

THE HIGH COURT OF JUDICATURE AT BOMBAY,
BENCH AT AURANGABAD.

WRIT PETITION NO. 1253 OF 2014

Jitendra Ayush Jain (H.U.F.)
Age: 42 years, Occupation: Business,
R/o. Raj Chambers,
Kotla Stand Ahmednagar.

... PETITIONER

VERSUS

Laxman Bhagaji Najan,
Age: 67 years, Occ: Agriculture,
R/o: Chitegaon, Taluka Paithan,
District Aurangabad.

... RESPONDENT

...

Mr. A. D. Kasliwal, Advocate for Petitioner.

Mr. D. S. Bharuka, Advocate for Respondent.

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CORAM : **T. V. NALAWADE, J.**

DATE : 13th February, 2019.

ORAL JUDGMENT:

. Rule. Rule made returnable forthwith. By consent, heard
both the sides for final disposal.

2 The proceeding is filed to challenge the order made by the learned Joint Civil Judge Senior Division, Aurangabad below Exhibit-36 in Special Civil Suit No.32 of 2012. The suit is filed for the relief of specific performance of contract of sale of immovable property, agricultural land, which is owned by the present Respondent. The Respondent, Defendant has filed written statement and the evidence of the Plaintiff was closed on the date when the application for amendment was filed. Only during cross-examination of the Defendant, the Plaintiff realized that amendment of the pleading needs to be made and so he filed application for amendment of the pleading. The Plaintiff wants to show that the property of the Defendant is situated at Georai, Tahsil and District Aurangabad and not at Chitegaon, Tahsil Paithan, District Aurangabad. The Plaintiff wants to prove that the Defendant is owner of Gat No.57 situated at Georai and the description of the property given in the agreement of sale tallies with the property of the Defendant situated at Chitegaon. The Plaintiff wants to show that due to mutual mistake village Chitegaon, Tahsil Paithan was shown as a place where the property is situated.

3 The learned counsel for Respondent, Defendant submitted that the Plaintiff has prayed only for amendment of the pleading when there is instrument of aforesaid nature. He submitted that so long the instrument is of aforesaid nature, the Trial Court could not have even considered even the amendment to the pleading as the document is not consistent with the pleading. There is force in this submission. This Court has carefully gone through the provision of Section 26 of the Specific Relief Act, 1963. The provision shows that when there is mutual mistake with regard to the intention of the parties, the Court can give a direction to the parties to rectify the instrument. Such direction can be given even in a pending suit and for that no new suit is required to be filed. Such amendment will be without prejudice to the rights / defences available to other side. Thus, in the present matter, first thing which the Plaintiff ought to have done was to file application for rectification of the document and he ought to have also prayed for permission to amend the pleading accordingly. The provision of Section 26 of the Specific Relief Act is as under:

“26. When instrument may be rectified.— (1) When, through fraud or a mutual mistake of the parties, a

contract or other instrument in writing not being the articles of association of a company to which the Companies Act, 1956 (1 of 1956), applies does not express their real intention, then –

(a) either party or his representative in interest may institute a suit to have the instrument rectified; or

(b) the plaintiff may, in any suit in which any right arising under the instrument is in issue, claim in his pleading that the instrument be rectified; or

(c) a defendant in any such suit as is referred to in clause (b), may, in addition to any other defence open to him, ask for rectification of the instrument.

(2) If, in any suit in which a contract or other instrument is sought to be rectified under sub-section (1), the Court finds that the instrument, through fraud or mistake, does not express the real intention of the parties, the Court may, in its discretion, direct rectification of the instrument so as to express that intention, so far as this can be done without prejudice to rights acquired by third persons in good faith and for value.

(3) A contract in writing may first be rectified, and then if the party claiming rectification has so prayed in his pleading and the Court thinks fit, may be specifically enforced.

(4) No relief for the rectification of an instrument shall be granted to any party under this section unless it

has been specifically claimed:

Provided that where a party has not claimed any such relief in his pleading, the Court shall, at any stage of the proceeding, allow him to amend the pleading on such terms as may be just for including such claim.”

4 From the submissions made by both the sides, it can be said that there is clear probability of mutual mistake on the description of the property and probably the parties had intention to sell and purchase the property situated at Georai and not at Chitegaon. In view of this possibility, this Court holds that other circumstance like delay caused in applying to the Court for making amendment can be ignored. The learned counsel for Defendant took this Court through the proviso of Order VI Rule 17, which shows that the Court needs to first ascertain that there was due diligence on the part of the party, who has applied for amendment. When there is mistake of aforesaid nature, one can say that only after cross-examination of the Defendant, the Plaintiff must have realized that there is some mistake with regard to description of the property. Ordinarily, the Defendant takes defence of total denial and so taking of such defence in the written statement by the Defendant could not have been taken

seriously by the Plaintiff. Defence was taken that the Defendant was not owner of the property described in the contract, instrument. In view of these circumstances, this Court holds that opportunity needs to be given to the Plaintiff to show that there was an intention to sell the property situated at Georai and not at Chitegaon and for that necessary amendment needs to be allowed. As the application for amendment is rejected, this Court holds that said order needs to be set aside to allow the Plaintiff to make amendment but for that the Plaintiff needs to make an application for direction to rectify the instrument, which contains the contract which is to be used in the suit. The learned counsel for Plaintiff, Petitioner undertakes to see that such application is moved. If such application is moved, the Trial Court is to consider the said application in view of the object behind the provision of Section 26 of the Specific Relief Act. Such application needs to be made within 15 days from today in the Trial Court. The Trial Court needs to decide the said application and if said application is decided in favour of Plaintiff, that order will automatically make the Plaintiff entitled to get the amendment in the pleading also and accordingly the amendment can be allowed. In aforesaid terms, the petition can be allowed. However, the Defendant is made to spend

for the present litigation due to some negligence shown by the Plaintiff. The Plaintiff was also expected to produce atleast 7/12 extract. So, the Plaintiff needs to pay the costs of present matter and also the costs in respect of the matter filed in the Trial Court for amendment of pleading and that costs is fixed as Rs.25,000/-. The amount is to be deposited in the Trial Court within 15 days. The petition is allowed and disposed of in aforesaid terms. Rule is made absolute in those terms.

[T. V. NALAWADE, J.]

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