

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION No. 7788 of 2018

Nandkumar Dattatraya Sardeshmukh ..Petitioner.
Vs
Smt. Nirmala Dattatraya Sardeshmukh & Ors ..Respondents.

Ms. Chandana Salgaonkar, Advocate for the petitioner.

Mr. Rahul S.Kadam for Respondent No. 1 and 2.
Mr. Jayesh Kocheta a/with C.S. Zende for Respondent No. 4
and 5.

CORAM: R.D. DHANUKA, J.
DATE : 4th October, 2018

P.C:-

1) By this petition filed under Article 227 of the Constitution of India, the petitioner has impugned the order dated 28th February, 2018 passed by the learned 5th Joint Civil Judge, Junior Division, Pune, below Exhibit-41 rejecting application filed by the petitioner (Original plaintiff) under Order VI Rule 17 of the Code of Civil Procedure.

2) The original suit was filed by the plaintiff inter-alia praying for declaration that the plaintiff is the co-owner of the whole property described in Paragraph No. 1 and for other reliefs. The suit was filed in the month of July, 2017.

3) On or about 13th December, 2017, the petitioner made an application for amendment of the plaint on the ground that during the pendency of the suit, the petitioner noticed various documents which were described in the application for amendment which were relevant for the purpose of deciding the issue and the controversy involved in the suit filed by the petitioner. The petitioner accordingly sought to place reliance on those documents and prayed for various reliefs in the nature of declaration in so far as those documents are concerned. The petitioner also applied for relief of partition in suit property by metes and bounds and to allot 1/5th well defined undivided share in the suit property and to put him in vacant and peaceful possession thereof.

4) The said application was opposed by respondent no. 1 and 2 (original defendant No.1 and 2) before the learned trial Judge by filing an affidavit on the ground that the amendment applied by the petitioner would change the nature of cause of action. The learned trial Judge by order dated 28th February, 2018 rejected the said application below Exh.41 on the ground that the nature of amendment sought by the petitioner was such that it would change the cause of action. The learned Trial Judge,

however, mentioned that the trial has not commenced.

5) The learned counsel for the petitioner invited my attention to the amendment and the averments in the plaint filed by her client and also the application for seeking amendment of the plaint filed under Order VI Rule 17 of the CPC. She submits that this suit was filed in July, 2017, whereas the application for amendment was filed in the month of December, 2017. The amendment was necessary in view of the fact that the petitioner found certain documents during the pendency of the suit. She submits that property which was subject matter of the original suit and in the amendment being the same and the declaration of the petitioner in respect of 1/5th share in the suit property being the same, the Court shall take a liberal view and in view of the trial not being commenced, the learned trial Judge ought to have allowed the said application Exh.41, inter-alia praying for amendment of the plaint.

6) The learned counsel also placed reliance on the judgment of the Supreme Court in Sampath Kumar Vs. Ayyakannu & Anr (2002) 7 SCC 559 and in case of Suraj Prakash Bhasin Vs. Smt. Raj Rani Bhasi & Ors (1981) 3 SCC 652. It is submitted that Order VI Rule 17 CPC confers jurisdiction on the

court to allow either party to alter or amend his pleadings at any stage of the proceedings and on such terms as may be just. Such amendments as are directed towards putting forth and seeking determination of the real question in controversy between the parties, shall be permitted to be made.

7) Mr. Kadam, learned counsel for the respondent No. 1 and 2, on the other hand, drew my attention to the prayers made in the plaint and also the application for seeking amendment and would submit that various declarations are sought by way of amendment by the petitioner which if would have been allowed by the learned trial Judge would have changed the cause of action in the original plaint. He submits that thus the impugned order passed by the learned trial Judge rejecting the application for amendment being justified, shall not be interfered with in this petition under Article 227 of the Constitution of India.

8) A perusal of the averments in the plaint indicate that the suit was filed by the petitioner on the premise that the deceased Dattatraya Haribhau Sardeshmukh had purchased the property from his own earning. The petitioner had accordingly applied for declaration that he is one of the co-owner of

property and was entitled to 1/5th share.

9) In so far as application for amendment filed by the petitioner is concerned, the prayers sought in the application indicate that 1/5th share demanded by the petitioner in the original plaint and in the amendment has not changed. The property which was subject matter of the original plaint also has not changed in the amendment. A perusal of the other prayers in the application indicates that the declaration is sought in respect of some of the documents as void to come to the conclusion that the petitioner was entitled to 1/5th undivided share in the property. In my, prima facie, view there is no change in the cause of action in the application for amendment filed by the petitioner.

10) I am thus not inclined to accept the submission of learned counsel for the respondent No. 1 and 2 that if the application for amendment would have been allowed by the learned Trial Judge, there would have change in cause of action.

11) The Hon'ble Supreme Court in Suraj Prakash Bhasin and Sampath Kumar (supra) has held that the Court should normally be liberal in allowing the amendment sought as pre-trial amendment. Admittedly, the trial has not commenced in

this matter. The learned counsel for respondent no. 1 and 2 does not dispute that the petitioner could have filed a separate suit for seeking declarations of various documents as void as sought in the application for amendment. In my view, with a view to avoid any multiplicity of proceedings and in view of the fact that there is no change in cause of action by allowing the amendment as sought in the application for amendment, the learned trial Judge has erroneously rejected the said application for amendment. The impugned order is contrary to the principle enunciated in the case of Sampath Kumar (supra).

12) I, therefore, pass the following order:

(a) The impugned order dated 28th February, 2018 passed by the learned Trial Judge below Exh.41 is quashed and set aside. Application Exh.41 filed by the petitioner is allowed. Amendment shall be carried out within four weeks from today.

(b) Amended copy shall be served upon the defendants within two weeks from the date of carrying out amendment. If the defendants have already filed written statement the defendants would be at liberty to file the additional written statement. It is made clear that merely because the amendment as prayed by the plaintiff is allowed, the defendants have not

accepted the correctness of the amendments and contentions relied in the amendment allowed by this Court.

- 13) The writ petition is allowed in the aforesaid terms.
- 14) There shall be no order as to costs.

(R.D. DHANUKA, J.)