

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 7161 OF 2012**

Balkrishna Maruti Mathwad and
Anr

Petitioners

Vs

Dhananjay Vishwanath
Chindhwaade and Ors

.. Respondents

Mr. Madhav Jamdar, Advocate for Petitioners.
Mr. R.S.Gadekar, Advocate for Respondents.

CORAM : R.G.KETKAR,J.
DATE : 11/03/2016

PC:

1. Heard Mr. Madhav Jamdar, learned counsel for the petitioners and Mr. R.S.Gadekar, learned counsel for the respondents at length.

2. By this Petition under Article 227 of the Constitution of India, the petitioners have challenged the Judgment and order dated 23.4.2012 passed by the learned 31st Civil Judge, Jr. Dn.,Pune below Exhibit-82 in Regular Civil Suit No.1873 of 2004. By that order, the learned trial Judge allowed the application made by the respondents, hereinafter referred to as 'plaintiffs' under Order VI, Rule 17 of C.P.C. and allowed the application for amendment of the plaint, subject to payment of costs of Rs.2000/- within 14 days.

3. The plaintiffs have instituted the suit against the petitioners, hereinafter referred to as defendants, for specific performance of contract dated 15.6.1988. In paragraph 1 of the

Plaint, the plaintiffs gave description of the suit property. The defendants filed written statement dated 25.1.2005 at Exh.18. In paragraph 2, the defendants contended that the description of the suit property given in paragraph 1 is not correct. The plaintiff is owner to the extent of undivided area admeasuring 375 sq.meters only. On the basis of the pleadings of the parties, the learned trial Judge framed Issues. Issue no.7 was to the following effect:

Does the defendants prove that the description of the suit property mentioned in the plaint was wrong?

4. The plaintiffs filed affidavit of evidence of their Power of Attorney, Dneshwar Dagdoba Hivrekar on 18.4.2015. He was cross examined by the defendants. The defendants also completed their evidence. The defendants also finished their arguments and it was at the stage of the plaintiffs' arguments. At that stage, the plaintiffs made application Exh.82 for amending the plaint on 19.3.2012. The defendants filed reply dated 26.3.2012 at Exhibit 84, inter alia, contending that the proposed amendment changes the nature of the suit. By the proposed amendment, the plaintiffs are trying to change boundaries of the suit property as also filling up lacunae in the pleadings as well as in evidence. The plaintiff has filed his application to wipe out the admissions given by the witness in cross examination and, therefore, the amendment should not be allowed. The defendants

further contended that suit is instituted in the year 2004 and application for amendment was taken out at a belated stage after eight years. The evidence of both the parties is over. Final arguments of the Advocate for the defendants are over and it is for the arguments of the plaintiff. It is at that stage, the application is filed to protract the hearing of the suit.

5. Though the learned trial Judge observed that application is filed belatedly, it was allowed by observing that there is no change in boundaries after institution of the suit. As the plaintiff has filed application belatedly, the same was allowed subject to payment of costs of Rs.2000/-.

6. Mr. Jamdar submitted that on 29.11.2004 the plaintiff has instituted the suit for specific performance of agreement dated 15.6.1988. On 25.1.2005, defendant no.1 filed written statement and disputed correctness of description of suit property. On 18.11.2010, issues were framed. Issue no.7 was pertaining to whether the defendants prove that description of the suit property mentioned in the plaint was wrong? On 18.4.2011 the plaintiff filed affidavit of evidence and was cross examined. He has taken me through the cross examination of the plaintiff's witnesses and in particular paragraphs 22, 23, 25 as also reply dated 26.3.2012 filed by the defendants opposing the application for amendment. He submitted that as per amended provisions of Order VI, Rule 17 of C.P.C, no application for amendment can be

allowed after the commencement of trial unless party applying satisfies the court that inspite of due diligence, it could not have raised issue before the commencement of trial and the Court is satisfied with explanation, amendment can be allowed even after commencement of the trial. He submitted that by allowing the amendment after commencement of trial particularly after completion of evidence as also completion of arguments of the defendants, prejudice is caused to the defendants and, therefore, the learned trial Judge ought not to have allowed the amendment. He further submitted that the application for amendment is moved belatedly after 8 years, that too, after completion of evidence as also arguments of defendants. The application was made at the stage of plaintiff's arguments. In support of his submissions, he relied upon decision of Rajkumar Gurawara (dead) through LRs Vs S.R.Sarwagi and Co. Pvt Ltd, (2008) 14 Supreme Court Cases 364 and in particular paragraphs 12 and 13.

7. On the other hand, Mr. Gadekar supported the impugned order. He has invited my attention to Agreement of sale dated 15.6.1988 and in particular description of property in paragraph 1 thereof as also paragraph 1 of the plaint. He also invited my attention to application Exhibit 82 and in particular the proposed amendment. He submitted that the defendants are fully aware with the case made out by the plaintiff and are not taken by

surprise. He further contended that making clear and explicit what was already implicit in the plaint does not change the nature of the suit. All amendments which are necessary for the purpose of determining the real questions in controversy between the parties should be allowed if it does not change basic nature of suit. He, therefore, submitted that no case is made out for interfering with the impugned order while exercising powers under Article 227 of the Constitution of India.

8. I have considered the rival submissions advanced by the learned counsel appearing for the parties. I have also perused the material on record. As noted earlier, suit is for specific performance of agreement of sale dated 15.6.1988. In paragraph 1 of the Agreement, description of the suit property is given which is to the following effect.

“All that piece and parcel of land bearing survey no.52, Hissa no. 38+39, admeasuring 50 Are and assessed at Rs.2.62 paise, situate at village Kothrud. Tq. Haveli, District Pune, which is within the jurisdiction Sub-Registrar, Haveli as also within the limits of Pune Zilla Parishad and Pune Municipal Corporation having boundaries as under:

East : Survey No.52/42;

Sourth Survey No.56 and 57

West : Survey no.52/37B

North : Survey No.52/36

Out of this land ademasuring 3000 sq.meters which is released under Urban Land (Ceiling and Regulation) Act, 1976 in which my 1/3rd share, namely 1,000 sq.meters equivalent to 11,000 sq. feet.”

9. As against this, in paragraph 1 of the Plaint, the plaintiff gave description of the suit property as under:

“1. DESCRIPTION OF THE SUIT PROPERTY-

All that piece and parcel of the land of 1000 sq.mtrs, i.e. 1/4rd share in the land bearing Survey No.52 Hissa No.38+39 situated at Village Kothrud, Taluka-Haveli, District-Pune, admeasuring 3000 sq.mtr, out of total area of 50 Ares. This land of 1000 sq. mtrs is **open land it is** adjacent to the PMC Road **and bounded as under:**

On or towards East - S.No.52,42

On or towards South - S.No.56,57

On or towards West- S.No.52,37B

On or towards North- S.No.52,36.

Herein after referred to as “the suit property”.

The plaintiff filed application Exhibit 82 for amending the above portion which is reproduced in bold portion. By the proposed amendment, the plaintiff intends to add the word “and” after the words “open land” and before the words “it is”. Further, the plaintiff wants to add the words “the entire survey number is” after the word “and” and before the word “bounded”.

10. Mr. Gadekar submitted that the description given in unamended plaint gives impression that the boundaries which are given are that of land of 1000 sq. meters whereas in fact boundaries are of entire land i.e. survey no.52, Hissa no.38/39 which can be seen from the agreement of sale dated 15.6.1988 and other agreements on record. Due to typographical error and oversight the said mistake has occurred. I find merit in the submission. Perusal of the description given in the agreement of sale clearly shows that the description given is of entire survey number and perusal of paragraph 1 of the unamended plaint, gives impression that the boundaries given therein are in respect of 1000 sq.meters

11. In the case of Abdul Rehman Vs Mohd Ruldu (2012) 11 Supreme Court Cases 341, the Apex Court has held that amendment of plaint after commencement of trial is permissible when the nature of the suit does not change. Making clear and explicit what was already implicit in the plaint does not change the nature of the suit. All amendments which are necessary for the purpose of determining real questions in controversy between the parties should be allowed if it does not change the basic nature of suit. In the present case, by the proposed amendment the nature of the suit is not changed. Suit is essentially for specific performance of agreement of sale dated 15.6.1988. Having regard to the description of the property in

paragraph 1 of the Agreement of sale, I do not find that the defendants were unaware of the case of the plaintiff and that by the proposed amendment that are taken by surprise.

12. Mr. Jamdar relied upon the decision of the Apex Court in the case of *Rajkumar Gurawara* (supra). In paragraph 13, the Apex Court observed that Order VI, Rule 17 C.P.C. confers jurisdiction on the court to allow either party to alter or amend his pleadings at any stage of the proceedings on such terms as may be just. Such amendments seeking determination of the real question of the controversy between the parties shall be permitted to be made. Pre-trial amendments are to be allowed liberally than those which are sought to be made after the commencement of the trial. In the former case, the opposite party is not prejudiced because he will have an opportunity of meeting the amendment sought to be made. In the latter case, namely, after the commencement of trial, particularly, after completion of the evidence, the question of prejudice to the opposite party may arise and, in such event, it is incumbent on the part of the court to satisfy the conditions prescribed in the proviso.

13. In the present case, I have already held that the defendants are not taken by surprise as they are fully aware of the case of the plaintiff, namely, for specific performance of Agreement of sale dated 15.6.1988. Defendants have to meet the case of the plaintiff for specific performance of agreement of sale dated

15.6.1988. Understood thus, in my opinion, no prejudice would be caused to the defendants by permitting the amendment. Hence, no case is made out for invocation of powers under Article 227 of the Constitution of India. Petition fails and the same is dismissed. Rule is discharged. In the circumstances of the case, there shall be no order as to costs. It is, however, expressly made clear that where a decree is appealed from by the petitioner, any error, defect or irregularity in the impugned order, affecting the decision of the case, may be set forth as a ground of objection in memorandum of Appeal as contemplated by Section 105(1) of C.P.C.

(R.G.KETKAR, J.)