



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

WRIT PETITION NO. 4500 OF 2019

1. Smt. Vanita wd/o Waman Pande,
Age 35 years, Occu.: Agriculture Labourer
R/o Shiva (Savanga), Tahsil and District
Nagpur.
2. Shri Subhash s/o Ganpatrao Mondhe,
Age 38 years, Occu.: Agriculturist,
R/o Khandala, Post Valni, Tahsil Nagpur
(Rural), District Nagpur.

**.. Petitioners/
(Original
Defendants)**

Versus

1. Markand @ Manoj Sheshrao Pande
(Died on 19.07.2017) Through his L.Rs.

**Deceased
Original
Plaintiff**

- (a) Smt. Nalini wd/o Manoj @ Markand Pande
Age 47 years, Occu. Household,
- (b) Ku. Pranshu d/o Manoj @ Markand Pande,
Age 24 years, Occu. Student, duly
represented through the power of
attorney holder No.1(a) Smt. Nalini wd/o
Manoj @ Markand Pande
- (c) Ku. Aditi d/o Manoj @ Markand Pande,
Age 20 years, Occu. Student, duly
represented through the power of
attorney holder No.1(a) Smt. Nalini wd/o
Manoj @ Markand Pande
- (d) Ku. Anushka d/oManoj @ Markand Pande,
age 16 years, Occu. student,
- (e) Ku. Lawanya d/oManoj @ Markand Pande,
age 09 years, Occu. Student,

**Legal heirs of
Original
Plaintiff/
Respondents**

Respondents No.1(d) and 1(e) minors duly represented through their natural guardian mother Smt.Nalini wd/o Manoj @ Markand Pande Respondent No.1(a). Respondent No.1(b) & 1(c) through their power of attorney holder No.1(a) Smt.Nalini wd/o Manoj @ Markand Pande.

.. Respondents

Respondent No.1(b) to (e) represented through Respondent No.1(a) mother Smt. Nalini wd/oManoj @ Markand Pande, R/o 111, Gomati Colony, Nehru Nagar, Bhopal (M.P)

Ms.P.S.Sadavarte Advocate for Petitioners.

Mr.A.R.Dhoble, Advocate with Ms.Bushra Khan holding for Mr.Raju Dhoble, Advocate for respondent No.1(a).

CORAM : ABHAY J. MANTRI, J.

DATED : 13/09/2024.

ORAL JUDGMENT (Per : Abhay J. Mantri, J.)

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

(2) Being aggrieved by the order dated 03/04/2019, passed below Exh.34, in Regular Civil Suit No.660/2015, by Learned 19th Jt. C.J.S.D., Nagpur, Whereby the application for amendment filed by the respondents/original plaintiffs came to be allowed, the original defendants have preferred this petition.

(3) Learned Counsel for the petitioners vehemently argued that the proposed amendment, which has sought to be incorporated in the suit, could change the cause of action and, therefore, without considering the said legal position, the trial Judge has allowed the amendment application. He further submitted that the original plaintiff, during his lifetime, has not taken any steps to amend the suit even though he has moved an application for the addition of the parties under Order I Rule 10 of the Civil Procedure Code (CPC), but he failed to move the application for amendment. Therefore, the legal heirs of the original plaintiff have no right to amend the plaint. He further canvassed that issues were framed on 22/10/2018 (Exh.29). The matter was listed for the evidence of the respondents. That means after the commencement of the trial, the respondents had moved an application to amend the Plaint, for which no Cogent reasons were given as per the proviso of Order VI R 17 of the C.P.C.

(4) During the argument, he took me through the original prayers in the suit, as well as the proposed amendment, which the plaintiffs have sought by the amendment application. He further submitted that no convincing reasons were given to amend the plaint. *As against*, the reasons stated in the amendment application are inconsistent with the proviso to Order VI Rule 17 of the CPC. Therefore, he urged that passing of the order by the learned Trial Judge is contrary to the provisions of the Law and liable to be set aside.

(5) To buttress his submissions, he has relied on the following judgments :-

- 1) *Vikas s/o Prem Somkuwar vs. Kailas s/o Panjabrao Dunedar and another 2019 (3) ALL MR 859.*
- 2) *Chander Kanta Bansal vs. Rajinder Singh Anand 2008(4) ALL MR 423.*
- 3) *Gajraj vs. Sudha and others II (2000) SLT 437.*
- 4) *Archana Ashok Amburle vs. Smt.Arpana Shankar Dudham and others 2019 (3) ALL MR 768.*

Relying on all the above judgments learned, Counsel for the petitioners urge for allowing the petition.

(6) Per contra, the learned Counsel appearing for respondents/original plaintiffs vehemently contended that after considering the material before it, the trial Court rightly allowed the application for amendment. Therefore, no interference is required in it. He further argued that the legal heirs of the original plaintiff, after filing the written statement by defendant No.2 during the preparation of the affidavit of evidence, plaintiffs, i.e. legal heirs of the original plaintiff, realised that it was necessary to amend the suit. Therefore, they have moved an application. The learned trial Court has rightly considered the said facts and passed the impugned order; thus, no interference is required in it.

(7) In order to substantiate his arguments, he has relied on the judgment of the Apex Court in the case of ***Rajesh Kumar Aggarwal and others vs. K.K.Modi and others (2006) 4 Supreme Court Cases 385*** and more particularly pointed out paras 14 to 20 of the said judgment and submitted that while considering the application for amendment, it is necessary to determine the real question in controversy between the parties, provided it does not cause injustice or prejudice to the other side and urges for dismissal of the petition.

(8) I have appreciated the rival submissions of the parties. Perused the impugned order, record and judgments relied upon by the learned Counsel for the respective parties.

(9) At the outset, it appears that on 22/06/2015, the original plaintiff, Makrand, filed suit for declaration and permanent injunction. Thereafter, on 10/04/2017, the original plaintiff filed an application under Order I Rule 10 of the CPC for adding the proposed respondent No.2 in the suit. In the said application, the plaintiff has categorically stated that on 27/02/2017, he learned that defendant No. 1 Vanita Waman Pande had sold some portion of the suit property to one Subhash Ganpatrao Mondhe. Therefore, he wants to add him as defendant No.2. During the pendency of this application and suit, on 19/07/2017, the original plaintiff, Markand, expired. Thus, his legal

heirs were brought on record on 06/09/2017. On 16/09/2017, the application for the addition of the party was allowed, and thereby, plaintiffs added Subhash Ganpatrao Mondhe as defendant No.2, who filed a written statement and counter-claim on 16/04/2018.

(10) It further appears that on 22/10/2018, issues were framed, and the matter was posted to adduce the plaintiffs' evidence. Then, while preparing the affidavit of evidence, the plaintiffs realised that it had become necessary to claim the relief of declarations in respect of the suit property and the sale deed executed by defendant No.1 in favour of defendant No.2 as a sham, bogus and illegal. It is further contended that in view of the subsequent development that occurred during the pendency of the suit, it is necessary for them to bring the said facts on record, and, therefore, they have moved the application for amendment.

(11) A bare perusal of the application for amendment, it appears that the plaintiffs have moved the said application on two grounds viz.(i) after getting the knowledge from reading the counter-claim, the plaintiffs have realised to amend the suit by incorporating the proposed paras and prayer clauses and (ii) he wants to bring subsequent development that occurred during the pendency of the suit, on record. However, on scrutiny of the record, it seems that on

27/02/2017, the original plaintiff got the knowledge about the execution of the sale deed by defendant No.1 in favour of defendant No.2. At the time of filing of the application under Order I Rule 10 of the CPC the original plaintiff has not taken any steps to amend the suit/plaint. Besides, plaintiffs have not assigned any reason for non-amending the plaint when the original plaintiff knew about the execution of the sale deed. The plaintiffs have not explained in that regard.

(12) Secondly, it is evident that the trial has commenced. Therefore, as per the proviso of Order VI Rule 17 of the CPC, the party to the proceeding must satisfy the Court that, in spite of due diligence, the party could not have raised the matter before the commencement of the trial. However, on perusal of the application, it does not appear that the plaintiffs have given reasons for non-filing the application for amendment before the commencement of the Trial. In fact, it was imperative for the original plaintiff to specify reasons for the non-filing of the application for amendment prior to the commencement of the trial when he knew about the execution of the sale deed on 27/02/2017.

(13) It is apparent from the wording of Order VI Rule 17 of the CPC that the prayer for amendment is generally required to be

allowed if the amendment is required to effectively and properly adjudicate the controversy between the parties and to avoid multiplicity of proceedings. However, as per the proviso of the said Rule, if the trial has commenced, then no application for amendment shall be allowed unless the Court comes to the conclusion that, in spite of due diligence, the party could not have raised the said matter before the commencement of the trial. Undisputedly, in the case at hand, the trial has commenced. The plaintiffs failed to give reasons that, in spite of due diligence, they could not have moved the application for amendment of the pleadings before the commencement of the trial when the original plaintiff had got knowledge about the execution of the sale deed on 27/02/2017 itself, i.e. prior to framing of issues. Therefore, I do not find substance in the application to permit the respondents to amend the plaint.

(14) *Moreover,* it seems that, by way of the proposed amendment, the plaintiffs want to change the nature of the suit and cause of action, which is not permissible in law. Thus, it appears that without considering the settled legal position, the learned trial Court erred in passing the impugned order, observing that it would not cause any prejudice to the rights of the defendants and to avoid the multiplicity of the proceedings and the Court cannot go into the merits of the case. However, while deciding the amendment application, the

learned trial Court ignored the mandate given in proviso to Order VI Rule 17 of the CPC and vaguely observed, as referred to above furthermore, when the plaintiffs or legal heirs of the plaintiff knew about the execution of the sale deed before framing the issues as well as filing the evidence.

(15) As discussed above, it appears that in the present petition, the moot question arises whether plaintiffs are entitled to carry out the proposed amendment. Therefore, the question of going into the merit of the matter does not arise at all. In view of the same, the observations made in the case of **Rajesh Kumar Aggarwal** (supra) are hardly of any assistance to the respondents in support of their contentions. *Per contra*, the dictum laid down in the judgments relied upon by the learned Counsel for the petitioners applies to the case in hand.

(16) In fact, while determining the question to permit the plaintiffs to amend the plaint after the commencement of trial, the learned trial Judge has to record a finding whether the Court comes to the conclusion that in spite of due diligence, the plaintiffs could not have sought amendment before the commencement of trial but no finding on the said point has been recorded. The learned trial judge did not consider the mandate of the proviso to Order 6 Rule 17 of the CPC

nor the facts in that regard while deciding the application for amendment. Thus, it appears that the learned Judge has erred in allowing the application for amendment without recording the finding about the compliance of the mandate conferred in the proviso to Order VI Rule 17 of the CPC. As such, in my view, the impugned order is not sustainable in the eyes of the law and is liable to be set aside.

(17) In the aforesaid background, the petition stands allowed in terms of prayer clause (ii). No order as to costs.

[ABHAY J. MANTRI, J.]

KOLHE