

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

WRIT PETITION NO.10197 OF 2019

Shriman Kisanlalji Sarda Pratishthan
and othersPetitioners

Versus

Ashabai Nivrutti Pawar
and others Respondents

Mr. Drupad Patil, Advocate a/w. H.S. Khokhawala i/b. Nankani Associates, for the Petitioners.

Mr. Sachin Gite, Advocate for Respondent Nos.2 & 3.

Smt. V.S. Nimbalkar, AGP for the Respondent No.4-State.

CORAM : SARANG V. KOTWAL, J.

DATE : 17th MARCH, 2023

P.C. :

1. Heard Shri Drupad Patil, learned counsel for the Petitioners, Shri Sachin Gite, learned counsel for the Respondent Nos.2 & 3 and Smt. V.S. Nimbalkar, learned AGP for the Respondent No.4-State. The Respondent No.1, though duly served, is not appearing.

2. In the past, both the sides were put to notice that the matter will be decided finally at the admission stage. It was so mentioned in the order dated 10.8.2022. Therefore, I have

heard the parties to decide this Petition finally.

3. The Petitioners have challenged the order dated 22.4.2019 passed by the learned 8th Jt. Civil Judge, Senior Division, Nashik below Exhibit-112 in Regular Civil Suit No.627/2015.

4. There is a brief history to this petition. The Petitioners are the original Plaintiffs. They had filed Regular Civil Suit No.56/1999 before the Civil Judge, Junior Division at Kalwan, District-Nashik for perpetual injunction against the Defendants. The Defendants in that suit are the Respondent Nos.1, 2 & 3 herein. The injunction was sought in respect of Plot Nos.32, 14, 31, 29, 28, 27 and 21 to 26 situated at Kalwan, District-Nashik. The other prayer in the plaint was for declaration that the lay-out plan which was subsequently sanctioned be declared as illegal.

5. The case of the Petitioners was that the Defendants and their predecessor-in-title had sold those plots to the Petitioners in the year 1990. The Petitioners were told that the main plot was sub-divided into different sub-plots as per the lay-out. The first lay-out plan was sanctioned on 21.12.1988.

The sale deed was executed in respect of the suit property i.e. the aforementioned sub-plots on 5.9.1990. After this, according to the Petitioners, the Respondents cancelled the first lay-out and a new lay-out plan was sanctioned. According to the Petitioners, the concerned plots were already in possession of the Petitioners. According to the Petitioners, the subsequent lay-out plan was illegally sanctioned. Based on these pleadings, the suit was filed.

6. In the first round, the suit was dismissed against the Petitioners. They challenged the order of dismissal of the suit by filing Regular Civil Appeal No.129/2010 before the District Judge-6, Nashik. The appeal was allowed and the judgment and decree passed in Regular Civil Suit No.56/1999 dated 7.6.2010 passed by the Jt. Civil Judge, Junior Division, Kalwan was set aside. The suit was remanded back to the trial Court with directions to dispose of the suit in the light of the observations made by the Appellate Court.

7. Pursuant to that order, the suit was remanded back and it was re-numbered as Regular Civil Suit No.627/2015. In the first round, the evidence was led by the parties. There were

certain answers given on behalf of the defendants. Based on those answers, the Petitioners herein made application for amendment to the plaint claiming certain reliefs. The said application was made on 13.1.2017 vide Exhibit-112 in the said Suit. The proposed amendment claimed the relief that the plot Nos.21 to 33, mentioned in the new lay-out plan should be directed to be given to the Petitioners by the Defendants.

8. This particular application was rejected vide order dated 22.4.2019 passed by the 8th Jt. Civil Judge, Senior Division, Nashik in the said suit. The said order is under challenge before this Court.

9. Learned counsel for the Petitioners submitted that the proposed amendment is based on the answers given by the Defendants in their cross-examination. Therefore, the Defendants are not taken by surprise. The fresh prayers are made based mainly on the answers given by the Defendants. He submitted that as per the observations in the Appellate Court's order, certain additional issues were to be framed. The Rozanama also mentions that the suit is kept for framing of the additional issues. He, therefore, submitted that the Petitioners

were well within their rights in preferring an application for amendment to their plaint under O-6 R-17 of C.P.C..

10. Learned counsel relied on the observations of the Hon'ble Supreme Court in the case of **Sampath Kumar Vs. Ayyakannu and another**¹. He submitted that no prejudice would be caused to the Defendants if the amendment is allowed. In fact, the amendment was necessary to avoid multiplicity of the proceedings. He further submitted that as of today, the State of Maharashtra is added as the Defendant No.4. Learned AGP is representing the Defendant No.4, who is the Respondent No.4 in the present Petition.

11. Learned counsel for the Defendants No.2 & 3 opposed these submissions. According to him, this amendment is proposed much belatedly. There is nothing to show that the proposed amended prayer could not have been made by the Petitioners at the earliest by exercising due diligence. The lay-out was cancelled in the year 1993 and the suit was filed in the year 1999. The application for proposed amendment is made in the year 2017. Thus, this delay shows that this amendment was neither necessary nor permissible. According to him, the

¹ (2002) 7 SCC 559

Petitioners could have made that prayer in the suit filed in the year 1999 itself.

12. I have considered these submissions. It is necessary to refer to the observations made by the Appellate Court in the order dated 11.3.2015 passed in Civil Appeal No.129/2010 before the District Judge-6 at Nashik. The learned Appellate Judge made reference to the observations made by the trial Court in the first round while dismissing the suit that the Government Officer was a necessary party in the suit and since the Government was not made a party, the decree could not be passed because of non-joinder of the necessary parties. The trial Court had also observed that the Plaintiffs-Petitioners had got knowledge about the change in the sanctioned lay-out plan in the year 1995 itself and, therefore, the suit was not within limitation. The Appellate Court observed that there were no issues framed to that effect regarding the point of limitation and regarding non-joinder of necessary parties and on this basis the appeal was allowed and the suit was remanded back. Thus, the effect of the Appellate Court's order is that it is necessary to frame the additional issues in the said suit. The suit is pending

at that stage.

13. It is also necessary to refer to the answers given on behalf of the Defendants in the cross-examination. The Court had asked specific questions to the Defendant No.2 during cross-examinations. The two questions and their answers are as follows :

“Q.No.1 How many plots out of the new lay-out plan are still available ?

Ans. Around 20 plots are still available.

Q.No.2 Whether you are willing to handover same area which you have sold in respect of thirteen plots to the Plaintiffs ?

Ans. We are willing but our cost for revenue should be given to us.”

14. The learned counsel for the Petitioners relied on this particular answers and submitted that the Defendants have agreed to hand over the same area to the Petitioners. This, according to learned counsel, was relevant. In my opinion also these answers are very important and, therefore, these issues can be raised before the trial Court.

15. The observations made by the Hon’ble Supreme Court in the case of **Sampath Kumar** (supra) in paragraphs-6, 7 & 9, as relied by learned counsel for the Petitioners, are

important. They are as under :

- “6. It is true that the plaintiff on the averments made in the application for amendment proposes to introduce a cause of action which has arisen to the plaintiff during the pendency of the suit. According to the defendant the averments made in the application for amendment are factually incorrect and the defendant was not in possession of the property since before the institution of the suit itself.
7. In our opinion, the basic structure of the suit is not altered by the proposed amendment. What is sought to be changed is the nature of relief sought for by the plaintiff. In the opinion of the Trial Court it was one to the plaintiff to file a fresh suit and that is one of the reasons which has prevailed with the Trial Court and with the High Court in refusing the prayer for amendment and also in dismissing the plaintiffs revision. We fail to understand, if it is permissible for the plaintiff to file an independent suit, why the same relief which could be prayed for in a new suit cannot be permitted to be incorporated in the pending suit. In the facts and circumstances of the present case, allowing the amendment would curtail multiplicity of legal proceedings.
8. xxxxx
9. Order 6 Rule 17 of the CPC confers jurisdiction on the Court to allow either party to alter or amend his pleadings at any stage of the proceedings and on such terms as may be just. Such amendments as are directed towards putting-form and seeking determination of the real questions in controversy between the parties shall be permitted to be made. The question of delay in moving an application for amendment should be decided not by calculating the period from the date of institution of the suit alone but by

reference to the stage to which the hearing in the suit has proceeded. Pre-trial amendments are allowed more liberally than those which are sought to be made after the commencement of the trial or after conclusion thereof. In former case generally it can be assumed that the defendant is not prejudiced because he will have full opportunity of meeting the case of the plaintiff as amended. In the latter cases the question of prejudice to the opposite party may arise and that shall have to be answered by reference to the facts and circumstances of each individual case. No strait-jacket formula can be laid down. The fact remains that a mere delay cannot be a ground for refusing a prayer for amendment.”

16. It is not the question of the Plaintiffs showing due diligence, as contended by learned counsel for the Respondents. It is about the answers given by the Defendants, which has given rise to filing of the application for amendment. The issue raised by learned counsel for the Respondent Nos.2 & 3 regarding the issue of limitation will have to be decided during trial after framing of the issues as is observed by the Appellate Court. Thus, no prejudice will be caused to the Defendants. Since the amendment application is based on the answers given by the Defendants themselves, it cannot be contended that there would be prejudice to the Defendants if the amendment is

allowed. Thus, based on this discussion, I am of the opinion that the amendment as prayed for by the Petitioners is required to be allowed. Consequently the impugned order will have to be set aside. Hence, the following order :

:: O R D E R ::

i. The Petition is allowed in terms of prayer clauses (a) & (b), which read as follows :

- “(a) Rule be issued, record and proceedings be called for after examining the legality, validity and propriety thereof, the Hon’ble Court be pleased to quash the impugned order dated 22nd April 2019 passed by the Ld. Joint Civil Judge Senior Division on Application filed below Exh.-112 in Regular Civil Suit No.627 of 2015, being Exhibit “F”, hereto;
- (b) This Hon’ble Court be pleased to allow Application filed below Exh.-112 in Regular Civil Suit No.627 of 2015, being Exhibit-“D” to this Petition.”

ii. The Petitioners are allowed to carry out the amendment in the plaint within a period of four weeks from today. It is needless to add that the Respondents would be at liberty to file their additional written statement.

iii. The Petition is disposed of accordingly.