

(2022) 12 BOM CK 0059

In the Bombay High Court

Case No : Writ Petition No.6971 Of 2022

Damodhardas Govindprasad Sangi

APPELLANT

Vs

Fatehsinh And Others

RESPONDENT

Date of Decision : 12-12-2022

Acts Referred:

Code Of Civil Procedure, 1908 — Order 2 Rule 2, Order 6 Rule 17

Citation : (2022) 12 BOM CK 0059

Hon'ble Judges : Sandeep V. Marne, J

Bench : Single Bench

Advocate : S.S. Gangakhedkar, Rajendra Deshmukh, Devang R. Deshmukh, Shriram V. Deshmukh

Final Decision : Allowed

Judgement

Sandeep V. Marne, J

1. By this petition, petitioner has challenged the order dated 30.08.2021 passed by 2nd Jt. Civil Judge Senior Division, Nanded below Exh.118 in Special Civil Suit No.27 of 2020 allowing application filed by respondent nos.1 and 2 - original plaintiffs for amendment of the plaint under Order-VI, Rule-17 of the Code of Civil Procedure (hereinafter referred to as the 'CPC').

2. Plaintiff nos.1 and 2 are real brothers of defendant no.1. It is the case of plaintiffs that while obtaining lease in respect of the suit property by their father, defendant no.1 (plaintiffs' brother) was minor and out of pure love and affection, their father added his name in the lease agreement. After their father passed away, series of litigation took place between defendant no.1 and defendant nos.5 to 11 over the suit property. Initially defendant nos.5 to 11 decided to sell the suit property. Plaintiffs alleged that defendants ought to have purchased the suit property jointly in the name of two plaintiffs and defendant no.1 as the original lease deed was obtained through funds of their father. However the sale-deeds in respect of the suit land were admittedly executed in favour of defendant no.1

alone on 16.09.2017 (by defendant nos.5 to 11) and 09.11.2017 (by defendant no.12). This has led to filing of Special Civil Suit No.27 of 2020 by two plaintiffs against their brother (defendant no.1), his children (defendant nos.2 to 4) as well as defendant nos.5 to 11. In the unamended plaint, plaintiffs prayed for 1/3rd share each in the suit property as well as recovery thereof. They also sought declaration that the sale-deeds dated 16.09.2017 and 09.11.2017 are illegal and not binding on them. They also sought injunction against defendant nos.5 to 12 from alienating suit properties. They also sought damages of Rs.Five Crores against defendant nos.5 to 12.

3. Before the trial of the suit would commence, plaintiffs filed application for amendment of the plaint on 23.02.2021. By way of amendment, plaintiffs sought to completely overhaul the prayers in the suit by deleting most of the original prayers and substituted the same by the following prayers.

"1. Suit of the plaintiff may kindly be decreed in favour of plaintiff no.1 and 2 and against the defendant no.1 to 11 for declaration that the plaintiffs are entitle for rights of pre-emption in suit property and also entitle a decree for pre-emption against the defendant calling upon defendant no.5 to 11 to execute a registered sale deed in favour of the plaintiffs on payment of consideration amount in suit property bearing CTS No.15929 Mun. No.2-10-84 (new) admeasuring South – North 22.83 mtr. And East – West 40.54 mtr., total admeasuring 925.83 sq.mtr. To the east – Govardhan Ghat Road, To the west – Back side wall of house of Shri. Narayan Patil. To the south – Land belonging to Shri. Rajesh Chandak and Pushpa Chandak, To the North – Back side wall of house of Shri. Gangusing."

4. In short, the nature of the original suit seeking share in the suit property and cancellation of sale-deeds was sought to be changed to that of a decree of pre-emption for execution of sale-deed in favour of plaintiffs.

5. The application was opposed by defendant no.5 (petitioner herein) by filing reply contending that the proposed amendment changes the entire nature of the suit. It appears that the rest of the defendants did not oppose the application for amendment. By order dated 30.08.2021, the trial Court proceeded to allow the amendment on payment of costs of Rs.500/-.

6. Mr. Gangakhedkar, the learned Counsel for petitioner would submit that the amendment allowed by the trial Court completely changes the nature of the suit. He would submit that the amendments are so drastic that the original nature of the suit is not at all retained and completely new lease is sought to be introduced. He would rely upon the judgment of the Apex Court in Asian Hotels (North) Limited vs. Alok Kumar Lodha and Others, (2022) 8 SCC 145.

7. Per contra, Mr. Deshmukh, the learned Senior Counsel for respondent nos.1 and 2 (original plaintiffs) would oppose the petition and support the order passed by the trial Court. He would submit that the petition is filed after inordinate delay as the order granting amendment was passed on 30.08.2021, the amendment was carried out and the present petition is filed on 29.06.2022. He would submit

that petitioner alone (defendant no.5) is aggrieved by the order granting the amendment and the main contesting respondent (defendant no.1) has chosen not to challenge order allowing amendment. Mr. Deshmukh would further submit that the real objective of plaintiffs in filing the suit is to claim their right, title and interest in the suit property which is sought to be claimed by defendant no.1 alone and since the original prayers were erroneous, the same are sought to be replaced by way of amended plaint. He would submit that the basic nature of suit being claimed share in the suit property remaining the same. Mere change in the nature of reliefs sought would not amount to change the nature of suit. Referring to ground clause-II of the petition wherein petitioner has relied upon provisions of Order-II, Rule-2 of the CPC., Mr. Deshmukh would rely upon the judgment of the Supreme Court in Life Insurance Corporation of India vs. Sanjeev Builders Private Ltd & Anr, 2022 LiveLaw (SC) 729. He would pray for dismissal of the petition.

8. After hearing the learned counsel for the parties, it is clear that the main claim of plaintiffs is against their brother - defendant no.1. Their grouse essentially is that name of defendant no.1 was added as lease holder in the lease agreement by their father only out of love and affection and the entire funds for creating of such leasehold rights were that of their father. On this basis plaintiffs are claiming 1/3rd share each in the suit property. They contended that instead of getting sale-deeds in respect of the suit properties executed in joint names of plaintiffs and defendant no.1, the same was illegally executed in the name of defendant no.1 alone. On the basis of these pleadings, plaintiffs are claiming 1/3rd share each in the suit properties. Therefore in the suit plaintiffs challenged the sale-deeds on the basis of which the title in respect of the suit properties was acquired by defendant no.1 alone. The sale-deeds were executed in favour of defendant no.1 by defendant nos.5 to 12. However while setting up a challenge to those sale-deeds, plaintiffs possibly did not realize that in the event of their suit being decreed and the sale-deeds being declared null and void, the title in respect of the suit properties would revert to defendant nos.5 to 12. Thus, even after succeeding in the suit, plaintiffs would not have been able to claim any right in the suit properties. Possibly realizing this error in drafting the plaint, the application for amendment appears to have been filed.

9. Now coming to the amendments that were sought to be introduced, there can be no iota of doubt that the same completely overhauls the plaint and possibly changes the nature of the suit. In fact, it must be observed that the amendments are so drastic that it has become difficult to compare the amended plaint with unamended one. Be that as it may, what is required to be seen is whether after effecting such drastic amendments, whether the basic nature of the suit would change. As observed earlier, the real objective behind filing the suit was to claim share in the suit properties against defendant no.1. Though originally relief of injunction was also sought against defendant nos.5 to 11 also, it is incomprehensible as to how defendant nos.5 to 11 once again alienate the property having already alienated the same in favour of defendant no.1. That

prayer appears to have been deleted in the amended plaint.

10. In their quest to claim the share in the suit property now plaintiffs have added the prayer to seek right of pre-emption against defendant nos.5 to 11 and a direction against them to execute sale-deed in respect of the suit property. Thus the entire nature of the suit is now sought to be altered. In the original suit, no case was made out about any right of pre-emption existing in favour of the plaintiffs against defendant nos.5 to 11. Now an altogether new case is sought to be introduced. For the sake of convenience, it would be appropriate to compare the prayers as original sought in the plaint with that of the amended prayers as under:

Prayers in the original plaint

Prayers in the amended plain

1.

. Suit of the plaintiffs may kindly be decreed in favour of plaintiff No.1 & 2 and against the defendant no.1 to 12 for declaration that, the plaintiff Nos.1 & 2 are having 2/3rd share (1/3rd share each) in the suit land bearing CTS No.15929, Mun. No. 2-10-84 (New), admeasuring in length south-north 38.55 meter (appx.) and in width east – west 35.88 meter (appx.) total adm. 1383.17 sq. meter (appx.) situated near Tiranga Chowk, Vazirabad, Nanded, which is bounded by To the East Govardhan Ghat road, To the West – Back side wall of house of Shri. Narayan Patil, To the South – Land belonging to Shri. Lal Ahmad, To the North – Back side wall of house of Shri. Gangusing.

1.

Suit of the plaintiff may kindly be decreed in favour of plaintiff no.1 and 2 and against the defendant no.1 to 11 for declaration that the plaintiffs are entitle for rights of pre-emption in suit property and also entitle a decree for pre-emption against the defendant calling upon defendant no.5 to 11 to execute a registered sale deed in favour of the plaintiffs on payment of consideration amount in suit property bearing CTS No.15929 Mun. No.2-10- 84 (new) admeasuring South – North 22.83 mtr. And East – West 40.54 mtr., total admeasuring 925.83 sq. mtr. To the east – Govardhan Ghat Road, To the west – Back side wall of house of Shri. Narayan Patil. To the south – Land belonging to Shri. Rajesh Chandak and Pushpa Chandak, To the North – Back side wall of house of Shri. Gangusing.

2.

That, suit of the plaintiffs may kindly be decreed in favour of plaintiff No.1 and 2 and against the defendant no.5 to 12 & defendant nos.5 to 12 for recovery of possession of plaintiff no.1 & 2, 2/3rd share in the suit property as mentioned in para No.A of claim clause.

2

That, suit of the plaintiffs may kindly be decreed in favour of plaintiff no.1 and 2 and against the defendant no.5 to 11 for recovery of possession of plaintiff nos.1 & 2 share in the suit property as mentioned in para no.A of claim clause.

3.

That, suit of the plaintiffs may kindly be decreed in favour of plaintiff No.1 and 2 and against the defendant no.1 to 12 for declaration that the registered saledeed No.5199/2017 dt.16.09.2017 executed by defendant No.5 to 11 in favour of defendant no.1 to 4 is illegal, null and void and not binding on plaintiff no.1 & 2.

3

That, suit of the plaintiffs may kindly be decreed in favour of plaintiff No.1 and 2 and against the defendant No.5 to 11 for damages for the recovery of amount of Rs.5,00,000/- lump sum from 10.11.2017 till the date of filing of the suit and for further inquiry of future damages of suit property under Order 12 Rule 20 of CPC from the date of suit till its realization.

4.

That, suit of the plaintiffs may kindly be decreed in favour of plaintiff No.1 and 2 and against the defendant No.5 to 12 for declaration that, the registered saledeed No.6073/2017 dt.09.11.2017 executed by defendant no.1 to 4 in favour of defendant no.12 is illegal, null and void and not binding on plaintiff No.1 & 2.

4.

That, any other relief for which plaintiffs are entitled may kindly be awarded in favour of plaintiff no.1 & 2 and against the defendant no.1 to 11.

5.

That, suit of the plaintiffs may kindly be decreed in favour of plaintiff No.1 and 2 and against the defendant no.5 to 12 for perpetual injunction restraining the defendant No.5 to 12 or any other persons claiming through them from alienating or creating third party interest or raising any type of construction in the suit property more particularly described in para no.A of claim clause.

6.

That, suit of the plaintiffs may kindly be decreed in favour of plaintiff no.1 and 2 and against the defendant no.5 to 12 for damages for the recovery of amount of Rs.5,00,000/- lump sum from 10.11.2017 till the date of filing of the suit and for further inquiry of future damages of suit property under Order 12 Rule 20 of CPC from the date of suit till its realization.

7.

That, any other relief for which plaintiffs are entitled may kindly be awarded in favour of plaintiff No.1 and 2 and against the defendant no.1 to 12.

11. Comparing the prayers in the original suit with the amended suit, there would leave no matter of doubt that the entire nature of the suit has been changed because of the amendment.

12. It is trite that any amendment which changes the nature of suit is required to be declined. The principles relating to amendment of pleadings have been summed up in the recent judgment of the Supreme Court in Life Insurance Corporation of India (*supra*).

"(i) Order II, Rule 2 CPC operates as a bar against a subsequent suit if the requisite conditions for application thereof are satisfied and the field of amendment of pleadings falls far beyond its purview. The plea of amendment being barred under Order II Rule 2 CPC is, thus, misconceived and hence negatived.

(ii) All amendments are to be allowed which are necessary for determining the real question in controversy provided it does not cause injustice or prejudice to the other side. This is mandatory, as is apparent from the use of the word "shall", in the latter part of Order VI Rule 17 of the CPC.

(iii) The prayer for amendment is to be allowed

(i) if the amendment is required for effective and proper adjudication of the controversy between the parties, and

(ii) to avoid multiplicity of proceedings, provided

(a) the amendment does not result in injustice to the other side,

(b) by the amendment, the parties seeking amendment does not seek to withdraw any clear admission made by the party which confers a right on the other side and

(c) the amendment does not raise a time barred claim, resulting in divesting of the other side of a valuable accrued right (in certain situations).

(iv) A prayer for amendment is generally required to be allowed unless

(i) by the amendment, a time barred claim is sought to be introduced, in which case the fact that the claim would be time barred becomes a relevant factor for consideration,

(ii) the amendment changes the nature of the suit,

(iii) the prayer for amendment is malafide, or

(iv) by the amendment, the other side loses a valid defence.

(v) In dealing with a prayer for amendment of pleadings, the court should avoid

a hypertechnical approach, and is ordinarily required to be liberal especially where the opposite party can be compensated by costs.

(vi) Where the amendment would enable the court to pin-pointedly consider the dispute and would aid in rendering a more satisfactory decision, the prayer for amendment should be allowed.

(vii) Where the amendment merely sought to introduce an additional or a new approach without introducing a time barred cause of action, the amendment is liable to be allowed even after expiry of limitation.

(viii) Amendment may be justifiably allowed where it is intended to rectify the absence of material particulars in the plaint.

(ix) Delay in applying for amendment alone is not a ground to disallow the prayer. Where the aspect of delay is arguable, the prayer for amendment could be allowed and the issue of limitation framed separately for decision.

(x) Where the amendment changes the nature of the suit or the cause of action, so as to set up an entirely new case, foreign to the case set up in the plaint, the amendment must be disallowed. Where, however, the amendment sought is only with respect to the relief in the plaint, and is predicated on facts which are already pleaded in the plaint, ordinarily the amendment is required to be allowed.

(xi) Where the amendment is sought before commencement of trial, the court is required to be liberal in its approach. The court is required to bear in mind the fact that the opposite party would have a chance to meet the case set up in amendment. As such, where the amendment does not result in irreparable prejudice to the opposite party, or divest the opposite party of an advantage which it had secured as a result of an admission by the party seeking amendment, the amendment is required to be allowed. Equally, where the amendment is necessary for the court to effectively adjudicate on the main issues in controversy between the parties, the amendment should be allowed. (See *Vijay Gupta v. Gagninder Kr. Gandhi & Ors.*, 2022 SCC OnLine Del 1897)"

13. Thus, the Supreme Court has held that whether amendment changes the nature of the suit or the cause of action, so as to set up an entirely new case, foreign to the case earlier set up in the plaint, the amendment must be disallowed. In the present case there was complete absence of pleadings with regard to alleged right of pre-emption in favour of plaintiffs and therefore it cannot be stated by any stretch of imagination that the amended prayer is premised on the pleadings which already existed in the plaint.

14. The trial Court ought to have rejected the application since the amendment completely changes the nature of the suit. Mr. Gangakhedkar has relied upon in another recent judgment of the Apex Court in *Asian Hotels* (supra) in which it is held in para nos.34 to 36 as under:

"34. By way of an amendment of the plaint the plaintiffs now want to challenge

the mortgages / charges on the entire premises created by the appellant. As such, the original plaintiffs are not at all concerned with the mortgages created by the appellant which is required for the continuous development of the hotel. By the purported amendment, the original plaintiffs have now prayed to declare that all the mortgages / charges created on the premises as void abinitio. Even such a prayer can be said to be too vague. How the original plaintiffs can now can be permitted to challenge various mortgages / charges created from time to time.

35. At this stage, it is required to be noted that even under the License Agreement (clause 13) the Licensor shall have the right to create charges / mortgages as and by way of first charge on its land, premises and the buildings (including shops) constructed and to be constructed, in favour of financial institutions and banks as security for their terms loan advanced / to be advanced to the licensor for the completion of its hotel project. Therefore, in fact original plaintiffs being the licensee are aware that there shall be charges / mortgages on the entire premises and the buildings including the shops. In that view of the matter, now after a number of years, plaintiffs cannot be permitted to challenge the mortgages / charges created on the entire premises including shops.

36. The High Court while allowing the amendment application in exercise of powers under Order 6 Rule 17 of the Code of Civil Procedure has not properly appreciated the fact and / or considered the fact that as such, by granting such an amendment and permitting plaintiffs to amend the plaints incorporating the prayer clause to declare the respective charges / mortgages void ab-initio, the nature of the suits will be changed. As per the settled proposition of law, if, by permitting plaintiffs to amend the plaint including a prayer clause nature of the suit is likely to be changed, in that case, the Court would not be justified in allowing the amendment. It would also result in misjoinder of causes of action."

15. Perusal of the impugned order passed by the trial Court would indicate that it has completely lost sight of the fact that the amendment would change the nature of the suit entirely. In fact, though specific objection was raised by defendant no.5 about change of nature of suit, the trial Court has not recorded any finding on that aspect. However the trial Court did observe that "Given thoughtful consideration to the contentions in the plaint it notices that, it is crystal clear that plaintiffs are coming with a new case in respect of their right to pre-emption."

16. Despite arriving at a finding that plaintiffs were introducing an altogether new case by amending the plaint, the trial Court has still proceeded to allow the application for amendment on the ground that since the amendment is also in respect of the same property, the plaintiffs are at liberty to seek a prayer as to how they are entitled to the suit property. This reasoning in my view is completely erroneous.

17. In the result, I find that the order passed by the trial Court is indefensible

and the same is liable to be set aside.

18. Accordingly, the writ petition is allowed. The order dated 30.08.2021 passed by 2nd Jt. Civil Judge Senior Division, Nanded below Exh.118 in Special Civil Suit No.27 of 2020 is set aside and application for amendment filed by respondent nos.1 and 2 (original plaintiffs) stands dismissed. Rule is made absolute accordingly.