

IN THE HIGH COURT OF JUDICATURE AT BOMBAY***CIVIL APPELLATE JURISDICTION*****WRIT PETITION NO. 4379 OF 2016**

**City and Industrial Development)
Corporation Ltd.,)
A Company registered under the)
Companies Act, 1956 having its)
Head Office at CIDCO Bhavan,)
CBD-Belapur, Navi Mumbai – 14)**

**..... Petitioner
(Org.Defendant)**

VERSUS

**1. M/s.Preet Sonal Investments &)
Finance Co. Pvt. Ltd.)
Having its office address at)
C-4, Big Splash, 1st Floor,)
Turbhe Road, Section 17, Vashi,)
Navi Mumbai)**

**2. Shri Nemchand Chheda,)
One of the Directors of the first)
Respondent, having its office address))
at C-4, Big Splash, 1st Floor,)
Turbhe Road, Section 17, Vashi,)
Navi Mumbai)**

**..... Respondents
(Org.Plaintiffs)**

Mr.R.S.Apte, Senior Advocate, i/b. Mr.Ashutosh M. Kulkarni for the Petitioner.

Mr.Akhilesh Dubey, a/w.Mr.Nishant Tripathi, Mr.Vaibhav Bandgor, Mr.Somnath Iyer, i/b. M.Tripathi & Co. for the Respondents.

CORAM : R.D. DHANUKA, J.

DATE : 16th OCTOBER, 2018

JUDGMENT

By this petition filed under Article 227 of the Constitution of India, the petitioner (original defendant) has impugned the order dated 4th April, 2016 passed by the 4th Civil Judge, Senior Division, Thane allowing the application (Ex.40) filed under Order 6 Rule 17 of the Code of Civil Procedure, 1908 thereby allowing the amendment of the plaint filed by the respondent (original plaintiff).

2. The suit was filed on 13th March, 2002 by the plaintiff *inter alia* praying for a declaration that the defendant had committed unfair trade practice against the plaintiff under the provisions of section 36A of Monopolies and Restrictive Trade Practices Act and for damages and other reliefs. The petitioner resisted the suit by filing written statement.

3. During the pendency of the suit, the petitioner (original defendant) appears to have passed a resolution in the year 2009 in respect of the said plot which was subject matter of the suit. One of the condition mentioned in the said resolution was that the plaintiff shall withdraw this suit unconditionally and all ongoing litigation pending before this court. Based on this resolution, the plaintiff filed an application (Ex.130) under Order 12 Rule 6 of the Code of Civil Procedure, 1908 *inter alia* praying for decree or admission. The said application was resisted by the defendant on the ground that there was no such pleading in the original plaint filed by the plaintiff. In view of such defence raised by the defendant, the plaintiff filed an application under Order 6 Rule 17 of the Code of Civil Procedure, 1908 *inter alia*

praying for amendment of the plaint and to bring the said resolution passed by the defendant on record and for other reliefs based on the said resolution. It was the case of the plaintiff that based on the resolution, the plaintiff has taken various steps by approaching various financial institutions for assistance. It was the case of the plaintiff that under the said resolution, the defendant had agreed to re-allot the said plot to the plaintiff on various terms and conditions. The said application under Order 6 Rule 17 of the Code of Civil Procedure, 1908 came to be opposed by the defendant and more particularly on the ground of delay. The learned trial judge allowed the said application by an order dated 4th April, 2016. The said order is impugned by the original defendant in this writ petition.

4. Mr.Apte, learned senior counsel for the defendant invited my attention to the prayers in the original plaint, the written statement, the application for amendment filed by the original plaintiff, the reply given by the defendant and the impugned order passed by the learned trial judge below Ex.140 and would submit that there was gross delay on the part of the plaintiff to file an application for seeking amendment under Order 6 Rule 17 of the Code of Civil Procedure, 1908. He submits that the suit was filed in the year 2002. The resolution was admittedly passed in the year 2009. The application for amendment was made in the year 2016. He submits that the said application for amendment was filed with *malafide* intention in view of the defendant resisting the application under Order 12 Rule 6 for decree on admission. He submits that if the amendment order is not set aside, there would be change of entire cause of action.

5. Learned counsel for the original plaintiff on the other hand invited my attention to the averments made in the plaint and the prayers. He submits that the entire suit was based on the premise that the allotment in favour of the plaintiff was illegally cancelled by the defendant. He submits that the plaintiff had acted upon the said resolution passed by the defendant. The plaintiff had filed an application under Order 12 Rule 6 of the Code of Civil Procedure, 1908 *inter alia* praying for a decree on admission. The said application was resisted by the defendant on the ground that there was no such plea raised in the plaint. In view of such hyper technical objection raised by the defendant, the plaintiff filed a fresh application for amendment of the plaint under Order 6 Rule 17 of the Code of Civil Procedure, 1908.

6. Learned counsel invited my attention to the proviso to Order 6 Rule 17 inserted by 2012 Amendment Act w.e.f. 1st July, 2002 and would submit that in this case the suit was filed on 13th March, 2002 i.e. much prior to the date of insertion of the said proviso to Order 6 Rule 17 of the Code of Civil Procedure, 1908 and thus the said proviso would not be applicable to the pending suit with retrospective effect. In support of this submission, learned counsel placed reliance on the judgment of Supreme Court in case of ***State Bank of Hyderabad vs. Town Municipal Council, (2007) 1 SCC 765*** and in particular paragraphs 5 to 8. He submits that there was thus no question of the plaintiff proving any due diligence in the application for amendment filed under Order 6 Rule 17 of the Code of Civil Procedure, 1908.

7. It is submitted there there is no change of cause of action in view of the trial court allowing the application for amendment filed by the plaintiff. He submits that the original suit was also on the basis of the wrongful cancellation of the allotment of the land. In the resolution passed by the defendant, the defendant proposed to re-allot the said land however on certain terms and conditions. He submits that the said resolution is already acted upon by the plaintiff.

8. It is submitted that in these circumstances, the learned trial judge had rightly allowed the said application for amendment. The oral evidence has not commenced in the suit. He submits that this court thus shall not interfere with the impugned order passed by the learned trial judge.

9. A perusal of the averments made in the plaint clearly indicates that the said suit was filed on the basis that the defendant had allegedly and illegally cancelled the allotment of the land in favour of the petitioner. The defendant has not disputed the passing of the resolution in the year 2009 during the pendency of the suit. It is not in dispute that relying upon the said resolution, the plaintiff had filed an application (Ex.130) under Rule 6 of the Code of Civil Procedure, 1908 *inter alia* praying for a decree on admission. The said application was however opposed by the defendant on the ground that there was no such plea in the plaint and thus no such order under Order 12 Rule 6 could be passed. The said application is still pending.

10. In view of such objection raised by the defendant, the plaintiff

was required to file an application under Order 6 Rule 17 of the Code of Civil Procedure for bringing the said resolution on record and to seek a decree on admission.

11. It is not in dispute that the suit was filed on 13th March, 2002 which is much prior to the said proviso inserted by Amendment of 2002 w.e.f. 1st July, 2002. In my view the said proviso thus would not apply to the pending suit. The Hon'ble Supreme Court in case of ***State Bank of Hyderabad*** (supra) has considered this question and has held that in the said proviso having been inserted w.e.f. 1st July, 2002 would not apply to the pending suits as on 1st July, 2002. The principles of law laid down by the Supreme Court in case of ***State Bank of Hyderabad*** (supra) would squarely apply to the facts of this case. I am respectfully bound by the said judgment.

12. Insofar as the issue of delay is concerned, in view of said proviso being made applicable w.e.f. 1st July, 2002, the question of proving due diligence in making an application for amendment thus would not arise to the facts of this case. The learned trial judge however has considered this issue in paragraph (7) of the impugned order and has rightly allowed the application for amendment.

13. Insofar as issue of limitation if any is concerned, it is made clear that the said issue is kept open. Merely because the amendment is allowed by the learned trial judge, the contents thereof are not deemed to have been admitted by the defendant.

14. Insofar as submission of the learned senior counsel for the defendant that by allowing the amendment there was change of cause of action is concerned, in my view there is no merit in this submission of the learned senior counsel for the defendant. The suit was based on the premise that allotment of the land in favour of the petitioner was illegally cancelled by the defendant. However by virtue of the resolution passed by the defendant, the defendant had propose to re-allot the land to the petitioner however on certain terms and conditions. There is thus no change in the nature of suit as sought to be canvassed by the learned senior counsel for the defendant. If the trial court is convinced that the said resolution was passed by the defendant and the same was acted upon by the plaintiff, the entire suit can be disposed of based on the subsequent prayer. I am thus not inclined to accept this submission on the part of the learned senior counsel for the defendant.

15. The oral evidence has not commenced. The learned trial judge was justified in allowing the said application for amendment filed by the plaintiff by imposing a cost of Rs.5,000/-. Writ petition is thus devoid of merit. I, therefore, pass the following order :-

- (a) Writ petition is dismissed.
- (b) The defendant would be entitled to file an additional written statement within four weeks from the date of effecting service of the amended plaint by the plaintiff.
- (c) It is made clear that merely because the amendment is permitted by the learned trial judge, the defendant has

not admitted the contents of the amendment.

(d) The learned trial judge shall consider the issue of limitation also at the stage of final hearing and also *prima facie* at the stage of considering the application filed by the plaintiff (Ex.130) without being influenced by the order passed by the learned trial judge.

(e) No order as to costs.

[R.D. DHANUKA, J.]

Kanchan
Vinod
Mayekar

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Kanchan Vinod
Mayekar
Date: 2018.10.22
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