

Vidya Amin

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION No. 2945 OF 2017

Kallappa Bhupal Magdum ... Petitioner
Vs.
Mahavir Bhupal Magdum & Ors. ... Respondents

Mr. Saurabh Oka, Advocate for the petitioner.
Mr. Vijay Killedar, Advocate for respondent nos. 1 and 2.

CORAM: **MRS.MRIDULA BHATKAR, J.**
DATE: **4th July, 2017.**

P.C.:

The learned counsel for the petitioner seeks leave to amend the prayer clause (a) of the Petition.

2. Leave granted. Amendment to be carried out forthwith.
3. Rule. Rule made returnable forthwith. By consent, this Writ Petition is heard finally and decided at the stage of admission.
4. This Writ Petition is directed against the order dated 27th January, 2017 passed below Application Exhibit 69 in Regular Civil Suit No. 352 of 2012 by the learned Joint Civil Judge Senior Division, Jaysingpur thereby rejecting the Application for amendment which

was made by the petitioner/plaintiff under Order 6 Rule 17 and section 151 of the Code of Civil Procedure.

5. It is necessary to give the chronological events before recording the submissions of learned counsel for both the sides.

The petitioner/plaintiff has filed the suit for partition and declaration against the respondents/defendants. Earlier, the petitioner/plaintiff has filed Regular Civil Suit No. 22 of 1990 for partition against the defendants. The suit was compromised between the parties and accordingly the compromise pursis was filed. Thereafter, the decree was not acted upon. Again, the petitioner/plaintiff filed Suit No. 352 of 2012 for partition. The evidence of the plaintiff/petitioner was over on 15th March, 2016. During his cross-examination, the defendants produced the compromise pursis and the decree in Regular Civil Suit No. 22 of 1990. On the basis of said decree, the plaintiff took search and obtained certified copies of the property record from the revenue office and realized that the defendants have disposed of some of the properties by sale deeds dated 25th March, 2008 and 27th March, 2008. Thereafter, the defendants filed pursis for closure of evidence on 25th June, 2016 and the matter was fixed for final arguments on 5th

July, 2016. On 22nd July, 2016, the Application at Exhibit 61 was preferred by the plaintiff/petitioner for amendment in the plaint, by which the plaintiff wanted to plead that the sale deeds dated 25th March, 2008 and 27th March, 2008 executed between the defendants and proposed defendants are not binding on him. The plaintiff also wanted to add certain paragraphs in the plaint in respect of earlier decree and Suit No. 22 of 1990, however, it was rejected. Hence, this Writ Petition.

6. The learned counsel for the petitioner submitted that a fact of hukumnama in R.C.S. No. 22 of 1990 was actually forgotten or thought that it is not to be pleaded because that suit was compromised and whatever was stated in the hukumnama was not acted upon, therefore, the plaintiff never acted upon. The partition was not according to its metes and bounds and the plaintiff forget to mention about hukumnama in R.C.S. No. 22 of 1990. It is submitted that after obtaining certified copies of sale deeds on 18th April, 2016, the fact of sale of suit land by the defendants to the proposed defendants was known to the petitioner/plaintiff and therefore, he moved the Application for amendment on 22nd July, 2016. The learned counsel further submitted that the fact of the transfer of the

property by the respondents/defendants to the other proposed defendants was not within the knowledge of the petitioner/plaintiff till 18th April, 2016. He further submitted that the plaintiff did not make the application for amendment immediately after obtaining certified copies of the sale deeds because the plaintiff wanted to put those sale deeds to the defendants in his cross-examination and wanted to seek admissions to that effect. However, the defendants did not step in the witness box and thus, the plaintiff lost the opportunity to cross-examine the witness on the basis of the sale deeds, therefore, he could not give any explanation. So, he had no option but to file the Application for amendment.

7. The learned counsel for respondent nos. 1 and 2 opposed this Writ Petition. The learned counsel submitted that due diligence is a legal requirement to allow the Application for amendment under Order 6 Rule 17 of CPC. In the present case, the petitioner/plaintiff has not pleaded anywhere in his Application Exhibit 69 of due diligence. He further submitted that earlier suit was filed in the year 1990. Thereafter the said suit was compromised. The plaintiff had knowledge of the Suit and compromise taken place in the said suit, so it was his duty to obtain certified copies of the documents of the

suit land from the revenue record as per the decree in Suit No. 22 of 1990, which he did not do. Moreover, after filing of the suit, the plaintiff/petitioner could have obtained the certified copies of the suit property based on the decree, which he failed to do and this shows that he was negligent. It was further argued that in the written statement, the defendants have mentioned about R.C.S. No. 22 of 1990 and the compromise taken between the parties, so there was another opportunity for the plaintiff to get certified copies of the decree, which he did not do. On the point of due diligence, the learned counsel relied on judgment of the Hon'ble Supreme Court in the case of **J. Samuel & Ors. vs. Gattu Mahesh & Ors., reported in 2012 (4) Mh.L.J. 40**. The learned counsel while opposing this Petition has further submitted that the petitioner/plaintiff was completely negligent in obtaining the certified copies from the revenue record when he filed the suit. He has further pointed out that another suit is filed by the petitioner/plaintiff, i.e., Suit No. 24 of 2017 against one Jayram, i.e., proposed defendant. He submitted that the Application for amendment is rightly rejected by the trial Court and it is to be maintained.

8. The Hon'ble Supreme Court in the case of **J. Samuel & Ors.**

(*supra*) while dealing with the issue of amendment under Order 6 Rule 17 of CPC has explained and analyzed what is meant by due diligence. It held that it is a reasonable investigation which is necessary before certain kinds of relief are requested. It is also held that “the term “due diligence” is specifically used in the Code so as to provide a test for determining whether to exercise the discretion in situations of requested amendment after the commencement of the trial”. In the present case, not only the trial is commenced but the evidence is closed and the matter is fixed for arguments. In the normal circumstances, this is not the stage where the amendment can be allowed. However, the plaintiff has not said a word about compromise and decree of R.C.S. No. 22 of 1990 and therefore, in his amendment what he has stated and what was argued that the said decree was never acted upon and, therefore, forgotten and not considered, appears true. In the written statement, though there is mention of R.C.S. No. 22 of 1990, the plaintiff actually became alert and aware about the execution of the decree of R.C.S. No. 22 of 1990 when in the cross-examination of the plaintiff, the defendants showed the said decree to the plaintiff. It is the case of the plaintiff that he applied for certified copies thereafter. His cross-examination was closed on 15th March, 2016 and on 18th April, 2016 he obtained

the certified copies of the documents pertaining to revenue record of suit properties and at that time, the fact of two sale deeds was revealed. This cannot be disbelieved at this stage. It is to be noted that fact of sale deeds is not mentioned and not revealed by the defendants in their written statement. If the transfer of land through these sale deeds would have been revealed by the respondents/defendants in their written statement, then the petitioner/plaintiff would not have been allowed to carry out the amendment at this stage and the submissions of the learned counsel for the respondent nos. 1 and 2 that the petitioner/plaintiff was not due diligent in carrying out the amendment would have been accepted. However, the fact of disposal of the property by two sale deeds is not mentioned in the written statement rather is suppressed by the defendants and, therefore, the plaintiff/petitioner himself has knowledge of these sale transactions on 18th April, 2016 when he obtained the certified copies, has to be believed. Further, the explanation given by the petitioner that he wanted to put those two documents while cross-examining the defendants and he also wanted to seek admissions and explanation from the respondents in the cross-examination, however, by way of strategy, the respondents/defendants did not enter the box and the

petitioner/plaintiff lost the chance to seek admissions on the basis of those two sale deeds and thus, the petitioner/plaintiff had no option left but to go for amendment of the plaint under Order 6 Rule 17 of CPC is also convincing. Considering these submissions, I am of the view that this Application for amendment is to be allowed, especially, this is required to adjudicate the issue of partition fully and once for all between the parties. Thus, the order dated 27th January, 2017 passed by the learned Joint Civil Judge Senior Division, Jaysinigpur is hereby set aside.

9. Rule is made absolute in terms of amended prayer clause (a) of the Petition subject to cost of Rs.5,000/- to be paid by the petitioner.

(MRIDULA BHATKAR, J.)