

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

977 WRIT PETITION NO.4167 OF 2021

**PRABHAT KUMAR RADHAKISHANJI KHEMKA
VERSUS
USHA SUNIL AGRAWAL AND OTHERS**

...
Advocate for Petitioner : Mr. Anil S. Bajaj
Advocate for Respondent Nos.1 & 2 : Mr. S.V. Natu

...

CORAM : SANDEEP V. MARNE, J.

DATE : 15-11-2022

PER COURT :

. By this petition, the petitioner has assailed the order dated 31.01.2020 passed by the 8th Jt. Civil Judge Junior Division, Aurangabad thereby allowing the application of defendant nos.1 and 2 for amendment of the written-statement.

2. Mr. Bajaj, the learned counsel for the petitioner submits that the amendment application was filed after about 20 years of filing of the written-statement. He submits that the real intention behind filing of the amendment application is to wriggle out of the admissions given in the original written-statement. He further submits that the amendment sought to be introduced involved mutually destructive pleadings which cannot be permitted to be introduced by way of amendment. He further submits that in the

initial written-statement, the agreement to sale of which specific performance is sought was not disputed and now by way of amendment, the defendant nos.1 and 2 are seeking to dispute the same. He further submits that in the original written-statement there was no dispute about the transaction that took place between the defendant nos.1 and 3, but by way of amendment now pleadings are sought to be added to question validity of that transaction. Since the amendment sought is inconsistent with the original defence of defendant nos.1 and 2, the trial Court ought to have rejected the application for amendment.

3. Per contra, Mr. Natu, the learned Counsel for the respondent nos.1 and 2 opposes the petition and supports the order passed by the trial Court.

4. Perusal of the original written-statement filed by defendant nos.1 and 2 and the amendment that has been allowed by the trial Court shows that there are no mutually destructive pleadings between the original written-statement and the amended one. The stand now sought to be taken by defendant nos.1 and 2 cannot be treated as inconsistent one. Defendant nos.1 and 2 had disputed agreement to sale alleged to have been executed in favour of the

petitioner in their original written-statement as well. Now, a new facet of defence is sought to be added to demonstrate whether the defendant no.1 acquired any title out of the transaction executed with defendant no.3. In my opinion, it cannot be said that the amendment sought to be introduced is either inconsistent or mutually destructive.

5. Coming to the submission that amendment application was filed after passage of 20 long years, the chronology of events that have occurred in the suit till date is required to be taken into consideration. The suit was decreed on 11.01.2010. The *ex parte* decree was set aside and the suit was remanded for the fresh trial on 20.11.2017. The petitioner challenged the order of remand before this Court by filing Appeal from Order No.23 of 2018, which came to be dismissed on 09.01.2019 with certain observations. Immediately thereafter, the defendant nos.1 and 2 moved an application for amendment on 22.03.2019. In the light of these events, the objection of Mr. Bajaj that the amendment application was filed after passage of 20 years does not appear to be correct.

6. So far as the stage of suit is concerned, the plaintiff had filed affidavit of evidence before the suit was decreed *ex parte*.

Thereafter the suit came to be remanded for fresh trial on 20.11.2017 and after dismissal of Appeal from Order on 09.01.2019, the proceedings are commenced before the trial Court for a fresh trial. It appears that no further steps are taken thereafter towards recording of evidence of the parties. Therefore even though technically the trial in the suit had commenced in the year 2010 itself on account of filing of affidavit of evidence by the plaintiff, nothing further has progressed in the suit. I am therefore of the view that the amendment application could not have been rejected on the ground of failure to show due diligence.

7. Mr. Bajaj has also raised objection that all the events that are sought to be brought on record by way of amendment were already in the knowledge of the defendant nos.1 and 2 at the time of filing of their written-statement. However, considering the peculiar facts of the case when the suit was remanded for fresh trial on 20.11.2017 and Appeal from Order challenging the remand order was decided on 09.01.2019, it cannot be said that the defendant nos.1 and 2 are guilty of laches in introducing the amendment.

8. Mr. Bajaj has relied upon judgment of this court in **Chhabubai Haribhau Badakh vs. S. H. Khatod and Sons and another,**

[2009 (6) Mh.L.J. 760]. In that case the amendment was introduced at the fag end of the trial, which is not the case in hand and therefore the decision has no application. Mr. Bajaj has also relied upon the judgment of the Apex Court in **Vimal Chand Ghevarchand Jain & Ors vs. Ramakant Eknath Jajoo** [2009 ALL SCR 2027]. Firstly, the judgment does not relate to the issue of amendment of pleadings. Secondly, the Hon'ble Apex Court has held that defendants cannot be permitted to raise plea which are mutually destructive of each other. In the present case, I have already recorded a finding that the pleadings sought to be introduced by way of amendment cannot be said to be mutually destructive of the pleadings in the original written-statement. The judgment in **Vimal Chand** (*supra*) is therefore clearly distinguishable.

9. In view of above, I do not find any merits in the petition and the same is dismissed without any orders as to costs.

(SANDEEP V. MARNE, J.)