

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.3409 OF 2015**

Shri Shivaji Savliram Jadhav and
Anr

Petitioners

Vs

Shri Upendra Jamnadas Dinani
and Ors

.. Respondents

Mr.Sachin Gite, Advocate for Petitioners.

Mr.Anilkumar K. Patil, Advocate for Respondents.

CORAM : R.G.KETKAR,J.

DATE : 05/01/2016

PC:

1. Heard Mr. Sachin Gite, learned counsel for the petitioners and Mr. Anilkumar Patil, learned counsel for the respondents at length. Rule. Mr. Patil waives service on behalf of the respondents. At the request and by consent of the parties, Rule is made returnable forthwith and Petition is taken up for final hearing.

2. By this Petition under Article 227 of the Constitution of India, original plaintiffs have challenged the judgment and order dated 15.7.2014 passed by the learned 5th Jt. Civil Judge, Sr. Dn Nashik, below Exh.61 in Special Civil Suit No.46 of 2007. By that order, the learned trial Judge rejected the application filed by the petitioners, hereinafter referred to as 'plaintiffs', under Order VI Rule 17 of C.P.C. for amending the plaint.

3. Mr. Gite submitted that the plaintiffs instituted suit for specific performance of Agreement of Sale dated 25.7.2005; in

the alternative, for damages of Rs.1,42,74,350/- together with interest at the rate of 18% per annum. During the pendency of the suit, the plaintiffs took out application Exh.61 for amending the plaint. By the proposed amendment, the plaintiffs wanted: (1) to substitute word "Makhmalabad" in paragraph 1 of the Plaint by the words "Makhmalabad Naka"; (2) to substitute area admeasuring 7694.08 sq.meters by area admeasuring 3100 sq.metes and (3) instead of specific performance of Agreement for Sale dated 25.7.2005, specific performance of Development Agreement dated 25.7.2005.

4. Upon taking instructions from the plaintiffs, Mr Gite states that he is not pressing amendment of substitution of area from 7694.08 sq.meters by 3100 sq.meters.

5. Mr.Gite submitted that as far as substitution of word "Makhmalabad" by words " Makhmalabad Naka" is concerned, the nature of the suit does not change. The amendment to that extent is of formal nature. The learned trial judge, therefore, ought to have allowed the amendment and permitted the plaintiffs to substitute the word "Makhmalabad" by the words "Makhmalabad Naka".

6. As far as the relief of specific performance of Agreement of Sale dated 25.7.2005, he submitted that the plaintiffs are now seeking relief of specific performance of Development Agreement of 25.7.2005. He submitted that the learned trial judge while

rejecting the application wrongly observed that the trial has commenced and, therefore, the plaintiffs did not satisfy condition stipulated in proviso to order VI Rule 17. He submitted that issues were framed on 4.12.2007 and at the time of passing of the impugned order, the plaintiffs have not filed affidavit of evidence. In other words, he submitted that trial is not yet commenced. He, therefore, submitted that the learned trial judge committed error in holding that the petitioners did not satisfy the conditions stipulated in proviso to Order VI Rule 17.

7. On the other hand, Mr Patil supported the impugned order. He submitted that if the plaintiffs are permitted to claim relief of specific performance of Development Agreement, it will change the nature of the suit. He submitted that in case the Court is inclined to allow amendment, the plaintiffs should be put to terms, namely, that they will hereafter not pray for specific performance of Agreement of sale. Mr Gite, upon taking instructions, makes a statement that the plaintiffs will proceed with the suit and claim specific performance of Development Agreement dated 25.7.2005 and will not claim specific performance of Agreement of sale dated 25.7.2005. Statements made by Mr. Gite, on instructions are recorded.

8. As noted earlier, the plaintiffs have sought amendment of paragraph 1 by substituting the word "Makhmalabad" by the words "Makhmalabad Naka". In my opinion, said amendment is

purely of formal nature and does not cause any prejudice to the defendant. The learned trial judge, therefore, ought to have allowed this statement.

9. In so far as prayer for specific performance of contract is concerned, learned trial Judge rejected the application mainly on the ground that trial has already commenced. It is not disputed and is a matter of record that at the time of passing the impugned order, the plaintiffs did not file affidavit of evidence. Mr Patil submitted that though the plaintiffs were repeatedly directed to file affidavit of evidence, they did not file affidavit. Be that as it may. The fact remains that as on the date of passing of the order, the plaintiff did not file affidavit of evidence. In the case of Vidyabai Vs. Padmalatha, AIR 2009 SC 1433, the Apex Court has considered Order VII, Rule 17 and observed in paragraph 11 that filing of an affidavit in lieu of examination-in-chief of the witness amounts to “commencement of proceeding.”

10. In view of the aforesaid decision, it has to be held that trial has not commenced. The learned trial Judge has, therefore, committed error in holding that the plaintiffs did not satisfy the conditions stipulated in proviso to Order VI, Rule 17.

11. Mr. Patil submitted that if the proposed amendment is allowed, the nature of the suit changes. I do not find merit in the submission as basically the suit instituted by the plaintiffs is for specific performance of contract. Instead of claiming specific

performance of **Agreement of sale dated 25.7.2005**, the plaintiffs are now seeking specific performance of **Development agreement dated 25.7.2005**. Transaction is one and the same. In view thereof, the nature of the suit also does not change and it continues to be suit for specific performance. Mr. Gite has stated that the plaintiffs will hereafter not apply for amending the plaint so as to claim specific performance of Agreement of sale. In view thereof also, the proposed amendments deserve to be allowed. Hence, the following order.

- (1) Plaintiffs are permitted to substitute the word "Makhmalabad" by the words "Makhmalabad Naka".
- (2) Plaintiffs are permitted to pray for specific performance of Development Agreement dated 25.7.2005 subject to the conditions stipulated herein above. Amendment shall be carried out within 3 weeks from today. After service of the amended plaint, the defendant shall file additional written statement within 4 weeks.
- (3) Liberty is reserved to the parties to apply for disposal of the suit in time bound manner. If such application is made, learned trial Judge will pass appropriate orders thereon.
- (4) Rule is made absolute in the aforesaid terms with no order as to costs.

(R.G.KETKAR, J.)