

Ajay

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 8073 OF 2022

~~Vatsala Tukaram Kale~~

Deceased through legal heirs

Dilip Tukaram Kale and Ors.

.. Petitioners

Versus

Mahesh Vijayram Unecha and Ors.

.. Respondents

-
- Mr. Anil Anturkar, Senior Advocate i/by Mr. Ranjit Shinde, Advocate for Petitioners.
 - Mr. Hemant P. Ghadigaonkar, Advocate for Respondents.
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CORAM : MILIND N. JADHAV, J.

DATE : JANUARY 30, 2023.

P.C.:

1. Heard Mr. Anturkar, learned Senior Advocate for Petitioners and Mr. Ghadigaonkar, learned Advocate for Respondents.

2. Petitioners are Plaintiffs before the learned Trial Court. Perused the impugned order dated 04.04.2022. Petitioners filed Special Civil Suit No.347 of 2005 for challenging two sale deeds dated 27.05.2004 and 30.12.2006. The parties led their respective evidence before the learned Trial Court and the matter was kept for final arguments.

3. On 24.11.2021 Petitioners filed Application below Exhibit-211 seeking amendment under Order VI Rule 17 of the Code of Civil Procedure, 1908 (for short “CPC”) to the effect that the Petitioners had

recently received some relevant documents under the RTI, *inter alia*, pertaining to the layout of the building plans of the suit property contained in the two sale deeds of 2004 and 2006 and had thereafter sought an opinion from the expert on the same and thus wanted to place / bring on record these relevant documents and the expert's opinion / plan by way of amendment to aid and assist the Court in better adjudication of the Suit proceedings to ascertain the utilisation of the area in the suit property.

4. It was the Petitioners' contention that the relevant documents obtained under RTI as well as the expert opinion opining that the Suit area was already utilized would assist the learned Trial Court while passing the final judgment. Hence, the Application for amendment was made.

5. It is seen that nothing precluded the Petitioners to place the above material before the Trial Court during the trial. It is seen that the Application below Exhibit-211 was filed at a much belated stage after the entire evidence was over and when the suit was fixed for final hearing. The Suit was filed in 2005 and the amendment Application has been made as belatedly as on 24.11.2021. Undoubtedly the Petitioners could have applied earlier and procured the documents under RTI. Allowing such an amendment after the closure of evidence of parties would amount to allowing the party to

improve its own case, that too on the basis of material which was never placed before the Trial Court during the evidence as also in the pleadings. It would also involve fresh witness action. Such a course would not be permissible in the facts of the present case as also in law.

6. The learned Trial Court after examining the amendment Application and hearing the parties returned the findings on the aforementioned aspect. Paragraph Nos.11, 12, 15 and 18 of the impugned order are quoted below in order to appreciate the reasons given by the learned Trial Court and I do not find any reason to interfere with the same :-

“11. Taking into consideration the aforementioned legal aspect I am of the view that, the proposed amendment cannot be considered for the reason that, the Plaintiffs did not showed the due diligence in bringing on record the proposed facts at the initial stage. They have proceeded with the suit till the end of hearing without making such amendment since 2005. The contents of the plaint discloses that, most particularly the plaintiffs have come before this Court that, they have agreed to entrust the development rights of the suit property to defendant no. 4 by way of development agreements dated 25th to 26th May 1995. They have permitted to defendant no. 4 sale the flats to purchasers. They have not authorized the defendant no. 4 to sub-delegate the powers under power of attorney. However, the defendant no. 4 executed development agreement dated 02/06/2003 in favour of defendant no. 3 and entrusted only the development rights of the plot no. 6 out of the said land in favour of defendant no. 3. In pursuance of that development agreement, the defendant nos. 5 and 6 have executed the power of attorney to defendant no. 3 and authorized him to sell the said plot which is illegal. Thereafter, the defendant no. 3 has sold out plot no. 6 to defendant nos. 1 and 2 on 27/05/2004 which is in dispute. In short, it appears that the plaintiffs have given development rights to defendant no. 4. He sub-delegate the power of development rights to defendant no. 3. Thereafter defendant nos. 5 and 6 have executed power of attorney in his favour to sell out the plot no.6 which is under question.

12. *It seems from the aforesaid activities that since long back, the plaintiffs and defendants have entered into an agreement for development of the suit land. Thereafter, the defendants have proceeded further and defendant no. 3 sold out the plot no. 6 to defendant nos. 1 and 2. Nowhere in these activities, the plaintiffs have raised question in respect of area of land of plot no. 6, they are simply asking for cancellation of sale deed dated 27/05/2004 which is executed in favour of defendant nos. 1 and 2 and asking for declaration that the sale deed is not binding upon them. If the plaintiffs are giving their land for development purpose, then one can presume that such land may have been given for development purpose after measurement. Since the presentation of this suit, the plaintiffs have not raised any objection in regards with the area of the suit land. Of course, they have asked for the cancellation of sale dated 27/05/2004, it can be considered on merit. Therefore, I am of the view that the plaintiffs have not shown due diligence in bringing the proposed facts on record at right time during the course of hearing of the case. Being the entire evidence on part of the plaintiffs and defendants is completed then the possibility of wash of admissions if any, which come on record, cannot be ruled out.*

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15. *No doubt, the plaintiffs have raised claim against the sale deed dated 27/05/2004 executed in favour of the defendant nos. 1 and 2 for canceling it in 'toto'. If the circumstances are such, it can be considered on merit, but I am of the view that, the proposed amendment will not be just and proper on the count that, it is made after the end of trial. It prima facie seems that the plaintiffs are creating a new story by way of proposed amendment and that too without making due diligence over a period of last 20 years, which cannot be considered and allowed.*

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18. *With these discussions, I am of the view that the present application is devoid of merit. So I answered above points accordingly and proceed to pass the following order.*

ORDER

1] *The present application **Exh. 211** stands rejected.*

2] *No order as to costs."*

7. It is pertinent to note that since inception of the suit,

Petitioners never raised the objection in regards to the area of the suit land. The learned Trial Court has held that the proposed amendment would be contrary to the evidence recorded and would lead to the possibility of being contrary to the admissions recorded in evidence. In view of the above observations and findings, I fully concur with the reasons given by the learned Trial Court in rejecting the amendment Application and do not find any reason to interfere with the same. Order dated 04.04.2022 is sustained.

8. With the above directions, Writ Petition is dismissed.

[MILIND N. JADHAV, J.]

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