

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 1849 OF 2018

DATTATRAYA KASHINATH MANDEKAR AND ANOTHER
VERSUS
CHANGDEO DAGDU KHULE AND OTHERS

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Advocate for Petitioners : Shri Tambe Rahul A.
Advocate for Respondents 1 & 2 : Shri Padalkar Harshad H,
Respondents 3 to 13 : Deleted.

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CORAM : RAVINDRA V. GHUGE, J.
Dated: February 15 2018

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PER COURT :-

1. Learned counsel submits, on instructions, that since respondent Nos.3 to 13 are not contesting respondents and such a statement has already been made even in the plaint, he seeks leave to delete respondent Nos. 3 to 13. Deletion is allowed at the risk of the petitioners / plaintiffs. Deletion be carried out forthwith.

2. The petitioners are aggrieved by the order dated 8.1.2018 passed by the trial Court, by which, application Exhibit 86 praying for leave to place on record a rough sketch map as an annexure to the plaint, has been rejected.

3. The plaintiffs have filed RCS No.437 of 2011 for seeking

measurement of the suit land, fixing of the boundaries and for recovery of the encroached area of about 0.03 gunthas. After the suit was filed, the Written Statement was entered by the contesting defendants / respondent 1 and 2 herein, on 3.1.2012. It was specifically stated in paragraph No.4 of the Written Statement that the suit deserves to be dismissed on the ground of a rough sketch map having not been placed on record in compliance of Order VII Rule 3 of the Code of Civil Procedure ("CPC"). Thereafter, the plaintiffs have sought appointment of the Court Commissioner, who has submitted his report along with a map on 23.10.2013. Based on the said report and the map, the plaintiffs have added prayer clause (C) to the plaint, by an amendment. The recording of oral evidence of all the litigating sides had concluded. The final arguments were also over and the matter was at the stage of delivering a judgment. However, since Exhibit 73 was filed by the plaintiffs for seeking an amendment, an additional issue was cast and hence the matter was relegated to the stage of recording of evidence.

4. At this stage, the plaintiffs preferred application Exhibit 86 on 15.9.2017 making a request that a rough sketch map needs to be placed on record and the earlier advocate engaged by the plaintiffs had not advised them to file a rough sketch map as is

required under Order VII Rule 3 of the CPC. By the impugned order, the trial Court has rejected Exhibit 86, concluding that a sufficient opportunity was available to the plaintiffs and yet the rough sketch map was not placed on record even though the defendants had specifically raised an objection. An issue as regards maintainability of the suit on that count has also been framed.

5. The learned counsel for the plaintiffs has relied upon the following judgments:-

- (i) Pratibha Singh Vs. Shanti Devi Prasad
(2002 DGLS (SC) 1043)
- (ii) Shri Mohana Kashinath Naik Vs. Shri Prakash Gajanan
Sukthankar - Second Appeal No.69 of 2017 (Goa)
Dated 25.1.2018
- (iii) Catarina Fernandes and others Vs. Jose Menino
Rodrigues and another [2013 (1) Mh.L.J. 367 and
- (iv) Laxman Wamanrao Nagapure Vs. Shankar
Haribhau Adhau and another [2014 (3) Mh.L.J.791].

6. The contention of the plaintiffs is that as they are agriculturists and do not have detailed knowledge of the Code of Civil Procedure, they have totally relied upon their Advocate with regard to filing of the plaint and manner of conducting the suit. For some reason, when the Advocate was changed and the new

Advocate studied the entire case, it was informed that a rough sketch map was not placed on record and this is likely to be fatal to the suit since the plaintiffs have not acted even though the defendants had raised an objection in the Written Statement under Order VII Rule 3 of the CPC. If non-furnishing of a rough sketch map would be fatal, the plaintiffs' suit would be dismissed even without considering the merits of the matter, as the rough sketch map is not on record. It is, therefore, urged that the failure to comply with Order VII Rule 3 of the CPC would result in the dismissal of the suit. The plaintiffs would have no opportunity to remove these deficiencies, which are on account of lack of proper advice by the concerned Advocate.

7. Learned counsel for the contesting defendants has relied upon the judgment of this Court dated 18.2.2014 in Writ Petition No.1322 of 2013 delivered at the Nagpur Bench in the matter of Smt. Jayashree Subhash Kalbande Vs. Bhaurao Nagorao Derkar - Writ Petition No.1322 of 2013, dated 18.2.2014. It is canvassed that this Court has concluded in paragraph No.10 that in spite of knowledge, failure by the litigating party or an Advocate in removing deficiencies, cannot be a matter of amendment. Learned Advocate, therefore, submits that the ground put forth by the plaintiff is not sufficient and is not appreciable. The Advocate

of the plaintiffs was alerted by the Written Statement and though the plaint was once amended, the plaintiffs have failed to comply with Order VII Rule 3 of the CPC. He, therefore, prays that this petition be dismissed with heavy costs.

8. The Honourable Apex Court has held in catena of judgments that if certain defects can be cured before it is too late, the trial Court with the intention of doing complete justice, can give such an opportunity to a litigant rather than letting the litigation progress and a reversal would cause a severe loss of time, money and energy to the litigating sides.

9. In Laxman Wamanrao (supra), this Court has concluded in paragraph Nos.14 and 15 as under:-

"14. Be that as it may, when the suit is filed for removal of encroachment from and for the possession immovable property, the plaintiff is required to take care to comply with Order VII Rule 3 of the Code of Civil Procedure so as to describe the suit property which is subject-matter of the suit sufficiently so as to identify appropriately with boundaries thereof. The plaintiff must be careful to describe the property by its boundaries, Survey Number/Gat Number with area mentioning the boundaries on North, East, West and South of the suit property. Without such description, the trial

Court may not be assisted properly by the plaintiff to pass an effective decree if it is passed for the removal of encroachment from the suit land/property in such cases.

15. *In the present case, a plaint in Regular Civil Suit No. 73 of 2005 instituted in the Court of Civil Judge Junior Division, Telhara, mentioned only Survey Number and area but did not describe the suit land sufficiently by its boundaries on North, East and West. The plaintiff may after such description mention as to how much area is encroached upon approximately by the defendants in respect of which possession is sought and with or without consequential relief of damages and/or mesne profits under Order XX Rule 12 of the Code of Civil Procedure. It appears that the Courts below overlooked the legal requirement in the plaint under Order VII Rule 3 of the Code of Civil Procedure. The trial Court could have insisted upon sufficient and full description in respect of the suit property in such case."*

10. This Court, therefore, passed an order in a Second Appeal in the case of Laxman Wamanrao (supra) and remitted the matter back to the trial Court, in a suit which was preferred in 2005 thereby reversing the Clock by almost nine years. In my view, in the case in hand, such a situation as in Laxman Wamanrao (supra), can be avoided.

11. The Honourable Apex Court in the matter of Pratibha

Singh (supra), while dealing with Order VII Rule 3, Order XX Rule 3 and Section 47 read with Section 152 of the CPC, concluded that identification of an immovable property is a curable defect. It was concluded that such a defect, which remained in the suit, overlooking Order VII Rule 3 and Order XX Rule 3, can be cured by resorting to Section 152 or Section 47.

12. I find that the observations of the Honourable Apex Court in Pratibha Singh (supra), in paragraph No.14, in fact deserves to be brought to the notice of every trial Court. The said observations, in paragraph No.14 read as under:-

"14. Order 7 Rule 3 of the CPC requires where the subject-matter of the suit is immovable property, the plaintiff shall contain a description of the property sufficient to identify it. Such description enables the Court to draw a proper decree as required by Order 20 Rule 3 of the CPC. In case such property can be identified by boundaries or numbers in a record for settlement of survey, the plaintiff shall specify such boundaries or numbers. Having perused the revenue survey map of the entire area of R.S. plot No. 595 and having seen the maps annexed with the registered sale deeds of the defendant judgment-debtors we are clearly of the opinion that the sub-plots 595/I and 595/II were not capable of being identified merely by boundaries nor by numbers as sub-plot numbers do not appear in records of

settlement or survey. The plaintiffs ought to have filed map of the suit property annexed with the plaint. If the plaintiffs committed an error the defendants should have objected to promptly. The default or carelessness of the parties does not absolve the Trial Court of its obligation which should have, while scrutinizing the plaint, pointed out the omission on the part of the plaintiffs and should have insisted on a map of the immovable property forming subject-matter of the suit being filed. This is the first error." (Emphasis supplied).

13. It is, therefore, obvious that the Honourable Apex Court concluded that the default or carelessness of the litigating sides would not absolve the trial Court of its obligations while scrutinizing the plaint. By pointing out the omission on the part of the plaintiff, the trial Court should have insisted on a map of the immovable property, which becomes a part of the plaint and subject matter of suit under Order VII Rule 3 of the CPC. I, therefore, find that it would be an obligation of this Court to bring this matter, specifically, to the notice of all the trial Courts in this case.

14. The Apex Court then concluded in Pratibha Singh Case (supra), in paragraph Nos.15 and 16 as under:-

"16. *The second error was committed during the execution*

proceedings. Under Order 21 Rule 32 of the CPC a decree for specific performance of a contract, on failure to obey, may be enforced by the judgment-debtor being detained in civil prison. Order 21 Rule 34 provides the procedure for execution of documents pursuant to a decree. Where a decree is for the execution of a document the decree holder may prepare a draft of the document in accordance with the terms of the decree and deliver the same to the court. Thereupon the court shall cause the draft to be served on the judgment-debtor together with a notice requiring his objections, if any, to be made out within time as the court fixes in this behalf. Where the judgment-debtor objects to the draft, his objections shall be stated in writing and then determined. The draft shall be approved or altered consistently with the finding arrived at by the Court. In the present case the plaintiff-decree holders pointed out that the defendant judgment-debtors were aware of the contents of the draft sale deed. The fact remains that the draft sale deed accompanied by a notice requiring objections to be made by judgment-debtor as provided by Sub-rule 2 of Rule 34 of Order 21 of the CPC was not caused to be served by the Court. The record also reveals the judgment-debtors repeatedly insisting, may be dogmatically, on draft sale deed being delivered to them enabling objections being filed. There is no determination by the Executing Court that the immovable property as delineated and demonstrated in the map accompanying the draft sale deed was the property forming subject-matter of agreement to sell and the decree. Inasmuch as the possession is yet to be taken by the plaintiff decree holders this aspect can still be taken care of and that

we shall do by making an appropriate direction in the operative part of this order.

16. *When the suit as to immovable property has been decreed and the property is not definitely identified, the defect in the court record caused by overlooking of provisions contained in Order 7 Rule 3 and Order 20 Rule 3 of the CPC is capable of being cured. After all a successful plaintiff should not be deprived of the fruits of decree. Resort can be had to Section 152 or Section 47 of the CPC depending on the facts and circumstances of each case -- which of the two provisions would be more appropriate, just and convenient to invoke. Being an inadvertent error, not affecting the merits of the case, it may be corrected under Section 152 of the CPC by the Court which passed the decree by supplying the omission. Alternatively, the exact description of decretal property may be ascertained by the Executing Court as a question relating to execution, discharge or satisfaction of decree within the meaning of Section 47 CPC. A decree of a competent Court should not, as far as practicable, be allowed to be defeated on account of an accidental slip or omission. In the facts and circumstances of the present case we think it would be more appropriate to invoke Section 47 of the CPC." (Emphasis supplied).*

15. This Court, in Second Appeal No.69 of 2017, has delivered a judgment on 25.1.2018 at the Goa Seat, while dealing with breach of Order VII Rule 3 of the CPC. It was

concluded in paragraph Nos.12 to 14 as under:-

"12. A comparison of the Bombay High Court amendment with the original rule would clearly show that it is substantially on similar lines except that the High Court amendment provides that in case of an encroachment a sketch showing 'as approximately as possible' the location and extent of encroachment shall also to be filed along with the plaint. In the present case the respondents/plaintiffs had filed a suit for mandatory and prohibitory injunction. The mandatory injunction is in respect of the structure which is to the north west corner of survey no.36/1. The learned trial court refused to grant the mandatory injunction on the ground that the identity of the said structure is not established, which finding has been reversed by the first appellate court. The question is whether the said finding can be said to be perverse or infirm in the absence of compliance of Order 7 Rule 3 of C.P.C. The Supreme Court in the case of Prathibha Singh and Ors. (supra) had an occasion to consider the provisions of Order 7 Rule 3 of C.P.C. It has been inter alia held that in a suit of the present nature the plaintiff ought to have filed a map of the suit property annexed to the plaint. However, if the plaintiff commits an error, it is for the defendants to object to it promptly. It has further been held that the default and the carelessness of the parties does not absolve the trial court of its obligation which should have been done while scrutinizing the plaint pointing out the omission on the part of the plaintiffs and should have insisted on a map of the property forming subject matter of the suit. In para 17 the Hon'ble Supreme Court has held thus:

(Paragraph 16 of Pratibha Singh (supra) is reproduced)."

13. *It can thus be seen that as held by the Supreme Court that the irregularity with regard to non compliance of Order 7 Rule 3 of C.P.C. is held to be curable. It has specifically been held that a successful plaintiff should not be deprived of the fruits of decree.*

14. *In my considered view merely on account of the fact that the said decision was not rendered in the context of Order 7 Rule 3 of C.P.C., as amended by the Bombay High Court, would not make any difference because the basic principles as laid down by the Supreme Court would still apply. Thus the contention that the decision in the case of Prathibha Singh is distinguishable to my mind cannot be accepted. "*

16. This Court has, therefore, held in the light of Pratibha Singh (supra) that non-compliance of Order VII Rule 3 is a curable defect. A similar view has been taken by this Court at the Goa Seat in Catarina Fernandes (supra) and has concluded in paragraph No.18 as under:-

"18. *Since case of the plaintiffs is specifically that all the encroachments fall within the suit property bearing survey no. 280/3 and that the said suit property belongs to them, the question of filling of sketch under Order VII Rule 3 of the C.P.C., showing the extent of encroachments, does not arise and non-production of such sketch would not be fatal.*

Substantial question no. III therefore gets answered in favour of the plaintiff."

17. Learned counsel for the contesting defendants has relied upon the judgment of this Court delivered at the Nagpur Bench in the matter of Smt. Jayashri (supra), observations of which are reproduced as under:-

"..... The law laid down by the Apex Court as is summarized in clause (b) in the earlier para, clearly indicates that the due diligence is distinct from ignorance. In spite of knowledge, ignorance by party or an advocate cannot be a matter of due diligence. The neglect to perform an action which one has an obligation to do cannot be called as a mistake. The Apex Court has also taken a view that the degree of prejudice to the other side by an amendment after the commencement of trial is greater than one at pretrial stage. Unless this hurdle is crossed of due diligence, it is not permissible to allow the application for amendment after the commencement of trial. In the absence of a case of due diligence being made out in the pleadings, the trial Court could not have allowed the application for amendment."

18. There can be no debate on the issue of due diligence and more so in the light of the contention of the defendant that an amendment was earlier carried out and though the defect was pointed out in the Written Statement, the plaintiffs have not

attempted to cure the said defect. It is equally true that the petitioners have faltered in so far as due diligence is concerned. Though ignorance of law is no excuse, it cannot be over-looked that these plaintiffs are agriculturists with their origins in rural areas. They completely rely upon the assistance of an Advocate in conducting their suits. If an Advocate, in a given situation appears to be ignorant of Order VII Rule 3 and is not alert even after the defendants point out the deficiency through the Written Statement, it would be a disaster for such plaintiffs, who are bound to suffer an adverse order in a suit which pertains to their agricultural land.

19. As has been concluded by this Court in Mohana Naik (supra) and Caterina (supra), that such a defect deserves to be cured and for which purpose the Second Appeals were allowed and the matters were remitted to the trial Court after a litigating journey of about 9 to 10 years. In my view, such a situation can be averted in this case as the stage in the suit is now for recording of evidence post framing of an additional issue. So also the suit is of the year 2011 and it cannot be said that it is more than ten years' old. Nevertheless, the rigours of the contesting defendants can be reduced by imposing costs upon these two plaintiffs.

20. As such, this petition is allowed. The impugned order dated 8.1.2018 is quashed and set aside and application Exhibit 86 is allowed by imposing costs of Rs.10,000/- which both these petitioners shall deposit jointly in the trial Court on 26.2.2018 when the matter is posted before the trial Court. Both these defendants, namely, Changdeo Dagadu Khule and Bhaskar Dagadu Khule shall withdraw the said costs, in equal proportions of Rs.5,000/- without any conditions.

21. Considering the above and in the light of the observations of the Honourable Apex Court in Pratibha Singh case (supra), in the underlined portion of paragraph No.14, reproduced above, I deem it appropriate to direct the learned Registrar (Judicial) of this Court to place a copy of this order before each learned Principal District Judge in this State so as to bring to the notice of each Judicial Officer under the respective Judicial district that a proper scrutiny of the suit shall be performed by the concerned office of the Courts and in the event of a sketch map being required to be annexed to the complaints, depending upon the cause of action in due deference to Order VII Rule 3 of the CPC, the trial Court shall place such suits in objection category and shall not proceed with the said suits, until there is a proper

compliance of Order VII Rule 3 of the CPC to avoid further complications as are visible in the judgments cited in this proceeding.

(RAVINDRA V. GHUGE, J.)

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