

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

WRIT PETITION NO. 6039 OF 2019

Santosh S/o Mukka Waghade (Dead) Through LRs
Vs.
Manojkumar Babanlalji Jaiswal and others

Office Notes, Office Memoranda of Coram,
appearances, Court's orders of directions
and Registrar's orders

Court's or Judge's orders

Mr. A.K. Neware, Advocate for Petitioner
Mr. P.A. Gode, Advocate for Respondent No.1

CORAM : MANISH PITALE, J.

RESERVED ON: 29/06/2022

PRONOUNCED ON: 04/07/2022

By this writ petition, the petitioner i.e. the original plaintiff has challenged order dated 13/08/2019, passed by the 5th Joint Civil Judge (Senior Division), Nagpur, whereby an application for amendment of plaint at Exh.135, filed on behalf of the petitioner was rejected. During pendency of the writ petition, the petitioner (original plaintiff) expired and his legal representatives were brought on record.

2. The petitioner / plaintiff in the present case has filed a suit for declaration, permanent injunction and cancellation of sale deed against the respondents herein. The defendants filed their written statement in the said suit and upon issues being framed, the trial commenced before the Court below. The

evidence of the plaintiff was completed and the evidence of the defendants was being recorded. The evidence of the defendant No.2 was closed and when the proceedings before the Court below reached the stage of cross-examination of defendant No.1, as D.W.-3, the aforesaid application for amendment of plaint was filed on behalf of the plaintiff. By the said application, the plaintiff sought to add pleadings in the plaint to the effect that the property in question was purchased from income of agricultural land, which was joint family property and, therefore, the plaintiff alone did not have the right to execute sale deed. The said application was opposed by the defendants, as according to them it was completely in variance with the original pleadings in the plaint.

3. In the impugned order, the Court below found that the proposed amendment was not necessary for determining the real question in controversy between the parties and that even otherwise, the plaintiff had failed the due diligence test as per Order VI Rule 17 of the Code of Civil Procedure. On this basis, the Court below rejected the application.

4. The petitioner filed the present writ petition, wherein notice was issued and interim stay of the proceedings before the Court below, was granted.

5. Mr. Neware, learned counsel for the petitioner submitted that the Court below committed a grave error in rejecting the application for amendment because the proposed

amendment further clarified the nature of grievance being raised on behalf of the original plaintiff and that the merits of the claims sought to be made by way of the proposed amendment could be decided in due course during the trial, but, the prayer for amendment ought not to have been rejected. It was submitted that the plaintiff had challenged the sale deed and the proposed amendment sought to add another angle to the very same grievance sought to be raised on behalf of the plaintiff and that, therefore, the amendment ought to have been granted.

6. It was submitted that even though the trial had commenced, the Court below ought not to have held that the plaintiff failed the due diligence test, for the reason that the amendment was for elaborating the pleadings on record and sufficient material was placed on record to indicate that even though the counsel engaged by the plaintiff was given material and instructions to place on record pleadings that were sought to be added by way of amendment, the counsel had failed to raise such pleas in the original plaint. It was submitted that when another counsel was engaged and evidence was being recorded, that the necessity was felt for seeking the proposed amendment. The learned counsel for the petitioner / plaintiff relied upon judgment of the Hon'ble Supreme Court in the case of **Mohinder Kumar Mehra Vs. Roop Rani Mehra & Ors** reported in **2018(2) SCC 132**.

7. On the other hand, Mr. Gode, learned counsel appearing for the respondents submitted that the proposed amendment sought to bring on record pleadings, which were absolutely inconsistent with the pleadings in the original plaint. By referring to the contents of the plaint, the learned counsel submitted that the case of the plaintiff throughout was that the property in question was purchased by him and that the sale deed was got executed by the defendants fraudulently by giving an impression to the plaintiff that a mortgage deed was being executed. The entire pleadings in the plaint were on these lines. The learned counsel for the respondents submitted that the trial had not only commenced in the present case, but, the evidence of the plaintiff was over and when the evidence of the defendant No.1, as D.W.3, was being recorded that the aforesaid application was moved on behalf of the original plaintiff. It was submitted that, therefore, the Court below was justified in referring to the test of due diligence and the fact that such an amendment was not concerned with the real controversy raised in the suit. The learned counsel has relied upon judgment of the Hon'ble Supreme Court in the case of **J. Samuel and others Vs. Gattu Mahesh and others (2012) 2 SCC 300** and judgment of this Court in the case of **Dharamsingh S/o. Sardarsingh Chabada Vs. Pritamsingh s/o. Sardarsingh Chabada & Ors.** reported in **2008(2) ALL MR 201**.

8. Heard learned counsel for the rival parties and perused the material on record. In the present case, it is an undisputed

position that when the application for amendment was moved on behalf of the original plaintiff, the trial had commenced. The proviso to Order VI Rule 17 of Civil Procedure Code, clearly states that no application for amendment shall be allowed after the trial has commenced, unless the Court concludes that in spite of due diligence the party could not have raised the matter before commencement of trial. In the present case, as found by the Court below in the impugned order, not only had the trial commenced, but, the evidence of the plaintiff was over and the evidence of the original defendant No.1 as D.W. 3 was being conducted when the application for amendment was moved.

9. In such a situation, it was necessary for the plaintiff to have passed the due diligence test. It was necessary for the plaintiff to have demonstrated as to why despite due diligence he could not have raised the issue, which was proposed to be raised by way of the amendment. The nature of amendment sought on behalf of the original plaintiff shows that it did not pertain to some event that had occurred after filing of the suit or during pendency of the trial or after commencement of the trial. The claim sought to be placed on record by way of pleadings was based on something, which was clearly within the knowledge of the original plaintiff even before he filed the suit. The learned counsel for the petitioner is justified in relying upon judgment of the Hon'ble Supreme Court in the case of **J. Samuel and others Vs. Gattu Mahesh and others**

(supra), wherein it is held that due diligence determines the scope of constructive knowledge of a party and that the requirement of due diligence cannot be dispensed with. In the case of **Dharamsingh S/o. Sardarsingh Chabada Vs. Pritamsingh s/o. Sardarsingh Chabada** (supra), this Court has held that the date of filing of pleading is material in view of proviso to Order VI Rule 17 of the Code of Civil Procedure and, therefore, it becomes necessary that when an application for amendment is moved after the trial has commenced, the applicant is able to justify moving such an application after commencement of trial.

10. In the present case, the only explanation sought to be given on behalf of the petitioner is that after the evidence of the plaintiff was over and D.W.3 was being examined on behalf of respondents / defendants, when a new counsel was engaged, the necessity to move the amendment application was realized. This Court is not impressed with the said contention raised on behalf of the petitioner and the view adopted by the Court below on this aspect of the matter cannot be found fault with.

11. Even otherwise, a perusal of the plaint clearly shows that according to the petitioner / plaintiff, the suit property was purchased by him and the focus of attack on the sale deed, which the petitioner sought cancellation of, was on the fraud allegedly committed by the respondents in getting the sale deed executed from the petitioner in their favour by showing that a

mortgage deed was being executed. The entire drift of the pleadings in the original plaint was regarding such alleged fraud committed by the respondents on the original plaintiff. But, by way of amendment, the petitioner i.e. original plaintiff was now seeking to introduce pleadings that were not only completely inconsistent with the original pleadings in the plaint, but, such proposed pleadings amounted to taking away the effect of specific statements made in the original plaint. It is in this backdrop, that the Court below in the impugned order observed that the amendment was wholly irrelevant to the real controversy sought to be raised by the petitioner in respect of the sale deed executed by him in favour of the defendants. This Court agrees with the findings rendered by the Court below and it is found that the petitioner failed to make out a case for grant of amendment.

12. Reliance placed on the judgment in the case of **Mohinder Kumar Mehra Vs. Roop Rani Mehra & Ors** (supra), on behalf of the petitioner is also misplaced because in the said case the plaintiff had filed the suit for partition stating only one property in the Appendix. By way of amendment the plaintiff therein proposed to add another property as subject matter of the litigation. It is in the facts of such case that the Hon'ble Supreme Court found that the amendment could be granted so that the suit could be considered and decided in a holistic manner.

13. Such are not the facts in the present case. As noted above, not only was the application for amendment, filed on behalf of the petitioner / original plaintiff, hit by proviso to Order VI Rule 17 of the Code of Civil Procedure, but, the proposed amendment itself could not have been granted in the facts and circumstances of the present case. This was particularly in the light of the specific pleadings in the original plaint about the plaintiff having purchased the suit property and the attack on the sale deed executed in favour of the defendants on the ground that they had fraudulently got the sale deed executed by showing that only a mortgage deed was being executed.

14. This Court is convinced that the impugned order correctly applied the position of law to the facts of the present case to reject the application for amendment filed on behalf of the petitioner/original plaintiff.

15. In view of the above, it is found that the writ petition is without any merit and accordingly, it is dismissed. Pending applications, if any, stand disposed of.

JUDGE

MP Deshpande