

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

WRIT PETITION NO. 6711 OF 2019

Chandrakant s/o Jitendra Thakkar

Vs.

Mohan Maniram Pawar and anr.

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

Court's or Judge's Orders.

Mr. R.K. Thakkar, Advocate for petitioner.
Mr. Anil A. Dhawas, Advocate for respondents.

CORAM : MANISH PITALE J.

DATE : 11.04.2022.

By this writ petition, the petitioner has challenged order dated 20.09.2019 passed by the Court of District Judge-5, Akola, (hereinafter referred to as the 'appellate Court'), whereby application at Exhibit 18 has been allowed.

2. By the said application, the respondent No.1 i.e. the original defendant No.2 sought amendment of a reply filed before the trial Court, which was treated as written statement. According to the petitioner, the appellate Court committed a grave error in allowing such an application at the appellate stage, despite the fact that the respondent No.1 himself had requested the trial Court to treat the aforesaid reply as written

statement and he had even entered the witness box and he was cross-examined on behalf of the petitioner i.e. the original plaintiff.

3. In the present case, the petitioner filed a suit for specific performance of contract against the respondents. It was submitted that the petitioner had entered into an agreement prior in point of time with respondent No.2 i.e. the original defendant No.1, in respect of the suit property and that thereafter, the respondent No.2 had illegally executed a sale-deed dated 09.02.2011 in favour of respondent No.1 i.e. the original defendant No.2. The respondent No.1 filed only a reply to the application for temporary injunction filed on behalf of the petitioner and thereafter, a pursis was placed on record before the trial Court requesting the said reply to be treated as his written statement. It was on the basis of such pleadings that evidence was led on behalf of the rival parties. The respondent No.1 entered into witness box and he was cross-examined on behalf of the petitioner.

4. After taking into consideration the pleadings as well as the evidence and other material on record, by judgment and order dated 13.09.2015, the trial Court i.e. the Court of 2nd Joint Civil Judge Senior Division,

Akola, decreed the suit in favour of the petitioner. The Sale-deed dated 19.02.2011, executed by respondent No.2 in favour of respondent No.1 was cancelled and it was held as not binding on the petitioner. The petitioner was directed to pay the balance consideration and the respondent No.2 was directed to execute the sale-deed in favour of the petitioner. The respondent No.1 was restrained from transferring the suit property by any mode to any person and he was also restrained from creating third party rights in the suit property. Needless to say, the trial Court gave a consequential direction to the respondent No.1 to hand over possession of the suit property to the petitioner.

5. The aforesaid judgment and decree passed by the trial Court was made subject matter of appeal before the appellate Court by the respondent No.1. It is in the appeal that on 25.01.2019, the respondent No.1 filed an application for amendment of his reply, which was treated as written statement before the trial Court. It was marked as Exhibit 18. By the proposed amendment, the respondent No.1 sought to add certain pleadings from paragraph Nos.5A to 5E in the said reply, which was treated as written statement. The only reason stated in the application while seeking amendment was that the counsel engaged before the appellate Court

noticed that the reply to the application for temporary injunction before the trial Court was treated merely by way of pursis as written statement on behalf of the respondent No.1, which was prejudicial to the interest of respondent No.1 and that therefore, certain pleadings were sought to be added by way of amendment. The said application was opposed on behalf of the petitioner.

6. As noted above, by the impugned order, the appellate Court allowed the application merely by imposing costs of ₹ 1000/-.

7. Mr. Thakkar, learned counsel appearing for the petitioner submitted that the impugned order deserves to be set aside, for the reason that since the respondent No.1 not only entered into the witness box but he was cross-examined before the trial Court, he could not turn around at the stage of appeal before the appellate Court to claim that inadvertently the reply filed to the application for temporary injunction was treated as written statement and that since the counsel engaged before the appellate Court noted the deficiency, the amendment application was necessitated. It was submitted that nothing prevented the respondent No.1 to argue in support of the appeal on the basis of the material available on record in order to claim that the

decree of specific performance could not have been granted in favour of the petitioner.

8. It was contended that such amendment of pleadings at the whims and fancies of respondent No.1 and solely on the ground of advice given by counsel engaged at the appellate stage, ought not to be accepted.

9. Mr. Dhawas, learned counsel appearing for respondent No.1, on the other hand, submitted that the reply before the trial Court to the application for temporary injunction could not have been treated as written statement merely by placing a pursis on record before the trial Court. It was submitted that when the counsel engaged at the appellate stage noticed the prejudice caused to the respondent No.1, as the reply was treated as written statement by merely filing a pursis, the amendment application was necessitated, which was in the interest of justice. It was submitted that the appellate Court had correctly opined that multiplicity of litigation would be avoided, if the amendment was to be allowed. Reliance was placed on the judgment of the Hon'ble Supreme Court in the case of *Revajeetu Builders and Developers Vs. Narayanaswamy and Sons and Others, 2009 (10) SCC 84*.

10. Heard learned counsel for the rival parties and perused the material on record.

11. It is an admitted position that the respondent No.1 i.e. the original defendant No.2 had filed reply to the application for temporary injunction filed on behalf of the petitioner. It is also an admitted position that the very reply was treated as written statement on behalf of the respondent No.1 by moving a pursis before the trial Court. It is on the basis of the reply being treated as written statement and pleadings being treated as such on behalf of the respondent No.1 that the parties led evidence in support of their respective stands. The respondent No.1 entered the witness box and was cross-examined on the basis of such pleadings. The trial Court decreed the suit, as noted above.

12. The appellate Court considered the application for stay moved on behalf of the respondent No.1 and granted stay to the decree of the trial Court except Clauses 3 and 6. Clause 3 pertains to the direction to the petitioner to pay balance consideration amount or deposit the same in the Court and Clause 6 pertained to restraining respondent No.1 from transferring the suit property or creating third party

rights therein and also restrained the respondent No.1 from carrying out any construction in the suit property.

13. It is an admitted position that the petitioner indeed deposited the balance amount of consideration i.e. ₹ 10,99,000/- before the trial Court. It is alleged on behalf of the petitioner that the respondent No.1 violated the aforesaid direction contained in Clause 6 of the decree passed by the trial Court and that construction has been undertaken despite such order of the trial Court. This is disputed on behalf of the respondent No.1.

14. Insofar as violation of Clause 6 of the decree is concerned, the petitioner would be at liberty to raise the aforesaid issue before the appellate Court with necessary material and the appellate Court shall certainly look into the said aspect of the matter after hearing the rival parties.

15. Insofar as the question of amendment as claimed under application at Exhibit 18 is concerned, a perusal of the impugned order would show that according to the appellate Court the amendment deserves to be allowed because the Court is not supposed to take a hyper technical approach in such

matters and that a pragmatic approach is advised. It is further held that the Court must ensure minimization of litigation and further that the merits of the amendment could not be looked at by the Court while considering such an application.

16. There can be no doubt about the fact that hyper technical and pedantic approach on the part of the Court is to be eschewed and an approach promoting substantial justice is to be adopted. But, the question is, whether in the facts and circumstances of the present case, it could be said that dis-allowing the proposed amendment would amount to a hyper technical approach in the matter? It is an admitted position that the reply filed to the application for temporary injunction was treated as written statement on behalf of respondent No.1 and it was on the basis of such pleadings that the parties led evidence. The respondent No.1 also deposed on the basis of such pleadings and he was cross-examined on behalf of the petitioner.

17. The only reason stated in the application for amendment is that when the counsel at the appellate stage realized that treating reply to the application for temporary injunction as written statement had led to deficiency in the pleadings, that the application for

amendment was necessitated. This Court is of the opinion that wisdom in hindsight cannot be a sole ground for seeking amendment of basic pleadings in a situation where the matter has travelled upto the appellate Court, upon the trial Court having rendered findings in pursuance of a full-fledged trial. Merely because there is a change of counsel or that the counsel at the appellate stage has a different opinion in the matter, it cannot be a ground for entertaining such an application for amendment of basic pleadings. The appellate Court certainly erred in holding that rejecting the application for amendment would amount to a hyper technical approach.

18. Equally, the appellate Court was not justified in holding that rejecting the application for amendment would lead to multiplicity of litigation. In fact, it is to the contrary. Allowing such amendments at appellate stage would lead to opening the door for such litigants to then claim the right to lead evidence in the light of the amendment of pleadings and thereby not only create a situation for delaying the proceedings, but in a given situation, it may lead to proceedings being sent back to the original Court for filling in lacunae in the pleadings. This cannot be permitted in the facts and circumstances of the present case. As regards the merits of the

amendment not being appreciated at the stage of considering the application for amendment, there can be no quarrel with the proposition. But, when it is found that the basic approach of the appellate Court was erroneous, the aspect of the merits of the amendment being appreciated pales into insignificance.

19. Insofar as reliance placed on the judgment of the Hon'ble Supreme Court in the case of *Revajeetu* (supra) is concerned, although the Supreme Court has indeed discussed the situation where amendments ought to be allowed and that the Courts are generally liberal in permitting amendments of written statement as compared to amendments of the plaint, there are certain factors that are enumerated while dealing with applications for amendment. A perusal of the factors so delineated in the aforesaid judgment would show that in the facts and circumstances of the present case, the amendment could not have been granted, even upon imposition of costs.

20. In view of the above, it is found that the impugned order is unsustainable. Accordingly, the writ petition is allowed. The impugned order passed by the appellate Court is quashed and set aside and the application at Exhibit 18 is dismissed.

21. Considering the fact that the agreement in the present case pertains to the year 2010 and that the trial Court had decreed the suit as far back as in the year 2015, the appellate Court is directed to dispose of the appeal expeditiously and preferably within a period of six months from today.

JUDGE

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GABHANE

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2022.04.12
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