

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 11398 OF 2019

Narayan Mahadu Vavle & Anr. Petitioners
vs
Shri Laxman Tulshiram Vavle
Since deceased through legal heirs and Ors. Respondents

**WITH
WRIT PETITION NO. 11399 OF 2019**

Shri Milind Shripad Bendre Petitioner
vs
Shri Laxman Tulshiram Vavle
Since deceased through legal heirs Ors. Respondents

Mr. Shailendra S. Kanetkar, for the Petitioners.
Mr. Pankaj J. Das, for Respondent Nos.1A to 1C and 1E.
Ms. Nazia Shaikh i/b. Mr. Pradeep J. Thorat, for Respondent No.28.

CORAM : MADHAV J. JAMDAR, J.

DATE : 5th AUGUST, 2021

P.C. :

. Heard Mr. Shailendra S. Kanetkar, learned Advocate appearing for the petitioners, Mr. Pankaj J. Das, learned Advocate for respondent Nos.1A to 1C and 1E and Ms. Nazia Shaikh, learned Advocate for respondent No.28.

2. The petitioners in Writ Petition No.11398 of 2019 are original

defendant Nos.9 and 10 in Special Civil Suit No.385 of 1990. The petitioner in Civil Writ Petition No.11399 of 2019 is original defendant No.18 in said suit. In both these Writ Petitions, Order dated 20th June 2019 passed by the learned Civil Judge Senior Division, Pune below Exh.401 in Special Civil Suit No.385 of 1990 is challenged. It is to be noted that other defendants have not challenged the impugned order. By impugned order, the said application bearing Exh.401 filed by the plaintiff seeking amendment in the plaint was allowed. By said application, prayer clause 1(a) in para No.18 was proposed to be added in addition to the existing prayer clauses. By the proposed amendment, prayer to the effect that the defendants be directed to hand over actual and physical possession of the suit property to the plaintiff, was sought to be added. The said application was allowed by the impugned order.

3. Mr. Kanetkar, learned Advocate appearing for the petitioner submitted that the suit is of year 1990 and issues were framed on 9th March 2009. Additional issue was framed on 27th September 2016. After issues were framed in 2009, affidavit-in-lieu of the Examination-in-Chief of the plaintiff was filed on 7th November 2014. Plaintiff's cross-examination was completed and three witnesses were

examined. He therefore, submitted that the amendment is very belated amendment. He submitted that suit is filed for specific performance of Agreement for Sale dated 3rd February 1989. He submitted that amendment application filed on 16th November 2017 seeking relief of possession after about 28 years is belated and barred by limitation. He further submitted that in any case, even if, amendment is allowed the point of limitation be kept open. Ms. Nazia Shaikh appearing for respondent No.28 adopted the submissions of learned Advocate Mr. Kanetkar and submitted that the proposed amendment is barred by limitation and therefore, impugned order be quashed and set aside. However, it is to be noted that the respondent No.28 has not challenged the impugned order.

4. Mr. Das, learned Advocate appearing for respondent Nos.1A to 1C and 1E supported the impugned order. He submitted that as the suit is for specific performance, the prayer regarding possession is part and parcel of relief regarding specific performance and, therefore, limitation cannot operate as bar for the proposed prayer.

5. Perusal of the record shows that the original plaintiff-Laxman Tulshiram Vavle filed Special Civil Suit No.385 of 1990 on 8th March 1990. The said suit is for specific performance of Agreement of Sale

dated 3rd February 1989 executed by defendant No.3 for himself and for defendant Nos.2, 4 to 8 in favour of the original plaintiff. The respondent Nos.1A to 1C and 1E are the heirs and legal representatives of original plaintiff-Laxman Tukaram Vavle. They are impleaded as plaintiff Nos.1 to 5. By prayer clause 1 of the plaint, the plaintiff has sought direction to defendant Nos.2 to 8 to execute Sale Deed in favour of the plaintiff by accepting an amount of Rs.7,75,000/-. It is the contention of the original plaintiff in the application seeking amendment that on 14th November 2017, the plaintiff's constituted attorney was cross-examined by the Advocate of defendant Nos.1 to 8 and from the said cross-examination it was realized by the plaintiffs and their Advocate that in the plaint prayer regarding possession was inadvertently not included. It is specifically mentioned in the application that prayers regarding execution of Sale Deed as sought in the plaint which also contemplates handing over possession by the owner to the plaintiff. Therefore, by the proposed amendment, only prayer that defendants be directed to hand over possession to the plaintiff was sought to be inserted by adding prayer clause 1(a).

6. Admittedly, the suit is for specific performance. Section 22 of

the Specific Relief Act, is regarding power to grant relief for possession, partition, refund of earnest money etc. Section 22 is set out here-in-below.

“22. Power to grant relief for possession, partition, refund of earnest money, etc. -

(1) Notwithstanding anything to the contrary contained in the Code of Civil Procedure, 1908 (5 of 1908), any person suing for the specific performance of a contract for the transfer of immovable property may, in an appropriate case, ask for -

(a) possession, or partition and separate possession, of the property, in addition to such performance, or

(b) any other relief to which he may be entitled, including the refund of any earnest money or deposit paid or [made by] him, in case his claim for specific performance is refused.

(2) No relief under clause (a) or clause (b) of sub-section (1) shall be granted by the court unless it has been specifically claimed.

Provided that where the plaintiff has not claimed any such relief in the plaint, the court shall, at any stage of the proceeding, allow him to amend the plaint on such terms as may be just for including a claim for such relief.

(3) The power of the court to grant relief under clause (b) of sub-section (1) shall be without prejudice to its powers to award compensation under section 21.”

(Emphasis supplied)

7. Proviso to Section 22(2) clearly contemplates that if the

plaintiff has not claimed relief of possession, the Court shall at any stage of the proceedings allow him to amend the plaint on such terms as may be just for including claim for such relief.

8. The Supreme Court in Judgment reported in **(1982)1 SCC 525 Babu Lal v/s. M/s. Hazari Lal Kishori Lal and others**, having regard to Section 22 of the Specific Relief Act held that the relief of possession is only consequential to the relief of specific performance. The Supreme Court held that, in view of Section 22 the plaintiff would be entitled to the amendment of the plaint even at the execution stage. It is important to note that proviso to Section 22(2) contemplates amendment of the plaint at any stage of the proceeding for including the claim regarding “possession or partition or separate possession”. In this case, the suit is still pending.

9. It is also important to note that, Section 55 of the Transfer of Property Act, 1882 which is regarding rights and liabilities of buyer and seller specifically contemplates that the seller is bound to give possession of the property to the buyer (Section 55(1)(f)).

10. Mr. Kanetkar, learned Counsel appearing for the petitioners relied on Judgment reported in **AIR 1990 Delhi 151 Ansal Properties**

and Industries Pvt. Ltd. v/s. Dr. Anand Nath and Others. In that case, an amendment was sought by the plaintiff which relates to division of property i.e. of partition. The Delhi High Court has observed that Section 22 of the Specific Relief Act regarding relief of possession, partition or separate possession has to be claimed as a relief in the plaint. That relief was not claimed in the plaint as originally filed and such relief would be now barred by time. However, it is to be noted that, the Judgment of Supreme Court in **Babu Lal's case (supra)** was not cited before the Delhi High Court. As far as the aspect regarding limitation is concerned, the Supreme Court in **Babu Lal's case (supra)** has held as follows:-

“21. If once we accept the legal position that neither a contract for sale nor a decree passed on that basis for specific performance of the contract gives any right or title to the decree-holder and the right and the title passes to him only on the execution of the deed of sale either by the judgment-debtor himself or by the court itself in case he fails to execute the sale deed, it is idle to contend that a valuable right had accrued to the petitioner merely because a decree has been passed for the specific performance of the contract. The limitation would start against the decree-holders only after they had obtained a sale in respect of the disputed property. It is, therefore, difficult to accept that a valuable right had accrued to the judgment-debtor by lapse of time. Section 22 has been enacted only for the purpose of avoiding multiplicity of proceedings which the law courts always abhor.”

The Supreme Court in the Judgment of (2005) 8 Supreme Court Cases 486 PC. Varghese v/s. Devaki Amma Balambika Devi and others held as follows : -

“....
Section 22 enacts a rule of pleading that in order to avoid multiplicity of proceedings, the plaintiff may claim a decree for possession and/or partition in a suit for specific performance. Even though strictly speaking, the right to possession accrues only when a suit for specific performance is decreed, indisputably such a decree for possession and/or partition is prayed for in anticipation of the grant of prayer for specific performance of contract.”

Therefore, there is no substance in the contentions raised by Mr. Kanetkar, learned Counsel appearing for the petitioners.

11. However, it is to be noted that the suit was filed in year 1990. The plaintiff's evidence was almost completed in 2017 and amendment application came to be filed on 16th November 2017. Section 22 of the Specific Relief Act, contemplates that the Court shall allow the plaintiff to amend the plaint on such terms as just for including the claim, *inter alia* for possession. Although, the learned trial Court has allowed the amendment application, these aspects are not taken into consideration by the learned trial Court. The suit

property is very huge and valuable immovable property. The delay which has been caused in seeking amendment can be compensated by awarding costs.

12. Therefore, writ petition is dismissed. However, the respondent Nos.1 to 1C and 1E to pay cost of Rs.10,000/- per petition to the respective petitioners.

(MADHAV J. JAMDAR, J.)