

1

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR.

CIVIL APPLICATION (CAS) NO.415/2021
IN
SECOND APPEAL NO.116/2021

Gurudas Shikshan Sansthan through Secretary Smt. Tarini Ramkrishna Nikhare
Vs.

Sou. Shalini @ Chandraprabha Bhashkarrao Manekar and others.

Office notes, Office Memoranda of
Coram, appearances, Court's orders
or directions and Registrar's orders.

Court's or Judge's Orders

Shri S.V. Deshmukh, Advocate for appellant.
Shri D.L. Dharmadhikari, Advocate for respondents.

CORAM : S.M. MODAK, J.
DATE : OCTOBER 14, 2021.

Heard learned Advocate Shri Deshmukh for the appellants and learned Advocate Shri Dharmadhikari for original respondents as well as for proposed respondent no.7. In fact, when the hearing started, learned Advocate Shri Deshmukh apprised me about the substantial questions framed by this Court. Initially, he argued on admission of appeal. Later on, he advanced his arguments on Civil Application No.414/2021 (temporary injunction application). When he read the prayer clause, it is clear that temporary injunction is sought against proposed respondent no.7 - Pankaj Chandrakant Waghmare and one Parag Prabhakar Deshkar (though he is described as Supervisor, there is no prayer for joining him). So then, it was realized that prior to deciding temporary injunction application, the present application for amendment CA No. 415/2021 which includes the prayer for joining proposed respondent no.7 has to be

2

decided first.

2. Accordingly, both the learned Advocates have restricted their arguments on the present application only and today this Court is expected to deal with that application only.

3. The appellants want to carry out amendment in following manner:

- a) incorporating paragraph nos.7-A, 7-B, 7-C, 7-D and 7-E.
- b) adding Pankaj Waghmare as respondent no.7 and
- c) incorporating certain additional substantial questions of law.

4. When the application is perused, we may find that the averments in paragraph nos.7-A, 7-C & 7-D pertain to events that have taken place long back, that is to say when the suit/first appeal was pending. Whereas, the particulars mentioned in paragraph no.7-B pertains to the event dated 17/07/2021. On that date, when the Secretary of the appellant -Sanstha had gone to the suit land, she had noticed loud sound and demolition of one of the hostels which is being used by the appellant as girls hostel. The particulars also deals with the filing of First Information Report on 18/07/2021 with Beltarodi Police Station. Whereas, the particulars in paragraph no.7-E pertains to obtaining copy of sale-deed registered on 10/06/2021 executed with the proposed respondent.

5. During the arguments, learned Advocate Shri

3

Deshmukh had apprised me about various documents filed along with this application. It consists of photographs showing this structure (which is not demolished and which is in existence as on today). It consists of copy of First Information Report and various documents which appellant described them as inspection report. Copy of the sale-deed executed by proposed respondent is also filed on record.

6. Whereas learned Advocate Shri Dharmadhikari opposed the prayer for amendment on various grounds. He has substantiated his arguments by raising following objections:

- a) The cause of action for filing this application is different from the cause of action on the basis of which the suit was filed.
- b) The particulars in paragraph nos.7-A, 7-C & 7-D pertains to the events which cannot be considered as subsequent events.
- c) The documents labelled as inspection report are nothing but the details filled in by the appellants which suits to their requirements.
- d) Even the photographs do not corroborate the contentions of the appellant to the effect that the buildings can be described as boys hostel and girls hostel.

7. By way of reply, learned Advocate Shri Deshmukh submitted that the proposed respondent has purchased the property during the pendency of the lis. So, the principle of *lis-pendens* will be applicable. According to him the fate of

4

that sale-deed will depend upon the outcome of the present second appeal. It is submitted that the cause of action for filing temporary injunction application (that is the act of demolition on 17/07/2021) can certainly be agitated in this appeal. Because according to him, the act of execution of sale-deed and act of demolition cannot be bifurcated and separated.

8. With the assistance of both the Advocates, I have perused the observations given by both the Courts below. It is true that the First Appellate Court has specifically observed in paragraph no.24 to the effect that “plaintiff has failed to prove point nos.2 & 3”. Those points pertain to execution of an agreement dated 20/04/2001 and acceptance of earnest money by the defendants. It also pertains to put in the plaintiff in possession of the suit land on the date of the agreement.

9. Learned Advocate Shri Deshmukh submitted that this is perverse finding and there cannot be better proof of handing over possession than the averments in the registered agreement. Whether these findings are perverse or not cannot be decided now and it can only be decided in the second appeal when will be finally disposed of. But at this stage, it cannot certainly be said that there is a finding by the First Appellate Court that the plaintiff has failed to prove handing over possession to her by defendants.

10. When the particulars of amendment are perused in the light of these observations, this Court does not feel that

5

the averments in paragraph nos.7-A, 7-C and 7-D can be allowed to be incorporated in the memo of appeal. Because if they are perused, we may find that the appellants want to incorporate certain details which they admittedly have not pleaded before both the Courts below. So as on today, when there is a finding against these appellants they cannot be permitted to bring on record certain particulars which they could have been brought earlier.

11. It is true that the amendment prayer is governed by the provisions of Order-VI, Rule-17 of the Code of Civil Procedure. As per that provision, on certain matters, Court may permit the amendment whereas on certain matters, the Court has to allow the amendment. The amendment prayer also deals with the stage at which it is being asked for Whether it is prior to starting of the trial or, whether it is after starting of the trial. The trial of the suit is already over. The amendment prayer is made when the appeal is pending. It has to be judged on the basis of why there is a necessity for the appellants to seek for amendment. As stated above, these particulars are not on the basis of subsequent events. Even the appellants have not stated why these particulars were not incorporated earlier. The particulars are not on the basis of an information collected by the appellants, later on. These reasons do not find place in the application. So the particulars in paragraph nos.7-A, 7-C and 7-D cannot be allowed to be part of record by way of amendment.

12. However, I am inclined to allow the amendment in

respect of the particulars stated in paragraph nos.7-C and 7-E. No doubt, it deals with the subsequent events which took place during pendency of second appeal. The arguments advanced on behalf of the learned Advocate Shri Dharmadhikari about misjoinder of cause of action also needs to be addressed. No doubt, it is true that the cause of action for filing of suit and cause of action for these particulars are different. It is pertinent to note that the proposed respondent during his reply filed to temporary injunction application has stated that two structures were not constructed by the appellant but they were constructed by the previous owner. There is no denial to the fact that one structure has been demolished. It is even not disputed that the sale-deed was executed by him in respect of the suit plot i.e. Khasra No.46.

13. The point of *lis-pendens* is well settled. There are guidelines which suggest in which cases the subsequent transferee can be made as a party and in which cases he need not be made in the party. It is always not necessary to make the subsequent transferee as a party to the proceedings. Learned Advocate Shri Deshmukh is right in submitting that the fate of that sale-deed depends upon outcome of this second appeal. So the fact that the act of demolition has taken place after execution of a sale-deed is sufficient for this Court to allow that amendment.

14. Though the cause of actions are different, this Court is not inclined to accept that objection so as to refuse that part of the amendment. This Court feels that the act of execution of sale-deed and act of demolition, they are

7

connected to each other and when the Court is seized of the matter, it can give an opinion about any transaction taken place during pendency of lis. Certainly the Court can also deal with the prayer when the particular act has taken place on the basis of that subsequent transfer. Hence, the said objection about the misjoinder of cause of action is over turned.

15. So far as the prayer for incorporating the additional substantial question of law is concerned that will be heard once respondent no.7 will be joined as regular respondent. For the above reasons, following order is passed:

ORDER

- i) Civil Application is partly allowed. The appellants are permitted to incorporate paragraph no.7-B and 7-E in the Memo of Appeal.
- ii) They are permitted to join proposed respondent as respondent no.7.
- ii) The amendment sought in paragraph no.7-A, 7-C and 7-D are rejected and lastly the prayer for additional substantial question of law will be heard later on.

CIVIL APPLICATION NO.414/2021

There is a request to extend the operation of the order passed on 22/07/2021. It is opposed on behalf of the present respondents and proposed respondents. My attention is brought to the notice sent by the Planning Authority to the

8

proposed respondent. By that notice, the proposed respondent is asked to remove the unauthorized construction. The notice was given under purported exercise of the power under Section 53 of the Maharashtra Regional and Town Planning Act, 1966. Even though, it is true that the above said notice is given but when the dispute is pending with the Court and when the Court has granted interim injunction, it needs to be continued till next date. The proposed respondent can certainly intimate to the planning authority that the injunction is granted by this Court. So it is extended till next date.

Matter be kept on **17/11/2021** for hearing on remaining civil application and for hearing on admission.

JUDGE

R.S. Sahare