

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR.

Writ Petition No.7079 of 2018

(Mangesh Madhukar Giri .vs. Lata Ganpatrao Korde and another)

Office Notes, Office Memoranda of Coram,
appearances, Court's orders or directions
and Registrar's orders

Court's or Judge's orders.

Mr. M. Anilkumar, Advocate for Petitioner.

Mr. R.D. Bhuibhar, Advocate for Respondent Nos. 1 & 2.

CORAM : Manish Pitale, J.

DATED : January 23, 2019.

By this writ petition, the petitioner (original plaintiff) has challenged order dated 16.12.2017 passed by the Court of Civil Judge, Senior Division, Akola, whereby an application for amendment moved on behalf of the petitioner has been rejected.

2. The petitioner filed a suit for permanent injunction on 11.09.2013 before the trial Court against the respondents (original defendants), claiming that the possession of the petitioner in the suit property being plot no.10, field survey no.26, mouza Malkapur, Gaurakshan Road, Akola, was being threatened by the respondents. In the said suit, the petitioner specifically referred to agreement between the parties dated 13.02.2012 whereby the petitioner had agreed to purchase the suit property for a total consideration of Rs.8,00,000/- and that sale deed in pursuance to the said agreement was to be executed on or before 7.4.2012. It was further specifically stated on behalf of the petitioner in the said suit that on 29.03.2012, a sale

deed was executed between the parties but that the said document was a notarized document. It was further contended that the respondents had issued a notice dated 26.08.2013 which demonstrated that they intended to dispossess the petitioner from the suit property, possession of which had been given to him in pursuance of the aforesaid agreement and notarized sale deed. It was stated that on 08.09.2013, the respondents had physically threatened to dispossess the petitioner from the suit property. On this basis, the aforesaid suit for permanent injunction was filed by the petitioner against the respondents.

3. Thereafter on 24.01.2017, the petitioner moved an application for amendment contending that he intended to amend the aforesaid suit to the effect that the suit would now be a suit for specific performance of contract and for permanent injunction and for declaration. The petitioner proposed addition of paragraphs in the plaint to support the amendment of the plaint and prayer clause to add the prayers for grant of decree of specific performance and for declaration.

4. By impugned order dated 16.12.2017, the trial Court rejected the said application holding that the said amendment was barred by limitation and that it was also barred by operation of Order 2 Rule 2 of the Civil Procedure Code, 1908. Aggrieved by the impugned order, the petitioner has filed the present writ petition.

5. Mr. M. Anilkumar, learned counsel for the

petitioner, submitted that the impugned order passed by the trial Court deserved to be set aside for the reason that a proper appreciation of the proposed amendment would show that the petitioner was entitled to convert the suit into a suit for specific performance, permanent injunction and declaration and that the question of limitation could be left open. It was further contended that the respondents had specifically failed to oppose the application before the trial Court and that, therefore, the trial Court fell in error in rejecting the application of the petitioner on the ground that it was barred by the limitation as also by operation of Order 2 Rule 2 of the C.P.C. The learned counsel placed reliance on judgment of the Hon'ble Supreme Court in the case of **Rathnavathi .vs. Kavita Ganashamdas** reported in **(2015) 5 Supreme Court Cases 223**.

6. On the other hand, Mr. R.D. Bhuibhar, learned counsel for the respondents, submitted that the order passed by the trial Court was in consonance with the position of law as laid down by the Hon'ble Supreme Court in similar fact situation and it did not deserve to be interfered with by exercise of writ jurisdiction by this Court. The learned counsel relied upon judgments of the Hon'ble Supreme Court in the case of **K. Raheja Constructions Ltd. .vs. Alliance Ministries** reported in **AIR 1995 Supreme Court 1768** and **Van Vibhag Karmachari Griha Nirman Sahakari Sanstha Maryadit .vs. Ramesh Chander** reported in **(2010) 14 Supreme Court Cases 596**, to contend that the trial Court had correctly examined as to whether the

proposed amendment in the present case was barred by limitation and by operation of Order 2 Rule 2 of the C.P.C. It was submitted that a perusal of the proposed amendment itself would show that the cause of action as claimed by the petitioner, was at the most available to him on 26.08.2013 when the notice in question was issued by the respondents and that, therefore, the amendment sought by filing application on 24.01.2017 was clearly barred by limitation under Article 54 of the Limitation Act, 1963. It was further submitted that the very cause of action which was now sought to be claimed by the petitioner was very much available to him when he filed suit on 11.09.2013 and having failed to incorporate any prayer for specific performance and for declaration, now by way of amendment the petitioner could not be permitted to do so. On this short ground, it was submitted that the present writ petition deserved to be dismissed.

7. Heard counsel for the parties.

8. A perusal of the plaint in the present case shows that in paragraph 7 thereof, the petitioner has pleaded as follows:-

"7. The cause of action to file present suit is arose on dated 26/08/2013 when the defendants issued false and baseless notice to plaintiff and thereby threatened to dispossessed the plaintiff from the suit property and also on dated 08/09/2013 when defendants came to plaintiff and threatened to dispossessed the plaintiff from the suit property and thereafter arose continuously within the jurisdiction of

this Hon'ble Court. And the above incidences and cause of action arose within the jurisdiction of this Hon'ble Court and hence this Court Hon'ble Court have jurisdiction to try this suit."

9. In the proposed amendment moved before the trial Court on 24.01.2017, the petitioner has stated that he intends to amend the paragraph for cause of action as follows:-

"The cause of action to tile present suit is arose on dated 20/08/2013, when the plaintiff request the defendants to came alongwith plaintiff before competent authority to regularize the suit plot and further request to give the applications for the same under their signature, but defendant refuse to do so. And also arose on dated 26/08/2013 when the defendants issued false and baseless notice to plaintiff and thereby threatened to dispossessed the plaintiff from the suit property and also on dated 08/09/2013 when defendants came to plaintiff and threatened to disposed the plaintiff from the suit property and there after arose continuously within the jurisdiction of this Hon'ble Court. And the above incidences and cause of action arose within the jurisdiction of this Hon'ble Court and hence this Hon'ble Court have jurisdiction to try this suit."

10. Apart from this, the petitioner intended to add paragraph 4-A to the plaint in order to justify prayer for grant of decree of specific performance and declaration, wherein reference is made to the aforesaid notarized sale deed dated 29.03.2012 and the notice dated 26.08.2013 issued by the respondents threatening the

dispossession of the petitioner from the suit property.

11. A perusal of the plaint and proposed amendment shows that as per the agreement dated 13.02.2012 executed between the parties, the date of 07.04.2012 was fixed for execution of sale deed. A notarized document titled as sale deed was indeed executed by the parties on 29.03.2012 about which there is no dispute. Thus, there was indeed a date fixed in the present case on or before which the sale deed in pursuance of the aforesaid agreement was to be executed. Therefore, under Article 54 of the Limitation Act, 1963, the period of limitation for seeking specific performance of such an agreement would start from the aforesaid fixed date of 07.04.2012. But, even if the second limb of Article 54 of the Limitation Act, 1963, is applied to the facts of the present case, the pleadings on record clearly show that by notice dated 26.08.2013, the respondents had expressly repudiated the aforesaid agreement and this was very much within the knowledge of the petitioner when he filed the suit for permanent injunction on 11.09.2013. Therefore, the period of limitation applying the second limb of Article 54 of the Limitation Act, 1963, would show that it was triggered on 26.08.2013. Looked at from any angle, the amendment application filed on 24.01.2017 seeking to add the prayer of grant of decree for specific performance was barred by limitation on the face of it.

12. Apart from this, a perusal of the original plaint and the proposed amendment filed on behalf of the

petitioner would show that the cause of action for the proposed prayer for grant of decree of specific performance and declaration was very much available to the petitioner when he filed the suit for permanent injunction on 11.09.2013. Having failed to incorporate prayers for aforesaid reliefs and restricting the suit only for the relief of permanent injunction, clearly shows that the attempt subsequently made by the petitioner by filing application for amendment on 24.01.2017 was barred by operation of Order 2 Rule 2 of the C.P.C. It is clear that the petitioner was now seeking to change the very nature of the suit, which was impermissible.

13. The trial Court has taken these aspects into consideration while passing the impugned order and rejecting the application filed by the petitioner.

14. In this context, the judgment relied upon by the learned counsel for the petitioner i.e. **Rathnavathi .vs. Kavita** (supra) is clearly distinguishable on facts. In the said case, the original plaintiff had filed two suits, one for specific performance of the agreement and the other for grant of permanent injunction in relation to the suit house property. It was pleaded before the Court that the plaintiff therein had entered into agreement with regard to the suit house property with defendant no.2 and further that during the pendency of the suits, the defendant no.2 had executed a sale deed in favour of the defendant no.1. In this backdrop, the plaintiff therein had sought to amend the plaint to add a prayer for cancellation of sale deed,

which was executed by defendant no.2 in favour of defendant no.1. In the context of the aforesaid facts, the Hon'ble Supreme Court had held that such an amendment could be permitted. The facts in the present case are completely different and, therefore, the aforesaid judgment is not applicable.

15. In fact, the facts considered by the Hon'ble Supreme Court in the case of **Van Vibhag Karamchari Griha Nirman Sahakari Sanstha Maryadit .vs. Ramesh Chander** (supra) relied upon by the learned counsel for the respondents, are closer to the facts of the present case. In the said case before the Hon'ble Supreme Court also a suit for permanent injunction was sought to be amended and prayer for grant of decree of specific performance was sought to be added. In the context of such similar facts, the Hon'ble Supreme Court held as follows:-

"24. In the present case, the factual situation is totally different and the appellants have not filed any suit for specific performance against the first respondent within the period of limitation. In this context, the provision of [Article 54](#) of the [Limitation Act](#) is very relevant. The period of limitation prescribed in [Article 54](#) for filing a suit for specific performance is three years from the date fixed for the performance, or if no such date is fixed, when the plaintiff has notice that performance is refused.

25. Here admittedly, no date has been fixed for performance in the agreement for sale entered between the parties in 1976. But definitely by its notice dated 3.2.1991, the first

respondent has clearly made its intentions clear about refusing the performance of the agreement and cancelled the agreement.

26. *The appellant, on noticing the same, filed a suit on 11.2.1991 but he did not include the plea of Specific Performance. The appellant wanted to defend this action by referring to two facts- (i) there was an acquisition proceeding over the said land under the [Land Acquisition Act](#) and (ii) in view of the provisions of the Ceiling Act, the appellant could not have made the prayer for Specific Performance.*

27. *The aforesaid purported justification of the appellant is not tenable in law. If the alleged statutory bar referred to by the appellant stood in its way to file a suit for Specific Performance, the same would also be a bar to the suit which it had filed claiming declaration of title and injunction. In fact, a suit for Specific Performance could have been easily filed subject to the provision of Section 20 of the Ceiling Act.*

28. *Similar questions came up for consideration before a Full Bench of Gujarat High Court in the case of [Shah Jitendra Nanalal v. Patel Lallubhai Ishverbhai](#) [AIR 1984 Guj 145]. The Full Bench held that a suit for Specific Performance could be filed despite the provisions of the Ceiling Act. A suit for Specific Performance in respect of vacant land in excess of ceiling limit can be filed and a conditional decree can be passed for Specific Performance, subject to exemption being obtained under [Section 20](#) of the Act. (Paras 11- 13).*

29. *We are in respectful agreement with the views of the Full*

Bench in the abovementioned decision and the principles decided therein are attracted here.

30. *This Court is, therefore, of the opinion that the appellant had the cause of action to sue for Specific Performance in 1991 but he omitted to do so. Having done that, he should not be allowed to sue on that cause of action which he omitted to include when he filed his suit. This Court may consider its omission to include the relief of Specific Performance in the suit which it filed when it had cause of action to sue for Specific Performance as relinquishment of that part of its claim. The suit filed by appellant, therefore, is hit by the provisions of Order 2 Rule 2 of the Civil Procedure Code."*

16. In the case of **K. Raheja Constructions Ltd. .vs. Alliance Ministries** (supra) referred to in the above quoted judgment of the Hon'ble Supreme Court, it was held by the Hon'ble Supreme Court as follows:-

"4. It is seen that the permission for alienation is not a condition precedent to file the suit for specific performance. The decree of specific performance will always be subject to the condition to the grant of the permission by the competent authority. The petitioners having expressly admitted that the respondents have refused to abide by the terms of the contract, they should have asked for the relief for specific performance in the original suit itself. Having allowed the period of seven years elapsed from the date of filing of the suit, and the period of limitation being three years under Article 54 of the Schedule to the Limitation Act, 1963, any amendment on the grounds

set out, would defeat the valuable right of limitation accrued to the respondent."

17. The position of law as elucidated in the aforesaid judgments relied upon by the learned counsel for the respondents shows that in the present case also prayers sought to be added by the petitioner by way of amendment were not only barred by limitation under Article 54 of the Limitation Act, 1963, but also by operation of Order 2 Rule 2 of the C.P.C.

18. Insofar as the contention raised on behalf of the petitioner that relief of specific performance could have been sought by the petitioner only after the competent authority had granted regularisation under the provisions of the Gunthewari Act, as noted by the Hon'ble Supreme Court in the case of **Van Vibhag Karamchari Griha Nirman Sahakari Sanstha Maryadit .vs. Ramesh Chander** (supra), nothing prevented the petitioner to make a prayer for decree of specific performance when the suit for permanent injunction was filed on 11.09.2013. The Court would certainly have the power to pass a decree of specific performance in favour of the petitioner, which would be a conditional decree, subject to the competent authority in the present case granting order of regularisation under the provisions of the Gunthewari Act. Therefore, the said submission raised on behalf of the petitioner is also untenable.

19. In the light of the above, it is found that the

present writ petition is without any merit and accordingly it is dismissed.

JUDGE

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