

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 3125 OF 2017

Sajjansingh Gopal Chittodiya	.. Petitioner
Versus	
Mahaveer Bhupal Patil & ors	.. Respondents

...

Mr.Sandeep S. Koregave for the petitioner.
Mr.Vijay Killedar for respondent no.6.

CORAM: BHARATI DANGRE, J.
DATED : 20th OCTOBER 2021

P.C:-

1 By the said Writ Petition, the petitioner assails the order below Exhibit 75 passed in Regular Civil Suit No.1928 of 2012. The said order has been passed on an application moved by the plaintiff seeking amendment in the plaint by adding the proposed paragraph nos.4-A, 4-B, 4-C, prayer clause 10-A(a) and 10-B.

2 By the impugned order dated 19th August 2016, application is partly allowed and the application sought for inserting para 4-A, 4-B and clause 10-B stands rejected, whereas amendment is permitted in form of para 4-C and 10A.

3 Heard the respective counsel appearing for the petitioner who is the original plaintiff and the respondents. With the assistance of the respective counsel, I have perused papers placed on record.

4 Civil Suit No.1928/12 is instituted for specific performance of an agreement dated 17th September 2002, which contained a stipulation that the vendor shall obtain necessary permission of the Urban Land Ceiling Authority and execute the sale deed. Since the sale deed was not executed within the period stipulated, being of three months, the Suit for specific performance is instituted by the plaintiff. The issues were settled in the Special Civil Suit vide Exhibit-46 and the affidavit of evidence was tendered in the Court on 25th December 2014 and the matter was fixed for cross-examination.

On 22nd June 2016, the application was moved under Order VI Rule 17 seeking amendment. The application proceeded on premise that the amendment is clarificatory in nature and inadvertently the narration which ought to have been part of the suit for seeking a relief for specific performance was missed out by the counsel for the party and the amendment is necessary for effective adjudication of the issues that have been settled and for determining whether the plaintiff is entitled for the relief as prayed in the Civil Suit.

The Application was opposed by defendant no.6 on the ground that no due diligence has been demonstrated by the

plaintiff, permitting such amendment to be carried out when the suit is at the stage of evidence.

5 On considering the rival submissions, the learned Judge has passed the impugned order, which is premised on the proviso to Rule 17 of Order 6 and it has been rejected on the ground that the plaintiff has not come out with any explanation for filing the application at the stage when the examination-in-chief affidavit was already on record. The learned Judge was highly impressed by the argument of the defendant no.6 to the effect that in absence of due diligence, the application could not have been allowed, though the amendment in para 4(c) has been allowed by the very same order.

6 It is true that the power to allow amendment in pleadings has to be exercised with due caution and though Rule 17 permit the Court to allow the amendment of the pleadings at any time, in such manner and on such terms as may be just and the factor which should be taken into account, should be whether the amendment is necessary for the purpose of determining the real question in controversy between the parties. The proviso appended to Rule 17 however poses an embargo where no application can be allowed after the trial has commenced, unless the Court comes to the conclusion that inspite of due diligence the party could not have raised the matter before the commencement of trial.

7 The proviso thus carves out an exception to the main Rule 17, which would permit the Court to allow amendment of the pleadings if it is necessary for determining the real controversy between the parties, but if such an amendment is moved after the trial has commenced, the burden is upon the party to seek an amendment to show that due diligence has been exhibited.

As far as the impugned order is concerned, the learned Court has clearly avoided to pay attention to sub-rule (1) of Rule 17, to determine whether the amendment is necessary for effective adjudication of discord between the parties in terms of issuing that have been settled. It has given undue weightage to the proviso and particularly when it allowed the amendment as sought by prayer clause (c), without taking into consideration the delay that has been caused, it cannot be justified as to why prayer clauses 4(a) and 4(b) was not permitted to be inserted by way of amendment.

Reliance placed on the decision in case of Vidyabai and Anr vs. Padmalata and ors, 2009 (2) SCC 409, no doubt set out the proposition of law as regards the amendment of pleadings, but ultimately, the discretion to be exercised by the Court should be taken into account and if on the discretion being exercised, and it do not cause prejudice to any of the parties and particularly in the present case, when the trial is yet to commence and only an affidavit evidence has been filed. Yet another reason which prompt me to quash and set aside the impugned order is that

down the line for last five years, it has been informed by the respective counsel that the Suit has not proceeded an inch and that is only on account of the pendency of the present Writ Petition, though there is no stay granted to the proceedings in the trial court.

In such circumstances, since the amendment is necessiated in view of the relief sought and being merely explanatory in nature, which would assist the Court to deal with the issues which have been settled, by effectively addressing the said issues with an opportunity being given to the defendant to traverse the said pleadings, I deem it appropriate to quash and set aside the said order by allowing the Writ Petition.

8 Amendment is sought by adding para 4(a) and 4(b) as well as prayer clause 10(b) shall be permitted to be carried out and the Court shall then proceed to afford an opportunity to the defendant to submit his amended written statement within the stipulated period as prescribed under the Code and make an endeavour to try the suit strictly in accordance with the time schedule set out in the Code of Civil Procedure.

9 Writ Petition stands allowed in the aforesaid terms.

SMT. BHARATI DANGRE, J