

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

WRIT PETITION NO. 727 OF 2018

Baburao Govind Wadar	...	Petitioner
V/s.		
Aallabaksha Rahimtulla Mulla & Ors.	...	Respondents

- Mr.Sandeep S. Koregave for the Petitioner.

CORAM : DR.SHALINI PHANSALKAR-JOSHI, J.

DATE : 29th JANUARY, 2018.

P.C. :

- 1] Heard learned counsel for the Petitioner.
- 2] By this Writ Petition filed, under Article 227 of the Constitution of India, the Petitioner is challenging the order dated 16th September 2017, passed by the Civil Judge Junior Division, Peth Vadgaon, below Exhibit-48 in Regular Civil Suit No.42 of 2006.
- 3] The application at Exhibit-48 was filed by the Respondents herein for review under Order-47 Rule-1 of Civil Procedure Code (for short "C.P.C.") of the order passed by the trial Court below Exhibit-41 on 3rd September 2016.
- 4] The application at Exhibit-41 was filed by the present Petitioner under Order-6 Rule-17 of C.P.C. for amendment in the plaint

on the count that the description of the suit property given in the plaint is not correct and hence it needs to be corrected. The amendment was sought also on the ground that the Petitioner has filed a suit simpliciter for declaring that the sale-deed dated 10th May 1995 is not binding. However, due to inadvertence the relief of possession remained to be claimed in the plaint and therefore, he sought to amend the plaint to include the relief of possession also.

5] The trial Court, after hearing learned counsel for both the parties and after relying upon the various judgments including the judgment of the Apex Court in the case of *Sampath Kumar vs. Ayyakannu*, (2000) 7 SCC 559, allowed the said application, holding that, if a separate suit seeking possession of the suit property can be filed by the Petitioner, in order to avoid multiplicity of proceedings, the amendment application can be allowed.

6] However, after this order dated 3rd September 2016 was passed by the trial Court, on 18th January 2017 Respondent No.3 herein filed an application at Exhibit-48 under Order-47 Rule-1 of C.P.C. bringing to the notice of the trial Court that earlier also the Petitioner has filed the application for amendment of the plaint in order to correct the boundaries and the said application at Exhibit-41

was rejected by the trial Court. However, this material fact was not disclosed by the Petitioner in the present application for amendment and hence, as the error apparent on the face of record is occurring in the said order, the said order needs to be reviewed.

7] The trial Court again, after hearing learned counsel for both the parties and after perusal of the order passed by it below Exhibit-38 came to the conclusion that the Petitioner should have disclosed this material fact that his earlier application for amendment of the plaint seeking change in the four boundaries of the suit property was rejected. Hence, as there was an error apparent on the face of record, the trial Court allowed the Review Application and directed that the amendment carried out by the Petitioner in the plaint, on the basis of the order passed below Exhibit-41 be deleted from the plaint. Being aggrieved thereby, this Writ Petition is preferred.

8] The submission of learned counsel for the Petitioner is that, even if the amendment as regards correction of the four boundaries of the suit property, which was earlier rejected by the trial Court vide order below Exhibit-38 and subsequently allowed inadvertently, amendment to that extent could have been set-aside. However, as regards the relief of possession, sought by the Petitioner,

the trial Court should not have set-aside the said amendment and to that extent the Review Application should not have been granted.

9] In support of his submission, learned counsel for the Petitioner has relied upon above-said judgment of the Apex Court in the case of *Sampath Kumar vs. Ayyakannu*, (2000) 7 SCC 559 and that of *Khasagi (Private) Devi Ahilyabai Holkar Charitable Trust vs. Audumbar Gangadhar Nikate & Ors.*, 2016(1) BCR 534 and *Narhari Balku Kavade & Ors. vs. Hanmanta Timma Pujari & Ors.*, 2004 (6) BCR 414 to submit that, in order to avoid the multiplicity of proceedings and especially in the facts of the present case, when a separate suit for recovery of possession would be maintainable, the trial Court should not have reviewed its own order of allowing the amendment in the plaint to the extent of seeking recovery of possession.

10] However, in the facts of the present case, this Court finds it very difficult to accept the submission advanced by learned counsel for the Petitioner and the vital reason for the same is that the Petitioner has not come to the Court *bonafide*, with clean hands and with equity. He was fully aware that his earlier application at Exhibit-38 seeking amendment in the plaint, in order to correct the four

boundaries of the suit property was rejected by the trial Court. He has not preferred any appeal challenging the said order before the higher Court. However, without disclosing the said relevant fact, he filed another application at Exhibit-41 seeking the same amendment in the plaint for correction of the four boundaries of the suit property. The trial Court has allowed the said application on the *bonafide* impression that such amendment was sought for the first time. However, when it was brought to the notice of the trial Court that, the Petitioner has suppressed this important fact and by misguiding the Court, got the application for amendment of the plaint allowed, hence the trial Court has rightly reviewed its own order as the error apparent on the face of record has occurred and thus set-aside the order of allowing the amendment passed on Exhibit-41. It need not be stated that the Petitioner has indirectly played a fraud upon the Court, by concealing the material fact of rejection of his earlier application of amendment and therefore, such Petitioner cannot be entitled for any indulgence on the part of the Court, as he does not deserve such indulgence or discretion to be exercised by the Court in his favour.

11] Even as regards the prayer for seeking the amendment relating to the recovery of possession of the suit flat, absolutely no explanation is offered as to why this amendment is sought at such a

belated stage. The suit is filed in the year 2006. The order passed below Exhibit-1 on 24th September 2008 shows that the suit came to be dismissed for default as the Petitioner remained absent since long and no application for adjournment was filed and therefore, it was inferred that the Petitioner was not interested in proceeding with the suit. It is true that the suit is restored to its original file but thereafter also immediately no application was filed for amendment of the plaint. Such application is filed only in the year 2015 and that too in respect of the sale-deed executed on 10th May 1995.

12] It was essential in the facts of this case that, when the amendment is sought at such a belated stage after 9 years from filing of the suit and that too, after the trial has commenced, for the Petitioner to give some explanation as to the cause of the delay. However, no attempt is made in that direction. As observed by the trial Court, the delay is of about 9 years 4 months and 20 days and that too, without showing any exercise of due diligence.

13] It is pertinent to note that, the issues were also framed in the suit on 13th March 2007. Merely because the Petitioner remained absent and the suit came to be dismissed for default, it appears that the recording of evidence has not commenced. Hence, in no way, it can

be said that, as the trial has not commenced, the amendment should have been allowed.

14] As to the submission that, now the Petitioner is also seeking cancellation of sale-deed dated 21st March 2007 and therefore, this is a subsequent event, it needs to be stated that this subsequent event is also based on the earlier event of the sale-deed, because it is based on the previous sale-deed, Defendant has executed subsequent sale-deed in the year 2007. Hence, unless the earlier sale-deed is set-aside and at that time the relief of possession was sought, the Petitioner cannot become entitled to get the possession or cancellation of subsequent sale-deed. It is also significant to note that the subsequent sale-deed is also executed in the year 2007. Even then till 2015, no application for amendment was filed.

15] Thus, if for a long period of more than 7 to 8 years, the Petitioner has remained negligence throughout, even allowing his suit to be dismissed for default and now on concealment of certain facts if he is getting the order of amendment of the plaint, that order is rightly reviewed by the trial Court. Hence, now it does not lie in his mouth to contend that in order to avoid the multiplicity of proceedings, this Court should permit such amendment. The judgments of the Apex

Court in the case of *Sampath Kumar (supra)*, *Khasagi (Private) Devi Ahilyabai Holkar Charitable Trust (supra)* and *Narhari Balku Kavade (supra)* cannot be applicable to the facts of the present case. Though it is true that, in order to avoid multiplicity of the proceedings, the Court exercises the discretion in granting the amendment of the plaint, however, when it is the question exercise of the discretion of the Court, then such discretion has to be exercised in *bonafide* causes, to advance the substantive cause of justice and so as to not to cause any prejudice to the other side. Here none of these criterias especially the *bonafides* of the Petitioner are not at all appearing even *prima-facie*.

16] Therefore, on the facts of the present case, the spacious plea that in order to avoid multiplicity of the proceedings, such amendment be allowed, cannot be accepted. In my opinion, therefore, the trial Court has rightly allowed the application for review of its own order and set-aside the amendment.

17] In the facts of the present case, no interference is warranted in the impugned order passed by the trial Court. The Writ Petition, therefore, being without merits, stands dismissed.

[DR.SHALINI PHANSALKAR-JOSHI, J.]