

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.11962 OF 2015

Kiran S/o Vaijanathrao Pensalwar,
Age-45 years, Occu-Business,
R/o 8-2-897/7, Near Usha Kiran Theatre,
Latur.

-- PETITIONER

VERSUS

Ratnamala w/o Ramchandra Chidrawar,
Age-52 years, Occu-Household,
R/o Dharur, Tq.Dharur, Dist.Beed

-- RESPONDENT

Mr.P.N.Kalani, Advocate for the petitioner.

Mr.B.B.Bhise h/f Mr.D.J.Choudhary, Advocate for the respondent.

(CORAM : RAVINDRA V. GHUGE, J.)

DATE : 04/01/2017

ORAL JUDGMENT :

1. Rule. Rule made returnable forthwith and heard finally by the consent of the parties.

2. I have considered the strenuous submissions of Mr.Kalani and Mr.Choudhary on behalf of the respective sides and have gone through the judgment cited by the petitioner in the matter of Mohan Maluram Agrawal Vs. Kaladevi Sawarmal Agrawal and another, [2007(2) Mh.L.J.74].

3. The petitioner is aggrieved by the order dated 07/10/2015 by which application Exhibit 186 filed by the petitioner/defendant no.2 has been rejected in the light of the proviso to Order 6 Rule 17 of the CPC.

4. The thrust of the petitioner is that in the light of the view taken by this Court in the matter of Mohan Agrawal case (supra), proceedings which have been initiated prior to the introduction of the Civil Procedure Code (Amendment) Act, 2002, the proviso introduced below Rule 17 cannot be made applicable retrospectively.

5. The above contention of the petitioner deserves to be rejected for the reason that though the suit was instituted on 18/12/2000, the pleadings of the petitioner were presented through her written statement on 13/08/2004. As such, the pleadings of the petitioner were placed on record on 13/08/2004 which is after the introduction of the proviso to Rule 17 under Order 6 of The CPC.

6. The observations of this Court in paragraph Nos.7 to 11 in the Mohan Agrawal case (supra) read as under :-

“7. Insofar as applicability of the amended provisions of Order 6, Rule 17 of Code of Civil Procedure is concerned, it will be

necessary to refer Section [16](#) of The Code of Civil Procedure (Amendment) Act, 2002. The relevant provision reads thus :

16. Repeal and Saving. -...(2) Notwithstanding that the provisions of this Act have come into force or repeal under sub-section (1) has taken effect, and without prejudice to the generality of the provisions of section [6](#) of the General Clauses Act, 1897 (10 of 1897),-

..... (b) the provisions of rules 5, 15, 17 and 18 of Chapter VI of the First Schedule as omitted or, as the case may be, inserted or substituted by section [16](#) of the Code of Civil Procedure (Amendment) Act, 1999 (46 of 1999) and by section [7](#) of this Act shall not apply to in respect of any pleading filed before the commencement of section [16](#) of the Code of Civil Procedure (Amendment) Act, 1999 and section of this Act;.

It could thus be seen that the legislative intent regarding the applicability of amended provisions in respect of any pleading filed before the commencement of section [16](#) of the Code of Civil Procedure (Amendment) Act, 1999, is very clear. Section [16\(2\)\(b\)](#) of the Amendment Act, 2002 provides that the provisions of section [7](#) shall not apply to in respect of pleading filed before the commencement of section [16](#) of the Amendment Act, 2002. The amendment to the provisions of Order 6, Rule 17 of the Code of Civil Procedure has been made by way of section [7](#) of Amendment Act, 2002. In that view of the matter, I am unable to accept the contention raised by the learned counsel for the respondents. The amended provisions of Order 6, Rule 17 are to

be applicable to the pleadings which are not filed prior to commencement of the Amendment Act, 2002. Admittedly, the plaint is filed prior to 01.07.2002 i.e. the date on which Amendment Act came into effect, as such the amended provisions of Order 6, Rule 17 would not be applicable to the amendment of plaint in question.

8. *Insofar as second contention of delay is concerned, the Apex Court in the case of Sampath Kumar vs. Ayyakannu and another, in which the facts were almost similar as are in the present case, in Paragraph No. 11 has observed thus:*

11. in the present case the amendment is being sought for almost 11 years after the date of the institution of the suit. The plaintiff is not debarred from instituting a new suit seeking relief of declaration of title and recovery of possession on the same basic facts as are pleaded in the plaint seeking relief of issuance of permanent prohibitory injunction and which is pending. In order to avoid multiplicity of suits it would be a sound exercise of discretion to permit the relief of declaration of title and recovery of possession being sought for in the pending suit. The plaintiff has alleged the cause of action for the reliefs now sought to be added as having arisen to him during the pendency of the suit. The merits of the averments sought to be incorporated by way of amendment are not to be judged at the stage of allowing prayer for amendment. However, the

defendant is right in submitting that if he has already perfected his title by way of adverse possession then the right so accrued should not be allowed to be defeated by permitting an amendment and seeking a new relief which would relate back to the date of the suit and thereby depriving the defendant of the advantage accrued to him by lapse of time by excluding a period of about 11 years in calculating the period of prescriptive title claimed to have been earned by the defendant. The interest of the defendant can be protected by directing that so far as the reliefs of declaration of title and recovery of possession, now sought for, are concerned the prayer in that regard shall be deemed to have been made on the date on which the application for amendment has been filed.

It could be seen that in the case before the Apex Court prayer for possession on the ground of forcible dispossession was made after a period of 11 years. The Apex Court found that in order to avoid multiplicity of the litigation and since the basic structure of the suit was not changed, it was in the interest of justice to allow the amendment. The Apex Court further found that in order to protect the interest of defendants it could be directed that the amendment would relate back to the date on which the application of amendment was made and not to the date of the suit.

9. *The Apex Court in the case of Baldev Singh and others vs. Manohar Singh and another took a view that delay of 3 years in filing application for amendment written statement cannot be a ground for rejecting application for amendment of written statement. It has further been held that the Court should be extremely liberal in granting the prayer for amendment of pleadings unless prejudice has been caused to the other side.*

10. *The present case is squarely covered by the law laid down in the judgment of Apex Court in case of Sampath Kumar. The facts are almost identical in the said case. The claim for possession was made after a period of 11 years whereas in the present case it is made after about 4 years.*

11. *Insofar as third contention of the respondents that if the amendment is allowed, the Civil Judge, Jr. Division will have no jurisdiction, is concerned the learned Single Judge of this Court has taken a view in the case of Devichand Ratanchand Solanki and another vs. Premshankar Shivram Bajpayi [1994(1) Mh.L.J.1001] as under :*

“Civil Court can permit amendment of pleadings which would result in ousting its own jurisdiction. It is only after the amendment under Order 6, Rule 17 of the Civil Procedure Code is allowed and carried out that objection in regard to the jurisdiction of that Court can be raised and if the Court is satisfied in regard to the ouster of its jurisdiction it would return

the amended plaint to the plaintiff for presentation to the proper Court under Order 7, Rule 10 of the Civil Procedure Code.”

In paragraph No.5 this Court has observed as under :

.... "5. Thus it is only after the amendment is allowed and carried out that objection in regard to the jurisdiction of that court can be raised and if the court is satisfied in regard to the ouster of its jurisdiction, it would return the amended plaint to the plaintiff for presentation to the proper court under Order 7, Rule 10 of the Civil Procedure Code. That stage has not yet arrived in the present case. The petitioners have challenged the order of the court which only allows the amendments and directs the party to carry out the same. There is no infirmity in the said order. It is fully within the scope and ambit of the powers of the court under Order 6, Rule 17 of the Civil Procedure Code. In that view of the matter I do not find any reason to interfere with the said order. If any of the parties wants to raise any objection in regard to the jurisdiction of the court concerned to proceed with the case in view of the amended plaint or the written statement, it has to make an application before that court in that behalf and in that event it would be for that court to dispose of the same in accordance with law. Such an objection cannot affect the power of the court to allow amendment of the pleadings. The Court

has ample jurisdiction to pass suitable orders on the application for amendment of the pleadings and in the case the amendment is allowed and carried out, the proper course to be followed is to return the amended plaint to the plaintiff for presentation to the proper court under Order 7, Rule 10 of the Civil Procedure Code.

It is to be noted that the learned Single Judge has sought support from the judgment of Division Bench of this Court in the case of Benisham vs. Mahadeo, reported in 1985 Mh.L.J. 616 = AIR 1985 Bombay 462.

In that view of the matter, the third contention raised by the learned counsel for the respondents would also be without any merit. The question of ouster of jurisdiction would arrive only after amendment is allowed.”

7. It is thus evident from Section 16 that the proviso would not apply in respect of any pleading filed before the commencement of Section 16 of the Code of Civil Procedure (Amendment) Act 1999. The observations of this Court in paragraph No.7 reproduced above, would therefore mandate that the pleadings of the petitioner should have been completed prior to the introduction of Section 16. The written statement has been filed on 13/08/2004 which is after the introduction of the proviso vide Section 16 referred above and hence

the contention of the petitioner on this Count cannot be accepted.

8. The second limb of the petitioner's submission is that the proposed paragraph Nos.5(A) and 19(A) are purely aimed at giving better particulars and by way of a clarification. There is no dispute that the petitioner has put forth its written statement practically after 4 years of the filing of the suit and application Exh.186 has been filed on 12/06/2015 only after the petitioner changed her advocate.

9. An amendment cannot be clarificatory or argumentative in nature. The petitioner is yet to adduce the oral evidence. It is contended that the petitioner owes nothing to the original plaintiff. There cannot be any doubt that the Trial Court would allow the suit only if it is convinced that the petitioner owes something to the original plaintiff. As such, merely for the sake of giving better particulars or for recording a clarification that the petitioner owes nothing to the plaintiff, an amendment is not to be allowed and that to after 11 years.

10. The proviso to Rule 17 has been introduced with a purpose of ensuring that belated amendments are not permitted and moreso, to avoid delay. Due diligence is therefore the essence. Application

Exh.186 is apparently filed after 11 years of the filing of the written statement and after the evidence of the plaintiff has been concluded. For these reasons, an amendment aimed at giving more particulars and for issuing a clarification, cannot be entertained. If the basic pleadings are available, the petitioner would be entitled to support the pleadings put forth, by oral and documentary evidence.

11. In the light of the above, I do not find that the view taken by the learned Trial Judge could be termed as being perverse or erroneous. This petition, being devoid of merit, is therefore dismissed.

(RAVINDRA V. GHUGE, J.)