

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 2344 OF 2017

Bajrang Bansilal Agrawal
Age : 66 years, Occu. Business,
R/o. New Plots, Amalner
Taluka – Amalner, District – Jalgaon

.. Petitioner
(Orig. Plaintiff)

Versus

- 1] Sunil Shivdas Bhavsar
Age : 54 years, Occu. Business,
R/o. Behind Railway Station,
Bangali Galli, Main Road,
Amalner, Taluka – Amalner,
District – Jalgaon
- 2] Namdev Shivdas Bhavsar
Age : 60 years, Occu. Retired,
R/o. Patang Society, Plot No. 2,
Gandharva Nagar, Motwani Road,
Nashik Road.
- 3] Nandkumar Shivdas Bhavsar
Age : 57 years, Occu. Service,
R/o. Eknath Rang Mandir,
Disha Tarangan, Osmanpura,
Aurangabad
- 4] Sanjay Shivdas Bhavsar
Age : 52 years, Occu. Business,
R/o. New Area Gangaram Plot,
Near Circuswala Building,
Bhusawal, Taluka – Bhusawal,
District – Jalgaon
- 5] Kailas Shivdas Bhavsar
Age : 49 years, Occu. Service,
R/o. B-3, Udyoganand Apartment,
Garkheda Parisar, Saraswati Nagar,
Aurangabad, District – Aurangabad

- 6] Ratnaprabha Narayan Bhavsar,
Age : 68 years, Occu. Household,
R/o. Shrikrishna Colony,
Behind Ashok Backery,
Jalgaon, Dist. Jalgaon
 - 7] Sushilabai Shivdas Bhavsar
deceased
 - 8] Vijay Bapurao Mutthe
Age : 75 years, Occu. Pensioner,
R/o. Onkar Society, Dattawadi,
Pune (E), District – Pune
 - 9] Sudhir Vasant Hanmante
Age : 71 years, Occu. Pensioner,
R/o. B-108, Om Yamuna Madhav Society,
Sawarkar Road, Dombivali (E),
District – Thane
 - 10] Savita @ Pooja Shashikant Badale
Age : 69 years, Occu. Household,
R/o. Sadguru Housing Society,
Datta Mandir Road, Shivaji Nagar No.1,
Manmad, District – Nashik
 - 11] Minakshi Vasudeo Balajiwale
Age : 66 years, Occu. Household,
R/o. Quarter No. G-1497, IBM/1,
Ordinance Factory, Varangaon,
District – Jalgaon
 - 12] Maharashtra State Textiles Corporation Ltd.,
Lotus House, 33A, Sir Vitthaldas Thakkarsi Road,
Mumbai
Through its Secretary
- .. Respondents
(Orig. Defendants)

...

Mr. G.S. Rane, Advocate for petitioner
Mr. V.P. Golewar, Advocate h/f. Mr. A.R. Joshi, Advocate for
respondents no. 2 and 3

Respondents no.8 served as per court's order dated 15-12-2017
Respondent no. 9 served as per court's order dated 10-08-2018
Respondents no. 1,4,5,6, 10, 12 served – absent

Respondent no. 7 – deceased
Respondent no. 11 deleted as per court's order dated 23-06-2017
...

CORAM : SUNIL P. DESHMUKH, J.
DATE : 03-10-2018

ORAL JUDGMENT :

1. Rule. Rule made returnable forthwith. Heard learned counsel appearing for the parties finally, by consent.

2. Petitioner is before this court aggrieved by refusal to accede to request for amendment to plaint under order dated 18-01-2017, by appellate court. Petitioner is plaintiff in special civil suit no. 16 of 2003, seeking specific performance of agreement of sale, claimed to have been executed by defendant no.1 on behalf of defendants no. 2 to 7 in respect of suit property along with two other persons namely Mr. Mutthe and Mr. Hanmante.

3. It is the case of plaintiff that defendant no.1 is power of attorney holder of defendants no.2 to 7 empowering him dealing with the property. Defendants have denied claim of plaintiff about defendant no.1. It is their case that signature of defendant no.1 has been obtained on agreement of sale under misrepresentation.

4. Issues no. 1 and 2 framed would be relevant for the present matter, are,

- [1] Whether the plaintiff proves that the defendant no. 1 agreed on his behalf and on behalf of defendant nos. 2 to 7 to sale the suit land to plaintiff on 12-05-2002 for Rs.3,66,520/- accepting earnest amount of Rs.11,101/- ?
- [2] Whether the plaintiff proves that defendant no.1 is General Power of Attorney holder for defendant nos. 2 to 7 for transfer of suit land ?

5. Trial court had given negative findings on both the issues against plaintiff. The suit has been dismissed and appeal therefrom has been carried at the instance of plaintiff, which is bearing regular civil appeal no. 61 of 2012.

6. Plaintiff has moved application at Exhibit - 58 in aforesaid appeal averring that after judgment and decree had been passed by trial court, an application had been moved for measurement of suit properties before city survey officer, which had issued notice to defendant no.1. In response, defendant no.1 had made a statement for himself and as power of attorney holder of defendants no. 2 to 7 producing a copy of deed of power of attorney dated 15-02-2002, which according to learned counsel for petitioner justifies the case of plaintiff that defendant no.1 is holder of power of attorney of defendants no. 2 to 7 and with such a view, an application had been moved stating subsequent events

are necessary to be brought on record which would aid decision making in the matter.

7. Defendant no.1 by filing his 'Say' at Exhibit - 62 and defendants no. 3, 5 and 6 by filing their 'Say' at Exhibit - 63 had contested the application. It is submitted by them the general power of attorney had already been produced at Exhibit - 103 in the suit. Trial court has found that agreement of sale has not been executed by defendant no.1 as general power of attorney holder of defendants no. 2 to 7. According to them, amendment sought to be introduced is not necessary for decision in the suit.

8. During hearing of application Exhibit - 58, plaintiff, in support of his submission, had relied on various authorities. Appellate court had considered that though trial court had recorded finding on issue no. 2 in negative, holding that defendants no. 2 to 7 have not executed deed of general power of attorney in favour of defendant no.1, however, perusal of material on record, would evince that defendant no.1 had admitted the fact of executing deed of general power of attorney dated 15-02-2002. Appellate court further observed that statement by defendant no.1 before the city survey officer, for and on behalf of defendants no.2 to 7 would not be relevant for decision in the controversy involved in the suit, as the same revolves around fact that agreement of

sale was executed by defendant no.1 in favour of plaintiff for himself and on behalf of defendants no. 2 to 7. The document has been sought to be produced *viz.* power of attorney had already been on record as Exhibit - 103. The court thus purported to consider that as such, it would not be a case it could be said that it was not brought to the notice of trial court. Thus, the court went on to consider that it would not be a case falling under Order VI, Rule 17 of code of civil procedure. It appears, court has also considered that there has been laxity in submission of application for amendment and the court declined to consider the request under application Exhibit - 58.

9. Learned counsel for petitioner submits that appellate court although has adverted to the event of measurement and reliance on power of attorney executed by defendants no.2 to 7 in favour of defendant no.1, is an event which is subsequent to decision in suit and is sought to be brought on record which according to plaintiff, to quite some extent is conducive and beneficial to their interest, yet, the court has declined to accede to request and for very different reasons considering that fact of power of attorney had been noticed by court as the document had been on record. He submits that in the process, the court has been in oblivion of that, it is plaintiff's case that the very same

power of attorney on the basis of which agreement of sale was entered into and the same is also used during measurement. This action of defendants, is sought to be brought on record and the court has missed out on that. He submits that looking at the tenor of order, the court has generally gone by circumstances and authorities relied on without taking into account the true purport underlying the application and events sought to be brought on record. He, thus, contends that the order depicts that there is no application of proper mind to facts and circumstances of the case which calls for rectification under discretionary powers of this court.

10. Learned counsel, during course of his submissions, refers to and relies on two decisions which were also referred to before appellate court.

. The case of *Francisco Patrico Rodrigues and anr. Vs. Mr. Aleixo Cipriano Albuquerque and others* reported in 2011 BCI 359 is referred to support of his submission that a subsequent event ought to be considered and allowed to be incorporated in the plaint. The other contentions are matter of evidence as observed in paragraph no. 6 therein

“ 6. Having heard the learned Counsel appearing for the parties and on perusal of records, I find that there is no dispute raised by the respondents to the effect that the claim of the petitioners in the suit with regard to the access through the property of the respondents is not changed by the proposed amendment. As such, the subject matter of

the suit continues to be the same. But however as rightly pointed out by Shri S. Dessai, the learned Counsel appearing for the petitioners that most of the proposed amendment is to introduce some subsequent events which are not in dispute. Apart from that, the remaining part of the proposed amendments are merely clarificatory in nature. I have perused the application for leave to amend as well as the draft amendment and I find that in fact part of the proposed pleadings are clarificatory in nature and the remaining portion are to incorporate facts which occurred after the filing of the suit. The findings of the learned Judge in the impugned order to the effect that the said pleadings are not necessary for the purpose of deciding the dispute cannot be accepted. There is no dispute that the proposed amendments are in respect of the house property which belongs to the petitioners. Whether such facts are necessary and material are matters which have to be adjudicated after the parties are permitted to lead evidence in support of their pleadings. The learned Judge was not justified to refuse the application for leave to amend on the ground that such facts were to the knowledge of the petitioners at the time of the filing of the suit. Such findings of the learned Judge cannot be sustained. On perusal of the impugned order, I find that the learned Judge has refused the leave to the petitioners to amend on unjustifiable reason and as such the impugned order cannot be sustained and deserves to be quashed and set aside. But however, the application for leave to amend the plaint is allowed subject to payment of costs which are quantified at Rs.2000/- payable by the petitioners to the respondents.”

. He refers to case of *Dhanaji Kashinath Shendkar Vs. Khemchand S. Chawla and others* reported in 2011(6) Mh.L.J. 629 and emphasizes observations as are appearing under paragraph no. 19 therein,

“ 19. It is well settled that the amendment which is necessitated and is essential on account of subsequent events, must be allowed. All the controversies between the parties to the suit in respect of premises involved in the suit must be allowed to be adjudicated upon and for that purpose the amendment, if necessary, has to be allowed. In the case of Ganesh Trading Co., 1978 (2) SCC 91, the Supreme Court has observed thus :

" 5. It is true that, if a plaintiff seeks to alter the cause of action itself and to introduce indirectly, through an amendment of his pleadings, an entirely new or inconsistent cause of action, amounting virtually to the substitution of a new plaint or a new

cause of action in place of what was originally there, the Court will refuse to permit it if it amounts to depriving the party against which a suit is pending of any right which may have accrued in its favour due to lapse of time. But mere failure to set out even an essential fact does not, by itself, constitute a new cause of action. A cause of action is constituted by the whole bundle of essential facts which the plaintiff must prove before he can succeed in his suit. It must be antecedent to the institution of the suit. If any essential fact is lacking from averments in the plaint the cause of action will be defective. In that case, an attempt to supply the omission has been and could sometimes be viewed as equivalent to an introduction of a new cause of action which, cured of its shortcomings, has really become a good cause of action. This, however, is not the only possible interpretation to be put on every defective state of pleadings. Defective pleadings are generally curable if the cause of action sought to be brought out was not ab initio completely absent. Even very defective pleadings may be permitted to be cured, so as to constitute a cause of action where there was none, provided necessary conditions such as payment of either any additional Court fees, which may be payable, or, of costs of the other side are complied with. It is only if lapse of time has barred the remedy on a newly constituted cause of action that the Courts should, ordinarily refuse prayers of amendment of pleadings.”

. He submits that the court has not considered ratio therein that it is well settled while subsequent events necessitated amendment, same must be allowed. He further refers to reproduction of paragraph no. 5 from supreme court judgment reported in 1978 (2) S.C.C. 91.

11. On the other hand, learned counsel Mr. V.P. Golewar holding for learned counsel Mr. A.R. Joshi, appearing for respondents no. 2 to 4 (defendants no. 1, 3, 5 and 6) submits that all relevant aspects while declining request under Exhibit - 58 has

been considered for proper reasons. He submits that one and single object of petitioner is to procrastinate decision making in appeal. He submits that the question really involved is not of as to power of attorney has been executed in favour of defendant no. 1 by defendants no. 2 to 7 but the question is about authenticity and legitimacy of agreement of sale claimed to have been executed by defendant no.1 for himself and on behalf of defendants no. 2 to 7. Trial court has found that claim made by plaintiff is worthless and he has failed to prove the same. In the circumstances, the subsequent event as sought to be pressed into service would not be as relevant as an essential event.

12. He, therefore, submits, the appellate court has considered that citations relied on, on behalf of plaintiff were widely apart on facts and as such, had rightly not persuaded the court. He submits that lengthening of litigation in all probability, is likely to cause prejudice to defendants and they would be deprived of their full rights over suit property.

13. While the submissions are so advanced, what appears to be central to be considered is, as to whether amendment sought could be declined to be allowed for the reasons which have weighed with appellate court. The court appears to have considered as observed above, that controversy revolves around

agreement of sale and not as much with power of attorney and also that there is some laxity in lodging application and further that fact about power of attorney has been noticed by the trial court.

14. It is the case of plaintiff that while the power of attorney had not been relied on for execution of agreement of sale. The subsequent fact deserves to be brought on record before appellate court which according to plaintiff, is conducive to his case. Such action on behalf of defendants, according to plaintiff would justify the claims with regard to power of attorney empowering the executant to enter into agreement of sale.

15. The decision rendered by appellate court appears to be rather hasty and appears to be getting involved in merits of amendments whereas legal position shows, amendments are to be liberally construed and merits of amendment may not be germane to be considered.

16. Having regard to aforesaid, it appears to be expedient to consider request under writ petition, subject of course to by directing the plaintiff to compensate defendants for the inconvenience being suffered by them in the process for laxity, as is observed by trial court.

17. In view of aforesaid, impugned order dated 18-01-2017 passed below Exhibit – 58 in Regular Civil Appeal No. 61 of 2012 by District Judge – 1, Amalner is set aside. Application Exhibit - 58 is allowed. Petitioner - plaintiff to deposit costs of Rs. 5000/- (Rs. Five Thousand) before appellate court within a period of four weeks from the date of receipt of this order, for onward equitable disbursement to defendants no. 1 to 7.

18. Rule is made absolute accordingly.

[SUNIL P. DESHMUKH]
JUDGE

arp/