

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

WRIT PETITION NO.322 OF 2022

Ram S/o Shridhar Ayachit .Vs. Shri Kiran S/o Wamanrao Ayachit and
others

Office Notes, Office Memoranda of
Coram, appearances, Court's Orders
or directions and Registrar's order

Court's or Judge's Order

Shri A.A. Choube, Advocate for the petitioner.

Shri C.S. Dharmadhikari, Advocate for the respondent Nos.1 and 8 to 12.

CORAM : ANIL S. KILOR, J.

DATED : 13/07/2023

1. Heard.

2. The order below Exh.72 dated 22.11.2021 passed by the 10th Jt. Civil Judge Senior Division, Nagpur, allowing the application preferred by the plaintiff under Order VI, Rule 17 of the Code of Civil Procedure (CPC) for amendment of the plaint, is under challenge in this writ petition.

3. The petitioner is the original defendant No.5 in a suit filed by the respondent No.1 for declaration, permanent perpetual mandatory injunction with the following prayers:

“i) to declare that the defendant No.1 to 7 have no right to make any construction over the suit property and for

removal of ota which is constructed last year on the northern side of Lorad Balaji Temple and Lord Laxmi.

ii) To pass a decree for permanent perpetual mandatory injunction in favour of the plaintiff and against the defendants No.1 to 7 and their relatives and employees members or any other person acting on their behalf restraining them from creating obstacles in open land of the suit property which is common for all i.e. the plaintiff and defendants.

iii) The full costs of the suit be saddled against the defendant No.1 to 7 jointly and severally.

iv) To grant any other relief which is deemed fit and proper under the above circumstances in favour of the plaintiffs and against defendants No.1 to 7.”

4. The defendant Nos.1 to 7 filed a written statement with pleadings that the compromise decree passed before the High Court in First Appeal No.127 of 1963 dated 19.04.1973 has never been implemented. Therefore, the names of the respective share holder have not been mutated in all the revenue records.

5. In light of the above referred stand taken by the defendant Nos.1 to 7, the application Exh.72 was filed by the plaintiff under Order VI, Rule 17 of the CPC for amendment of the plaint. The learned trial Court vide impugned order dated 22.11.2021 allowed the said application, the same is the subject matter of the present writ petition.

6. Shri choubhe, learned counsel for the petitioner argues that the impugned order is erroneous for the reason that, the learned trial Court has ignored the fact that, the decree was passed in the year 1962 and thereafter, it was replaced by the compromise decree passed by this Court in First Appeal No.127 of 1963 vide judgment dated 19.04.1973. The same is tried to execute by way of amendment, belatedly by beyond limitation.

7. The learned counsel for the petitioner further submits that, for execution of any decree, the time period is of 12 years and therefore, seeking any execution of such decree, which is passed in the year 1962, admittedly, is time barred. The learned counsel for the petitioner to buttress his submission has placed reliance upon the judgment of the Co-ordinate Bench of this Court in the case of *Anil s/o Ramsing Bilawar and others vs. Anita w/o Gopal Kadam and another*¹.

8. On the other hand, Shri Dharamadhikari, learned counsel for the respondent Nos.1, 8 to 12 submits that, no error has been committed by the trial Court while allowing the application for amendment. The learned counsel for the respondent Nos.1, 8 to 12, has drawn attention of this Court to the proposed amendment and the prayers sought to be added in the plaint. It is submitted that

¹ 2022(2) Mh.L.J. 345

as far as limitation is concerned, it is a mixed question of facts and law that can be decided only after the evidence is led.

9. It is further submitted that, if any prayer which the plaintiff has sought to add to the suit is beyond the jurisdiction of the trial Court or which cannot be granted, the trial Court can refuse to grant such relief. However, at this stage, i.e. at the stage when the Court is considering the application for amendment, the Court cannot go into the merits of the amendment. He, therefore, submits that the present petition is merit less and same may be dismissed.

10. In light of the rival contentions, I have perused the record and the impugned judgment and order.

11. Admittedly, the application for amendment was moved by the plaintiff before the commencement of the trial. The suit is fixed for hearing on the application of Exh.5 i.e. for grant of temporary injunction which makes it clear that the trial Court has not yet commenced.

12. The Hon'ble Supreme Court of India in the case of *Revajeetu Builders and Developers vs. Narayan Swsami and sons*², has held thus :

2 2009 10 SCC 84

“63. On critically analyzing both the English and Indian cases, some basic principles emerge which ought to be taken into consideration while allowing or rejecting the application for amendment.

(1) Whether the amendment sought is im-perative for proper and effective adjudication of the case?

(2) Whether the application for amendment is bona fide or mala fide?

(3) The amendment should not cause such prejudice to the other side which cannot be compensated adequately in terms of money;

(4) Refusing amendment would in fact lead to injustice or lead to multiple litigation;

(5) Whether the proposed amendment constitutionally or fundamentally changes the nature and character of the case? and

(6) As a general rule, the court should decline amendments if a fresh suit on the amended claims would be barred by limitation on the date of application. (emphasis supplied)”

13. It is also settled law that, the amendment of plaint and amendment of written statement are not necessarily governed by the exactly same principle equally as the prayer for amendment of plaint and prayer for amendment of written statement do not stand on the same footing and in case of amendment to the plaint, the Court has to adopt a liberal approach.

14. In light of above referred observations, I revert back to the finding recorded by the trial Court while allowing the application. The learned trial Court has recorded the reasons in Paragraph 6 and 7 of the order which reads thus :

“6. The learned Counsel for the defendants also argued that the plaintiff wants challenge the some of the property in which before the Hon’ble High Court already earlier passed the decree. Hence, the application is not tenable. For that, I have taken the guidelines discussed in the case of **Bharat Petroleum Corporation Ltd. ..vs... Precious Finance investment Pvt. Ltd., 2007(1) Mh.L.J. 331**. In this case the Hon’ble Bombay High Court discussed guidelines of the case of the Hon’ble Supreme Court in the case of **Baldev Singh and Ors ... vs... Manohar Singh and Anr., 2006(5) Mh.L.J. (S.C.) 634**. In this case the Hon’ble Supreme Court held that, “while considering whether an application for amendment should or should not be allowed, the Court should not go into the correctness or falsity or the case in the amendment. Likewise, it should not record a finding on the merits of the amendment sought to be incorporated by way of amendments are not to be adjudged at the stage of allowing the prayer for amendment”. In this case, the Hon’ble Supreme Court also held that, “an application for amendment of the pleading should not be disallowed, merely because it is opposed on the ground that the same is barred by limitation, the plea of limitation being mixed question of law and facts and can be made subject to the matter of the issue after allowing amendment prayer for.

7. Therefore, the question raised by the defendants regarding the tenability of the application and some legal question, it can be decided by framing relevant issue. Prima facie it appears that to decide the real question of controversy on merits as well as to stop multiplicity of the suit for the question which can be decided in the present suit. The application needs to be allowed. The plaintiff had an opportunity to incorporate all the facts which the plaintiff wants to incorporate by way of present application. Therefore, in my opinion, the application needs to be allowed subject to costs as per final order.”

15. From the above referred observations made by the learned trial Court, it is evident that, the learned trial Court after considering the case of the petitioner as regards

the limitation and also the proposed prayer clause allowed the application for permitting the plaintiff to amend the plaint.

16. It is a settled law that, the point of limitation is a mixed question of facts. In case, the Court after recording the evidence and after hearing the parties arrives at a conclusion that, some prayers needs to be rejected, it can rejected such prayer recording reasons.

17. However, at the time of considering the prayer for amendment, the Court has to take into consideration the principles laid down by Hon'ble Supreme Court of India in the case of *Revajeetu Builders* (Supra).

18. In the present matter, considering the above referred law as regards amendment, the learned trial Court has allowed the application and as I do not find any legal infirmity committed by the trial Court, the writ petition is **dismissed**.

JUDGE