Shabnoor

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SHABNOOR AYUB PATHAN
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WRIT PETITION NO.6288 OF 2021

Dr. Vithal Balkrishna Kulkarni,
deceased through LRs & Ors. … Petitioners

V/s.

Shridhar Mukund Tambekar & Ors. … Respondents

Mr. G.S. Godbole, Senior Advocate i/by Ms. Shruti Tulpule for the petitioners.

Mr. S.S. Aradhye for the respondents.

CORAM : AMIT BORKAR, J.

DATED : JANUARY 6, 2025

<u>P.C.</u>:

1. The petitioners (original plaintiffs) in a suit for specific performance are challenging orders passed by the Appellate Court framing two additional issues and rejecting an application for amendment of the plaint in appeal.

2. The facts and circumstances giving rise to the present petition are as under:

According to the petitioners, respondent No. 1 along with his mother executed an agreement to sell the suit property in favor of the predecessors of the petitioners on 20th May 1988, representing themselves to be trustees of the Late Kaka Mahajani Trust. The agreement to sell was for consideration and contained specific terms regarding the obligations of both parties. Subsequently, on 24th September 1988, the vendors issued notice calling upon the petitioners to return the original agreement to sell, asserting therein that the agreement had come to an end.

3. The petitioners responded to the notice dated 24th September 1988, asserting their rights under the agreement to sell and maintaining their readiness and willingness to perform their part of the contract. On 2nd November 1988, the petitioners, through their predecessor Vasudeo Rajaram Patwardhan, addressed a letter dated 2nd November 1988 to the vendors, inclusive of a draft sale deed for their approval, indicating their intent to fulfill contractual obligations. Following an order dated 2nd January 1990 by the authorities under the provisions of the Urban Land (Ceiling and Regulation) Act, 1976, which impacted the alienability of the suit property, the petitioners addressed a communication to the vendors on 5th September 1990 stating their willingness to execute the sale deed and sought details of the tenants occupying the structures on the suit property. However, by a letter dated 10th May 1990, the vendors contended that the agreement to sell stood terminated and declared that the Earnest Money Deposit (EMD) would be forfeited.

4. On 10th June 1991, the petitioners filed Special Civil Suit No.376 of 2019 seeking specific performance of the agreement to sell. The Trial Court, by the judgment and decree dated 7th January 2001, partly decreed the suit granting relief of specific performance while rejecting the prayer for damages. The vendors challenged the judgment and decree by filing First Appeal No.954

of 2002.

5. In January 2021, the vendors (respondent No.1) filed an application under Order XLI, Rule 25 of the Code of Civil Procedure, 1908 (CPC), seeking the framing of additional issues, asserting that certain material questions requiring adjudication had been overlooked during the trial. This application was allowed by the Appellate Court by its judgment and order dated 12th February 2021, whereby two additional issues were framed.

6. Subsequent to the order framing additional issues, the petitioners filed an application under Order VI, Rule 17 of CPC seeking leave to amend the plaint by adding paragraphs 8(a) and 8(b) and introducing a new prayer clause 1(a). The proposed amendments sought a declaration that the unilateral cancellation of the agreement to sell by the defendants (vendors) was illegal, null, and void. The petitioners contended that the amendments were necessary to comprehensively address the issues arising from the vendors' actions and to bring on record facts that had either arisen post-filing of the suit or had been omitted inadvertently. However, the Appellate Court, by the impugned order, rejected the application for amendment.

7. The framing of additional issues by the Appellate Court and its rejection of the petitioners' application for amendment of the plaint during the pendency of the appeal have given rise to the present writ petition, invoking this Court's supervisory jurisdiction under Article 227 of the Constitution of India.

8. Mr. Godbole, learned Senior Advocate for the petitioners, submitted that the Appellate Court exceeded its jurisdiction by framing an issue regarding the maintainability of the suit in the absence of a declaratory relief concerning the termination of the agreement to sell, especially when no such specific objection was raised in the written statement during the trial. He argued that the framing of such an issue post-decree, particularly without adequate factual or evidentiary basis, is contrary to the procedural mandate under Order XLI, Rule 25 of the Code of Civil Procedure, 1908 (CPC). He further contended that the Appellate Court erred in rejecting the petitioners' application for amendment of the plaint under Order VI, Rule 17 of the CPC by holding that the amendment was barred by limitation. Mr. Godbole emphasized that the original plaint already contained necessary averments regarding the invalidity of the notice of termination, demonstrating the petitioners' consistent assertion of their right under the agreement to sell. The proposed amendment merely sought to elaborate upon and provide clarity to the existing pleadings in light of the additional issue framed by the Appellate Court.

9. Additionally, he argued that the framing of the issue concerning maintainability by the Appellate Court necessitated the amendment, as the petitioners were entitled to address the new question raised for the first time in appeal. He relied on the settled principle that amendments required for determining the real controversy between the parties should be liberally allowed. He submitted that the Appellate Court’s rejection of the amendment application not only disregards procedural fairness but also effectively denies the petitioners an opportunity to address the issue framed by the Court itself.

10. Mr. Godbole concluded by asserting that the Appellate Court's reasoning that the amendment was barred by limitation is flawed, as the amendment is a clarification of the original pleadings and relates back to the date of filing of the suit. He submitted that the rejection of the amendment application, therefore, amounts to a failure to exercise jurisdiction vested in the Appellate Court under the CPC.

11. Per contra, Mr. Sarang Aradhye, learned Advocate representing the respondents, supported the impugned order, contending that the issue of maintainability framed by the Appellate Court (Issue No. 1) pertains to a pure question of law and, therefore, could be framed for the first time in appeal. He relied on the principle that a court at any stage of the proceedings can frame issues concerning jurisdiction or maintainability if such issues are essential for determining the validity of the suit.

12. Mr. Aradhye argued that the petitioners’ application for amendment of the plaint was rightly rejected by the Appellate Court on the ground that the proposed amendment was barred by the law of limitation. He submitted that the cause of action for seeking a declaratory relief regarding the invalidity of the termination notice arose at the time of the issuance of the notice itself, and the petitioners had failed to raise such a claim within the prescribed period under Article 58 of the Limitation Act, 1963.

13. Mr. Aradhye further contended that the petitioners' reliance on the proposed amendment to cure the defect arising from the maintainability issue is misplaced. He emphasized that the petitioners had ample opportunity to seek declaratory relief at the time of filing the suit but failed to do so. He concluded by asserting that the Appellate Court's rejection of the amendment application was both procedurally and legally sound, as it prevented the introduction of a belated and time-barred claim that would have prejudiced the respondents.

14. The rival contentions advanced by the parties now fall for consideration. The primary issues include whether the framing of an issue on maintainability by the Appellate Court after the decree in the suit for specific performance is legally tenable, and whether the rejection of the petitioners' application for amendment to the plaint under Order VI, Rule 17 of the Code of Civil Procedure, 1908 (CPC) was justified.

15. Having heard the learned Advocates for the respective parties and upon a meticulous examination of the pleadings and the impugned order, it is evident that the respondents canceled the agreement to sell dated 20th May 1988 by issuing a notice dated 24th September 1988. The petitioners, by their reply dated 10th October 1988, contested the cancellation, terming it as untenable and mala fide. In their reply, the petitioners explicitly asserted their readiness and willingness to perform their part of the contract, further reserving their rights to seek specific performance of the agreement to sell. However, the framing of an issue by the Appellate Court regarding the maintainability of the suit for specific performance, in the absence of a declaratory relief concerning the legality of the termination of the agreement, brings into focus whether such a suit is maintainable without addressing the termination notice's validity.

16. The judgment in ***I.S. Sikandar (D) By LRs. & Ors. vs. K. Subramani & Ors.,*** **(2013) 15 SCC 27**, holds that in the absence of a declaratory relief to declare the termination of an agreement to sell as invalid or barred in law, a suit for specific performance along with consequential relief of permanent injunction is not maintainable.

17. In the present case, the factum of the termination notice dated 24th September 1988 and its disputed validity are not contested. The issue regarding the maintainability of the suit for specific performance without a declaration concerning the termination notice is a pure question of law, as it pertains to the legal tenability of the suit. The Appellate Court, exercising its powers under Order XLI, Rule 25 of CPC, was within its jurisdiction to frame such an issue during the pendency of the appeal. Therefore, in my opinion, no legal infirmity can be found in the impugned order framing an issue concerning maintainability.

18. The petitioners, by their application below Exhibit 60, sought an amendment to the plaint to incorporate pleadings and a prayer for a declaratory relief that the termination of the agreement to sell dated 20th May 1988 was invalid. The amendment application was filed on 10th March 2021, subsequent to the framing of the maintainability issue by the Appellate Court on 12th February 2021.

19. While it is contended that the amendment was necessitated by the framing of the maintainability issue, the principles governing amendments under Order VI, Rule 17 of CPC mandate that such amendments should be allowed if they are necessary to determine the real questions in controversy, provided they do not cause injustice to the other side.

20. It is a settled legal proposition that amendments should satisfy two conditions:
(a) They should not cause prejudice or injustice to the other side;
(b) They should be necessary for determining the real questions in controversy.

21. While it is true that an amendment application can be declined if the amended claim is barred by limitation as of the date of the application, this factor should be weighed against the fact that issue of maintainability of suit has been framed in the Appeal. The Appellate Court ought to have considered that the maintainability issue was introduced for the first time during the pendency of the appeal, which justified the petitioners' need to seek the amendment.

22. For the facts of the present case, I am of the opinion that the amendment is necessary for determining the real controversy between the parties. However, the respondents' apprehension regarding the limitation period must be addressed. Therefore, it is clarified that the question of limitation—whether a fresh suit based on the amended claim would be barred by limitation as of the date of the amendment application—shall remain open and be decided by the Appellate Court at the time of the final hearing of the appeal.

23. It is also made clear that, in view of the above clarification, the amendment to the plaint permitted by this order shall not relate back to the date of filing of the suit. The question of whether a fresh suit based on the amended claim would be barred by limitation as of the date of the application for amendment is expressly kept open to be determined by the Appellate Court during the final hearing of the appeal.

ORDER

(i) The writ petition, to the extent of the challenge to the order dated 12th February 2021 below Exhibit 58, is dismissed. The framing of the issue regarding maintainability by the Appellate Court is upheld as being within its jurisdiction under Order XLI, Rule 25 of the Code of Civil Procedure, 1908.

(ii) The application below Exhibit 60 in Regular Civil Suit No.217 of 2016 is allowed. However, the question of whether a fresh suit based on the amended claim would be barred by limitation on the date of the amendment application is kept open for determination by the Appellate Court at the time of final hearing of the appeal.

(iii) The amendment shall not relate back to the date of filing of the suit, and all rights, defenses, and objections available to the respondents under the Limitation Act, 1963, or otherwise, are preserved.

24. The writ petition stands disposed of in the aforesaid terms. No order as to costs.

25. Pending interlocutory application(s), if any, stands disposed of.

(AMIT BORKAR, J.)