

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 1492 OF 2020

1. Proprietor of Shivsahara Complex
And Developer
Ashok Dattatray Pujari, Age 43 years,
Occu. Agricultural and Business,
R/o. Parner, Taluka Parner,
District Ahmednagar
2. Vitthal Prabhu Pawar, Age 45 years,
Occu. Agril. and Business,
R/o. Shirur, Taluka Shirur,
District Pune

.. Petitioners
(Original Plaintiffs)

Versus

Rupali Gorakh Raskar,
Age 33 years, Occu. Business,
R/o. Shreya Beauty Parlor,
Near HDFC Bank, Parner Supa Road,
Parner, Tal. Parner, Dist. Ahmednagar

.. Respondent
(Original Defendant)

...

Mr. S.R. Sapkal, Advocate holding for Mr. V. D. Sapkal, Senior
Advocate, for Petitioners (original plaintiffs)
Mr. Amol S. Gandhi, Advocate for Respondent (original defendant)

...

CORAM : NITIN B. SURYAWANSHI, J.

DATE : 02-12-2021

JUDGMENT :-

Rule. Rule made returnable forthwith. Heard finally with
the consent of learned Advocates for the appearing parties.

2. This petition filed under Article 227 of the Constitution of India, is directed against the order dated 01-11-2019 passed by the learned Joint Civil Judge, Senior Division, Ahmadnagar, below Exhibit-25 in Special Civil Suit No. 107 of 2018 filed by the petitioners against the respondent.

The petitioners filed suit for declaration that the agreement dated 22nd December, 2015 entered into between the plaintiffs and the defendant-respondent, be declared null and void, as the defendant has breached the terms of the same.

By way of interim relief, injunction is sought against the defendant that she should not create third party interest in the suit property. The suit property is a flat situated at Ahmednagar in Shiv Sahara complex 'B' wing, ground floor, Flat No. 32 admeasuring 600 Sq.ft.

3. The defendant appeared and resisted the suit of the plaintiffs. Defendant also filed Special Civil Suit No. 159 of 2019 against the plaintiffs in Special Civil Suit No. 107 of 2018, under Section 15 of the Specific Relief Act, 1963, claiming that the sale deed of the suit property (the aforesaid flat) be executed in her favour as she has complied with all the terms and conditions of the agreement.

4. During the pendency of the suit filed by the plaintiffs-petitioners, an application (Exhibit-25) came to be filed under Order VI, Rule 17 of the Code of Civil Procedure ("CPC", in short), seeking amendment in the plaint, thereby proposing amendment in respect of the possession of the suit flat having been given to the defendant in the month of July 2016 and further seeking possession of the suit flat from the defendant. The said application was strongly objected by the defendant-respondent. The trial Court rejected the application, hence, the present petition.

5. Heard the learned Advocate for the petitioners and learned Advocate for the respondent.

6. The learned Advocate for the petitioners submitted that, with a view to avoid multiplicity of the proceedings, application (Exhibit-25) ought to have been allowed by the trial Court. Admittedly, the trial is yet to commence and the defendant has admitted her possession, in her written statement. Considering these aspects, the trial Court has erred in rejecting the amendment proposed by the petitioners. In support of his contentions, he relied (i) Decision of this Court (Nagpur Bench) in *Babarao Pandurangji Patil and another Vs. Kalavati Rambhauji Sathawane and others* reported in *2019 (4) Mh.L.J. 255* and (ii)

unreported judgment of the Madras High Court in the case of ***Rengarajan and another Vs. Rajendran and another*** in C.R.P. (PD) (MD) No. 2132 of 2015 and M.P (MD) No. 1 of 2015 dated 05-05-2017.

7. Per contra, the learned Advocate for the respondent vehemently opposed the petition, contending that inconsistent pleas have been taken by the petitioners-plaintiffs, which are not permissible in law. The proposed amendment would change the nature of the suit and since due diligence on the part of the petitioners/plaintiffs is lacking, the trial Court was justified in rejecting the application. In support of his arguments, he relied on judgment of the Supreme Court in the case of ***M. Revanna Vs. Anjanamma (Dead) by legal representatives and others*** reported in ***(2019) 4 SCC 332***.

8. It is not in dispute that the trial is yet to commence. Though, it is a matter of record that the plaintiffs have pleaded in the plaint that they are in possession of the suit property, however, taking into consideration the averments made in the written statement, the plaintiffs have realized that they have to amend the pleadings and seek a relief of possession.

9. With a view to avoid multiplicity of the proceedings, it is

necessary in the facts of the present case, to allow the petitioners/plaintiffs to amend their suit by allowing application (Exhibit-25).

10. In “**Rengarajan**” (supra) it is held :

*“13. In an identical situation, when the matter was taken up to the Hon’ble Supreme Court in **Sampath Kumar Vs. Ayyakannu and another**, 2002(7) SCC 559, where the Hon’ble Supreme Court has dealt an application for amendment made after 11 years from the date of institution of the suit for declaration of title and recovery of possession. The words of the Hon’ble Supreme Court, which are extracted below:*

“The short question arising for decision is whether it is permissible to convert through amendment a suit merely for permanent prohibitory injunction into a suit for declaration of title and recovery of possession.

It is true that the plaintiff on the averments made in the application for amendment proposes to introduce a cause of action which has arisen to the plaintiff during the pendency of the suit. According to the defendant the averments made in the application for amendment are factually incorrect and the defendant was not in possession of the property since before the institution of the suit itself.

In our opinion, the basic structure of the suit is not altered by the proposed amendment. What is sought to be changed is the nature of relief sought for by the plaintiff. In the opinion of the Trial Court it was one to the plaintiff to file a fresh suit and that is one of the reasons which has prevailed with the Trial Court and with the High Court in refusing the prayer for amendment and also in dismissing the plaintiffs revision. We fail to understand, if it is permissible for the plaintiff to file an independent suit, why the same relief which could be prayed for in a new suit cannot be permitted to be incorporated in the pending suit. In the facts and circumstances of the present case, allowing the amendment would curtail multiplicity of legal proceedings.

...

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Order 6 Rule 17 of the CPC confers jurisdiction on the Court to allow either party to alter or amend his pleadings at any stage of the proceedings and on such terms as may be just. Such amendments as are directed towards putting-form and seeking determination of the real questions in controversy between the parties shall be permitted to be made.”

11. In “**Babarao Pandurangji Patil**” (*supra*) relied on by the learned Advocate for the petitioners, the learned Single Judge of this Court has held that, “even if the amendment is rejected, respondent Nos. 1 to 4 would still be entitled to file a separate suit for partition and separate possession. This would lead to multiplicity of litigation, which needs to be avoided, as emphasized by the Hon’ble Supreme Court in the aforesaid judgment in the case of *Abdul Rehman and Another Versus Mohd. Ruldu and others, 2013 (1) ALD (SC) 1*”.

In the light of above ratio, to avoid multiplicity of the litigation and so as to decide the real controversy between the parties which can be resolved in the present suit itself, it is necessary to allow the amendment.

12. In “**M. Revenna**” (*supra*) relied on by the learned Advocate for the respondent, it is observed :

“7. Leave to amend may be refused if it introduces a totally different, new and inconsistent case, or challenges the fundamental character of the suit. The proviso to Order VI Rule 17 of the CPC virtually prevents an application for amendment of pleadings from being allowed after the trial has commenced, unless the Court comes to the conclusion that in spite of due

diligence, the party could not have raised the matter before the commencement of the trial. The proviso, to an extent, curtails absolute discretion to allow amendment at any stage. Therefore, the burden is on the person who seeks an amendment after commencement of the trial to show that in spite of due diligence, such an amendment could not have been sought earlier. There cannot be any dispute that an amendment cannot be claimed as a matter of right, and under all circumstances. Though normally amendments are allowed in the pleadings to avoid multiplicity of litigation, the court needs to take into consideration whether the application for amendment is bona fide or mala fide and whether the amendment causes such prejudice to the other side which cannot be compensated adequately in terms of money.”

13. Applying the aforesaid ratio to the facts of the present case, it cannot be said that the amendment is not bonafide and it is malafide. The amendment would not cause prejudice to the defendant as it is the case of the defendant that she is in possession of the suit flat. The aspect of due diligence on the part of the petitioners can be taken care of by adequately compensating the defendant in terms of money.

14. For the afore-stated reasons, writ petition deserves to be allowed. Hence, the following order :-

ORDER

- I) Writ petition is allowed in terms of prayer clause 'A'.
- II) The impugned Judgment and order dated 01-11-2019 passed by learned Civil Judge, Senior Division, Ahmednagar, below Exhibit-25 in Special Civil Suit No. 107 of 2018, is hereby quashed and set-aside.

- III) The application (Exhibit-25, in Special Civil Suit No. 107 of 2018), is allowed.
- IV) The amendment as per application Exhibit-25 shall be carried out by the petitioners/plaintiffs in Special Civil Suit No. 107 of 2018, within a period of two weeks from the date of the receipt of this order.
- V) Rule is made absolute in above terms, subject to the petitioners-plaintiffs paying costs of Rs.10,000/- (Rs. Ten Thousand) to the defendant-respondent, within a period of four weeks from the date of this order.

**(NITIN B. SURYAWANSHI)
JUDGE**

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