

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

901 WRIT PETITION NO. 2234 OF 2019

RIYAZUNNISA BEGUM MOHD JAFFAR
VERSUS
ABDUL QADAR SK. AMEER AND ANOTHER

.....

Advocate for Petitioner : Mr. Ajit D. Kasliwal
Advocate for Respondent No.2 : Mr. S. V. Adwant

.....

CORAM : V. K. JADHAV, J.
DATED : 9TH FEBRUARY, 2021

PER COURT :-

1. Heard finally with consent at admission stage.
2. The petitioner has instituted a civil suit bearing R.C.S. No. 769 of 2001 for declaration, possession and a decree of perpetual injunction. The said suit was decreed by the 9th Civil Judge Junior Division Aurangabad.
3. Being aggrieved by the judgment and decree passed by the trial court, respondent no.2/original defendant no.2 has preferred an appeal bearing R.C.A. No. 40 of 2009 before the District Court. In the pending appeal, respondent

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no.2/original defendant moved an application (Exhibit 23) under Order 41 Rule 27 of the Code of Civil Procedure. Respondent No.2/original defendant also moved an application Exhibit 27 for amendment in the written statement.

4. The petitioner moved an application Exhibit 30 praying therein that the applications filed by respondent no.2/original defendant at Exhibits 23 and 27 be heard and decided along with the hearing of the appeal.

5. So far as application Exhibit 23 is concerned, filed under Order 41 Rule 27 of the Code of Civil Procedure, respondent no.2/original defendant filed a pursis at Exhibit 31 on 17.01.2015 contending therein that the application Exhibit 23 be heard along with the main appeal. Accordingly, the lower appellate court was pleased to pass order on the said pursis on 17.01.2015 itself, mentioning it as filed. However, the lower appellate court has allowed the

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application Exhibit 27 seeking amendment in the written statement.

6. Learned counsel for the petitioner submits that the proposed amendment was sought in the written statement. Respondent no.2 moved application Exhibit 23 for permission to adduce additional evidence and when the said application is directed to be heard along with the appeal, the lower appellate court ought not to have passed order below Exhibit 27 and the said application also should have been heard along with the hearing of the appeal itself. Learned counsel submits that the petitioner has moved an application Exhibit 30 and the lower appellate court, on the basis of the pursis Exhibit 31 filed by respondent no.2, passed order on it. In view of the same, the lower appellate court should have heard application Exhibit 27 along with the main appeal itself.

7. Learned counsel for the petitioner further submits that the lower appellate court has not taken into consideration

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the fact that the suit was instituted way back in the year 2001 and was decided by the trial court in the year 2009. The appeal before the first appellate court is pending since 2009 and the application Exhibit 27 came to be filed in the year 2011. There is no explanation for filing application seeking amendment in the written statement at belated stage. Learned counsel submits that in the written statement filed by respondent no.2, there is no whisper about the alleged documents sought to be produced on record. Even those documents are not referred in the cross-examination of the petitioner. Learned counsel submits that the Writ Petition deserves to be allowed by setting aside the order passed below Exhibit 27.

8. Learned counsel for respondent no.2 submits that in paragraph no. 2 of the written statement, it is specifically averred that defendant no.1 was in possession of the suit property as an owner thereof, and he sold the same to defendant no.2 under registered sale deed dated 21.01.2000. Learned counsel submits that it is also averred

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in paragraph no. 7 of the written statement that the sale deed dated 21.01.2000 came to be executed by defendant no.1 in favour of defendant no.2 for a valuable consideration of Rs.50,000/-. Learned counsel submits that thus, the basic averments are there in the pleadings about purchase of the suit property.

9. Learned counsel for respondent no.2 submits that respondent no.2, by filing application Exhibit 27 in the pending appeal, has proposed the amendment to the effect that after purchase of the property by the appellant (respondent no.2 herein) from defendant no.1 under registered sale deed dated 21.01.2000, the appellant has informed the Maharashtra Co-operative Housing Society Ltd., Aurangabad on 31.01.2000 about his acquisition of right, title, interest and possession over the suit property and requested to enroll him as a member of the society. In the proposed amendment, in clauses 1-A, 1-B and 1-C, the details of the meetings of the society and allotment of letter of NOC issued by the society are given. Learned counsel

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submits that the aforesaid clarificatory details, for which the basic foundation is already there in the written statement, are formal in nature and hardly cause prejudice to the petitioner/plaintiff. Learned counsel for respondent no. 2 submits that the lower appellate court has rightly allowed the said application Exhibit 27. There is no substance in this Writ Petition and the same is liable to be dismissed.

10. I have carefully perused the plaint and the written statement.

11. The petitioner/plaintiff has instituted the suit for declaration that the sale deed dated 21.01.2000 is illegal, null and void and for cancellation of the same and also for recovery of possession and a decree of injunction. It is the specific pleading of the petitioner/plaintiff that the defendant no.1 is not the owner of the suit property. Therefore, on the basis of the alleged sale deed, defendant no.2 does not get any derivative title. Respondents/defendants, in the written statement,

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particularly in paragraph no. 7, while answering the paragraph no. 7 of the plaint, stated that the sale deed dated 21.01.2000 was executed by defendant no.1 in favour of defendant no.2 for a valuable consideration of Rs.50,000/-. Thus, the basic foundation as to how defendant no.2 acquired title of the suit property is there in the written statement. In the application Exhibit 27 filed by respondent/ defendant no.2 seeking amendment in the written statement, vide para 3 it is stated that :

“3) It is stated that for bolstering the defence raised by the defendant No.2, it is necessary to amend the written statement and file the documents traced recently by inserting the following paras after para 1, which be read as paras 1-A to 1-D :

1-A. That after the purchase of the property by the appellant from the defendant No.1, under registered sale deed No.413 on 21.01.2000, the appellant has informed the Maharashtra Co-operative Housing Society Ltd. Aurangabad on 31.1.2000 about his acquisition of right, title, interest and

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possession to the suit property and requested it to enroll him as the member of the society.

1-B. It is stated that on 05.02.2000, meeting of the Society was convened and plot No.7 of the society was transferred in the name of the defendant no.2.

1-C. It is stated that on 7.2.2000, an allotment letter and NOC was issued by the society and the society has also accepted the amount under receipt No.215 on the said date.

1-D. Thus the source of acquisition of the defendant No.2 over the suit property is complete and lawful, therefore the proprietary right of the defendant No.2 to the suit property is established.”

12. In view of the pleadings of defendant no.2 in the written statement as referred above, the aforesaid proposed amendment appears to be consistent with the pleadings and the same is also clarificatory in nature. The proposed amendment, in any way, is formal in nature and hardly

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causes prejudice to the petitioner/plaintiff. In view of the same, I proceed to pass the following order:

ORDER

The Writ Petition is hereby dismissed.

(V. K. JADHAV, J.)