

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO.5115 OF 2019

Vimal Bhimrao Jagtap and Ors.

..Petitioners

Versus

M/s. Jagtap and Co. and Ors.

..Respondents

Mr. N. R. Bubna, Advocate for the Petitioners.

Mr. Girish Godbole i/by Ajinkya J. Jaibhave, Advocate for
Respondent Nos.1.1 to 1.3.

CORAM : NITIN W. SAMBRE, J.

DATE : 1st MARCH, 2022

PC.

1. Respondent No.1 (1.1 to 1.3) initiated Special Civil Suit No.89 of 2005 on the file of Civil Judge Senior Division, Nashik for declaration and injunction based on the registered Agreement of Development dated 22nd March, 1990, Power of Attorney dated 22nd March, 1990, Supplementary Agreement dated 21st November, 2000 and the Communication/Receipt dated 3rd February, 2002. In the suit, respondent No.1 sought declaration that the plaintiffs have every right to develop and transfer the property mentioned in paragraphs 4 and 6. An injunction is sought that the defendants be restrained from disturbing peaceful possession of the plaintiffs over the suit property and not to create any third party interest. In the said suit for declaration and injunction, plaintiffs took out application Exh.186 under Order VI Rule 17 of the CPC alleging that the aforesaid registered Development Agreement, Power of Attorney,

Supplementary Agreement are not only restricted to the right of development and transfer but the plaintiffs have every right to enjoy the said property as an owner. In the aforesaid background, it is claimed that it was agreed between the plaintiffs and the defendants to transfer the suit property in favour of the plaintiffs. It is claimed that for all this time transfer was not effected because of some technical glitch. In the aforesaid background, the amendment is claimed by inserting plea for specific performance or in alternate for compensation. The said prayer for grant of amendment is allowed vide impugned order dated 31st December, 2018 (hereinafter shall be referred to as the impugned order). As such, this petition is by the original defendants.

2. Mr. N. R. Bubna, learned counsel appearing for the petitioners/original defendants would urge that admittedly the suit was initiated by the respondent No.1 based on the right of development created vide registered Development Agreement and irrevocable Power of Attorney dated 22nd March, 1990, Supplementary Agreement dated 21st November, 2000 and further Communication/Receipt dated 3rd February, 2002. He would invite attention of this Court to unamended plaint, so as to claim that the suit was only for declaration and injunction. Petitioners would further claim that the respondents/plaintiffs took out application for amendment being Exh.186 alleging that when the aforesaid Development Agreement and Irrevocable Power of Attorney was entered into, it was principally decided to even transfer the

ownership. So as to substantiate his aforesaid claim, he would invite attention of this Court to the very pleadings in the application. He would further claim that the suit for simplicitor declaration and injunction is sought to be converted into specific performance that too after a period of about twelve years of the date of initiation of the suit claim. He would further claim that not only amendment granted by the Court below changes entire nature of the suit claim, there was absence of due diligence on the part of the respondents/plaintiffs. He would claim that *prima facie* it can be inferred that the claim for specific performance is barred by limitation which the Court below has failed to appreciate. Drawing support from the judgments of Apex Court in the matter of ***Puran Ram Vs. Bhaguram and Anr.*** reported in ***2008(4) Mh.L.J. 1, Van Vibhag Karmachari Griha Nirman Sahkari Sanstha Maryadit Vs. Ramesh Chander and Ors.*** reported in ***(2010) 14 SCC 596*** and ***Revajeetu Builders and Developers Vs. Narayanaswami and Sons*** reported in ***(2009) 10 SCC 84***, he would claim that the amendment claimed cannot be granted.

3. While countering the aforesaid submissions, Mr. Girish Godbole representing interest of respondents/plaintiffs would urge that the amendment is granted on the basis of very scheme of Specific Relief Act. So as to substantiate his contentions, he has invited attention of this Court to the provisions of Section 21 of the Specific Relief Act. He would claim that proviso to Sub Section (5) of Section 21 of Specific Relief Act provides that amendment of the

plaint, at any stage of proceedings, can be allowed, irrespective of the embargo created by virtue of the provisions of the CPC. Drawing support from the judgments of Apex Court in the matter of ***Babu Lal Vs. M/s. Hazari Lal Kishori Lal and Ors.*** reported in ***AIR 1982 SC 818***, so also ***M/s. Chakreshwari Construction Pvt. Ltd. Vs. Manohar Lal*** reported in ***2017 ALL SCR 2326***, he would urge that the amendment of pleadings by filing additional document needs to be granted, as the same is permissible within the scheme of the provisions of the Specific Relief Act. He would urge that this Court may put the respondents to additional conditions than the one incorporated by the Trial Court while granting amendment by saddling cost or such other conditions which this Court deems fit and proper including that of expediting the suit. He would draw support from the judgment of Apex Court in the matter of ***Ragu Thilak D. John Vs. S. Rayappan and Ors.*** reported in ***AIR 2001 SC 699***, so as to claim that the amendment of pleadings in a suit for injunction, recovery of damages can always be sought by way of amendment and whether such claim is within limitation, can be gone into while deciding merits of the suit, as the same is mixed question of facts and law. He would further claim that for deciding the issue raised in the suit, the grant of amendment is very significant and relevant for which he has drawn support from the judgment of ***M/s. Chakreshwari Construction Pvt. Ltd.*** (*cited supra*). In addition to above, he has also claimed that the relief of specific performance can be granted even irrespective of the stage at which the same is moved. According to him, the provisions of

Sections 21 and 22 of the Specific Relief Act and plea supports the case of the respondents/plaintiffs, as can be inferred from the observations of the Apex Court in the matter of *Babu Lal (cited supra)*. As such, he has sought dismissal of the writ petition.

4. Considered submissions.

5. By way of impugned order passed below Exh.186 by the Trial Court, the prayer for amendment is allowed subject to cost of Rs.10,000/-.

6. Perusal of application Exh.186 in categorical terms speaks that the basis of such amendment is the Development Agreements dated 22nd March, 1990 and registered Power of Attorney, Supplementary Agreement dated 21st November, 2000 and Communication/Receipt dated 3rd February, 2022. Based on the very same documents, initially the respondents/plaintiffs initiated suit for declaration and permanent injunction.

7. Respondents/plaintiffs are sensitive to the fact that their suit initially was only for declaration and injunction and accordingly reliefs were claimed. In paragraph 4 of the suit, plaintiffs have come out with the case that defendants have approached their late father Laxman for purchase of the defendants share also and in view of embargo under Ceiling Act (technical glitch), the aforesaid documents were executed. It is further claimed that the Urban Land

Ceiling Act repealed in 2007 i.e. post filing of suit. As such, it is necessary for them, in view of subsequent development to claim specific performance of contract.

8. This Court is required to be sensitive to the principle of Order II Rule 2 of the CPC. The very relief by way of amendment sought by the respondents/plaintiffs is based on the same cause of action on which the suit is based. *Prima facie*, the claim of execution of sale-deed and damages appears to be time barred, as same is brought into action after more than ten years.

9. If an amendment introducing a cause of action is such, which otherwise is not time barred or if an independent suit would not be barred by limitation, such amendment can be allowed. As far as the aforesaid proposition is concerned, support can be drawn from the judgment of the Apex Court in the matter of *Revajeetu Builiders and Developers (cited supra)*. However, so far as claim for amendment for specific performance and damages is concerned, same *prima facie* appears to be time barred, as the claim is brought into action after more than ten years of the cause of action. Apart from above, suit is brought prior to Urban Land Ceiling Act, repeal of same took place sometime in 2007, whereas prayer for amendment is moved in 2019 i.e. almost after twelve years.

10. That being so, claim in the amendment *prima facie* appears to be barred by limitation, so also the provisions of Order II

Rule 2 of the CPC. Even the new suit for said cause is not maintainable, as same is also time barred.

11. As far as the original claim in the suit is concerned, it is not in dispute that the same is for only declaration and injunction. By way of amendment, the respondents/plaintiffs have sought insertion of claim for specific performance or in alternate grant of compensation. Such claim, if permitted to be inserted by way of amendment, necessarily changes the entire nature of the claim in the suit, as it was never pleaded or claimed that the respondents/plaintiffs have become owner of the suit property by virtue of the Development Agreement and Power of Attorney etc.

12. Mr. Girish Godbole, learned counsel has drawn support from the provisions of Section 21 of the Specific Relief Act, which reads thus :-

“21. Power to award compensation in certain cases.- (1)

In a suit for specific performance of a contract, the plaintiff may also claim compensation for its breach [in addition to] such performance.

(2) If, in any such suit, the court decides that specific performance ought not to be granted, but that there is a contract between the parties which has been broken by the defendant, and that the plaintiff is entitled to compensation for that breach, it shall award him such compensation accordingly.

(3) If, in any such suit, the Court decides that specific performance ought to be granted, but that it is not sufficient to satisfy the justice of the case, and that some

compensation for breach of the contract should also be made to the plaintiff, it shall award him such compensation accordingly.

(4) In determining the amount of any compensation awarded under this section, the Court shall be guided by the principles specified in section 73 of the Indian Contract Act, 1872 (9 of 1872).

(5) No compensation shall be awarded under this section unless the plaintiff has claimed such compensation in his plaint:

Provided that where the plaintiff has not claimed any such compensation 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 compensation.

Explanation. - The circumstance that the contract has become incapable of specific performance does not preclude the court from exercising the jurisdiction conferred by this section.”

13. Perusal of the Sub Section (1) of Section 21 of the Specific Relief Act quantifies that the said section is applicable only to a suit for specific performance of a contract wherein the plea for compensation for breach can be inserted at any point of time. Admittedly, the claim for specific performance was never brought into action but for by way of amendment which is delayed by almost twelve years. That being so, support drawn or reliance placed on the provisions of Section 21 of the Specific Relief Act and also on the judgments of the Apex Court in the matter of *Babu Lal (cited supra)*, *M/s. Chakreshwari Construction Pvt. Ltd. (cited supra)* and *Ragu Tilak D. John (cited supra)* will be of hardly any assistance as

the respondents/plaintiffs have never initiated claim for specific performance in suit.

14. In that view of the matter, it has to be held that the claim put forth by the respondent No.1 in application Exh.186 not only is time barred but also hit by the provisions of Order II Rule 2 of the CPC. The provisions of Section 21 of the Specific Relief Act has no application to the same, as it was never claim by the respondents/plaintiffs to grant specific performance when the suit was brought in action.

15. That being so, the Court below, in my opinion, has committed a patent error in granting amendment thereby permitting incorporation of such pleadings and reliefs which are not only time barred but which changes the nature of the suit.

16. That being so, the order impugned dated 31st December, 2018 passed below Exh.186 in Special Civil Suit No.89 of 2005 by the Court of 8th Joint Civil Judge Senior Division, Nashik is quashed and set aside.

17. Application Exh.186 for the reasons aforesaid stands rejected.

18. The petition stands allowed in above terms.

[NITIN W. SAMBRE, J.]