

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.3527 OF 2017
(Shivdas s/o Santram Gavhane Vs. Ravindra Sudhakar Ghadge)

Mr.G.K.Naik Thigle, Advocate for the petitioner.

(CORAM : Ravindra V.Ghuge, J.)
DATE : 23/07/2018

PER COURT :

1. Though the respondent represented by two Advocates have circulated this matter, none appears. I have heard the submissions of the learned Advocate for the petitioner who is aggrieved by the order dated 20/01/2017 passed by the Appellate Court, by which application Exh.7 filed by the petitioner/plaintiff, seeking leave to amend the plaint and put forth a prayer for refund u/s 22(1)(b) of the Specific Relief Act, 1963, has been rejected.

2. There is no dispute that an appeal, challenging the rejection of a suit by the Trial Court or even against a decree, is a continuation of the suit. Section 22(2) of the Specific Relief Act prohibits grant of any relief under Sub Clause (a) or (b) under Sub Section (1) of Section 22, unless it is specifically prayed for.

3. Section 22 of the Specific Relief Act reads as under :-

“22. Power to grant relief for possession, partition, refund of earnest money, etc :- (1) Notwithstanding anything to the contrary contained in the Code of Civil Procedure, 1908 (5 of 1908), any person suing for the specific performance of a contract for the transfer of immovable property may, in an appropriate case, ask for -

(a) possession, or partition and separate possession, of the property, in addition to such performance ; or

(b) any other relief to which he may be entitled, including the refund of any earnest money or deposit paid or [made by] him, in case his claim for specific performance is refused.

(2) No relief under clause (a) or clause (b) of sub-section (1) shall be granted by the Court unless it has been specifically claimed :

Provided that where the plaintiff has not claimed any such relief in the plaint, the Court shall, at any stage of the proceeding, allow him to amend the plaint on such terms as may be just for including a claim for such relief.

(3) The power of the Court to grant relief under clause (b) of sub-section (1) shall be without prejudice to its powers to award compensation under section 21.”

4. In the matter of Balasaheb Dayandeo Naik (Dead), through LR's and others Vs. Appasaheb Dattatraya Pawar [(2008)4 SCC 464], the Hon'ble Apex Court has concluded that a plaintiff has a right to put forth an alternate prayer which can be considered in the event the main prayers put forth cannot be or do not deserve to be entertained. A prayer for refund of earnest money would squarely fall under Section 22(1)(b) and unless such a prayer is put forth, the same

cannot be granted u/s 22(2).

5. In the matter of Lalchand s/o Sheetalsing Pardeshi died through heirs and legal representatives Ashabai w/o Lalchand Pardeshi and others Vs. Ramkrishna s/o Kashinath Jadhav and others, [2003(4) Mh.L.J. 119], this Court has concluded that Section 22(1) of the Specific Relief Act has an overriding effect over the provisions contained in the Civil Procedure Code. Section 22 is also a Law dealing with pleadings, as is the case in relation to Order VI Rule 17 of the CPC. It is concluded that once Section 22 is held to have an overriding effect over Order VI Rule 17, then the plaintiff has a right to seek such amendment claiming possession or an alternate prayer. The word “shall” used in the proviso to Section 22(2) would indicate that such an application can be entertained at any stage in the suit.

6. Considering the above and keeping in view that the plaintiff could have putforth this prayer in the plaint itself as it was the first available opportunity for him to seek a relief in the alternative, the said request can be granted by imposing costs for having put forth the said prayer belatedly. Any refusal to permit such an amendment would disqualify the plaintiff from seeking that alternate relief u/s

22(2).

7. Since the learned Advocates for the respondent have not appeared, the costs to be imposed shall be donated by the petitioner, with his consent, to the Civil Hospital, Beed for the treatment of poor patients.

8. In view of the above, this petition is partly allowed. The impugned order dated 20/01/2017 is quashed and set aside and application Exh.7 is partly allowed by permitting the petitioner to introduce paragraph No.15-A and prayer clause D. An amount of Rs.5,000/- (Rs. Five thousand only) shall be deposited on or before 09/08/2018. Receipt of such deposit shall be placed before the Appellate Court on or before 16/08/2018. The amendment shall be carried out on or before the said date in the pending appeal.

9. Since the appeal is pending from 2010, the Appellate Court is requested to decide RCA No. 159/2012, as expeditiously as possible, and preferably on or before 28/02/2019.

(Ravindra V.Ghuge, J.)