



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

WRIT PETITION NO.1889/2023

Gopichand Chayankar Tembhurkar .Vs. Collector, Chandrapur and Ors.

Office Notes, Office Memoranda of Coram,
appearances, Court's orders of directions
and Registrar's orders

Court's or Judge's orders

Dr. R. S. Sirpurkar, Advocate for petitioner.
Mr. G. S. Umale, A.G.P for respondent Nos. 1 and 2.
Mr. M.I. Dhatriak, with Mr. S. A. Sahu, Advocates for respondent No.3.

CORAM : **ANIL L. PANSARE, J.**

DATE : **AUGUST 29, 2024**

Rule. Rule is made returnable forthwith. Heard finally with consent of learned counsel for the parties.

Heard Dr. R. S. Sirpurkar, learned counsel for petitioner, Mr. G. S. Umale, learned A.G.P for respondent Nos. 1 and 2 and Mr. M.I. Dhatriak, with Mr. S. A. Sahu, learned counsel for respondent No.3.

2. The Trial Court, vide order dated 18.01.2023, rejected the application filed by the petitioner-plaintiff seeking amendment mainly on three grounds. One, that the amendment is barred by limitation. Second, that it will change nature of the suit and third, the trial has begun and, therefore, in terms of Order VI Rule 17 of the Civil Procedure Code, 1908 (hereinafter referred to as the, "CPC") the petitioner ought to have satisfied that despite due diligence, he could not have pleaded the amended portion.

3. Counsel for the petitioner has convincingly argued that the Trial Court has committed apparent error while rejecting the application.

4. By way of amendment, the petitioner sought to add a prayer to declare that notice dated 30.10.2017 was illegal. The petitioner has filed suit simplicity for injunction seeking to injunct respondent Nos.2 and 3 (original defendant Nos. 2 and 3) from demolishing the suit structure. The issues have been framed. The petitioner, at the time of preparing affidavit of examination-in-chief, realized that the prayer of declaration ought to have been made. Accordingly, the application was filed on 27.09.2022.

5. In context with above, if the period of limitation is to be considered, it began on 30.10.2017. The limitation to seek declaration is three years, which will end on 30.10.2020. The Supreme Court in Suo Motu Writ Petition No.3/2020, on 10.01.2022, issued following directions.

“5. Taking into consideration the arguments advanced by the learned counsel and the impact of the surge of the virus on public health and adversities faced by litigants in the prevailing conditions, we deem it appropriate to dispose of MA No. 21 of 2022 with the following directions:

5.1. The order dated 23-3-2020 is restored and in continuation of the subsequent orders dated 8-3-2021, 27-4-2021 and 23-9-2021, it is directed that the period from 15-3-2020 till 28-2-2022 shall stand excluded for the purposes of limitation as may be prescribed under any general or special laws in respect of all judicial or quasi-judicial proceedings.

5.2. Consequently, the balance period of limitation remaining as on 3-10-2021, if any, shall become available with effect from 1-3-2022.

5.3. In cases where the limitation would have expired during the period between 15-3-2020 till 28-2-2022,

notwithstanding the actual balance period of limitation remaining, all persons shall have a limitation period of 90 days from 1-3-2022. In the event the actual balance period of limitation remaining, with effect from 1-3-2022 is greater than 90 days, that longer period shall apply.

5.4. It is further clarified that the period from 15-3-2020 till 28-2-2022 shall also stand excluded in computing the periods prescribed under Sections 23(4) and 29-A of the Arbitration and Conciliation Act, 1996, Section 12-A of the Commercial Courts Act, 2015 and provisos (b) and (c) of Section 138 of the Negotiable Instruments Act, 1881 and any other laws, which prescribe period(s) of limitation for instituting proceedings, outer limits (within which the court or tribunal can condone delay) and termination of proceedings.”

6. As could be seen in the case where limitation would expire during the period between 15.03.2020 till 28.02.2022, all persons shall have limitation period of 90 days from 01.03.2022 and if the actual balance period of limitation remaining, with effect from 01.03.2022, is greater than 90 days that longer period shall apply.

7. In the present case, the balance period of limitation that was available with the petitioner was 30.10.2020 (-) 15.03.2020 = 7 months 15 days. This period, if calculated from 01.03.2022, the outer limit of limitation would come to 16.10.2022. The application seeking amendment has been filed on 27.09.2022. In that sense, the prayer seeking declaration was well within limitation. Even the counsel for the respondent would admit such status. Thus, the Trial Court has committed apparent error when it rejected the application on the ground that the declaration sought is barred by limitation.

8. On the point, the prayer would change nature of suit, to my mind, the Trial Court failed to note from the pleadings that the suit proceeds on presumption that notice under question is illegal and, accordingly, injunction has been sought. The petitioner has pleaded that notice dated 30.10.2017 is illegal and accordingly injunction was sought. The petitioner has pleaded that the notice dated 30.10.2017 is illegal and accordingly injunction was sought.

9. Thus, it was well within knowledge of the respondents that the petitioner has filed plaint on the footing that notice being illegal the suit structure cannot be demolished and accordingly the suit simplicitor for injunction was filed. The plain reading of the plaint indicates that the prayer of declaration is inbuilt and what the plaintiff has done by way of amendment is to expressly make out his case and accordingly the declaration was sought. One cannot, therefore, say that this prayer is something that was not within knowledge of the Court or the defendant and thus will change the nature of the suit. The Trial Court thus committed error in holding that prayer would change the nature of the suit. In any case, the amendment is necessary because legality of the impugned notice will have to be tested first.

10. So far as the third ground is concerned, true it is that the proviso to Order VI Rule 17 of the CPC would require party who seeks amendment, to satisfy the Court that despite due diligence, amendment could not have been sought earlier. In the present case, due diligence will have to be understood in the light of the pleadings which are self explanatory. The plaintiff

has already pleaded that the notice under question is illegal. It is not the case that this plea has been taken for the first time by way of amendment. As stated earlier, the suit proceeds on the ground that the notice issued by the respondent No.2 is illegal. The only issue is that the requirement of express declaration to that effect was realized while preparing the affidavit of examination-in-chief. In the circumstances, the pleadings having been already incorporated, one cannot blame the plaintiff of not showing due diligence. The Trial Court has thus committed error on this count as well.

11. As such, counsel for the respondents has opposed the application on the count that the plaintiff has failed to show due diligence. He has relied upon the judgment in **Basavaraj .vs. Indira and Ors, (2024) 3 SCC 705**, wherein the Court has held that proviso to Order VI Rule 17 of the CPC 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, party could not have raised the matter before commencement of the trial. In the said case, the party seeking amendment took a plea of oversight, which the Supreme Court found to be not worthy of consideration. In the present case, the pleadings as regards notice being illegal were duly made, only declaration escaped. Thus, there was sufficient diligence. The Trial Court ought to have considered the due diligence in context with the aforesaid pleadings.

12. Put all together, the Trial Court committed apparent error, which is unsustainable. The petition is accordingly allowed. Impugned order dated 18.01.2023 passed by Joint

Civil Judge Senior Division, Warora, Chandrapur in Regular Civil Suit No. 110/2017 is set aside.

Application Exh.67 in Regular Civil Suit No. 110/2017 is allowed. The petitioner shall carry out amendment, within 15 days from the scheduled date. The respondents are at liberty to make consequential amendment, within 15 days thereafter. The Trial Court shall, thereafter, proceed with the in suit, in accordance with law.

Rule is made absolute in the above terms. No order as to costs.

(Anil L. Pansare, J.)

Kahale