

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 4282 OF 2019
WITH
WRIT PETITION NO. 4307 OF 2019

Dr. Rohit D. Mehta

.. Petitioner

vs.

M/s. Radheya Machining Ltd.
and ors.

.. Respondents

Mr. Anirban Tripathy for the Petitioner.

Mr. Abhijit Kulkarni i/b. D.D. & Abhijit Associates for
Respondent No.1.

Mr. J.M. Joshi for Respondent Nos.2 and 3.

CORAM : M. S. SONAK, J.

DATE : 11 APRIL 2019.

ORAL JUDGMENT :-

1] Heard Mr. Anirban Tripathy for the petitioner and
Mr. Abhijit Kulkarni for respondent No.1 and Mr. Joshi for
respondent Nos.2 and 3.

2] Mr. Tripathy, learned counsel for the petitioner, states
that respondents No.4 and 5 are the brother and wife of the
petitioner herein. He states that they are supporting the case
of the petitioner and therefore, their presence is not
necessary for deciding the issue raised in these petitions.

3] Accordingly, Rule in both petitions. Rule is made returnable forthwith in both petitions, with the consent of and at the request of learned counsel for the parties.

4] Learned counsel for the parties agree that both these petitions can be disposed of by common judgment and order, since the petitions concerned the same parties and even the impugned order in both these petitions are virtually identical. For sake of convenience, reference will be made to the facts in Writ Petition No. 4282 of 2019.

5] The challenge in Writ Petition No. 4282 of 2019 is to the order dated 20th September 2016 by which learned Trial Judge has dismissed the petitioner's application under Order 6 Rule 17 of the CPC seeking leave to amend the plaint.

6] Mr.Tripathy, learned counsel for the petitioner, submits that in the present case, the application seeking leave to amend was filed before commencement of trial and therefore, learned Trial Judge erred in applying the proviso to Order 6 Rule 17 of CPC to the matter. He submits that in any case

detailed explanation has been furnished as to why the application seeking leave to amend could not be filed earlier. He submits that the amendment only proposes to state the correct boundaries of the suit property. He submits that when the suit was originally filed, the impact of change of the boundary by the Collector in connected proceedings was not noticed. He submits that the amendment is necessary to effectively decide the issues which arise in the matter. He submits that no prejudice will be occasioned to the defendants, in case leave were to be granted. In any case, he submits that prejudice can always be compensated in terms of costs. For all these reasons, he submits that the impugned order may be set aside.

7] Mr. Kulkarni and Mr. Joshi, learned counsel for respondent Nos.1,2 and 3, defend the impugned order on the basis of reasoning reflected therein. They point out that there is material on record that the petitioner, way back in the year 2007 itself had full knowledge about the Sale Deed and the boundaries reflected therein. They submit that there is absolutely no explanation for the inordinate delay on the part

of the petitioner. They point out that if the boundaries of the suit property are permitted to be altered, then the nature of the suit itself will be fundamentally changed. They point out that one of the defences raised by the defendants was that there was discrepancy in the statement of boundaries. He submits that such defence cannot be permitted to be watered down on basis of belated application seeking leave to amend the plaint. They submit that prejudice that will occasion the defendants will not be compensable in terms of costs. For all the aforesaid reasons, they submit that the petition may be dismissed with costs.

8] The rival contentions now fall for determination.

9] From the perusal of impugned order, it is clear that the main reason as to why learned Trial Judge has declined leave to amend is the alleged delay on the part of the petitioner. This means that learned Trial Judge has virtually invoked the proviso to Order 6 Rule 17 of the CPC and on such basis, declined the petitioner leave to amend. According to me, this was not a correct approach on the part of learned Trial Court

in the facts and circumstances of the present case, which shall be referred to in brief herein.

10] In this case, the petitioner, some time in April 2015 itself, much before the commencement of trial, had applied for leave to amend the plaint. However, such application was made in English language, when in fact the plaint was in Marathi language. On this short ground, learned Trial Judge by order dated 16th November 2015, dismissed the application. According to me, such dismissal was not necessary. At the highest, learned Trial Judge could have directed the petitioner to make any application in Marathi language.

11] Be that as it may, the petitioner by application dated 23rd February 2016 then applied for leave to amend. There is no clarity but there is no dispute either that the affidavit in lieu of examination-in-chief was filed by the petitioner either on 24th February 2016 or 1st December 2016. This means that the affidavit in lieu of examination-in-chief was filed after the petitioner had already filed an application seeking

leave to amend the plaint. To such a situation, the proviso to Order 6 Rule 17 of CPC cannot apply.

12] In ***Vidyabai and ors. vs. Padmalatha and anr.*** -**2009 Vol.2 SCC 409**, the Hon'ble Supreme Court has held that filing of affidavit in lieu of examination-in-chief of the witness would amount to "*commencement of proceedings*". This means that the application seeking leave to amend was made before the commencement of the trial in the suit. To such an application, learned Trial Judge was not justified in applying the proviso to Order 6 Rule 17 of CPC.

13] Merely, because the proviso to Order 6 Rule 17 of CPC does not apply, the petitioner, is not absolved from explaining the delay in taking out the application seeking leave to amend. However, the explanation in such cases, can be liberally construed. In the present case, in the application seeking leave to amend the petitioner had not explained his diligence. However, since the proviso does not apply, there may not be any requirement for offering explanation in the application itself. However, in this Court, the petitioner has

explained the circumstances in which the application for amendment could not be filed earlier and the circumstances in which the error of disclosing the correct boundaries was realised. According to me, there is no reason to doubt the explanation, at least in so far as the issue of delay is concerned. This is hardly, the stage to go into the truth or rather the entire truth of the pleadings in the writ petition. However, this does not appear to be a case where the petitioner had anything to gain by delaying his own suit. Therefore, it cannot be said that the petitioner on account of some *mala fide* or oblique purpose wanted to protract the suit. Thus construed, the application seeking leave to amend could not have been denied on the ground of delay. No doubt, some prejudice is bound to occasion the defendants, but the same is as such can be compensated by way of costs.

14] Besides, granting leave to alter boundaries does not amount to change the fundamental nature of the suit. The fundamental nature of the suit remains what it was. In order that the suit is not defeated on account of incorrect description of the boundaries, leave to amend appears to

have been applied for and such leave, according to me, was required to be granted. The fact that the leave to amend is granted does not mean that the contents of the amendment are accepted as correct. Ultimately, all these matters will have to be proved in the course of trial. Similarly, the defendants are also not precluded from raising all permissible defences. In such matters, consequent upon leave to amend the plaint, in fact, the defendants will have to be granted an opportunity to file additional written statement in the matter.

15] For all the aforesaid reasons, the impugned orders in both the petitions, which are virtually identical, are set aside. The petitioner's applications seeking leave to amend the plaints are allowed. The amendment will have to be carried out within two weeks from the date of this order is uploaded on the website. A copy of the amended plaint will have to be served upon the defendants in the suit. The defendants will have liberty to file additional written statement within a period of six weeks from the date of service of amended

plaint. All contentions of all parties on merits are specifically kept open.

16] The aforesaid relief to the petitioner in both these petitions, is subject to the petitioner paying costs of Rs.50,000/- (Rupees Fifty Thousand) in each of the petition to respondent Nos.1 to 3. This means that in all, in both these petitions, costs of Rs.1,00,000/- (Rupees One Lakh) will have to be paid by the petitioner. The costs will have to be paid within two weeks from the date of this order is uploaded on website. If there is any difficulty in payment of costs, liberty is granted to the petitioner to deposit such costs before the Trial Court from where respondent Nos.1 to 3 are at liberty to withdraw the same unconditionally and equally.

17] Rule, in both the petitions, is made absolute with costs in the aforesaid terms.

18] All concerned to act on the basis of an authenticated copy of this order.

19] Learned counsel for respondent No.1 seeks a stay on the proceedings in the suit for a period of eight weeks from today, since respondent No.1 would like to challenge the order now made before the Hon'ble Supreme Court. According to me, there is no necessity to stay the proceedings before the learned Trial Judge. However, it is made clear that even if the amendment is actually carried out, the same shall be subject to the orders that will be made by the Hon'ble Supreme Court in the matter. In fact, this is something in which goes without saying. However, in order to allay the apprehension expressed by learned counsel for respondent No.1 this is made clear.

(M. S. SONAK, J.)