

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Writ Petition NO. 11057 OF 2015

Shri Krishna Kumar Dave	...Petitioner
<i>Versus</i>	
Smt Meetaben Himmatlal Parikh	...Respondent

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Mr.Vishal Kanade a/w. Ms. Mona Bhide, Rajeshekhar Upadhyay,
Advocate for the Petitioner.

Mr. Manoj Prajapati i/b. Sameer M. Bhandari, Advocate for the
Respondent.

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CORAM : R. G. KETKAR, J.

DATE : 13th FEBRUARY, 2017

P.C.

1. Heard Mr.Vishal Kanade, learned Counsel for the petitioner and Mr.Manoj Prajapati, learned Counsel for the respondent, at length.

2. By this Petition under Article 227 of the Constitution of India, the petitioner, hereinafter referred to as the 'plaintiff' has challenged the judgment and order dated 16.7.2016 passed by the learned Jt. Civil Judge, Senior Division, Satara below Exhibit-61 in Special Civil Suit No.422/2011. By that order, the learned trial Judge rejected the application made by the plaintiff

under Order VI Rule 17 of C.P.C. for amending the plaint.

3. The plaintiff has instituted suit against the respondent, hereinafter referred to as the 'defendant', for recovery of Rs.8,88,749.46 together with interest @ 10% per annum from the date of the suit till the realization of the amount. The plaintiff contended that the defendant was in search of house in Aharnagar Housing Society, Panchagani. The plaintiff was knowing Vinod Chhadda and Mrs. Nilam Chhadda, owners of flat No.G-12, Ground floor in Aharnagar Housing Society and that they were intending to sell the same. The plaintiff introduced the defendant to the owners of flat No.G-12. The sale transaction was finalized for a consideration of Rs.6,50,000/- in favour of the defendant. The defendant approached the plaintiff with a request to advance hand-loan of Rs.6,50,000/- to the defendant so as to buy the flat. Having regard to the repeated requests made by the defendant and particularly her mother who was 79 years, the plaintiff agreed to advance Rs.6,50,000/- and issued eight separate chques in favour of the owners as consideration in respect of flat No.G-12. It is the case of the plaintiff that he has paid the entire consideration from his own income. The defendant agreed to pay

interest @ 10% on the said amount. It was further agreed between the parties that flat No.G-12 would be transferred in the name of the defendant only on repayment of the above amount to the plaintiff. The plaintiff orally called upon the defendant to pay the amount. The defendant paid Rs.2 Lakhs out of Rs.6,50,000/- and assured to pay Rs.4,50,000/- with 10% interest. The defendant failed and neglected to make the payment. The plaintiff, therefore, instituted suit for recovery of the amount of Rs.8,88,749.46 with interest from November, 2004. The defendant resisted the suit by filing written statement dated 23.12.2011.

4. During pendency of the suit, the plaintiff took out application at Exhibit-11 for amending the plaint so as to (i) implead Ms. Roopali Rohit Vadodria as defendant (ii) for incorporating paragraphs-5A and 5B of the plaint as also prayer clauses [E] and [F] in paragraph-10. By order dated 22.3.2012, the learned trial Judge partly allowed the application so as to carry out amendment in respect of cheque numbers which were described in application paragraph-1 on page-2. So far as impleadment of Roopali as defendant in the cause title as also other amendment is concerned, that prayer was rejected.

5. The defendant thereafter filed application Exhibit-53 for amending the written statement on 4.4.2015. By the proposed amendment, the defendant intended to incorporate paragraph-8A wherein it was set out that the defendant had gifted flat No.G-12 to sister's daughter namely Ms. Rupali Rohit Vadodaria by registered gift deed dated 9.4.2008. By order dated 27.4.2015, the learned trial Judge rejected the application.

6. The plaintiff has thereafter filed the present application under Order VI Rule 17 of C.P.C. for amending the plaint so as to implead Rupali Rohit Vadodaria as defendant No.2 and Mamata Rohit Vadodaria as defendant No.3 as also for incorporating paragraphs-5A and 10A in the plaint. By the impugned order, the learned trial Judge has rejected the application. It is against the order dated 22.3.2012 below Exhibit-11 and order dated 16.7.2011 below Exhibit-61, the plaintiff has instituted present petition.

7. In support of this Petition, Mr. Kanade submitted that the suit is instituted for recovery of Rs.8,88,749.46 together with interest @ 10% per annum from the defendant. Application Exhibit-9 was taken out for attachment of flat No.G-12 on the

ground that the plaintiff apprehended that the defendant is likely to dispose of said flat with a view to defrauding him. In other words, it was only to ensure that in the event of the plaintiff succeeding in the suit, he can recover the amount from the defendant. The defendant thereafter filed application at Exhibit-53 for amending written statement thereby inserting paragraph-8A. In paragraph-8A, the defendant specifically contended that she did not have any source of income and her financial condition was very weak. She is living on the support of her sister Mamta Vadodaria. She had gifted flat No.G-12 to Rupali Rohit Vadodaria on 9.4.2008. Though the learned trial Judge rejected that application nonetheless it has come on record that the defendant has executed gift deed in favour of Rupali Rohit Vadodaria. The plaintiff, therefore, filed application Exhibit-61 for impleading Rupali and Mamta as defendants No.2 and 3 as also for incorporating paragraph-5A and 10A. He submitted that the learned trial Judge committed error in observing that there was no change in circumstances for filing application Exhibit-61. He has taken me through the impugned order and submitted that the learned trial Judge was not justified in rejecting the application in view of the stand

taken by the defendant in the application Exhibit-53 for amending the written statement.

8. On the other hand, Mr. Prajapati invited my attention to the affidavit dated 2.9.2008 made by the plaintiff to the effect that he has no claim whatsoever in respect of flat No.G-12 either from the defendant or any of her family members. He further submitted that there is no change in circumstances warranting the plaintiff to file second application for amendment. In fact the second application for amendment itself was not maintainable once earlier application for impleadment of Roopali was rejected by the trial Court.

9. I have considered the rival submissions advanced by learned Counsel appearing for the parties. I have also perused the material on record. Present Petition is instituted on 15.10.2015 challenging the order dated 22.3.2012 below Exhibit-11 as also order dated 16.7.2016 below Exhibit-61. While partly allowing the application Exhibit-11 filed by the plaintiff for amending the plaint, in paragraph-10, the learned trial Judge has observed thus :

“10. On perusing the date of cheques,

it appears that those were issued on 24-5-2004 to 4-11-2004 and the sale deed in respect of G-12 flat was executed on 10-2-2005. Hence, from issuance of cheques or execution of sale deed till filing of the suit, during the span of 6 years, plaintiff not claimed right over the said flat. Therefore, it appears that the plaintiff have no any right over the said flat G-12. Thus, said Roopali Vadodria at this movement disputed flat in her name, is not a interested party in this suit. Therefore, amendment in respect of adding party to said Roopali in this suit would not be bonafide and there is no real controversy in between parties in respect of flat No.G-12 and there is no any real controversy in between proposed defendant – Roopali. Thus, if the proposed amendment in respect of adding of party will affect and cause injustice to Roopali. As far as amendment in respect of cheque numbers, it indicates that plaintiff have not changed the date of cheques or any amount and according to him, as per topographical mistake, the cheque numbers can be corrected. If those are corrected, it will not substantially affect on the merits of the case. Considering this amendment, if it would be carried out, it will not change the nature of the suit or cause any prejudice or injustice to the defendant.”

10. For the reasons recorded in paragraph-10 as also perusal of the prayers made in the plaint, I do not find any fault with the order dated 22.3.2012. The challenge, therefore, made by the plaintiff to the order dated 22.3.2012 fails.

11. As far as application Exhibit-61 is concerned, Mr.

Kanade submitted that this was a subsequent development and the learned trial Judge committed error in holding that there is no change in the circumstances. It is no doubt true that the defendant filed application Exhibit-53 for amending written statement for incorporating paragraph-8A wherein the defendant came with the case that she had gifted flat No.G-12 to Rupali. The learned trial Judge rejected the application made by the defendant. In other words, now the Court has to proceed on the footing of un-amended written statement of the defendant. Even if the defendant has stated in the application for amendment to written statement that she had gifted flat No.G-12, perusal of the present application as also plaint as it stands today shows that the plaintiff has not sought any relief qua flat No.G-12. Even in the present application for amendment, no relief is sought qua flat No.G-12. I have already extracted paragraph-10 of the order dated 22.3.2012, wherein the learned trial Judge has observed that the plaintiff has not claimed right over flat No.G-12 and consequently the plaintiff has no right over flat No.G-12. In view thereof, I do not find that the learned trial Judge has committed any error in rejecting the application Exhibit-61. By application Exhibit-61, the plaintiff intended to implead Rupali and Mamta

as defendants No.2 and 3 and incorporate paragraphs-5A and 10A as also sought decree against defendants No.1 to 3. In my opinion, in the plaint the plaintiff specifically came with the case that he has advanced amount to the defendant. It is no where his case that he had advanced loan to defendants No.2 and 3. In other words, no case was made out by the plaintiff for advancing amount to defendants No.2 and 3. In view thereof also I do not find any fault in the impugned order. Hence, the Petition fails and the same is dismissed.

12. It is made clear that where a decree is challenged by the petitioner, any error, defect or irregularity in impugned order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of the proposed proceedings as contended by Section 105(1) of C.P.C.

13. At this stage, Mr.Kanade states that the plaintiff will file application for amendment of the plaint so as to challenge the gift deed. Statement made by Mr. Kanade is recorded. Order accordingly.

(R. G. KETKAR, J.)