

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO. 4143 OF 2016

Shri. Dashrath Nathu Borkar

...Petitioner

Versus

Shri Baban Bapu Borkar & Anr.

...Respondents

.....

Mr.Vishwanath S.Talkute for the Petitioner.

Mr.Milind Deshmukh for Respondent No.1.

.....

CORAM: Mrs.MRIDULA BHATKAR, J.

DATED: AUGUST 03, 2017

P.C. :

1. Rule. Rule made returnable forthwith. By consent, Petition is heard finally and disposed of at the stage of admission.

2. This Petition is directed against the order dated 09.10.2015 passed by the learned Joint Civil Judge, Senior Division, Baramati, below Exhibit 115 in Regular Civil Suit No.135 of 2012 thereby rejecting the application filed by the petitioner/defendant for seeking amendment in the Written Statement.

3. Respondent no.1/plaintiff has filed a Regular Civil Suit No. 135 of 2012 for perpetual injunction and declaration that the Agreement of Sale

Deed dated 21.06.2010 and the Power of Attorney executed by defendant no.1 in favour of respondent no.2/defendant no. 2 are to be declared as null, void, illegal and are to be cancelled. The evidence of the original plaintiff was recorded. Thereafter, the petitioner/defendant no.1 filed an application dated 17.08.2015 for seeking amendment to the Written Statement on the ground that in the said Suit, the plaintiff has challenged the Power of Attorney dated 11.04.1983, which was not produced by the plaintiff earlier, but after completion of his evidence, the said Power of Attorney was produced by him and, therefore, the petitioner/defendant needs to amend his Written Statement. The said application was opposed by respondent no.1/plaintiff and it was rejected by the trial Court vide order dated 09.10.2015, hence this Writ Petition.

4. Learned counsel for the petitioner has submitted that the petitioner/defendant no.1 had executed the Power of Attorney dated 11.04.1983 in favour of the plaintiff, however, it pertains to only in respect of one land i.e. Gat No. 1158 and not about other lands. He has further submitted that respondent no.1/ plaintiff did not file original Power of Attorney dated 11.04.1983, however, on 16.07.2014 he filed an application for seeking permission to lead secondary evidence of the said Power of Attorney by producing photocopy of the said Power of Attorney, wherein other Gat numbers of the lands are also included. He has further submitted that the petitioner/defendant no.1 seriously

disputes that Power of Attorney and, therefore, the petitioner/defendant no.1 requires to amend his Written Statement to that effect. He has further submitted that the application for production of the secondary evidence was filed on 16.07.2014 and it was allowed by order dated 18.04.2015. Thereafter, immediately the petitioner had filed the application for amendment in August 2015.

5. Per contra, the learned counsel for respondent no.1 while opposing this Petition has submitted that in the plaint, there is a reference of this Power of Attorney. The petitioner/defendant no.1 was aware that the plaintiff is relying on this Power of Attorney and accordingly, the petitioner/defendant no.1 has raised these contentions in his Written Statement and hence, there is no necessity to amend the Written Statement. He has further submitted that these all facts are within the knowledge of the petitioner/defendant no.2 and thus, the petitioner/defendant no.1 ought to have mentioned all these facts in Petition. No due diligence is shown by the petitioner/defendant no.1. He has further submitted that the evidence of the plaintiff was over. If the amendment in the Written Statement is allowed, then it will cause prejudice to the plaintiff. In support of his submission, he relied on the judgment in the case of **Anilkumar Shrivallabh Sikchi versus Bharat Petroleum Corporation Limited**, reported in **2017 DGLaw (Bom) 63**

and also relied on the judgment of Delhi High Court in the case of ***Sonia Mehra versus Manisha Rawat in CM (M) 208/2015*** decided on ***21.08.2015***.

6. Heard submissions. Perused the impugned order. The ratio laid in the case of ***Anilkumar Shrivallabh Sikchi*** (*supra*) and in the case of ***Sonia Mehra*** (*supra*), is that the amendment at late stage should not be allowed when diligence is absent, however, it is irrelevant and not useful to the sets of the facts of the present case.

7. In the pleadings, there is reference of the impugned Power of Attorney. The petitioner/defendant no.1 has also contended about the Power of Attorney in the Written Statement. The photocopy of the said Power of Attorney was filed alongwith Plaint, however, original was not filed and hence, it was not exhibited. The application below Exhibit 15 was filed by respondent no.2/defendant no.2 on 15.06.2010 calling upon the plaintiff to produce the original documents. The trial Court has directed the plaintiff to produce the documents. The applications below Exhibits 16 and 20 were filed by defendant no.2, wherein it was stated that for non-production of original Power of Attorney, it is difficult for defendant no. 2 to file Written Statement. The evidence of the plaintiff was recorded. The application was preferred by the plaintiff on

16.07.2014 to lead secondary evidence of Power of Attorney by producing the photocopy of the said Power of Attorney and to exhibit the same was allowed by the trial Court, vide order dated 18.04.2015. After going through the schedule of the amendment, it appears that the petitioner/defendant no.1 wants to restrict his amendment to the Power of Attorney only and that amendment is to be allowed.

8. A question of due diligence does not arise in the present set of facts as the petitioner/defendant no.1 has already filed Written Statement and respondent no.1/plaintiff took nearly two years to tender the secondary evidence. After allowing the application of respondent no.1/plaintiff by the trial Court, the petitioner/defendant no.1 has immediately moved the application for amendment, which is found relevant and proper. Hence, the order passed by the learned trial Judge requires to be set aside. Accordingly, the following order is pass:

ORDER

- i) The order dated 09.10.2015 passed by the learned Joint Civil Judge, Senior Division, Baramati is hereby set aside.
- ii) The petitioner/defendant no.1 is directed to amend the Written Statement on the next date in the trial Court and thereafter, the trial Court to proceed with the matter.

iii) The parties to co-operate with the trial Court.

9. Writ Petition is disposed of accordingly.

(MRIDULA BHATKAR, J.)