

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 12604 OF 2015

M/s. Raigad Land Developers .. Petitioner
vs.
Narayan B. Khopkar .. Respondent

Ms K.C. Nichani I/b Mr. G.G. Dave for the Petitioner.
Mr. Yogesh D. Dalvi for the Respondent.

CORAM : M. S. SONAK, J.
DATE : 23 APRIL 2019.

ORAL JUDGMENT

1] Heard Ms K.C. Nichani for the petitioner and Mr. Dalvi for the respondent.

2] Rule. Rule is made returnable forthwith, with the consent of and at the request of learned counsel for the parties.

3] The challenge in this petition is to the order dated 8th June 2015 by which learned Trial Judge has rejected the petitioner's application seeking amendment of the plaint.

4] The record indicates that the application seeking leave to amend was filed much prior to commencement of the trial

in the suit. The amendment basically seeks to change the cause title since it is conceded that there was mis-description of the plaintiff. Ms Nichani, learned counsel for the petitioner relies on the decision of the Hon'ble Supreme Court in case of ***M/s. Ganesh Trading Co. vs. Moji Ram - AIR 1978 SC 484*** in support of this petition.

5] Mr. Dalvi, learned counsel for the respondent, submits that if leave to amend is granted, the entire nature of the suit will be changed. He points out that in the written statement, the respondent had specifically pointed out that the issue of mis-description. He points out that in the documents relied upon by the plaintiff, there is clear reference to the petitioner being a partnership firm. He points out that at no stage, there was any whisper about the plaintiff being a society. He therefore, submits that the amendment ought not to be allowed and there is no case made out to interfere with the impugned order.

6] Upon due consideration of the rival contentions and upon perusal of the record, according to me, the application

seeking leave to amend was required to be allowed, no doubt, subject to payment of substantial costs.

7] This is a case of mis-description of the plaintiff. The issue as to whether cause of action had accrued to a partnership firm or the issue that there was never any reference to the society are all matters which will have to be decided on merits. Merely because leave to amend is granted, that does not mean that the Court has accepted the case of the plaintiff or that the Court has accepted that cause of action accrued in favour of the society and not a partnership firm. All contentions of parties obviously will have to be kept open for determination on merits.

8] However, when amendment is applied for which prior to the commencement of the trial and the amendment is for purposes of describing the plaintiff in a particular manner, there is no reason to reject such amendment by observing that fundamental nature of the suit will change. There is no question of change of fundamental nature of the suit.

9] In a matter of this nature, the prejudice, if any, that will occasion the respondent can surely be compensated by costs. It is true, as contended by Mr. Dalvi, the petitioner should have been more diligent in the matter.

10] The decision in *Ganesh Trading Co. (supra)* supports the case of the petitioner. In that case, the suit was instituted by one of the partners of the dissolved firm. The Hon'ble Supreme Court held that mere specification of the capacity in which the suit was filed could not change the character of the suit or the case. Even where an essential fact is lacking from the averments in the plaint the cause of action will be defective. In that case, an attempt to supply the omission has been and could sometime be viewed as equivalent to an introduction of a new cause of action which, cured of its short-comings, has really become a good cause of action. This, however, is not the only possible interpretation to be put on every defective state of pleadings. Defective pleadings are generally curable if the cause of action sought to be brought out was not *ab initio* completely absent. Even very defective pleadings may be permitted to be cured, so as to

constitute a cause of action where there was none, provided necessary conditions, such as payment of either any additional court fees, which may be payable, or of costs of the other side are complied with.

11] The Supreme Court has observed that however negligence or careless may have been the first omission and however, late the proposed amendment, the amendment may be allowed if it can be made without injustice to the other side subject to conditions such as payment of costs. No doubt, on the aspect of delay, due regard will have to be had to the amended provisions of Order 6 Rule 17 of CPC. However, in *M/s. Ganesh Trading co. (supra)*, the Hon'ble Supreme Court has observed that procedural law is intended to facilitate and not to obstruct the course of substantive justice. The provisions relating to pleadings in civil cases are meant to give to each side intimation of the case of the other so that it may be met, to enable Courts to determine what is really at issue between the parties.

12] Applying the aforesaid principles to the facts of the present case, the impugned order is liable to be set aside and is hereby set aside. The petitioner's application at Exhibit-20 is hereby allowed, subject to payment of costs of Rs.15,000/- within a period of four weeks from today. The costs to be either paid to the respondent or deposited before the Trial Court from where the respondent is granted unconditional liberty to withdraw the same.

13] If the costs are paid or deposited within four weeks from today, the petitioner will have leave to amend the plaint within a period of two weeks thereafter. However, if there is default in payment/deposit of costs, then this petition shall be deemed to have been dismissed with costs of Rs.15,000/-.

14] Upon service of copy of the amended plaint upon the respondent, the respondent will have liberty to file additional written statement within a period of four weeks from the date of such receipt.

15] It is made clear that merely because leave to amend is granted it does mean that the Court has accepted the

averments in the amended plaint. All such contentions are expressly kept open.

16] Rule is made absolute in the aforesaid terms.

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

(M. S. SONAK, J.)