3.2015. The plaintiff thereafter took out application Exhibit 30 under Order VI, Rule 17

on 9.7.2015 for amending the plaint so as to incorporate paragraphs 11-A, 14-A and adding prayer clauses (b-1), (d-1) and (d-2). The plaintiff also took out application at Exh.32 under Section 151 on 9.7.2015 for adding paragraphs 11-A and 14-A. Defendant no.2 filed reply at Exhibit-54 on 4.9.2015 to the application filed under section 151 of C.P.C. Defendant no.1 also filed reply Exhibit-78 on 14.9.2015 to the application filed under Order VI, Rule 17 of C.P.C. Defendant no.4 also filed reply opposing application Exh.30. Defendant no.3 filed purshis adopting say of defendant no.4 to Exhibits 30 and 32. By the impugned orders, the learned trial Judge rejected the applications Exhibits 30 and 32. It is against these orders, the plaintiff has instituted the present petitions.

8. Mr. Shah submitted that during the pendency of the suit, advocate for defendant no.4 produced tripartite agreement dated 25.2.2015. Perusal of this tripartite agreement shows that it was registered on 2.3.2015. The plaintiff had made correspondence with City Industrial Development Corporation (CIDO) for cancellation of tripartite agreement dated 30.6.2010 as also 6.8.2012. Defendant no. 4 was also requested not to enter into any transaction in respect of the suit plot. The plaintiff issued notice to the Advocate on 23.2.2015 to defendant no.4 which was received by defendant no.4 on 25.2.2015. On 9.3.2015 the plaintiff instituted present suit and despite receipt of notices

dated 24.4.2015 and 25.2.2015, defendants colluded and entered into tripartite agreement which was registered on 2.3.2015. Though the plaintiff has specifically challenged tripartite agreement dated 30.6.2010, however, inadvertently prayer to that effect was not made. It is, therefore, necessary to add that prayer clause. The plaintiff, therefore, proposed to add paragraphs 11-A, 14-A as also prayer clauses (b-1), (d-1) and (d-2). He submitted that the issues are yet to be framed and the trial is therefore yet not commenced. The learned trial Judge however rejected the application on the ground that the plaintiff is trying to fill up lacunae in the suit and proposed amendment changes the nature of the suit. He submitted that by the proposed amendment, the nature of the suit does not change as also there is no question of filling up any lacunae in the suit. He, therefore, submitted that the impugned orders deserve to be set aside.

9. As far as order below Exh.32 is concerned, for the self-same reasons while rejecting application Exhibit 32, the learned trial Judge rejected the application. He, therefore, submitted that the petition deserves to be allowed.

10. On the other hand, Mr.Soni supported the impugned orders. Mr. Soni submitted that the learned trial Judge rightly came to the conclusion that by the proposed amendment, nature of the suit changes. He submitted that though in the suit, the plaintiff has

referred to tripartite agreement dated 30.6.2010 in paragraphs 11 and 13, still no such prayer was made. The challenge to tripartite agreement dated 30.6.2010 is clearly barred even at the time of filing of the suit. The learned trial Judge was, therefore, justified in rejecting the application for amendment which introduced time barred claim.

11. In so far as Writ Petition No.4210 of 2016 is concerned, Mr. Shah submitted that while considering applications for amendment, the Court cannot enter into merits of the case. He submitted that the impugned orders deserve to be set aside. Mr Soni invited my attention to paragraph 5 of the plaint and paragraph 3 of application Exhibit 47 and submitted that one one hand, the plaintiff asserted in paragraph 5 of the plaint that the transaction was entered into with defendant no.1 in July 2012 and the plaintiff received Rs. 25 lacs from defendant no.1 in August 2012, on the other, in paragraph 3 of the application Exh.47 the plaintiff has alleged that the development agreement dated 3.7.2012 does not bear the plaintiff's signature. The signatures of the plaintiff and son of the plaintiff appearing on the said document are forged and fabricated. He submitted that the plaintiff cannot take inconsistent stand and the learned trial Judge was, therefore, justified in rejecting the application.

12. 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 not in dispute that the issues are yet to be framed. In other words, the trial is yet to commence. In view of the decision of the Apex Court in the case of Vidyabai Vs Padmalatha, 2009 (2) SCC 409 and in particular paragraphs 7 and 8 thereof, proviso to Order VI, Rule 17 is not applicable. Perusal of the plaint shows that in paragraphs 11 and 13, the plaintiff has referred to tripartite agreement dated 30.6.2010 and he is issuing notice through Advocate on 23.2.2015 for cancellation of Development Agreement dated 24.6.2010, tripartite agreements dated 30.6.2010 and 6.8.2012. In paragraph 13, the plaintiff has referred to Development Agreement dated 24.6.2010 and tripartite agreement dated 30.6.2010 and alleged that they were entered into between plaintiff and defendant no.1 by playing deception on the plaintiff. The plaintiff has also prayed for cancellation of tripartite agreements dated 30.6.2010 as also dated 6.8.2012. However, perusal of the prayer clause shows that inadvertently the prayer for cancellation of tripartite agreement dated 30.6.2010 was not made and prayer for cancellation of Development Agreement dated 24.6.2010 and tripartite agreement dated 6.8.2012 was only made. In the case Abdul Rehman Vs Mohd Ruldu, (2012) 11 SCC 341, the Apex Court has held that "making clear and explicit what was already implicit in plaint is permissible and nature of suit does not change. It is further held that all amendments

which are necessary for purpose of determining real questions in controversy between the parties should be allowed if it does not change basic nature of suit”.

13. In the present case, the plaintiff has laid foundation for challenging the tripartite agreement dated 30.6.2010. However, prayer clause to that effect was not made. The relief of cancellation of tripartite agreement dated 30.6.2010 does not change nature of suit as alleged by the defendants. As the trial is yet to commence, I find that the defendants are not taken by surprise and no prejudice will be caused to them in case amendment is allowed. The learned trial judge, however, rejected the application Exh.30 on the ground that by the proposed amendment the plaintiff wants to fill up lacunae as also it changes the nature of the suit. The said reasons cannot be sustained in view of paragraphs 11 and 13 of the plaint referred herein above. In view thereof, the order below Exhibit 30 is liable to be set aside. At the same time, the learned trial Judge will frame issue as to whether challenge to tripartite agreement dated 30.6.2010 is barred by limitation.

14. As far as order below Exhibit 32 is concerned, for the self-same reasons, the learned trial Judge has rejected the application. In view thereof, the order below Exhibit 32 is also liable to be set aside. Hence, the following order.

(i) Impugned orders dated 6.11.2015 below Exhibits 30 and 32

are quashed and set aside and the applications are allowed.

(ii) Amendment in the main suit shall be carried out within 14 days from production of the authenticated copy of the order and amended slip shall be made over to the other side.

(iii) While framing the issues, the learned trial Judge will also frame issue as to whether the prayer for cancellation of tripartite agreement dated 30.6.2010 is barred by limitation. The defendant are at liberty to file additional written statement to the amended plaint within two weeks from the service of the amendment slip.

(iv) As the application at Exh.5 is pending since 9.3.2015, the learned trial Judge is requested to decide the said application as expeditiously as possible and preferably on or before 30.6.2016.

(v) Rule is made absolute in the aforesaid terms with no order as to costs.

15. As far as challenge to orders below Exhibits 47 and 49 in Writ Petition No. 4210 of 2016 is concerned, perusal of paragraph 5 of the plaint and paragraph 3 of the application Exh.47 does not show that the plaintiff has referred to transaction of July 2012 in paragraph 5 of the plaint. What is referred by the plaintiff in paragraph 5 is that he made inquiries with defendant no.1 as to payment of balance enhanced compensation whereupon defendant no.1 issued four cheques of Rs. 25 lacs each in Aug. 2012. In paragraph 3 of the application Exh.47, the plaintiff has

referred to Development Agreement dated 23.7.2012 executed by defendants no.1 to 3. The plaintiff alleged that defendants no. 1 to 3 colluded and executed Development Agreement and the signatures of the plaintiff thereon are forged and fabricated. Even the signature of the plaintiff's son Prakash as a witness is also forged and fabricated. The plaintiff never executed such document. In view thereof, submission of Mr. Soni that the proposed amendment is inconsistent with the assertions in paragraph 5 of the plaint cannot be accepted. While rejecting applications, the learned trial Judge entered into merits of the case.

16. In view thereof and for the reasons recorded in allowing Writ Petition no.1727 of 2016, this petition also deserves to be allowed. Hence the following order.

- (i) Impugned orders dated 4.2.2016 below Exhibits 47 and 49 are quashed and set aside and the applications are allowed.
- (ii) Amendment in the main suit shall be carried out within 14 days from production of the authenticated copy of the order and amended slip shall be made over to the other side.
- (iii) Rule is made absolute in the aforesaid terms with no order as to costs.

17. It is expressly made clear that the observations made herein are tentative and prima facie and are made only for the purpose of considering correctness of the impugned order. The

learned trial Judge will decide the suit on the basis of evidence on record and on its own merits in accordance with law uninfluenced by the observations made in the impugned orders and in this order. Order accordingly.

(R.G.KETKAR, J.)