

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

**WRIT PETITION NO. 10135 OF 2014
WITH
CIVIL APPLICATION NO. 1275 OF 2016**

Bastyao Liya Lope (Since decd.)	]	
Through his heirs and legal	]	
representatives as under:-	]	
1 Rajesh Bastyao Lopes	]	
Dhakalwadi, Village : Agashi,	]	
Taluka : Vasai, District : Palghar	]	
2 Avantika Mates Correlia	]	
Nandan, Village : Satpala,	]	
Taluka : Vasai, District : Palghar	]	
3 Lujan Victor Almeida	]	
Nirmal, present Village : Nirmal	]	
Nawale Fremch Ruskina Marg,	]	
Taluka : Vasai, District : Palghar	]	
4 Koshav Damascus Fargose	]	
Gass, Vanat Ali, Near Gass Talao,	]	
Taluka : Vasai, District : Palghar	]	
5 Jayashree Simon Almeida	]	
Nirmal, Taluka : Vasai,	]	
District : Palghar	]	... Petitioners

Versus

1 Francis Silu Tuscan	]	
Age 63 years, Occ. Farming	]	
2 Simon Silu Tushcan	]	
Age 61 years, Occ. Farming	]	
Respondent Nos.1 and 2 both are	]	
Inhabitants of Dhakalwadi,	]	
Village Agashi, Taluka : Vasai,	]	... Respondents
District : Thane	]	(Org. Defendants)

- Mr.Umashankar Rampyare Singh a/w. Mr.C.M. Lokesh for the Petitioners.
- Mr.Subhash V. Gutte for Respondents.

CORAM : DR.SHALINI PHANSALKAR-JOSHI, J.

DATE : 15th MARCH, 2018.

ORDER :

1] Heard learned counsel for the Petitioners and learned counsel for Respondents.

2] By this Writ Petition filed under Article 227 of the Constitution of India, the Petitioners are challenging the order dated 8th August 2014 passed by the Civil Judge Junior Division, Vasai, below the Application Exhibit-62 in Regular Civil Suit No. 54 of 2005.

3] The Application at Exhibit-62 was filed by the present Petitioner-Bastyav Liya Lope, who is the Plaintiff before the trial Court, for amendment in the plaint under Order-6 Rule-17 of the Code of Civil Procedure (*for short, "C.P.C."*).

4] It is the case of the Petitioner that he has filed the suit bearing Regular Civil Suit No. 368 of 1981 for getting possession of the suit premises from the Respondents. In the said suit, the matter was

settled out of the Court, hence he has withdrawn the said suit as per the terms and conditions of the said compromise. As Respondents did not act as per the said compromise, whereas Petitioner has acted upon it, the Petitioner filed the suit bearing Regular Civil Suit No. 132 of 1988 for challenging the said compromise decree. That suit came to be dismissed. The Petitioner preferred Appeal No. 92 of 1988. The said Appeal also came to be dismissed.

5] Thereafter, the Petitioner filed a suit before the Mamlatdar Court under Section 5 of the Mamlatdar's Courts Act, 1906. In that suit, the evidence of Respondent No.1-Francis Silu Tuscan, holding the Power of Attorney of Respondent No.2-Simon Silu Tuscan, came to be recorded. During the cross-examination, he has admitted several aspects which clearly go to show that certain material facts were not brought to the notice of the Petitioner, when the matter was compromised between the parties. However, in the said cross-examination, as he has stated that he was still ready and willing to transfer the property in the name of the Petitioner, the Petitioner has filed this suit for directing the Respondents to execute the Exchange-Deed and handover the possession of the property to the Petitioner as per the terms and conditions of the compromise decree and if they fails to do so, then it should be done through the Court, otherwise the

Respondents be directed to handover the possession of the property to the Petitioner, which the Petitioner has given to the Respondents by virtue of the compromise.

6] During the *pendency* of the suit, at the stage of filing the affidavit in evidence with the change of Advocate, the Petitioner realized that he should have also asked for the setting aside of the judgments and decrees which were passed in the earlier proceedings, namely, Regular Civil Suit No. 368 of 1981, then Regular Civil Suit No. 132 of 1988 and Civil Appeal No.92 of 1988 which were obtained by fraud. Accordingly, the Petitioner filed this application at Exhibit-62 before the trial Court for amendment of the plaint, to claim these additional/alternate reliefs.

7] The trial Court has, after considering the submissions advanced at bar, rejected this application for amendment, mainly on the ground that, there is delay in seeking such amendment. It was held that the suit itself was filed by the Petitioner on the basis of the admission given by the Respondent/Defendant in the suit filed in Mamlatdar's Court and despite that, such relief, that the decrees passed in earlier proceedings are not binding on the Petitioner, was not sought in the suit and now after the lapse of more than 8 to 9 years, as the amendment was sought in the plaint and that too,

without giving any explanation about exercise of due diligence; especially when the trial has commenced and the proposed amendment is also going to change the nature of the suit, the trial Court found it fit to reject the same.

8] While challenging this order of the trial Court, the submission of learned counsel for the Petitioners is that the proposed amendment is necessary for deciding the real dispute between the parties finally and effectively. Moreover, factual matrix for seeking proposed amendment is also laid down in the plaint itself and only the prayer clauses are required to be amended for seeking these additional reliefs.

9] Secondly, it is submitted that the Petitioner has at the time of drafting the plaint, safely relied on his counsel and this being adversary form of legal system, the Petitioner is not supposed to know as to which relief was required to be claimed in the suit. Only when he has changed the Advocate, he came to know that the necessary and effective relief was, to set-aside the decrees passed in earlier suit. It is urged that, mere delay should not defeat the cause of justice, if the Petitioner is cheated as the fraud is played, not only upon him, but also upon the Court and therefore, according to learned counsel for the Petitioner, this is a fit case where this Court should exercise its

discretion and set aside the impugned order passed by the trial Court rejecting the Petitioner's application for amendment of the plaint.

10] Per contra, learned counsel for the Respondents has supported the impugned order by submitting that the Petitioner is seeking amendment in respect of the facts which were within his knowledge at the time of filing of the suit itself. Not only that, such suit claiming reliefs also cannot be maintainable, as earlier also, the similar suit filed by the Petitioner for setting aside the decree in Regular Civil Suit No.368 of 1981 is dismissed and the Appeal against the said order is also dismissed.

11] Further, it is submitted that, no separate suit can be tenable for challenging the decree, even if it is contended to be obtained on the basis of the fraud. In this respect, the reliance is placed by learned counsel for the Respondents on the judgment of the Hon'ble Apex Court in the case of *R. Rajanna V/s. S.R. Venkatswamy & Ors.*¹ and *Pushpa Devi Bhagat V/s. Rajinder Singh & Ors.*² wherein it was held that, “No independent suit can be filed for setting aside a compromise decree on the ground that the compromise was not lawful in view of the bar contained in Order-23 Rule 3-A of C.P.C..”

1 Civil Appeal Nos.10416-10417 of 2014, dated 20th November 2014

2 (2006) 5 SCC 566

12] In view thereof, the submission of learned counsel for the Respondents is that if separate suit itself is not maintainable, there is no question of allowing the application for amendment of the plaint and that too, after the trial has commenced and in respect of the facts which were to the knowledge of the Petitioner at the time of filing of the suit itself. Learned counsel for the Respondents has therefore supported the impugned order passed by the trial Court and requested this Court to dismiss this Writ Petition.

13] At the outset itself, it has to be stated that this Court cannot enter into the question about the maintainability of the suit, as such, it is an independent issue which can be decided by the trial Court alone. Moreover, if the maintainability of the suit is to be challenged, then this proposed amendment is required to be allowed and then only the Respondents can contend that the separate suit is not maintainable for setting aside the compromise decree on the ground that the compromise was not lawful, in view of the bar contained in Order-23 Rule-3A of the C.P.C..

14] This Court has only to consider, whether the proposed amendment is necessary in order to advance the substantive cause of justice. As rightly submitted by learned counsel for the Respondents, the factual matrix is sufficiently laid down in the plaint itself as to how

the compromise decree came to be passed and as to how the Respondents have avoided to act upon the said compromise decree. In the plaint, it is also stated that, in view of the admissions given by the Respondent in the suit before the Mamlatdar's Court that he is still ready and willing to execute the sale-deed and hand over the property to the Petitioner, initially, the Petitioner on the advice of his Advocate has filed the suit for getting the said property on the basis of the admissions given by the Respondent. However, at that time itself, though there were admissions given by the Respondent himself, in the suit before the Mamlatdar, showing that at the time of obtaining compromise decree, certain facts were not brought to the notice of the Petitioner and the Court, his Advocate, who has drafted the plaint, did not claim this relief of setting aside the compromise decree on the ground that the fraud was played, though it should have claimed at that time itself. However, only when he changed the Advocate, this fact that such relief could have been claimed but not claimed was brought to his notice and thereafter, he has applied for the amendment of the plaint to seek this necessary relief of declaration that the decrees obtained in the earlier proceedings are not binding, as they are obtained by playing fraud.

15] In this respect, learned counsel for the Petitioners has

relied upon the judgment of the Hon'ble Apex Court in the case of *Rafiq and Anr. V/s. Munshilal and Anr.*³ wherein the Hon'ble Apex Court has considered the disturbing feature of the present adversary legal system where the parties generally appear through their Advocates to do the necessary requisite things. It was observed that, *“the party may be a villager or may belong to a rural area and may have no knowledge of the court's procedure. After engaging a lawyer, the party may remain supremely confident that the lawyer will look after his interest. If the lawyer does not look after the interest of the party properly, whether such party should suffer for the inaction, deliberate omission, or misdemeanor of his Advocate?”* It was held that, *“the party, having done everything in his power to effectively contest the case can rest assured that the Advocate will take care of his interest. what is the fault of the party who having done everything in his power and expected of him to suffer because of the fault of his Advocate. The only one who would suffer would not be the lawyer but the party whose interest he represented. We cannot be a party to an innocent party suffering injustice merely because his chosen advocate defaulted”*.

16] Here, in the case also, as submitted by learned counsel for

the Petitioners, it was for the Advocate for the Petitioners to seek necessary relief in respect of these earlier judgments and decrees being not binding on the Petitioners, as they were obtained by fraud, in view of the admission given by the Respondent in the suit before the Mamlatdar's Court, wherein he has stated that the terms and conditions of the compromise were not brought to the notice of the Civil Court at an earlier time.

17] Thus, it is apparent that the relevant facts were not brought on record by the learned Advocate of the Petitioners, who has drafted the plaint. The cause of action, as given in plaint arose, when the Respondent has given admissions in cross-examination in Suit No.3 of 2003 before the Mamlatdar's Court. In the said cross-examination, the Respondent has stated that he is ready and willing to execute the sale-deed and handover the property to the Petitioner as per the agreement. He has also further stated that the relevant facts were not brought to the notice of the Court in the earlier proceedings. Therefore, it was necessary for the learned Advocate of the Petitioners to seek the requisite relief of setting aside the earlier judgments and orders, which were obtained by alleged fraud played by the Respondents. If learned counsel for the Petitioners has not done so, then as observed by the Hon'ble Apex Court in the above said

judgment, the Petitioner, who has wholly placed reliance on his Advocate for drafting the necessary plaint, in the light of the cross-examination of the Respondent conducted in the Mamlatdar's Court, why the Petitioner should suffer?

18] Especially when the question of fraud is raised, this Court has to be very cautious in ascertaining that no act of the Court should perpetuate or cause any party to suffer on account of the fraud played by other party. Admittedly, when the earlier suit and the Appeal thereto was decided, these admissions of the Respondents were not brought on record, as those admissions given by the Respondent on 21st June 2004 when the cross-examination was conducted in the Mamlatdar's Court; whereas the earlier suit and the Appeal came to be decided in the year 2003 itself. In such situation, when the new facts were brought to the notice by the Petitioner to his Advocate, it was necessary for his Advocate to seek the relief of setting aside the earlier judgments and decrees, so as to give the effective relief to the party.

19] Now if such relief is not sought in the plaint, though the factual matrix is laid in the plaint, then as held by the Hon'ble Apex Court in the case of *Abdul Rehman & Anr. V/s. Mohd. Ruldu & Ors.*⁴

4 (2012) 11 SCC 341

such application for amendment needs to be allowed, so as to decide the dispute between the parties finally and completely. As held in this judgment, the object of the Order-6 Rule-17 of C.P.C. and also of the Proviso thereto is that the Courts should try the merits of the case that come before them and should, consequently, allow all amendments that may be necessary for determining the real question in controversy between the parties, provided it does not cause injustice or prejudice to the other side.

20] It was also observed that, *“this Court in a series of decisions has held that the power to allow the amendment is wide and can be exercised at any stage of the proceeding in the interest of justice. The main purpose of allowing the amendment is to minimize the litigation and the plea that the relief sought by way of amendment was barred by time is to be considered in the light of the facts and circumstances of each case”*.

21] It was further held that, *“if the relief claimed by way of proposed amendment is implicit in the factual matrix set out in the un-amended plaint, then such relief needs to be granted, so as to settle the dispute between the parties finally”*.

22] In paragraph No.18 of the judgment, it was also observed

that, *“A change in the nature of relief claimed shall not be considered as a change in the nature of suit and the power of amendment should be exercised in the larger interests of doing full and complete justice between the parties”*.

23] Here, in the case, the allegation is that the Respondent has played fraud upon the Petitioner by inducing him to part with his own property and thereafter, not transferring his own property in favour of the Petitioner, though he has agreed to do so. The Respondent admitted the said alleged fraud, by giving admissions before the Mamlatdar's Court. Hence, if any such fraud is played by any of the litigant on the other party, then the Court cannot be a mute spectator thereto or cannot reject the amendment application, merely on a technical plea that it is sought at the belated stage and especially in the facts of the present case, when whatever pleadings are required to be stated about the same, are already appearing in the un-amended plaint.

24] In this respect, learned counsel for the Petitioners has also relied upon the judgment of the Hon'ble Apex Court in the case of *A.K. Gupta and Sons Ltd. V/s. Damodar Valley Corporation*⁵ wherein in paragraph No.14, it was held that, *“the question to be considered by*

5 AIR 1967 SCC 96

the Court is, whether the amendment sought is necessary for a decision of the real dispute between the parties and that dispute, if already covered in the plaint and all the necessary basic facts have been stated and if only through a misconception a relief which could be asked on those facts had not been asked, then, even if, the amendment is sought at the belated stage, such amendment needs to be allowed”.

25] Learned counsel for the Petitioners has then cited number of decisions of the Hon'ble Apex Court before this Court, like, *Rajesh Kumar Aggarwal & Ors. V/s. K.K.Modi & Ors.*⁶ and *J. Samuel & Ors. V/s. Gattu Mahesh & Ors.*⁷, which show that the consistent view taken by the Hon'ble Apex Court is that, *“it will be for the Court to consider whether the proposed amendment is necessary for deciding the real dispute between the parties and while doing so, the Court as to adopt the liberal approach, particularly in a case where the other side can be compensated with costs. The technicalities of law should not be permitted to hamper the Court in administration of justice between the parties”*. After all due diligence contemplates absence of any negligence on the part of the party and not of the Advocate of the party.

6 (2006) 4 SCC 385

7 (2012) 2 SCC 300

26] Here, in the case, the Petitioner has immediately approached his Advocate for drafting of the plaint and filing the suit on the basis of the admissions given by the Respondent in the Mamlatdar's Court and as stated above, it was for his Advocate to seek the necessary relief on the basis of the said admissions. As his Advocate has failed to do so, this Court has to be liberal in allowing this application, so that no prejudice will cause to the Petitioner/Plaintiff on account of such alleged fraud. Hence, in the present case, though there is delay, considering the peculiar facts of the case and having regard to the averments made in the plaint, as only the reliefs remained to be claimed, in the interest of substantive cause of justice, the application for amendment as regards the insertion of prayer clauses, in the plaint, needs to be allowed.

27] Accordingly, the Writ Petition is allowed. The impugned order passed by the trial Court is quashed and set-aside. As a result the application for amendment is allowed to the extent of adding prayer clauses to the plaint and as it is sought at the belated stage, it is allowed subject to costs of Rs.5,000/- to be paid by the Petitioners to the Respondents, within two weeks from the receipt of this order by the trial Court.

28] On the request of learned counsel for the Respondents, it is clarified that the issue relating to maintainability of the suit is not considered by this Court at this stage and it is left open to be considered by the trial Court as and when it is raised. It is further clarified that, all the points and contentions raised by the parties hereto are expressly left open. The trial Court is not to be influenced by this order, as the observations made here-in-above are only for the purpose of deciding this Writ Petition.

29] In view of disposal of Writ Petition, nothing survives in the Civil Application and therefore, it also stands disposed of.

[DR.SHALINI PHANSALKAR-JOSHI, J.]