

vks

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

WRIT PETITION NO.11141 OF 2017

- | | |
|---------------------------------------|---|
| 1. Bhimrao Laxman Kamble |] |
| (since deceased, through his Lrs |] |
| |] |
| 1(a) Sharada Bhimrao Kamble |] |
| age: 53 years, |] |
| |] |
| 1(b) Dr. Ravindra Bhimrao Kamble |] |
| Age: 35 years, |] |
| |] |
| 1(c) Rekha Vijesh Hosmani |] |
| age: 33 years. |] |
| |] |
| 1(d) Shanta Mahadev Bhachimani |] |
| age: 31 yrs. |] |
| |] |
| 1(e) Prema Nandkumar Kurhade |] |
| Age 25 Years |] |
| |] |
| 1(f) Anita Bhimrao Kamble |] |
| age: 23 yrs. |] |
| All residing at Mudhol, Dist.Bagalkot |] |
| Karnataka. |] |
| |] |
| 1(g) Nagendra Bhimrao Kamble |] |
| age: 27 years,Occn. Education, |] |
| residing on above address |] |
| (Power of Attorney Holder) |] |

V/s.

- | | |
|--------------------------------------|---|
| 1. Annaso Dhondiram Manole |] |
| age: 52 years,Occn.Agriculture |] |
| r/p R.V.No.1, H.No.390, Ichalkaranji |] |
| |] |
| 2. Mahadev Ramchandra Jagdade |] |
-] Respondents
] Original
] Plaintiffs.

age: 56 yrs, Occn.Agriculture]
r/o R.V.No.9, H.No.1233]
Ichalkaranji]

Mr. Rajesh S. Patil a/w Meet Sawant, for the
Petitioners.

Mr. Rajure V. Babwappa for the
Respondents.

CORAM : DR.SHALINI PHANSALKAR-JOSHI, J.

DATE : 15th JANUARY, 2018.

ORAL JUDGMENT :

1] Heard learned counsels for the petitioners and
respondents.

2] Rule.

3] Rule is made returnable forthwith with the consent of
parties and the petition is taken up for final hearing.

4] By this petition, filed under Article 227 of the Constitution
of India, the petitioners are challenging the order dated 30th August,
2017, passed by 5th Joint Civil Judge, Junior Division, Ichalkarani,
thereby allowing the respondents' application filed under Order VI
rule 17 of Code of Civil Procedure, seeking permission to amend the
plaint .

5] The petitioners herein are the original defendants. Respondents have filed a suit for declaration that they are the owners of the suit property and also for injunction restraining the petitioners from creating third party interests therein. The suit was filed on the basis of an agreement of sale dated 18.5.1998, executed by the petitioners in favour of respondents. A specific pleading was made in the plaint that as the petitioners were creating third party rights in the suit property, it has become necessary for the respondents to file suit, seeking injunction and declaration over the suit property and restraining the petitioners from creating third party interests therein.

6] However, when the suit came up for hearing, it was noticed by the respondents that the relief of specific performance of the contract was not expressly asked for in the plaint and therefore, they moved an application before the trial Court pointing out technical infirmity in the suit and for seeking specific performance of the agreement and consequential amendment was accordingly sought in the plaint for adding the clause of valuation of the suit claim for the payment of Court fees.

7] This application, however, came to be strongly resisted by the petitioners, contending inter alia that the relief claimed by proposed amendment is barred by Law of Limitation. It was submitted that the suit was filed in the year 2000; whereas the application for amendment is filed in the year 2017 i.e., after about 16 years and therefore, amendment sought is not only at a very belated stage but even Proviso to Order VI rule 17 CPC would come into play, as the trial of the suit has already commenced.

8] The trial Court was, however, after hearing learned counsel for the parties, pleased to allow the amendment application, by its impugned order, holding that the respondents are not introducing any new case and in order to determine the real question and controversy between the parties, proposed amendment is necessary. The trial Court, further held that as still the evidence in the suit is yet to be led, the petitioners will have an opportunity to cross-examine the respondent, and hence no prejudice is going to be caused to the petitioners. In order to compensate the petitioners for the delay in allowing such amendment, the trial Court, accordingly allowed the application with costs of Rs.1,000/-.

9] While challenging the impugned order passed by the trial

Court, the submission of learned counsel for the petitioners is that the proposed amendment is expressly barred by the Proviso to Order VI Rule 17 of CPC as the amendment is sought after the issues are framed and the suit is fixed for recording of evidence. Secondly, it was submitted that the said amendment is sought after a period of about 16 years from the date of filing of the suit and no explanation, worth the name, is given for such delay and on this count also, the trial Court should have rejected the same. Thirdly, it is submitted that by the proposed amendment, respondents want to add time a barred claim and therefore, such application for amendment should have been rejected as it is definitely going to cause prejudice to the petitioners.

10] Per contra, learned counsel for respondents has supported the impugned order by pointing out that the cause of action for filing the suit was the execution of said agreement and it was sufficiently pleaded in the plaint. Hence proposed amendment does not introduce any new case. The proposed amendment is also necessary for deciding the real controversy between the parties and to avoid multiplicity of suits. Secondly, it is submitted that the Proviso to Order VI rule 17 of CPC cannot have application to the present case as the suit was filed much prior to the said Proviso was introduced to

Order VI Rule 17 CPC, by way of amendment in C.P.C. Further, it is submitted by learned counsel for respondents that the issue of limitation has to be decided at the time of trial. Hence to achieve the substantive cause of justice, this Court should maintain the order of the trial Court, without interfering in the same.

11] Learned counsel for both the parties have relied upon various judgments of this Court and the Apex Court to substantiate their rival submissions.

12] As the application for amendment has to be decided in the factual matrix of the case, the facts of present case sufficiently disclose that in the plaint the respondents have categorically relied upon the agreement of sale dated 18.5.1998 and how despite the said agreement, the petitioners were trying to create third party interest in the suit land and therefore, it was necessary for the respondents to file the suit for declaration of their ownership and the possession over the suit property and for the relief of injunction.

13] The perusal of plaint, thus, makes it clear that respondents have very much relied on this agreement of sale and their right over the suit property on the basis of the said agreement;

making it obvious that there was no intention on their part to give up or omit in any way the claim for specific performance of the contract. On the contrary, indirectly and implicitly, they had asked for specific performance of the contract itself, as they were seeking the relief of declaration of ownership and possession over the suit land. Thus, the claim sought by the amendment is substantially in tune with the averments in the plaint, on which relief is based. Therefore, as held by the Division bench of this Court, in ***Shaikh Iliyas s/o Shaikh Dada and anr -vs- Ganpat s/o Mahtarji Shirisath, [2016 (1) Mh. L.J. 124]*** if since beginning the intention of the respondents was to get the specific performance of the agreement, then merely because due to inadvertence, that relief was not expressly claimed in the plaint, the respondents cannot be barred from seeking that relief by way of amendment in the plaint, especially when such relief is necessary to be considered to resolve the real controversy between the parties and for avoiding multiplicity of proceedings. As per the settled position of law also, the approach of the Court has to be liberal while considering the application for amendment in the pleading.

14] As regards the grievance of the learned counsel for the petitioners that the proposed amendment is barred in view of Proviso

to Order VI Rule 17 CPC, learned counsel for respondents has relied upon the judgments of this Court in case of ***Mohan Maluram Agrawal -vs- Kaladevi wd/o Sawarmal Agrawal and anr, 2007 (2) Mh. L.J. 74, Badrinarayan Bansilal Somani -vs- Vinodkumar K. Shah, [2003 (2) Mh. L.J. 120]*** and judgment of the Hon'ble Supreme Court in ***State Bank of Hyderabad -vs- Town Municipal Council [(2007) 1 SCC 765]***, categorically holding that the amendment in C.P.C., by which Proviso to Order VI Rule 17 is introduced has no application when the suit has been filed prior to said Amendment in C.P.C. came into effect. In the instant case, admittedly the suit is filed prior to amendment is made in Civil Procedure Code for inserting Proviso to Order VI, Rule 17 CPC. Therefore, that Proviso cannot have any application.

15] Even if the said Proviso is held applicable, in view of the judgment of the Apex Court in the case of ***Abdul Rehman and another -vs- Mohd. Ruldu and ors [(2012) 11 SC 341]***, when amendment is sought making clear and explicit what was already implicit in plaint and if the nature of suit does not change by way of proposed amendment, then despite the bar of Proviso to Order VI Rule 17 CPC, such amendment needs to be allowed. It was held that if necessary factual basis for amendment is already contained in the

plaint, the relief sought on the said basis would not change the nature of the suit. In paragraph No.18 of the judgment, it was further observed that:-

“We reiterate that all amendments which are necessary for the purpose of determining the real questions in controversy between the parties should be allowed if it does not change the basic nature of the suit. 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.”

16] Furthermore, it was held that if the proposed amendment to include relief of declaration of title, in addition to the relief of permanent injunction which was claimed in unamended plaint, is to protect plaintiffs' interest and not to change basic nature of the suit, as alleged, hence the bar Proviso to Order VI Rule 17 cannot come into play.

17] In the instant case the entire factual matrix of the relief sought for, the proposed amendment had already been set out in the plaint. It is also not in dispute that relief sought by way of amendment could have also been claimed by the respondents by way of a separate suit and in such circumstances as the amendment

necessary for the purpose of determining the real question of controversy between the parties and as it does not change the basic nature of the suit, it is rightly allowed by the trial court.

18] The submission of learned counsel for the Petitioners is that even if the Proviso to Order VI rule 17 CPC has no application, the fact remains that the amendment in the plaint is sought 16 years after filing of the suit and relief sought by the proposed amendment is apparently barred by limitation. Moreover no sufficient explanation is given in the application as to why amendment was not sought at the earlier stage. In support of his submission, learned counsel for the petitioners has relied upon the judgment of the Apex Court in case of *Shiv Gopal Shah @ Shiv Gopal Sahu -vs- Sita Ram Saraugi and ors*, [2007 AIR (SC) 1478], wherein the amendment, sought of the similar nature, to seek specific performance of the contract, came to be rejected on the ground that there was substantial delay and no explanation was offered for substantial delay. It was held that, this negligence and complacency on the part of the plaintiffs would not permit them to amend plaint, more particularly when the claim is apparently time barred. It was further held that if the amendment application is sadly silent regarding explanation as to why such amendment was not sought for a longer

period, the trial Court and the Appellate Court should not have allowed such application.

19] However, from the perusal of the said judgment, it is clear that the said observations were made in particular facts of that case as the plaintiffs therein were held responsible for the conduct of blowing hot and cold and of approbation and reprobation, as there was clear assertion in the plaint that agreement stood cancelled and respondent also asserted title over the land in question. Hence it was held that 7 years thereafter by way of amendment in the plaint, plaintiff cannot claim relief of specific performance of such agreement. This judgment, therefore, cannot be of any assistance to the petitioners as in this, respondents have never given up, omitted or relinquished their right to claim specific performance of the agreement. Conversely, it was implicit in the plaint.

20] Learned counsel for the petitioners has then relied upon the judgment of Apex Court in case of *Revajeetu Builders and Develolpers -vs- Narayanaswamy & Sons & ors [2009 (6) All M.R.986]*, wherein having regard to the fact that the amendment was changing the entire nature of the suit, the amendment was rejected. Hence this judgment also cannot be of any assistance to the

petitioners.

21] Reliance placed by learned counsel for petitioners on the judgment of Apex Court in ***Van Vibhag Karmchari Griha Nirman Sahkari Sanstha Maryadit (regd) -vs- Ramesh Chander & ors, [2011 AIR (SC) 41]***, is also misplaced as in that case the amendment came to be rejected as it was found that original plaintiff, as also the subsequent purchasers remained complacent and negligent all through a period of more than 15 years and woke up for the first time to challenge the sale deed dated 12.10.1985 by seeking a declaration that it is bogus and did not create any title in favour of the original defendant. No explanation for such a towering delay was offered. Plaintiffs were earlier given such opportunity for amendment but they did not avail. Hence as such amendment application also lacked bonafides on the part of the plaintiffs, it came to be rejected.

22] According to learned counsel for the petitioners, consistent view of the Apex Court, as laid down in ***Revajeetu Builders & Developers -vs- Narayanaswamy & Sons and ors (supra)***, is that the Court has to take into consideration the important factors laid down therein while deciding the application for amendment and some of those factors are, *“Whether the proposed*

amendment constitutionally or fundamentally changes the nature and character of the case?”, and *“As a general rule, the court should decline amendments if a fresh suit on the amended claims would be barred by limitation on the date of application”*. It is urged that as both these factors go in favour of the petitioners and not in favour of the respondents, the impugned order passed by the trial Court cannot be sustained in law.

23] As regards the first factor, in this case it is already held that the proposed amendment does not change the nature of the suit and as held in the judgments on which learned counsel for the respondents has relied upon, such amendment, if found necessary to resolve the controversy between the parties, even if sought at belated stage, it can be allowed, keeping open the point of limitation, to be decided at the time of final hearing.

24] Here in the case, therefore, even if the amendment is sought at a belated stage, the point of limitation, as per settled position of law, is required to be kept open to be decided at the time of hearing of the suit, especially having regard to the fact that the suit is already fixed for hearing. Hence, it would be in the interest of both parties that this issue be decided at the time of trial, in order to

resolve the controversy between the parties.

25] Accordingly the impugned order, therefore, passed by the trial Court, does not call for interference. The Writ Petition stands dismissed with a direction that the trial Court shall specifically frame the issue as to, “*Whether the relief for specific performance of the agreement, as now sought by way of amendment of the plaint, is barred by limitation?*”. Trial Court shall decide the said issue on the basis of evidence that may be brought before it. The question whether this amendment relates back to date of filing of the suit is also kept open.

26] Keeping all the contentions of both the parties, expressly open writ petition stands disposed off.

27] Rule discharged in above terms.

[DR.SHALINI PHANSALKAR-JOSHI, J.]