

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 8438 OF 2019

M/s.NRB Bearing Ltd

.. Petitioner

Versus

Bhaskar Bhagvan Masurkar
and ors

.. Respondents

...

Mr.Vineet Naik, Sr. Counsel with Mr.Pradeep Bakhru and Mr.Kyle Curry i/b Wadia Ghandy & Co. for the petitioner.

Mr.Kishor K. Malpathak for respondent nos.2, 5, 7, 8, 10, 13, 16, 21, 24, 26, 28, 30, 31, 32 and 33.

CORAM: BHARATI DANGRE, J.

DATED : 30th NOVEMBER, 2021

P.C:-

1 The petitioner is aggrieved by the impugned order passed below Exhibit-244, by which the application filed in the capacity as plaintiff seeking amendment of the plaint by invoking Order VI Rule 7 of the Code of Civil Procedure has been rejected. The rejection is on the ground that the plaintiff has failed to justify the amendment in a Suit which was already dismissed in the year 2010 and on remand from the Appellate Court, the remand order had restricted the scope of the trial Court in determining the said suit.

Tilak

2 Heard the learned senior counsel Vineet Naik for the petitioner and learned counsel for the respondent. With their able assistance, I have perused the documents placed on record.

 The chronology of events would lead to a Suit being filed by the plaintiff for declaration, injunction and removal of encroachment. The suit property which was set out in the plaint was referred to approximately admeasuring 25,700 sq.m being purchased by the plaintiff company in or around 1972. The property mentioned in Serial No.2 of the plaint was referred to as the property admeasuring 2803 sq.m and a rough plan was annexed along with the plaint to be read as part and parcel of the plaint.

 In the backdrop of the averments and pleadings in the plaint, the plaintiff sought a declaration that the area admeasuring about 1000 sq.m shown on the rough sketch plan is encroached by the defendants and the defendants have no right, title or interest in the suit property and they shall be directed to remove illegal construction as set out in the sketch annexed to the plaint and marked by red hatched colour lines.

3 The Suit was dismissed, resulting into an Appeal being filed by the plaintiff vide RCA No.294/2012. The Principal District Judge, Thane on determination of the points which arose in the Appeal, partly allowed the said Appeal by specifically recording that the oral evidence of the witnesses of the

plaintiff as well as the evidence of the defence witness and specifically the evidence of Ratan Dabhade, an employee of the land record office who had specifically deposed before the Court that he cannot tell whether the contents of the map which was exhibited at Exhibit-202 are correct or not. Recording that, from his cross-examination, the position which emerged was that this witness was not aware as to who carried out the survey measurement and who prepared the map at Exhibit-202, an inference was therefore, drawn it is apparent, that he had never visited the site which is shown in the map and therefore, the said witness cannot be relied upon.

4 In the wake of the oral evidence brought before the trial court, to determine the issue as to whether the defendant Trust committed encroachment over the suit land and what is the extent of the encroachment, the Appellate Court deemed it fit to afford one more opportunity to the plaintiff to prove that the survey map prepared by the Court Commissioner is accurate. Also by affording an opportunity of cross-examination of the Court Commissioner, the Appellate Court deemed it expedient to remand the Suit to the trial Court for fresh consideration.

5 A specific observation is made by the Appellate Court to the following effect :-

“At this stage, all the points need to be kept open for the decision of the trial Court at the time of fresh consideration of the suit. Accordingly, my conclusion is that the decree passed by Trial Court based on incorrect survey measurement and passed without following proper procedure i.e. without appointment of Court Commissioner is bad in law and deserves to be set aside. As decree is set aside on technical ground, while allowing the appeal partly, parties shall bear their respective costs”

6 On the Appeal being partly allowed and the decree passed by Civil Judge, Sr. Division, in Special Civil Suit No. 323/2000 was set aside, the matter was remanded to the trial Court with the following directions :-

- (a) *Trial Court shall appoint Cadastral Surveyor from Dy. Superintendent of Land Record office, Thane as Court Commissioner.*
- (b) *Trial Court shall direct the Court Commissioner to hold joint survey measurement of survey Nos.189, Hissa No.4 and all sub-divisions of survey No.189, Hissa No.2, survey No.189, Hssa No.3 and survey No.365 after issuing prior notices to the owners of these survey numbers and other adjoining land owners, to ascertain the correctness of allegations of encroachment and extent of encroachment.*
- (c) *Plaintiff shall bear all the charges of survey measurement of above said survey numbers.*
- (d) *If survey map of survey No.189, Hissa No.2 showing sub-divisions is not available, then plaintiff shall take necessary steps to obtain survey measurement map showing sub-divisions of survey No.189, Hissa No.2.*

- (e) *Trial Court shall obtain survey measurement report within six months from the date of appointment of Court Commissioner.*
- (f) *After receipt of Court Commissioner's report, trial court shall award opportunity to both parties to lead additional evidence, if they desire.*
- (g) *Trial Court shall dispose of suit within one year from the date of receipt of Record and proceeding"*

7 On the matter being remanded to the trial Court in Appeal, an application has been taken out by the plaintiff, seeking amendment in the Suit, pursuant to the report of the TILR being brought on record, reporting that the area in ownership/ possession of the plaintiff out of Survey No.189 Hissa No.2 is merely 2650 sq.m.

 According to the plaintiff, the TILR report does not accurately record the area of the land in the ownership of the plaintiff as it had not taken cognizance of exchange of certain parts of the property between the plaintiff and one St.John Baptist Church, a registered Charitable Trust. The plaintiff pleaded that he had purchased various piece and parcels of land including 2830 sq.m from Survey No.189, Hissa No.2 by a registered Indenture of Conveyance dated 6th March 1972 and he acquired total area of 25,700 sq.m

8 Out of the Survey No.189, Hissa No.2 where he had purchased 3802 sq.m of land, the balance portion of the said

survey was owned by the Charitable Trust and the plaintiff initiated negotiation with the Trust for straightening of the boundaries of the respective properties of the plaintiff and the Trust since the boundary was abutting the property of the Trust. The negotiations resulted in the Trust travelling the area of 1138.732 sq.m out of Survey No.189, Hissa No.2 and the area admeasuring 339.115 sq.m out of Survey No.192 Hissa No.3 (Part) to the plaintiff and in the exchange thereof, the plaintiff transferring area of 1477.761 sq.m from other survey number. Accordingly, the exchange of lands took place between the plaintiff and the Trust and that is how, the plaintiff claimed that he acquired right, title and interest on additional land admeasuring 1138.752 sq.m and is in possession of the said area.

9 The plaintiff sought amendment on receipt of the TILR report which was received by him in November 2018 and at that time, the facts relating to the exchange of land with the Trust surfaced since the holding of the plaintiffs was wrongly shown in the TILR report. He therefore, pleaded that despite due diligence, the said plea could not have been raised at the time of filing of the Suit.

10 Relying upon the report of the TILR, the plaintiff sought amendment to his Suit in terms of the schedule of amendment, pursuant to the survey which was carried out on

16.4.2018 and 14.6.2018 and the report of which was produced before the Court on 6.9.2018 being marked as Exhibit-231.

11 The amendment which is sought is based on the said report and the plaintiff proposes to bring on record the deed of conveyance dated 6.3.1972, which disclose that there was already an encroachment to the extent of 304 sq.yards i.e. 251 sq.m approximately and the plaintiff had claimed right for removal of encroachment to the extent of 1000 sq.m, and has given up the right to claim back the area which was already encroached upon before the conveyance. The schedule of amendment also pleaded that the TILR has failed to consider the correct holding of the plaintiff and in order to bring on record the correct measurements, the amendment of the plaintiff was necessary. Projecting the amendment as not introducing any fresh cause of action, nor changing the nature of the proceedings, it was prayed that the amendment be allowed.

12 The proposed amendment was opposed by the defendant on the ground that the Suit was for declaratory relief of ownership and removal of encroachment and which was in respect of removal of 1000 sq.m of land out of Survey No.189/2 admeasuring 2803 sq.m. and since the Suit was already dismissed on 6th July 2010, and it is in the Appeal, the Court Commissioner was appointed to submit his report, and as per the said report, the

plaintiff is found in possession of 2650 sq.m of land out of Survey No.189/2. It was also further pleaded that the plaintiff had already filed two applications; one being Exhibit-238 for issuing summons to the Trust contending that acquiring the land admeasuring 1138.752 sq.meters from the said trust by way of exchange and that is how the plaintiffs are in an attempt to circumvent the findings of the TILR and introducing a new contention that they are holding an area of 3941.752 sq.mts, and this application ought to be rejected. Further, even an attempt to implead the said Trust as the defendant by taking out an application has also failed, the application vide Exhibit-240 being rejected. The amendment application was therefore, vehemently opposed on the ground that since the learned Court has rightly considered the objections and since now the matter is remanded for a limited purpose, the submission is that the new case is sought to be pleaded before the trial Court and therefore, amendment ought to be rejected.

13 Perusal of the impugned order reveal that it record that there is a delay in bringing the present amendment and there is failure to adhere the settled principle of due diligence in bringing the amendment at a time when the Suit was filed, the same is rejected.

14 On hearing the counsel and on perusal of record and specifically when the order of the Appellate Court remanding the matter back to the trial Court for re-trial of the issues with an observation that all these points are kept open for the decision of the trial Court, I am of the opinion that the proposed amendment, which intend to bring on record the additional pleadings vide para 28(g) to 28(h), do not bring change in nature of the Suit, which in any case, is now remanded back to the trial court for its fresh consideration. The amendment which has been moved is on account of the report which has surfaced on record subsequent to the remand and ultimately, the plaintiff will have to discharge the burden qua the said pleadings, with an opportunity being afforded to the defendant to contest and traverse the same. The plaintiff now intend to bring on record the exchange deed for which the permission was granted by the trial Court on 12th September 1974 and by virtue of which, the plaintiff became the owner and came into possession of the portion admeasuring 1138.752 sq.m in addition to its ownership over area andmeasuring 2802 sq.m out of Survey No.189, Hissa No.2 (Part). He is thus claiming ownership of a larger area of 3941.782 sq.m (2803 sq.m) acquired by convenance and 1138.752 acquired by exchange out of Survey No.189 Hissa No.2.

15 In the wake of the aforesaid pleadings being allowed to be incorporated in the Suit, the burden undisputedly would lie

on the plaintiff to bring the ownership and possession over and larger track of land and the defendant will also be afforded an opportunity to deal with the same. In any case, the Appellate Court has opportunity to the defendant to cross-examine the Court Commissioner open and if there is any need of further cross-examination of the parties, the trial Court will be at liberty to do so, particularly when the proposed amendment do not introduce a new cause of action, or do not either change the nature of the relief that is sought, being removal of encroachment of the defendants and the restraint order from interfering with the possession of the plaintiff.

16 In the wake of the aforesaid, the impugned order deserve to be quashed and set aside by allowing the proposed amendment vide Exhibit-244 by permitting the necessary amendment to be carried out within a period of two weeks. This however, is subjected to a civil right that the trial court shall make every endeavour to dispose of the suit within a period of eight months from the date of receipt of the order.

Needless to state that on the amendment being allowed, time shall also be allowed to file an additional written statement and traverse the pleadings in the said Suit.

17 With the aforesaid direction, Writ Petition is allowed.

SMT. BHARATI DANGRE, J