

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Writ Petition NO. 6247 OF 2015

Shri. Rakesh Rajendrakumar Agarwal ...Petitioner

Versus

Smt. Shakunatala Ishwarlal Dalal

And Ors

...Respondents

....

Mr. P.K. Dhakephalkar, Senior Advocate a/w. Mr. Amol Mhatre,
for the Petitioner.

Ms. S.P. Trivedi i/b. A. Bharat & Co. for respondent Nos.10 and
12.

Mr. K.S. Deval i/b. Jayesh Joshi, for Respondent No.15.

Mr. Nitin Gangal, Advocate for Respondent No.16.

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CORAM : R. G. KETKAR, J.

DATE : 26th APRIL, 2016

P.C.

1. Heard Mr.P.K. Dhakephalkar, learned Senior Counsel for the petitioner, Ms.S.P. Trivedi, learned Counsel for respondent Nos.10 & 12, Mr. K.S. Deval, learned Counsel for respondent No.15 and Mr. Nitin Gangal, learned Counsel for respondent No.16, at length.

2. By this Petition under Article 227 of the Constitution of India, the petitioner has challenged the judgment and order dated 12.3.2015 passed by the learned Civil Judge, Senior

Division, Vasai below Exhibit-83 in Special Civil Suit No.90/2010. By that order, learned trial Judge rejected the application made by the petitioner, hereinafter referred to as 'defendant No.5', under Order VI Rule 17 of Code of Civil Procedure, 1908 (for short, 'C.P.C.') for amending the written statement.

3. Respondent Nos.1 to 9, hereinafter referred to as the plaintiffs, have instituted the suit *inter alia* for declaration that the sale deeds dated 11.5.1989, 11.12.1990 and 12.12.1990 are illegal, null and void and for cancellation thereof; for possession of the properties more particularly described in paragraph-1 of the plaint; for perpetual injunction restraining defendant Nos.1 to 9 from carrying out any construction or creating third party interest in the suit properties. The subject matter of the suit are following properties :

Sr. No.	Survey No.	Hissa No.	Area [H R]
1.	110	–	0-07-1
2.	81	1	0-44-5 Pot Kharaba 0-23-5
3.	63	Part	0-47-0 Pot Kharaba 0-10-1
4.	64	Part	0-17-3

			Pot Kharaba 0-10-4
5.	71	1	0-15-2 Pot Kharaba 0-06-1
6.	54	3/1	0-39-8 Pot Kharaba 0-06-0

4. The controversy in the present petition is in respect of property at Sr. No.3 i.e. Survey No.63(P) admeasuring 47 Ares + pot kaharaba 0.10.1. The case of the plaintiffs is that the sale deeds were executed by imposters posing themselves as Ishwarlal Harkishandas Desai and Thakorbhai Harkishandas Desai who are the owners of these properties. As far as property at Sr. No.3 is concerned, the same was purchased by the defendants No.1, 2 and 4 on 11.12.1990. The plaintiffs alleged that said sale deed was executed by cheating by personation. In other words somebody pretending to be Ishwarlal Harkishandas Desai and Thakorbhai Harkishandas Desai executed sale deed dated 11.12.1990 in favour of defendant Nos.1, 2 and 4. Defendant No.5 had purchased the property at Sr. No.3 from defendants No.1, 2 and 4 on 13.9.2004.

5. Defendant No.5 filed written statement. As far as defendant No.5 is concerned, the allegations against him are to

be found in paragraph-5 of the plaint. Defendant No.5 denied the assertions made in the plaint. In particular while replying assertions in paragraph-5, defendant No.5 contended that the claim of the plaintiffs is false and mischievous. In other words, defendant No.5 filed written statement denying all the assertions pertaining to cheating by personation.

6. During pendency of the suit, defendant No.5 filed application Exhibit-83 on or about 5.8.2014 under Order VI Rule 17 of CPC for amending the written statement. It is the case of defendant No.5 that during pendency of the suit, he got information from the plaintiffs as regards cancellation of the mutation entries which were made in pursuance of the sale deeds dated 11.5.1989, 11.12.1990 and 12.12.1990. By the proposed amendment, defendant No.5 wants to incorporate paragraph-7A to the effect that sale deeds of 11.5.1989, 11.12.1990 and 12.12.1990 were not executed actually by Ishwarlal Harkishandas Desai and Thakorbhai Harkishandas Desai but were executed by somebody else pretending to be these persons. By the impugned order, learned trial Judge rejected the application mainly on the ground that whereas

earlier defendant No.5 has resisted the suit and denied the assertions made in the plaint, by the proposed amendment he is admitting the claim of the plaintiffs. Such type of amendment will amount to withdrawal of previous admission or the previous defence. Defendant No.5 by way of proposed amendment wants to come up with a new case and with contrary pleading. The amendment cannot be allowed to withdraw the admission.

7. In support of this Petition, Mr. Dhakephalkar strenuously contended that the proposed amendment is to bring on record the subsequent events. He submitted that mutation entries which were made in pursuance of various sale deeds were subject matter of challenge before the Revenue Authorities. The mutation entries were challenged by the plaintiffs. Appeal preferred by the plaintiffs was dismissed. Aggrieved by that decision, the plaintiffs preferred appeal before the Deputy Collector, Thane. Appeal was allowed and the mutation entries were cancelled. Aggrieved by this decision, defendant No.1 preferred Revision Application before the Additional Commissioner, Konkan Division, Mumbai which was dismissed. He submitted that while considering the application for

amendment of the written statement, the Court has to adopt liberal approach. In the written statement, the defendant can take inconsistent pleas. Even assuming that there was some admission in the original written statement, such admission can be explained by amending written statement. The trial is not yet commenced. In view thereof, the learned trial Judge should have allowed the application for amendment. He submitted that the learned trial Judge committed error in holding that by the proposed amendment, defendant No.5 wants to withdraw the admission. In support of these submissions, he relied upon following decisions :

[I] ***Sushil Kumar Jain vs. Manoj Kumar & Anr., 2010(4) Bom.C.R. 437*** and in particular paragraphs-9, 10 and 11 thereof to contend that even assuming that there was some admission by defendant No.5 in his original written statement, such admission can be explained by amendment of his written statement even by taking inconsistent pleas or subsisting or altering his defence. An amendment of a plaint and amendment of a written statement are not necessarily governed by exactly the same principle. In case of an amendment of written

statement, the Courts would be more liberal in allowing the amendment than that of a plaint as the question of prejudice would be far less in the former than in the later and addition of a new ground of defence or substituting or altering a defence or taking inconsistent pleas in the written statement can also be allowed.

[II] ***Akshaya Restaurant Vs. P. Anjanappa and another, 1995 Supp (2) SCC 303***, to contend that even admission in pleadings can be explained and inconsistent pleas can be taken in the written statement.

8. On the other hand, Mr. Gangal supported the impugned order. He invited my attention to original written statement filed by defendant No.5 and application for amendment. He further submitted that on 21.11.2013, the plaintiffs have executed the conveyance in favour of defendant No.5. The ulterior motive of defendant No.5 is to clandestinely support the plaintiffs for perfecting his title. He further submitted that the Additional Commissioner, Konkan passed status quo order. Notwithstanding that order, the conveyance was executed on 21.11.2013. He further submitted that by

permitting defendant No.5 to amend the written statement, irreparable prejudice will be caused to the defendant No.8 (respondent No.16 herein). He submitted that the proposed amendment is malafide and ought not to be allowed. He relied upon the decision of Apex Court in the case of **Gautam Sarup vs. Leela Jetly and others, (2008) 7 SCC 85**. Mr. Deval also supported the impugned order. He submitted that the plaintiffs executed conveyance in favour of defendant No.5 on 21.11.2013. Present application for amendment was made on 5.8.2014. In the application, defendant No.5 has suppressed execution of conveyance by plaintiffs in his favour.

9. I have considered the rival submissions advanced by learned Counsel appearing for the parties. I have also perused the material on record. As noted earlier defendant No.5 has made application for amending the written statement. In the case of **Sushil Kumar Jain (supra)**, Apex Court has observed in paragraphs-9 to 11 thus :

“9. That apart, a careful reading of the application for amendment of the written statement, we are of the view that the appellant **seeks to only elaborate and clarify the earlier inadvertence and confusion made in his written statement**. Even assuming that there

was admission made by the appellant in his original written statement, then also, such admission can be explained by amendment of his written statement even by taking inconsistent pleas or substituting or altering his defence.

10. At this stage, we may remind ourselves that law is now well settled that an amendment of a plaint and amendment of a written statement are not necessarily governed by exactly the same principle. Adding a new ground of defence or substituting or altering a defence does not raise the same problem as adding, altering, substituting a new cause of action (See Baldev Singh and Ors. Vs. Manohar Singh & Anr.), 2006(6) Bom. C.R. 710 (S.C.) : 2006 DGLS (soft) 490 : A.I.R. 2006 S.C. 2832.

11. Similar view has also been expressed in (Usha Balashaheb Swami and Ors. Vs. Kiran Appaso Swami & Ors., 2007 DGLS (soft) 438 : A.I.R. 2007 S.C. 1663. It is equally well settled that in the case of an amendment of a written statement, the Courts would be more liberal in allowing than that of a plaint as the question of prejudice would be far less in the former than in the latter and addition of a new ground of defence or substituting or altering a defence or taking inconsistent pleas in the written statement can also be allowed.”

[Emphasis supplied]

10. Perusal of the above extracted paragraphs show that it is settled position in case of amendment of written statement, the Courts have to be liberal in allowing the application as it deems fit in the facts than that of a plaint as the question of prejudice would be far less in the former than in the later and addition of a new ground of defence or substituting or altering a defence or taking inconsistent pleas in the written statement

can also be allowed. It is also settled position in law that the defendant can take inconsistent pleas in written statement. Apex Court held that amendment proposed was to only elaborate and clarify the earlier inadvertence and confusion made in the written statement.

11. In the case of **Gautam Sarup (supra)**, Apex Court considered various decisions including the decision in **Rajesh Kumar Aggarwal vs. K.K. Modi, (2006) 4 SCC 385**. In paragraph-20 of the report, it was observed thus :

“20. ...The court always gives leave to amend the pleadings of a party unless it is satisfied that the party applying was acting mala fide. There is a plethora of precedents pertaining to the grant or refusal of permission for amendment of pleadings. The various decisions rendered by this Court and the proposition laid down therein are widely known. This Court has consistently held that the amendment to pleading should be liberally allowed since procedural obstacles ought not to impede the dispensation of justice.”

12. The question is whether in the present case the proposed amendment is *mala fide* or not.

13. Perusal of the assertions made in paragraph-4 of the plaint shows that as far as property at Sr. No.3 is concerned that

was purchased by defendants No.1, 2 and 4 on 11.12.1990. Defendant No.5 had purchased the property from defendants No.1, 2 and 4 on 13.9.2004. The foundation laid by the plaintiffs in the suit about execution of sale deed dated 11.12.1990 is cheating by personation. Obviously, that time defendant No.5 was not in picture. Defendant No.5 came in picture only on 13.9.2004. Perusal of the original written statement shows that defendant No.5 specifically denied all the assertions and in particular as far as assertions made in paragraph-4 and 5 thereof. Basis of the application for amendment shows that defendant No.5 acquired information from the plaintiffs.

14. In the application defendant No.5 contended that WS was filed by him on the basis of information furnished by defendant No.1. As against this, perusal of verification clause shows that defendant No.5 solemnly affirmed that the contentions raised are true to his knowledge and belief and is true and correct. It is in this context, material to consider affidavit filed by respondent No.16 (defendant No.8) and in particular paragraph-3 thereof. On 21.11.2013 the plaintiffs executed sale deed in favour of defendant No.5. It is only

thereafter defendant No.5 had filed an application on 5.8.2014 proposing amendment on the ground that he got information from the plaintiffs. In the application, defendant No.5 has suppressed the fact of execution of conveyance dated 21.11.2013 by the plaintiffs in his favour. By the proposed amendment, defendant No.5 is admitting claim of the plaintiffs that the sale deeds were executed by some persons other than Ishwarlal Harkishandas Desai and Thakorbbhai Harkishandas Desai. In other words, there is cheating by personation. The proposed amendment will certainly cause prejudice to contesting defendants. In my opinion, the amendment proposed is not innocuous or innocent and clearly lacks *bonafide*. Change of heart of defendant No.5 was not sudden and it is only after execution of the sale deed by the plaintiffs in his favour that the amendment application is made. In my opinion the proposed amendment is both *malafide* and dishonest.

15. In the case of ***Revajeetu Builders & Developers vs. Narayanaswamy & Sons & Ors., 2009(10) SCC 84***, after critical analysis of both English and Indian cases, Apex Court culled out basic principles which ought to be taken into

consideration while allowing the application for amendments.

Some of them are as under :

- (1) Whether the application for amendment is *bona fide* or *mala fide* ?
- (2) Whether the proposed amendment constitutionally or fundamentally changes the nature and character of the case ? and
- (3) The decision on an application made under Order VI Rule 17 is a very serious judicial exercise and the said exercise should never be undertaken in a casual manner.

16. The Apex Court held that while deciding applications for amendments the Courts must not refuse bonafide, legitimate, honest and necessary amendments and should never permit malafide, worthless and/or dishonest amendments.

17. In view thereof, I am more than satisfied that the proposed amendment is *malafide* and dishonest. The learned trial Judge was fully justified in rejecting the application. By the proposed amendment, defendant No.5 wants to withdraw the admission or the defence, which will certainly prejudice the case of contesting defendants. Applying the tests laid down by the Apex Court in ***Revajeetu Builders & Developers (supra)***, no case is made out for invocation of powers under Article 227 of

the Constitution of India.

18. As I have recorded a finding that the proposed amendment is *malafide* and as the respondents are compelled to oppose amendment application before different Courts, the petition is required to be dismissed by imposing exemplary costs. Hence, the petition is dismissed with exemplary costs quantified at Rs.1,00,000/- (Rupees One Lac Only) to be paid to defendant Nos.1, 2, 4, 7 and 8 in equal proportion. The costs shall be paid within four weeks from today failing which the Collector, Palghar shall recover it as land revenue from defendant No.5. In case, defendant No.5 obtains suitable orders from the higher Court, same shall be communicated the Collector, Palghar. Let an authenticated copy of this order be transmitted to the office of the Collector, Palghar for taking appropriate action. Order accordingly.

(R. G. KETKAR, J.)

Deshmane (PS)