

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

WRIT PETITION NO.9758 OF 2016

Khushal Chetan Bataviya & Ors. ... Petitioners

Vs.

Sudhir Ramchandra Patel & Ors. ... Respondents

Mr.P.J. Thorat for the Petitioners
Mr.Amey Deshpande for Resp. Nos.1, 2 and 3

**CORAM: Mrs.MRIDULA BHATKAR, J.
DATED: JULY 13, 2017**

P.C. :

1. Rule. Rule made returnable forthwith by consent and heard finally.
2. This petition is directed against the order dated 28.6.2016 passed by the II Joint Civil Judge, Senior Division, Nasik, in the application below exhibit 50 in Special Civil Suit No.175 of 2012, thereby rejecting the prayer of amendment under Order 6 Rule 17 of the Civil Procedure Code.
3. The petitioners/plaintiffs have filed the suit for specific performance and possession based on the agreement dated 28.12.2007 executed with respondent No.1 i.e., defendant No.1.

The suit was filed on 17.3.2012. Thereafter, the written statement was filed by the defendants on 9.8.2012. The issues were settled on 2.1.2014. Thereafter, the petitioners have taken out the application under Order 6 Rule 17 for first amendment on 16.12.2014. The said amendment was allowed. It was opposed by the respondent / original defendant No.1, however, it was allowed. Thereafter, on 13.1.2016, the petitioners have moved second application for amendment under Order 6 Rule 17. By way of this second application, he wanted to substitute prayer clause (b) in the plaint which was earlier for possession of the suit property and which is a subject matter of the agreement. However, he wanted to delete the said prayer of possession and wanted to substitute a prayer that the suit land which is already in possession of the plaintiffs is to be confirmed by executing the sale deed in favour of the plaintiffs. He also seeks necessary pleadings in respect of he getting the actual possession of the suit land. This was opposed by the defendants and the said application was rejected on 28.6.2016 and hence, this Writ Petition.

4. Learned Counsel for the petitioners has submitted that the earlier suit was filed for specific performance of possession in

2012 based on agreement dated 28.12.2007 for 1/3rd share of the ancestral property which is fallen to the share of the defendants. However, the other two brothers of the defendants who were having 2/3rd share of the ancestral property, have sold their share by registered sale deed on 8.6.2010 in favour of the petitioners and at the time of handing over the said 2/3rd share of the land, the other two brothers and the respondent have handed over 1/3rd share of the defendant/respondents to the plaintiffs. The learned Counsel has submitted that thus, since 8.6.2016, the petitioners/plaintiffs are in actual possession of the suit land. The learned Counsel further submitted that inadvertently, in prayer clause (b), the possession of the suit land is asked for. The facts in respect of getting the possession of 1/3rd share i.e., the suit land alongwith 2/3rd share of the two brothers was remained to be mentioned and not pleaded. However, the plaintiffs have realised this mistake and therefore, they filed this application for amendment of the pleadings in the plaint.

5. Learned Counsel has submitted that the learned Judge while rejecting the application has rejected it mainly on the ground that though the plaintiffs were aware of this fact at the time of filing of

the suit, they did not mention these facts and made prayer accordingly. No satisfactory explanation is given to show their due diligence and hence, the application was rejected. The learned Counsel has submitted that the principle of due diligence which is incorporated in proviso to Order 6 Rule 17 will come into force if the trial has commenced. He further submitted that only the issues were settled, the trial has not commenced. Hence, the principle of due diligence cannot be attracted. In support of his submission on the point of commencement of trial, he relied on the judgments in **Baldev Singh & Ors. vs. Manohar Singh & Ors.**¹ and **Vidyabai & Others vs. Padmalatha & anr.**²

6. Learned Counsel for the respondents/defendants while opposing the petition, submitted that the petitioners have deliberately filed the application for amendment at a very late stage. The application is malafide which changes the nature and constitution of the suit. The suit is filed for possession, however, by deleting the said prayer clause (b), he wants to establish that he is in actual possession of the suit land which is countered by the defendants. The learned Counsel has further argued that already

1 (2006) 6 SCC 498

2 (2009) 2 SCC 409

the plaintiffs have sought a first amendment and this is the second amendment. If the plaintiffs want to claim possession of the suit land, since 2010, then, these facts were within the knowledge of the plaintiffs and ought to have pleaded accordingly. This shows that the plaintiffs were not diligent in carrying out the amendment. The learned Counsel has further submitted that it is not the plaintiffs but the defendant No.1 is in possession of the suit premises and the plaintiffs are trying to grab the possession of the suit land under the pretext of substitution of prayer clause (b). The learned Counsel justified the order passed by the learned trial Judge and has submitted that the application for amendment is rightly disallowed. In support of this submission, he relied on the judgment of **Revajeetu Builders & Developers vs. Narayanaswamy & Sons & Ors.**³

7. A discretionary power of the Court under Order VI Rule 17 of the Civil Procedure Code is restricted by the proviso. If at all the trial has commenced, then, the Courts are required to apply the principle of due diligence and if the test of due diligence is passed by either of the parties, then only the amendment can be allowed. However, in the present case, the trial has not commenced as an

³ (2009) 10 SCC 84

affidavit in chief of the plaintiffs is not on record, only the issues were settled and thus, the trial has not commenced in the light of the ratio of the judgment in the case of **Baldev Singh & Ors. (supra)**. I also rely on the judgment in the case of **Vidyabai & Others vs. Padmalatha & anr.**⁴, wherein the Supreme Court has held thus:

“11. The date on which the issues are framed is the date of first hearing. Provisions of the Code of Civil Procedure envisage taking of various steps at different stages of the proceeding. Filing of an affidavit in lieu of examination-in-chief of the witness, in our opinion, would amount to “commencement of proceeding”.

8. Thus, the trial Court ought not to have applied the test of due diligence. Moreover, the guiding factors in **Revajeetu Builders & Developers (supra)**, are to be taken into account by the Courts while dealing with applications for amendment. So also, whether refusal of amendment would lead to injustice or multiple litigation.

9. In the case of **Baldev Singh & Ors. vs. Manohar Singh & Ors. (supra)**, the Supreme Court while dealing with the Order 6 Rule 17, held that if the parties have not filed documentary evidence in the suit, then, the trial has not commenced.

4 (2009) 2 SCC 409

10. In the case of **Revajeetu Builders & Developers vs. Narayanaswamy & Sons & Ors.** (supra), the Supreme Court while dealing with the issue of Order 6 Rule 17 and the considerations which are to be taken into account, has given six factors as follows:

“67. On critically analyzing both the English and Indian cases, some basic principles emerge which ought to be taken into consideration while allowing or rejecting the application for amendment.

(1) Whether the amendment sought is imperative for proper and effective adjudication of the case?

(2) Whether the application for amendment is bona fide or malafide?

(3) The amendment should not cause such prejudice to the other side which cannot be compensated adequately in terms of money;

(4) Refusing amendment would in fact lead to injustice or lead to multiple litigation;

(5) Whether the proposed amendment constitutionally or fundamentally changes the nature and character of the case? And

(6) As a general rule, the court should decline amendments if a fresh suit on the amended claims would be barred by limitation on the date of application.”

11. Considering the nature of the suit and the facts therein, the plaintiffs want to delete the prayer of possession as they claim that they are already in possession of the suit premises, however, the

main substantive prayer in the suit is in respect of specific performance pursuant to the agreement, I allow this Writ Petition with costs of Rs.15,000/-.

12. It is made clear as argued by the learned Counsel for defendant No.1, that defendant No.1 is disputing the fact of possession of the suit premises by the plaintiff and he will be filing an additional written statement. Thus, if at all the said challenge is raised, then, the issue of proof of possession can be framed by the trial Court.

13. Rule made absolute accordingly.

(MRIDULA BHATKAR, J.)