

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

Writ Petition (WP) No. 4111 of 2022

Liyakat Ali Mahemud Ali and others

Versus

Erfan Ali Wanjir Alikhan

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

Court's or Judge's Order

Shri P.S.Khubalkar, Advocate for the petitioners.

Shri A.Y.Humne, Advocate for the respondent.

CORAM : ANIL S. KILOR, J.

DATED : 13th MARCH, 2023.

Heard.

2. In this writ petition, order below exhibit 72 dated 21st January, 2022, passed by I/c Fast Track Court, Civil Judge Senior Division, Bhandara in Special Civil Suit No. 26 of 2016 by allowing the application for amendment, is under challenge.

3. The respondent filed a suit for specific performance of the contract wherein the petitioners are the original defendants. In the said suit, the petitioner filed the written statement and opposed the suit. After the issues were framed and at the stage of evidence, the plaintiff examined himself as PW-1 by submitting his evidence on affidavit. The plaintiff was cross-examined

and thereafter certain witnesses were also examined and cross-examined.

4. Thereafter, the application under Order I Rule 10 and Order VI Rule 17 of Code of Civil Procedure (in short referred as “CPC”) for addition of parties and for amendment was filed at Exhibit 72, which was opposed by the petitioner.

5. The learned trial Court after hearing both the parties, allowed the amendment application on the ground that under Section 22 of Specific Relief Act, the relief for possession and partition can be claimed at any stage and the amendment is necessary, in view of the subsequent transaction relating to the suit property. The said order dated 21st January, 2022, is under challenge.

6. Shri Khubalkar, learned counsel for the petitioners submits that admittedly, the application for amendment was moved after the commencement of the trial and without considering the proviso to Rule 17 of Order VI of CPC, the learned trial Court allowed the application without recording any findings as regards due diligence. He, therefore, submits that impugned order is erroneous and liable to be quashed and set aside. For this purpose, he has placed reliance on the judgment of the Hon’ble Supreme Court of India in the

case of Pandit Malhari Mahale Vs. Monika Pandir Mahale and others¹.

7. On the other hand, Shri A.Y.Humne, learned counsel for the respondent submits that the proposed amendment is related to a relief of possession and partition which is permissible under Section 22 of Specific Relief Act. It is submitted that in view of subsequent transfer of suit property and Section 22 of Specific Relief Act, the trial Court has allowed the application.

8. It is submitted that as Specific Relief Act is a Special Act and therefore proviso to Rule 17 of Order VI of CPC will not come in the way of the plaintiff to claim relief of partition and possession even after the commencement of the trial Court. For this purpose, he has placed reliance on a single bench of Gujarat High Court in the case of Kanaiyalal Chandulal Ganeshwala Vs. Zubedabibi²

9. In the light of the rival submissions of both the parties, I have perused the record and impugned order.

10. In the case of Kanaiyalal Chandulal Ganeshwala Vs. Zubedabibi, the Gujarat High Court has held thus :

1 (2020) 11 SCC 549

2 2009 AIR (Gujarat) 87

8. Section 22 came to be considered by the Hon'ble Supreme Court in the case of Babu Lal Vs. M/s Hazari Lal Kishori Lal and others (supra). The relevant important observations of the Hon'ble Supreme Court in the aforesaid decisions are as under:

11. Section 22 enacts a rule of pleading. The Legislature thought it will be useful to introduce a rule that in order to avoid multiplicity of proceedings the plaintiff may claim a decree for possession in a suit for specific performance, even though, strictly speaking, the right to possession accrues only when suit for specific performance is decreed. The Legislature has now made a statutory provision enabling the plaintiff to ask for possession in the suit for specific performance and empowering the Court to provide in the decree itself that upon payment by the plaintiff of the consideration money within the given time, the defendant should execute the deed and put the plaintiff in possession.

12. The Section enacts that a person in a suit for specific performance of a contract for the transfer of immovable property, may ask for appropriate reliefs, namely, he may ask for possession, or for partition or for separate possession including the relief for specific performance. These reliefs, he can claim, notwithstanding anything contained in the Civil Procedure Code, 1908, to the contrary. Sub-section (2) of this Section, however, specifically provides that these reliefs cannot be granted by the Court, unless they have been expressly claiming by the plaintiff in the suit Sub-section (2) of the Section recognised in clear terms the well-established rule of procedure that the Court should not entertain a claim of the plaintiff unless it has been specifically pleaded by the plaintiff and proved by him to be legally

entitled to. The proviso to this sub-section (2), however, says, that where the plaintiff has not specifically claimed these reliefs in his plaint, in the initial stages of the suit, the Court shall permit the plaintiff at any stage of the proceedings, to include one or more of the reliefs, mentioned above by means of an amendment of the plaint on such terms as it may deem proper. The only purpose of this newly enacted provision is to avoid multiplicity of the suits and that the plaintiff may get appropriate relief without being hampered by procedural complications.

13. The expression in sub-section (1) of Section 22 'in an appropriate case' is very significant. The plaintiff may ask for the relief of possession or partition or separate possession 'in an appropriate case'. As pointed out earlier, in view of Order 2, Rule 2 of Civil Procedure Code some doubt was entertained whether the relief for specific performance and partition and possession could be combined in one suit; one view being that the cause of action for claiming relief for partition and possession could accrue to the plaintiff only after he acquired title to the property on the execution of a sale deed in his favour and since the relief for specific performance of the contract for sale was not based on the same cause of action as the reliefs for partition and possession, the two reliefs, could not be combined in one suit. Similarly, a case may be visualised where after the contract between the plaintiff and the defendant the property passed in possession of a third person. A mere relief for specific performance of the contract of sale may not entitle the plaintiff to obtain possession as against the party in actual possession of the property. As against him, a

decree for possession must be specifically claimed for such a person is not bound by the contract sought to be enforced. In a case where exclusive possession is with contracting party, a decree for specific performance of the contract of sale simplicitor, without specifically providing for delivery of possession, may give complete relief to the decree-holder. In order to satisfy the decree against him completely he is bound not only to execute the sale-deed but also to put the property in possession of the decree-holder. This is in consonance with the provisions of section 55(1) of the Transfer of Property Act, which provides that the seller is bound to give, on being so required, the buyer or such person as he directs, such possession of the property as its nature admits.

20. It is thus clear that the Legislature has given ample power to the Court to allow amendment of the plaint at any stage, including the execution proceedings. In the instant case the High Court granted the relief of possession and the objection raised on behalf of the petitioner is that this was not possible at the execution stage and in any case the Court should have allowed first an amendment in the plaint and then an opportunity should have been afforded to the petitioner to file an objection.

21. If once we accept the legal position that neither a contract for sale nor a decree passed on that basis for specific performance of the contract gives any right or title to the decree-holder and the right and the title passes to him only on the execution of the deed of sale either by the judgment-debtor himself or by the Court itself in case he fails to execute the sale deed, it is idle to contend that a valuable right had accrued to the

petitioner merely because a decree has been passed for the specific performance of the contract. The limitation would start against the decree-holders only after they had obtained a sale in respect of the disputed property. It is, therefore, difficult to accept that a valuable right had accrued to the judgment-debtor by lapse of time. Section 22 has been enacted only for the purpose of avoiding multiplicity of proceedings which the law Courts always abhor.

9. Now in light of the aforesaid observation of the Hon'ble Supreme Court, if Sub-section (2) of Section 22 of the Act is considered, in a case where the petitioner-original plaintiff has not asked for possession, the Court shall, at any stage of the proceeding, allow the petitioner-original plaintiff to amend the plaint on such terms as may be claimed for possession and, therefore, once amendment is sought in the suit for specific performance of agreement to sell asking for possession, the Court has no other alternate but to allow the petitioner-original plaintiff to amend the plaint, on such terms as may be just for including a claim for possession and the Court has no other alternate but to permit the petitioner-original plaintiff to amend the plaint asking for possession. It cannot be disputed that Specific Relief Act is a special Act and Section 22 is enacted for specific purpose to avoid multiplicity of proceedings (as observed by the Hon'ble Supreme Court in the aforesaid decision), and, therefore, Section 22 of the Act would override the procedural law, more particularly, Order 6, Rule 17 of the Civil Procedure Code. Under the circumstances, the bar/restriction as provided under Order 6, Rule 17 of the Civil Procedure Code would not be attracted in a case where amendment in the plaint is sought in the suit for specific performance of agreement to sell claiming relief of possession.

10. In the light of above observations and considering the proposed amendment, I do not find any error committed by the learned trial Court in allowing the amendment application.

11. As far as the judgment cited by the learned counsel for the petitioner in the case of *Pandit Malhari Mahale Vs. Monika Pandit Mahale and others* (supra), there is no dispute about the well settled principle of law that after commencement of the trial unless the Court comes to the conclusion that inspite of its due diligence, the party could not have raised the matter before the commencement of the trial, the amendment cannot be allowed. However, in the present case, in view of specific provision under Section 22 of Specific Relief Act which is a Special Act, such amendment is permissible on any stage.

12. The judgment cited by the learned counsel for the petitioner in the case of *Pandir Malhari Mahale Vs. Monika Pandir Mahale and others* (supra) is therefore of no help to the petitioner.

12. Accordingly, the writ petition is dismissed.

[ANIL S. KILOR, J.]

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