Sumedh

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 6943 OF 2019

Ramesh Macchindra Waghmare …Petitioner
Versus
Shankar Namdev Gaikwad & Ors …Respondents

Mr Rajesh Datar, *for the Petitioner.*
Mr AW Shaikh, *i/b Mohammed Umar Kazi, for Respondent No. 1.*
Mr Rajat Dighe, *i/b AS Rao, for the Respondent-KDMC.*

CORAM Kamal Khata, J.
DATED: 2nd February 2024

PC:-

1. Rule. Rule made returnable forthwith. With consent of all Advocates the matter is disposed finally at the stage of admission.

2. By this Petition, under Article 227 of the Constitution of India, the Petitioner is seeking to quash and set aside the order dated 29th November 2018, passed by the 5th Joint Civil Judge Senior Division, Kalyan, on application at Exhibit "118" in the Special Civil Suit No. 381 of 2012 annexed at Pg 85 of the Petition.

3. The Suit filed in the year 2012 against the Respondent No. 1 is for specific performance of the agreement titled as "Bayana

Pavati," dated 15th March 2011. Additionally, the suit seeks a declaration that the notices dated 20th June 2012 and 25th June 2012, issued to the Petitioner by the Respondent No. 2, are illegal. The Petitioner is also seeking a permanent injunction to prevent the cancellation of the license issued by Respondent No. 2 for operating a hospital, along with other reliefs.

Brief Facts:

4. The Respondent No. 1 had let out to the Petitioner three shops and an adjoining one room kitchen flat, admeasuring about 1000 square feet at 1st floor, Mira Apartment, Mauje Teesgaon, Taluka Kalyan, District Thane (herein after referred to **"suit property"**), vide agreement dated 10th November 1997, on rental basis, on the terms and conditions stipulated therein for a period of three years upto 9th November 2000. The Petitioner started a Hospital being "Laxmi General Hospital" from the said premises.

5. Around 15th March 2011, the Respondent No.1 approached the Petitioner with a proposal for sale of the suit property for a consideration of ₹ 28,00,000/-. According to the Petitioner, certain amounts totalling to ₹ 3,00,000/- were paid to Respondent No. 1 from 1st March 2011 to 15th March 2011, towards the sale consideration, for which Respondent No. 1 issued a 'Bayana Pavati' on 15th March 2011. Then a sum of ₹ 7,00,000/- in cash around the same time, was paid. Accordingly, there was a balance amount of ₹ 18,00,000/- that was agreed to be paid at the time of agreement for sale.

6. Subsequently, a public notice was issued in the local newspapers, disclosing the Petitioner's and Respondent No. 1's intentions. According to the Petitioner, the balance amount of ₹18,00,000/- was paid to the Respondent No. 1, who, instead of fulfilling the contract, chose to close down the Petitioner's hospital. Show-cause notices dated 20th June 2012 and 25th September 2012 were issued by the Respondent No. 2, calling upon the Petitioner to explain why the license granted to the hospital should not be cancelled.

7. During the pendency of the suit, around April-May 2013, the Respondent No. 2 demolished the southern side portion of the suit premises, admeasuring about 450 square feet, for road widening purposes. The Petitioner incurred ₹ 2,22,500/- for repairs and construction. To record subsequent events, an application of amendment to the plaint was sought and that was granted by an order dated 6th March 2017.

8. Respondent No. 1 not only contested the suit but also raised a counter claim against the Petitioner, inter alia claiming possession of the said premises. According to the Respondent No.1, the suit premises was let out to the Petitioner for three years commencing from 10th November 1997 to 9th November 2000. Respondent No. 1 denies executing an agreement for sale or issuing a 'Bayana Pavati' to the Petitioner and alleges that the Petitioner obtained licenses from Respondent No. 2 giving false information.

9. In response to the counter-claim, the Petitioner contends that no agreement was executed by the Respondent No. 1, though monthly rent was paid as per the agreement. The Petitioner refuted the Respondent No. 1's contention that he agreed to vacate by March 2011 or sought time to vacate the suit premises.

10. In another turn of events, the Respondent No.3 entered the scene, claiming entitlement to a 50% share in the suit property and sought impleadment in the suit. Respondent No. 3 was allowed to be impleaded by an order dated 21st March 2016.

11. Upon filing the Affidavit in lieu of examination in chief and notes of evidence, it was noticed that the 'Bayana Pavati' that was relied upon by the Petitioner was insufficiently stamped. Respondent No.1 denied the execution of the document, contending that it was not enforceable. By an order dated 21st August 2017, the 5th Joint Civil Judge, Senior Division, Kalyan, impounded the 'Bayana Pavati' and sent it to the Collector of Stamps for determining the exact Stamp Duty and penalty.

12. By an order dated 20th November 2017, the Collector of Stamps adjudicated the document dated 15th March 2011 and directed the Petitioner to pay ₹ 1,69,500/- as stamp duty and penalty of ₹ 2,71,200/-, totalling to ₹ 4,40,700/-. A revised order dated 24th January 2018 the Collector of Stamps directed the Petitioner to pay ₹ 1,32,100/- towards stamp duty and ₹ 2,16,700/- towards penalty totalling to ₹ 3,48,800/-. The Petitioner filed an application under Order VI Rule 17 for amendment of the plaint to bring on record the subsequent developments on 30th July 2018.

13. The Petitioner contends that the payment of penalty was due to the deliberate and wilful avoidance of Respondent No. 1 to register the documents with the concerned sub-Registrar of assurances. It was also contended that the amendment would not change the nature of the suit and would be necessary for adjudicating the dispute between the parties.

14. On the other hand, the Respondent contended that the amendment was against the law, and the Petitioner was not entitled for such an amendment at that stage of the suit. A response to the application was filed on 22nd October 2018. It was fixed for hearing on 12th November 2018. The Petitioner, under the impression that the Court had allowed the amendment, carried out the amendment in the Plaint. On 29th November 2018, the application was posted for hearing and rejected, directing the Petitioner to discard the inadvertent amendment. The order observed the Petitioner's duty to execute the document on proper stamp duty, holding the Petitioner liable for payment of the deficit stamp duty and fines imposed by the concerned authority. The order also held that the amendment was unwarranted.

15. In this context, being aggrieved by the impugned order of 29th November 2018 this Petition is filed.

16. A reply has been filed by Respondent No. 3 but none appears. The Affidavit indicates that the Petitioner has paid ₹5,00,000/- during the tenancy period. It also indicates that the Petitioner is running a hospital since 1997 i.e., for the last 24 years. The Affidavit further confirms the case of the Petitioner and records that the Respondent No. 1 had agreed to give half share of the sale proceeds of the suit property to the Respondent No. 3, that has not been given to the Respondent No. 3 by the Respondent No.1. The Respondent No. 3 supports the Petitioner contention to allow the amendment to the Plaint.

17. Respondent No. 1's counsel vehemently argued the case and supported the impugned order though no reply was filed.

Analysis and Conclusion

18. I have perused the papers and proceedings and I have heard both counsels at length.

19. While deciding the issues involved in the present Writ, it would be pertinent to refer to Order 6 Rule 17 CPC which reads as under:

Order 6 Rule 17

> **"17.** ***Amendment of pleadings***.—The Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties:

> Provided that no application for amendment shall be allowed after the trial has commenced, unless the Court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of the trial."

20. From the above it can be construed that Order 6 Rule 17 CPC provides for amendment of the pleadings. The Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties. Proviso to Order 6 Rule 17 CPC further provides that no application for amendment shall be allowed after the trial has commenced, unless the Court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of the trial.

21. In other words, the proviso to Order 6 Rule 17 CPC prohibits entertainment of amendment application after commencement of the trial. Its objective is to prevent the introduction of new pleadings once parties proceed with the leading of evidence.

22. The Supreme Court in *Chander Kanta Bansal v. Rajinder Singh Anand*[1] has noted the object and purpose of amendment made in 2002. Paragraphs 13 and 15, read as follows:

> "*13.* The entire object of the said amendment is to stall filing of applications for amending a

1 (2008) 5 SCC 117

> pleading subsequent to the commencement of trial, to avoid surprises and the parties had sufficient knowledge of the other's case. It also helps in checking the delays in filing the applications. Once, the trial commences on the known pleas, it will be very difficult for any side to reconcile. In spite of the same, an exception is made in the newly inserted proviso where it is shown that in spite of due diligence, he could not raise a plea, **<u>it is for the court to consider the same. Therefore, it is not a complete bar nor shuts out entertaining of any later application. As stated earlier, the reason for adding proviso is to curtail delay and expedite hearing of cases.</u>**"
>
> **15.** As discussed above, **though first part of Rule 17 makes it clear that amendment of pleadings is permitted at any stage of the proceeding, the proviso imposes certain restrictions.** It makes it clear that <u>after the commencement of trial, no application for amendment shall be allowed.</u> **However, if it is established that in spite of "due diligence" the party could not have raised the matter before the commencement of trial depending on the circumstances, the court is free to order such application.**
>
> **[*<u>Emphasis applied</u>*]**

23. In the above context it would be relevant to understand what is 'commencement of trial'. In the case of *Vidyabai v. Padmalatha*[2], the Apex Court elucidated the phrase 'commencement of trial'.

2 (2009) 2 SCC 409 : (2009) 1 SCC (Civ) 563

The Court held that the filing of an affidavit in lieu of examination-in-chief of the witness constitutes 'commencement of proceeding'. Paragraph 11 of the judgment, reads as follows:

> "*11.* From the order passed by the learned trial Judge, it is evident that the respondents had not been able to fulfil the said precondition. The question, therefore, which arises for consideration is as to whether the trial had commenced or not. In our opinion, it did. The date on which **the issues are framed is the date of first hearing**. Provisions of the Code of Civil Procedure envisage taking of various steps at different stages of the proceeding. **Filing of an affidavit in lieu of examination-in-chief of the witness, in our opinion, would amount to "commencement of proceeding"."**
>
> ***[Emphasis applied]***

24. In the present case, upon reviewing the proceedings and the impugned order dated 29th November 2018, it is evident that the Plaintiff was in the process of filing of affidavit in lieu of examination in chief and notes of evidence. It was during this stage that the 'Bay-ana Pavati' was impounded and sent to the Collector of Stamps for adjudication of stamp duty payable on the document. Therefore at this juncture, the Court had not relied on the proof or admissibility of any document as contemplated by the proviso to Order 18 Rule 4(1) nor had it conducted the evidence (cross-examination and re-examination) of the Plaintiff's witness as contemplated by Order 18 Rule 14(2). Hence, the application was filed before parties could present evidence. It is evident that due to the impounding of the document, that the trial had not commenced. This event occurred prior to the commencement of proceedings. Therefore, the Defendant cannot be said to be prejudiced by the amendment since the Plaintiff has not presented evidence based on the pleadings.

25. Considering the object and purpose behind imposing limitations on permitting amendment of the pleadings, it cannot be held that amendment application filed by the Plaintiff could not be considered due to the proviso's restriction.

26. The nature of the suit evidently is for specific performance and related reliefs. Through the proposed amendment, the Plaintiff seeks to amend the Plaint to additionally seek the amounts expended by them on stamp duty. The Learned judge has concluded, without giving an opportunity to the Plaintiff to prove his case and even without a trial, that the Plaintiff was liable for payment of deficit stamp duty as well as the fine imposed. Such premature conclusions are not permitted.

27. In my view, it cannot be said that the amendment is filed to prolong the matter. It was clearly a claim that arose subsequently, i.e., at the time filing of the affidavit in lieu of examination in chief.

28. In view of the above, I am inclined to set aside Order dated 29th November 2018 passed by 5th Joint Civil Judge, Senior Division, Kalyan. and allow the said Application below Exhibit – 118 in Special Civil Suit No. 381 of 2012 in terms of prayer clause (a) of the Petition.

29. The Petition is made absolute and stands disposed of. No order as to costs.

(Kamal Khata, J)