

(2019) 07 BOM CK 0215

In the Bombay High Court

Case No : Writ Petition No. 126, 127 Of 2019

Cyrila Aninha Cardoso

APPELLANT

Vs

Akar Creations Represented By Avinash Borkar And Others

RESPONDENT

Date of Decision : 01-07-2019

Acts Referred:

Citation : (2019) 07 BOM CK 0215

Hon'ble Judges : C.V. Bhadang, J

Bench : Single Bench

Advocate : Rohan R. Desai, Parikshit S. Sawant, Nehal Vernekar

Final Decision : Allowed

Judgement

C.V. Bhadang, J

1. Rule, made returnable forthwith. The learned counsel for the respondents waives service.

Heard finally by consent of parties.

2. Both these petitions are between the same parties and arise out of orders passed in Regular Civil Suit no. 120/2011/C. As such they are being disposed off by this common judgment.

3. The brief facts are that, the petitioner has filed the aforesaid suit against the respondent for declaration and injunction. The dispute pertains to an alleged access and a right to air/wind and light claimed by the petitioner to her property, more specifically described in plaint para no. 1. The suit property appears to be land admeasuring 272 sq.mts of Chalta no. 11 of P.T. Sheet no. 220 situated at Aquem, Matriz no. 218. In the plaint as originally filed, the petitioner had claimed that the suit property corresponds to land registration no. 38968.

4. The petitioner filed an application for amendment in the year 2015 and proposed to substitute the land registration no. 38968 as 39662, which

application was allowed and accordingly the land registration number was corrected as 39662. The petitioner has now filed an application (Exhibit 68) for amendment for restoration of the land registration no. 38968 as originally mentioned in the plaint. It was contended that at the time of filing of the suit the land registration number was correctly given as 38968, but later, some confusion was created on account of the boundaries. In such circumstances, the petitioner sought amendment of the plaint, in the following terms:

"A) At page 1, 1st para, line 4, of the plaint, the existing description number of the suit property i.e 39662 may be deleted and substituted/corrected as 38968.

B) At page 2 of the plaint, the existing boundaries of the suit property may be deleted and substituted/corrected as under: East: by property of one meter and a half reserved by Maria Ernestina Francisco Sales;

West: by property of Maria Amaltezinha De Souza;

North: by the property of the said Maria Ernestina Francisco Sales reserved for road;

South: by property of Manguexa Atmarama Quensorcar.

C) At para 3, para 7, 12th line onwards, of the plaint, the existing words "which is meant for the usage of family of Ana Marianinha De Souza" may be deleted and may be substituted by "reserved by Maria Ernestina Francisco Sales having one and half meter width".

5. The petitioner filed yet another application (Exhibit 67) for production of a notarized copy of the document of inscription and description of the suit property. This according to the petitioner is necessary for proper identification of the suit property. It was contended that it is a public document and can be allowed to be produced on record at any stage. It was pointed out that the plaintiff is yet to examine herself in the matter and the respondent will get adequate opportunity to cross examine the plaintiff on the said document and no prejudice shall be caused to them.

6. The learned trial court by an order dated 7/1/2019 has dismissed the application (Exhibit 68) for amendment only on the ground that the petitioner has sworn an affidavit earlier that the registration number of the suit property is 39662 and not 38968 (when the earlier amendment was sought in the year 2015) which affidavit has not been explained by her and the petitioner cannot now be allowed to take a contrary stand that the registration number is 38968 and not 39662. The said order is subject matter of challenge in Writ petition no. 127/2019.

7. The application (Exhibit 67) for production of additional documents is dismissed by an order of even date only on the ground that the amendment has not been allowed and therefore there was no question of allowing production of the document. That order dated 7/1/2019 is subject matter of challenge in Writ

petition no. 126/2019.

8. I have heard Shri Dessai, the learned counsel for the petitioner and Shri Sawant, the learned counsel for the respondents. Perused record.

9. It is submitted by the learned counsel for the petitioner that the entire confusion has occurred on account of the boundaries as originally mentioned in the plaint. It is pointed out that in any event the suit property is surveyed under Chalta no. 11 of P.T.S. Sheet no. 220 situated at Aquem, which description of the property continues in the plaint. It is submitted that the access and the claim of light and air is sought on the adjoining property of the respondent being chalta no. 52 of P.T. Sheet no. 220. It is submitted that there is no dispute as to the ownership of either chalta no. 11 or chalta no. 52 of P.T. Sheet no. 220 and the amendment by correction of the land registration number is merely to set the record straight.

10. Mr. Desai the learned counsel for the petitioner has placed reliance on the decision of the Supreme Court in the case of Sajjan Kumar v. Ram Kishan (2005) 13 SCC 89 and N.C. Bansal v. Uttar Pradesh Financial Corporation (2018) 2 SCC 347.

11. The learned counsel for the respondent on the contrary has submitted that the petitioner is not sure about the land registration number and has been repeatedly changing the land registration numbers, which is not permissible as has been rightly held by the learned trial court. It is submitted that the earlier application filed in the year 2015 seeking amendment of the land registration number as 39662 has not been explained by the petitioner, as has been noticed by the learned trial court and, therefore, no interference is called for.

12. I have considered the submissions made. As noticed earlier, the description of the property which also includes the City Survey number, (which is subsequent to the allotment of the land registration number) continues as City Survey no. 11 of P.T. Sheet no. 220 corresponding to Martiz no. 218. The only question is about the land registration number. The case made out in the plaint is that the late father of the original plaintiff had purchased two properties i.e land registration no. 38968 and 39662, under a registered sale deed dated 29/3/1951. The learned counsel for the petitioner has taken me through the said sale deed of the year 1951, in order to point out that although the sale deed mentions both these land registration numbers, it only sets out the boundaries of the land registration no. 39662. It is therefore claimed that the entire confusion occurred on account of the incorrect boundaries being mentioned. I find that the petitioner is not seeking any amendment so far as the Chalta no. 11 of P.T. Sheet no. 220 is concerned, which is allotted to the property subsequently in the City Survey. It does appear that the dispute is not about the ownership but merely of an access and the right to air and light claimed over the adjoining property belonging to the petitioner being chalta no. 52 of P.T. Sheet no. 220. It is true that there has been certain flip flop on the part of the petitioner in pleading the land registration

number. However, considering the stage of the suit and the fact that the chalta no. 11 of P.T. Sheet no. 220 is not being changed and further having regard to the fact that the basic issue is not about title, but of an access, I find that the amendment ought to have been allowed. This is just to set the record straight, as has been rightly contended on behalf of the petitioner. A perusal of the impugned order shows that the trial court has made an attempt to examine the merits of the amendment where the trial court has observed that the petitioner having sworn an affidavit in the year 2015 cannot now be allowed to take a contrary stand. It is trite that the merits of the amendment cannot be gone into at the stage, when the Court is considering whether the amendment needs to be allowed or not. In any event as noticed earlier, the amendment merely introduces the registration number which is said to be corresponding to chalta no. 11 of P.T. Sheet 220 of village Aquem, which remains unchanged right from the inception of the suit.

13. In the case of N.C. Bansal, there were similar two applications filed, one for amendment and the other for production of documents. In so far as the application for amendment was concerned, out of the various circumstances noticed, by the Supreme Court in para 17 of the judgment, at least two apply in this case, namely, that the suit is still at the initial stage where the trial had not commenced and secondly the proposed amendment does not change the nature of the suit, the cause of action or the relief claimed. In my considered view, it is necessary just to set the record straight. The Supreme Court after allowing the application for amendment found that the application for production has also to be allowed.

14. In the case of Sajjan Kumar (supra), the incorrect description of the suit property in the plaint was allowed to be corrected although it was found that the defendant/respondent had taken a specific plea in the written statement that the suit premises were not correctly described and yet the plaintiff had proceeded with the trial of the suit and did not seek the amendment at an earlier stage.

15. The Supreme Court in the case of Jai Jai Ram Manohar Lal v. National Building Material Supply, (1969) 1 SCC 869 has observed that the Court is not there to punish the parties for their mistake, negligence, inadvertence or even infraction of the rules of procedure. This is what is held in paras 5 of the judgment:

"The order passed by the High Court cannot be sustained. Rules of procedure are intended to, be a handmaid to the administration of justice. A party cannot be refused just relief merely because of some mistake, negligence, inadvertence or even infraction of the rules of procedure. The Court always gives leave to amend the pleading of a party, unless it is satisfied that the party applying was acting mala fide, or that by his blunder, he had caused injury to his opponent which may not be compensated for by an order of costs. However negligent or careless may have been the first omission, and, however late the proposed amendment, the amendment may be allowed if it can be made without injustice to the other

side. In *Amulakchand Mewaram v. Babulal Kanlal Taliwala*(1), Beaumont, C.J., in delivering the judgment of the Bombay High Court set out the principles applicable to cases like the present and observed:

"..... the question whether there should be an amendment or not really turns upon whether the name in which the suit is brought in the name of a non-existent person or whether it is merely a misdescription of existing persons. If the former is the case, the suit is a nullity and no amendment can cure it. If the latter is the case, prima facie, there ought to be an amendment because the general rule, subject no doubt to certain exceptions, is that the Court should always allow an amendment where any loss to the opposing party can be compensated for by costs."

16. In the case of *Revajeetu Builders and Developers v. Narayanaswamy and Sons*, (2009) 10 SCC 84, the Supreme Court had critically analyzed both English and Indian cases and had laid down the following principles which ought to have taken in consideration while allowing or rejecting the application:

- (i) whether the amendment sought is imperative for proper and effective adjudication of the case;
- (ii) whether the application for amendment is bona fide or mala fide;
- (iii) the amendment should not cause such prejudice to the other side which cannot be compensated adequately in terms of money;
- (iv) refusing amendment would in fact lead to injustice or lead to multiple litigation;
- (v) whether the proposed amendment constitutionally or fundamentally changes the nature and character of the case and;
- (vi) as a general rule, the court should decline amendments if a fresh suit on the amended claims would be barred by limitation on the date of the application.

17. Applying the aforesaid principles, the amendment ought to have been allowed.

18. The application for production has been dismissed only on the ground that the amendment is disallowed. In that view of the matter, the order dismissing the application for production of the documents has to be set aside. The production shall however, be subject to proof of the documents in accordance with law. In the result the following order is passed:

ORDER:

- (i) The petitions are allowed.
- (ii) The impugned orders dated 7/1/2019 below (Exhibits 67 and 68) are hereby set aside.

- (iii) The applications Exhibit 67 and 68 are allowed as prayed.
- (iv) The amendment shall be carried out within two weeks from today.
- (v) The production of the documents shall be subject to proof in accordance with law.
- (vi) Rule is made absolute in the aforesaid terms with no order as to costs.