

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 1789 OF 2014

Tulsiram S/o. Babu Chame,
Age : 80 years, Occu.: Agriculture,
R/o. Anandwadi (Gaur), Tq. Nilanga,
District Latur

.. Petitioner
(Orig. Defendant)

Versus

Vandanabai W/o. Bhagwat Chawre,
Age : 45 years, Occu.: Household and
Agriculture, R/o. Anandwadi (Gaur),
Tq. Nilanga, Distrit Latur

.. Respondent
(Orig. Plaintiff)

...
Mr. S.G. Chapalgaonkar, Advocate for petitioner
Mr. S.S. Kulkarni, Advocate for respondent
...

CORAM : SUNIL P. DESHMUKH, J.
DATE : 12-12-2017

ORAL JUDGMENT :

1. Rule. Rule made returnable forthwith. Heard learned counsel for the parties finally.

2. The petitioner is before this court aggrieved by order dated 07-11-2013 passed on Exhibit-56 in regular civil suit no. 297 of 2008, whereunder application for amendment Exhibit-56 filed on behalf of the respondent-plaintiff, has been allowed by 2nd joint civil

judge, junior division, Nilanga.

3. Learned counsel for petitioner Mr. Chapalgaonkar, with quite some vehemence contends, allowing of Exhibit-56 has been absolutely erroneous, for, in the first place, the same has been granted after commencement of trial, secondly, the nature of amendment causes prejudice to the case developed by petitioner-defendant and looking at the restraint on power under proviso to order VI, rule 17 of code of civil procedure, the order is unsustainable.

4. He submits that plaintiff has been in the court seeking recovery of possession of 78 Are land alleging encroachment by the petitioner. The suit has been instituted in 2008. Around 2010, the plaintiff herself had dealt with substantial portion of the disputed property and sold the same to a third person. Since 2010 to 2013, she had not referred to this development in the matter at all. While the plaintiff was being cross-examined and admission in respect of this development had been elicited, application has been moved for amendment at Exhibit-56. He submits that the nature of amendment is such that it not only purports to prejudice case developed by petitioner, but it also aims at defeating the development in the matter.

5. He further contends that object underlying the application is unlikely to be satisfied since the person to whom the property is sold, is not made a party to the suit. He submits that with such a deficient approach, it is clearly emerging, the object underlying the application for amendment, is only to prejudice the case developed by the petitioner, which in the facts and circumstances of the case, is unsustainable.

6. In support of his aforesaid submissions, he purports to place reliance on a decision of the supreme court in the case of *Rajkumar Gurawara (Dead) Thr. L.Rs. V. M/s. S.K. Sarwagi and Co. Pvt. Ltd. and anr.* reported in *AIR 2008 S.C. 2308* and puts emphasis on head note (B) thereof and quoted portion under paragraph no. 5. He submits that aforesaid decision clarifies the position while pre-trial amendments are to be allowed liberally, yet, the ones which are sought after commencement of trial are to be examined on the touchstone of prejudice being caused to the other side. He submits that in the present matter, the trial court has not done such an exercise and has made plain and simple observation, going rather too liberal. He, therefore, urges having regard to aforesaid, to allow the writ petition, setting aside the impugned order.

7. Mr. Suvidh Kulkarni, learned counsel, on the other hand, appearing for the respondent - plaintiff submits that the impugned

order can seldom be faulted with, for it can hardly be said that the exercise of discretionary power by trial court had been arbitrary or capricious. He submits that considerations which perhaps have weighed with the court, appear to be that plaintiff, a lady, occupied in household and agriculture work, would seldom have knowledge of intricacies in prosecution of litigation. He submits that while trial court has passed the order, such an exercise of power by trial court is supported by various decisions on amendments passed from time to time.

8. He submits that the plaintiff was not aware that such an amendment would be required to be immediately made and there had been no deliberate intention in not making the amendment soon after the event while it was realized that the absence of amendment is likely to be taken advantage of, immediately an application had been moved and had been granted by the court.

9. Learned counsel Mr. Kulkarni refers to and relies on a decision of this court rendered in *NTPC Ltd. Vs. Reliance Industries Ltd.* reported in 2009(4) Bom. C.R. 164. He submits that the factual scenario in the same comes quite close in respect of the stages of suit as involved in the present matter, for, trial may be for the sake of record, it can be said to have just commenced, yet, it would not be a case that the trial in real sense can be said to have commenced

since only affidavit of examination-in-chief of the plaintiff had been filed and her cross-examination has just started and it was realized that amendment may subserve the cause of justice, looking at the nature of litigation, Exhibit-56 as such was moved. He particularly refers to and relies on paragraphs no. 23, 24 of the judgment and the principles which undergo while considering the application for amendment as referred to in paragraphs no. 14 and 15 thereof. To avoid length of this order, said paragraphs are avoided to be reproduced here.

10. Learned counsel further places reliance on a decision in the case of *Dela Gurudal Vanjari Vs. Uddhal Govardhan Rathod* reported in 2012(3) Bom. C.R. 103 of this court (Aurangabad bench), wherein as well, it has been considered that the court has powers and unfettered discretion while considering the application for amendment. An amendment may not be refused only on the ground that it is belated. While amendment is considered, would be proper for deciding the real controversy between parties, it can be allowed on payment of costs.

11. Mr. Kulkarni further puts emphasis on a decision of supreme court in the case of *Abdul Rehman and anr. V. Mohd. Ruldu and ors.* reported in 2012 DGLS (SC) 510 : 2012 AIR (SCW) 5419, pointing out paragraphs no. 14 and 15 therefrom, holding that if granting of

amendment really subserves the ultimate cause of justice and avoids further litigation, the same should be allowed. Change in the nature of relief claimed may not necessarily change nature of suit and shall not be considered as such and that power to grant amendment should be exercised in the larger interest of doing full and complete justice between the parties.

12. In the present case, the plaintiff is a lady, who has come for recovery of possession of 75 Are land from her land-holding alleging encroachment by the defendant-petitioner. She purports to contend that the document executed during 2010 does not depict the real nature of transaction and is only an ostensible matter. It appears that while this transaction was being tried to be made use of disadvantage of petitioner, eliciting certain information from the plaintiff in the cross-examination, it had been felt necessary that an amendment in order to depict real nature of the transaction would be proper. It would not be a case that defendant would be declined to carry out consequent amendments to his defence.

13. Amendments generally are liberally considered and granted in discretionary powers of the court and while trial court has exercised discretion in favour of the plaintiff, having regard to the position of law, as would be emerging from the citations relied on, I do not consider that this is a case wherein exercise of powers by this

court is called for. As observed in one of the judgments, belated approach and inconvenience caused to the other side can be mended with, by imposing costs. While impugned order imposes certain costs, it would be expedient that the costs are enhanced to Rs.2500/-, looking at the facts and circumstances of the matter.

14. As such, respondent would be required to pay a further sum of Rs.2000/- towards costs to the petitioner for amendment pursuant to Exhibit-56.

15. With aforesaid observations, the writ petition is disposed of. Interim relief is vacated.

16. Rule stands discharged.

[SUNIL P. DESHMUKH]
JUDGE

arp/