

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO. 3403 OF 2016

M/s Trilok Builders,
Through its Partner
Shri Pankaj Trilokchand Pande,
Age : 41 years, Occupation : Business,
R/o Chouraha, Aurangabad.

...PETITIONER

-VERSUS-

- 1 Mr.Praveen Kapurchand Surana,
Age : 46 years, Occupation : Business,
R/o Flat No.6, Trilok Plaza,
Shahagunj, Aurangabad.
- 2 Mrs.Seema Praveen Surana,
Age : 39 years, Occupation : Household,
R/o Flat No.6, Trilok Plaza,
Shahagunj, Aurangabad.

...RESPONDENTS

...
Advocate for the Petitioner : Shri Bhandari Anand P.
Advocate for the Respondents : Shri Gangakhedkar Shailendra S.
...

CORAM: RAVINDRA V. GHUGE, J.

DATE :- 05th January, 2018

Oral Judgment :

- 1 Rule. Rule made returnable forthwith and heard finally by the consent of the parties.
- 2 The Petitioner/ original Plaintiff is aggrieved by the impugned

order dated 03.02.2016 by which, the application Exhibit-36 filed by the Petitioner seeking amendment to the plaint under Order 6 Rule 17 of the Code of Civil Procedure, has been rejected.

3 While issuing notice in this matter on 28.03.2016, this Court has granted ad-interim relief in terms of prayer clause "C" to the Petitioner.

4 I have considered the submissions of the learned Advocates for the respective sides.

5 Shri Gangakhedkar, learned Advocate for the Respondents, has strenuously defended the impugned order and has prayed that this petition be dismissed with heavy costs.

6 There is no dispute amongst the litigating sides that the application Exhibit-36 seeking amendment to the plaint was filed before the commencement of the trial in Special Civil Suit No.32/2007. The application was filed on 18.07.2009 and the Trial Court has dealt with the said application by passing the impugned order on 03.02.2016. During the pendency of Exhibit-36, the issues have been cast.

7 The Plaintiff and the Defendants had entered into an agreement to sale on 06.07.2004 with regard to a flat. The stamp value was Rs.6,76,200/- and actual sale value was Rs.6,75,000/-. The Petitioner/ Plaintiff is a builder and developer of the flat, which is owned by one Mr.Manikchand Gangwal, who is not a party to the suit before the Trial Court. The Respondents are the purchasers.

8 Clause (2) of the agreement indicates the eventuality of an automatic cancellation of the agreement, if the purchaser fails to pay the entire amount as is agreed in the said agreement. In the suit filed by the Petitioner seeking recovery of possession, the thrust of the Petitioner's case is based on the clause of automatic cancellation of the agreement to sale thereby, giving rise to the recovery of possession. Though it is so pleaded at different places in the plaint, a specific prayer that the agreement be declared as being automatically cancelled, has not been formally put forth by the Petitioner/ Plaintiff.

9 Shri Gangakhedkar has pointed out from the impugned order that the Trial Court has observed that since the entire issue in the case turns upon the agreement to sale, all conditions that are specifically set out in the agreement will have to be considered by the Trial Court. Since the Trial Court has so observed that while deciding the suit it would consider the effect of the language and conditions set out in the agreement, it would obviously enable the Plaintiff to canvass the issue of automatic cancellation of the agreement.

10 It, therefore, appears that the litigating sides are fully relying upon the agreement and the terms and conditions set out therein and consequentially, the Trial Court would then have to consider the effect of clause (2) of the agreement which provides for automatic cancellation on account of the purchaser having failed to pay the entire amount.

11 No doubt, in my view, the Trial Court will have to consider the effect of the terms and conditions of the agreement. However, it would be necessary to appreciate the backdrop in which the Plaintiff has pleaded for cancellation of the agreement to sale. If both sides are aware that the issue of automatic cancellation is being considered by the Trial Court and if the Trial Court is aware that it needs to consider the effect of automatic cancellation, I do not find that the Defendants would be prejudiced if a formal prayer to that effect is put forth in the plaint. It also needs to be considered that Exhibit-36 was filed before the trial has commenced.

12 Considering the above, this Writ Petition is partly allowed. The impugned order dated 03.02.2016 is quashed and set aside and the application Exhibit-36 is allowed on the condition that the Petitioner shall deposit an amount of Rs.7,500/- (Rupees Seven Thousand Five Hundred). The learned Advocate for the Respondents graciously submits that the said amount can be donated to the Advocates Association of Bombay High Court, Bench at Aurangabad.

13 As such, the Petitioner shall deposit the amount of Rs.7,500/- with the Advocates Association of Bombay High Court, Bench at Aurangabad on or before 02.02.2018 and shall produce a receipt of such deposit before the Trial Court on or before 09.02.2018.

14 Upon compliance of the above direction, the Petitioner shall carry out the amendment to the plaint by introducing paragraph 8-A and

prayer clause A(1) on or before 09.02.2018. Liberty is granted to the Defendants to file an additional written statement pursuant to the amendment. The learned Trial Court would be at liberty to frame an additional issue in the light of this amendment.

15 At this stage, the learned Advocates for the respective sides submit that as the suit is about 11 years old, the same be expedited.

16 Considering the said request, the Trial Court is directed to decide the suit as expeditiously as possible and preferably on or before 31.12.2018.

17 Rule is made partly absolute in the above terms.

kps

(RAVINDRA V. GHUGE, J.)