

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO.13798 OF 2018

Vijaykumar S/o Bhagwandasji Kagliwal,
Age: 69 Years, Occu: Business & Agriculture,
R/o: Lakkadkot, Aurangabad Road,
Jalna, Dist. Jalna. ...Petitioner

Versus

1. Bharat S/o Dhanji Patel,
Age: 45 years, Occu: Business,
R/o. Isaji Street, 50 Jamnabai Building,
2. Litesh S/o. Dhanji Patel,
Age: 39 years, Occu: Business,
Both R/o. Priyadarshi Colony, Lakkadkot,
Jalna, Dist. Jalna. ...Respondents

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Mr. Sumit S. Agrawal, Advocate for Petitioner.
Mr. D.V. Katneshwarkar, Advocate for Respondent Nos.1 & 2.

...

**CORAM : P.R. BORA, J.
DATED : 04th JULY, 2019.**

ORAL JUDGMENT:-

1. The order passed by the learned Civil Judge, Senior Division, Jalna on 09.10.2018 below application Exhibit-46 in Special Civil Suit No.79 of 2015 is questioned in the present petition.

2. The petitioner has filed the aforesaid Special Civil Suit No.79 of 2015 seeking specific performance of the agreement of sale allegedly executed by the present respondents in their favour on 21.10.2014. In the suit, the

(2)

number of suit property is mentioned as C.T.S. No.343/C/16. By filing an application at Exhibit-46, the petitioner-plaintiff sought an amendment in the plaint to correct the number of suit property as C.T.S. No.343/C/316. It was the contention of the petitioner-plaintiff in the said application that since beginning, it was represented by the respondents that the agreement of sale was executed in respect of the C.T.S. No.343/C/16 and accordingly, everywhere the suit property was mentioned by the said number. It was his further contention the number of the said property was specifically disputed by the respondents-defendants first time in the cross-examination of the plaintiff. The learned counsel further submitted that only then the plaintiff realized that a mistake has occurred at his hands in describing/mentioning the number of the suit property. In the circumstances, he filed an application to amend the number of suit property.

3. The application was strongly resisted by the respondents-defendants on various grounds. It was the contention of the respondents-defendants that in the written statement filed in the year 2015 itself, it was specifically denied by them that they have not entered into an agreement in respect of the property as is mentioned in the

suit plaint. In such circumstances, according to the defendants the amendment must have been sought by the plaintiff immediately after filing of the written statement by the defendants. The learned Trial Court after having considered the submissions advanced by the learned counsel appearing for the parties, has rejected the application vide the impugned order. Aggrieved by, the present petition is filed.

4. The learned counsel appearing for the petitioner submitted that though the delay has occurred in filing the application seeking amendment in the plaint, it was not with any malafide intention or deliberate. The learned counsel submitted that throughout an impression was created by the respondents-defendants that the property which was agreed to be sold was their residential house and they were residing in the said house. The learned counsel invited my attention to the notice reply given by the respondents-defendants to the notice issued by the petitioner-plaintiff before filing of the suit and more particularly, invited my attention to the averment in the said notice reply to the effect that C.T.S. No.343/C/16 is the only house for their residence. The learned counsel submitted that the plaintiff was also believing that there may be a typographical error in

mentioning the number of the property however, when specific questions were asked to the plaintiff in the cross-examination denying the entire transaction and more particularly disputing the number of the house, the petitioner-plaintiff filed an application raising all such contentions in his application.

5. Perusal of the agreement of sale reveals that the city survey number of the house property is mentioned therein as 343/C/16 admeasuring 300 square meters. It is further mentioned that in the said property, there is a construction at the eastern side admeasuring 750 square feet, consisting of four rooms constructed in RCC. The four boundaries of the said property are described as below:

*"E-Towards East- house of Shri Katke,
W-towards West- remaining portion of block no.2,
N-towards North- road and
S-towards South- Rajuri corner."*

In the suit plaint, as well as in the notice dated 08.10.2015 issued by the petitioner-plaintiff to the respondents-defendants, the same description is given of the suit property.

6. It is the assertion of the petitioner-plaintiff that the city survey number of the suit property is wrongly

mentioned in all the aforesaid documents since, it was represented by the respondents-defendants that the property agreed to be sold by them bears the said city survey number. There is a reason to believe the contention so raised on behalf of the petitioner-plaintiff in view of the fact that in Para 12 of the reply dated 19.10.2015 given by the respondents-defendants to the notice dated 08.10.2015 issued by the petitioner-plaintiff, it is averred that C.T.S. No.343/C/16 is the only residential accommodation for the respondents-defendants. It is further contended in the said paragraph that since, the aforesaid property is the only residential house of the respondents-defendants, there was no reason for the respondents-defendants to enter into the agreement of sale in respect of the said property. In the same context, it is further averred that as such, the contention of the petitioner-plaintiff that the respondents-defendants have agreed to sell the said property to the petitioner-plaintiff is false and frivolous and that the signatures of the respondents-defendants were fraudulently obtained on the said agreement of sale but, in fact the real transaction is of money lending.

7. From the averments as aforesaid in the notice reply, a reasonable inference can be drawn that the city

survey number of property which was agreed to be sold by the respondents-defendants was mentioned as C.T.S. No.343/C/16 in the agreement of sale at the instance of the respondents-defendants. As has been contended by the petitioner-plaintiff in view of certain questions put on behalf of the respondents-defendants in the cross-examination of the petitioner-plaintiff disputing the number of the suit property, when the petitioner-plaintiff made further enquiry, he came to know that the property agreed to be sold by the respondents-defendants was bearing C.T.S. No.343/C/316 and not 343/C/16. In the aforesaid circumstances, the application came to be filed by the petitioner-plaintiff seeking amendment to that effect in the suit plaint.

8. When it is the contention of the petitioner-plaintiff that except the number of the property, the entire other description given of the suit property is correct and the said property only has been agreed to be sold by the respondents-defendants to him and the agreement of sale in that regard was executed on 21.08.2014, the Trial Court should not have rejected the request of the petitioner-plaintiff to carry out the amendment in the suit plaint in that regard. Ultimately, the burden is on the petitioner-plaintiff to prove that the property as described in the suit plaint as

well as in the agreement of sale and also in the notice dated 08.10.2015 by him prior to filing of the suit is the property bearing C.T.S. No.343/C/316 and not 343/C/16. No prejudice is likely to be caused to the respondents-defendants if the petitioner-plaintiff is permitted to carry out the amendment as prayed by him. The respondents-defendants can certainly bring on record the evidence rebutting the contention of the petitioner-plaintiff to the effect that the property described in the suit plaint is C.T.S. No.343/C/316.

9. In the above circumstances, merely because the petitioner-plaintiff sought the amendment in the plaint after the evidence commenced in the matter, cannot be a reason for rejecting the request so made. The delay which has occurred in filing the application does not appear to be with any malafide intention or deliberate. In the similar fact situation, this Court in the case of **"Khasagi (Private) Devi Ahilyabai Holkar Charitable Trust Vs. Audumbar Gangadhar Nikate and Ors, 2016 (1) Bom.C.R. 534"**, had allowed the amendment though it was sought after the examination of the first witness of the plaintiff was over. I deem it appropriate to reproduce herein-below Para-9 of the said judgment which reads thus:

“9. In so far as proviso to Order 6 Rule 17 of the CPC is concerned, no doubt the said proviso postulates that the applicant seeking an amendment has to satisfy the due diligence test before he can be permitted to amend the pleadings. In the instant case, it is not as if that there is no description of the suit property or that the description is so defective that an objection is raised on the said ground. The objection taken to the description is on the ground that same is incomplete and skeletal and from the said description, it is not possible to identify the suit premises. Hence, it is not a case where the original description given in the plaint is sought to be taken away and replaced by a totally new description, but what is sought to be done is by maintaining the original description in the plaint, addition is sought to be made so as to give more clarity to the description. As indicated above, the alarm bells were rung when the Defendants in each of the suits put questions to the Plaintiffs' witness in the crossexamination revolving around the description of the suit property. It is also required to be noted that the suit is not at the stage where the situation is irreversible. As indicated above, only the evidence of the first witness of the Plaintiffs is complete and the suit was at the stage where the evidence of the second witness was to begun. At this stage, it would be gainful to refer to the judgment of the Apex Court in Sajjan Kumar's case (supra). In the said case, the Apex Court was concerned with almost identical facts as in the

instant case. In the said case also, though an objection was raised to the description of the suit property as given in the written statement, the amendment to the description was moved long thereafter. The Apex Court held that though there was a delay in moving the amendment, the proposed amendment was necessary for the purpose of bringing to the fore the real question in controversy between the parties and the refusal to permit the amendment would create needless complications at the stage of execution in the event of the Plaintiff succeeding in the suit. In my view the aforesaid judgment in Sajjan Kumar's case (supra) applies on all fours to the case of the Plaintiff in the instant suits, as to avoid future complications and proceedings, it would be appropriate to allow the Plaintiff to amend the plaint at this stage."

10. Having regard to the facts involved in the present case and to the observations made and the conclusions recorded in the aforesaid judgment, I am inclined to allow the present writ petition. Hence, the following order:

ORDER

i) The order passed by the learned Civil Judge, Senior Division, Jalna on 09.10.2018 below application Exhibit-46 in Special Civil Suit No.79 of 2015 is quashed and set aside. The application filed by the petitioner-plaintiff before the

Trial Court at Exhibit-46 is allowed.

ii) The petitioner-plaintiff shall carry out necessary amendment in the suit plaint within four weeks from the date of this order.

ii) The writ petition is allowed in the aforesaid terms.

(P.R. BORA, J.)

Mujaheed//