

(2003) 08 BOM CK 0073

In the Bombay High Court

Case No : Writ Petition No. 2800 of 2003

Lalchand Pardeshi died through heirs and legal
representatives Ashabai Pardeshi and Others

APPELLANT

Vs

Ramkrishna Jadhav and Others

RESPONDENT

Date of Decision : 13-08-2003

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 6 Rule 17
Specific Relief Act, 1963 — Section 22, 22(1), 22(2)

Citation : (2004) 2 BomCR 757 : (2003) 4 MhLj 119

Hon'ble Judges : A.P. Deshpande, J

Bench : Single Bench

Advocate : A.H. Vaishnav, for the Appellant; A.D. Kasliwal, for respondent Nos. 1 and 2 and U.M. Thigale, for the Respondent

Final Decision : Allowed

Judgement

A.P. Deshpande, J.—Heard the learned Counsel for the parties.

2. Rule. Rule made returnable forthwith by consent of parties.

Shri A. D. Kasliwal, learned Counsel, waives service for respondent Nos. 1 and 2.

Shri U. M. Thigale, learned Counsel appearing for respondent No. 3, waives service for the same respondent and undertakes to file Vakil Patra.

3. The petitioner is the original plaintiff who has instituted a suit for specific performance of contract against the respondents/defendants. The case of the plaintiff is that an agreement of sale was executed by defendant Nos. 1 and 2 in favour of the plaintiffs in regard to 12 plots and open land admeasuring 1 Acre 7 Gunthas from Survey No. 12 situated at Aurangabad, dated 28-4-1987. It is the case of the plaintiff/petitioner that the defendant Nos. 1 and 2 refused to execute the sale deed though the plaintiffs were ready and willing to perform their part of contract. The plaintiff further contended that they were placed in possession of the properties in part performance of contract. On these pleadings, the suit for

specific performance came to be filed and a prayer for injunction was also made seeking to restrain the respondents from obstructing the peaceful possession of the plaintiffs over the suit property. Along with the suit, an application seeking temporary injunction was also filed. No orders came to be passed on the said application and the suit itself proceeded further and when it reached the stage of evidence, the petitioner/plaintiff filed his examination-in-chief on affidavit. At this stage, i.e. when the evidence had commenced and when the proceedings had reached the stage of trial, the petitioners/plaintiffs moved an application seeking amendment to the plaint with a view to add a prayer in regard to claim of possession of the suit properties, as the plaintiffs contended in the amendment application, that they came to be dispossessed, pending the suit. The rejection of this application, for amendment moved by the plaintiff, by the trial court had given rise to the filing of the instant petition.

4. The trial court has rejected the application for amendment mainly on the ground that there is a contradiction in regard to the date of dispossession, inasmuch as, the trial court noticed that in the application for amendment, the dispossession is alleged to have taken, place in May 2002; whereas in the affidavit filed by the plaintiff on 13-8-2002, it is stated that the plaintiff is in possession of the property. Only on the ground that there is a discrepancy and/or contradiction in regard to the date or time of dispossession, the application came to be rejected. The trial Court further observed that if the application is allowed, the same would complicate the matter.

5. The learned Counsel appearing for the petitioners, Shri Vaishnav, placing reliance on the provisions contained in Section 22 of the Specific Relief Act, 1963, submitted that the trial court had no power, authority or jurisdiction to reject the application for amendment. In his submission, the Court is obliged to grant an amendment at any stage of the proceedings, if the amendment seeks possession of the property, in a suit for specific performance of contract in regard to immovable property.

6. Section 22 of the Specific Relief Act, 1963, reads thus :

"Power to grant relief for possession, partition, refund of earnest money, etc.--(1) Notwithstanding anything to the contrary contained in the Code of Civil Procedure, 1908 (5 of 1908) any person suing for the specific performance of a contract for the transfer of immovable property may, in an appropriate case, ask for-

(a) possession, or partition and separate possession, of the property, in addition to such performance; or

(b) any other relief to which he may be entitled, including the refund of any earnest money or deposit paid or made by him, in case, his claim for specific performance is refused.

(2) No relief under Clause (a) or Clause (b) of Sub-section (1) shall be granted

by the Court unless it has been specifically claimed. Provided that where the plaintiff has not claimed any such relief in the plaint, the Court shall, at any stage of the proceeding, allow him to amend the plaint on such terms as may be just for including a claim for such relief.

(3) The power of the Court to grant relief under Clause (b) of Sub-section (1) shall be without prejudice to its powers to award compensation u/s 21."

Perusal of Section 22 of the Specific Relief Act leaves no room of doubt, that a person suing for specific performance of contract for transfer of immovable property, may in an appropriate case, ask for possession and the proviso lays down that where the plaintiff has not claimed any such relief in the plaint, the court shall at any stage of the proceedings, allow him to amend the plaint. Placing reliance on the proviso and the language used in Section 22 of the Specific Relief Act, the learned Counsel appearing for the petitioners, Shri Vaishnav, contended that in a situation where the plaintiff has not claimed relief of possession in the plaint, the court is bound to allow him to amend the plaint and the court has no discretion in the said matter. In view of this submission, it is urged that the impugned order is manifestly illegal and without jurisdiction, which goes to reject the application for amendment moved by the plaintiff wherein the plaintiff has asked for possession of the suit properties.

7. Per contra, the learned Counsel appearing for the respondents, Shri Kasliwal, has relied upon the provisions contained in Order VI, Rule 17 of the Code of Civil Procedure, 1908. It is relevant to note that Rule 17 has been substituted by an Amendment Act of 22 of 2002. The amended provision of Rule 17, which has come into effect from 1-7-2002, reads as under :--

"The Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties.

Provided 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, the party could not have raised the matter before the commencement of trial."

Placing reliance on the proviso to Rule 17 of Order VI, the learned Counsel appearing for the respondents, Shri Kasliwal, has contended that the jurisdiction of the court to allow an amendment has been curtailed by the proviso, once the trial has commenced, which in fact, in the present case, had commenced. He submits that unless the court comes to the conclusion that in spite of due diligence, the party could not have raised the matter, before the commencement of trial, the court is powerless to allow the amendment.

8. Before I proceed to consider the rival submissions, it is to be noted that, as a matter of fact, the plaintiff could have filed an application for amendment of the

plaint before the commencement of trial, had he then been diligent. It is in this situation, that when the plaintiff failed to make an application for amendment before the commencement of the trial, which he could have done had he been diligent, is the court obliged by the mandate of Section 22 of the Specific Relief Act, to allow the amendment application, though the same is filed after the commencement of the trial due to want of diligence on the part of the plaintiffs. Perusal of proviso to Rule 17 of Order VI and the proviso to Section 22(1) of the Specific Relief Act, reveals that, no doubt, there is a conflict. If proviso to Rule 17 is to operate then, in the present case, the trial court did not have jurisdiction to allow the application for amendment; whereas if proviso to Section 22(1) of the Specific Relief Act is to operate, then the court is mandated to allow the amendment claiming possession in a suit for specific performance. It is, in this background, that I am called upon to resolve the conflict. Section 22 of the Specific Relief Act, on closure scrutiny reveals that the same begins with a non-obstante clause and the relevant opening portion of Section 22(1) reads thus :--

"Notwithstanding anything to the contrary contained in the Code of Civil Procedure, 1908 (5 of 1908) any person suing for the specific performance of a contract for the transfer of immovable property may ask for-

(a) possession"

Section 22(1) has an overriding effect over the provisions contained in Civil Procedure Code. Section 22 is also a law dealing with pleadings, as is the case in relation to Order VI, Rule 17 of Civil Procedure Code. Section 22 deals with pleadings in regard to specific type of cases and, as such, the said statute viz. Specific Relief Act is a special statute, in contradistinction to the provisions in the CPC which are general in nature. Provision in a special statute which has been given an overriding effect by introducing a non-obstante clause has to prevail over the provisions contained in the CPC and, in this view of the matter, the submission canvassed on behalf of the petitioners, that Section 22 overrides the provisions contained in the proviso to Rule 17 of Order VI of Civil Procedure Code, has to be accepted.

9. Once it is held that Section 22 of the Specific Relief Act has an overriding effect over the provisions contained in Order VI, Rule 17, then it is amply clear that the plaintiff has a right to seek amendment claiming possession, in a suit for specific performance of contract, for the transfer of immovable property and the Court has no option and/or choice but to allow the said amendment. The proviso to Sub-section (1) of Section 22 of the Specific Relief Act enables the plaintiff who has not claimed the relief of possession in the plaint, to seek an amendment and claim the same at any stage of the proceedings and the said right of the plaintiff cast an obligation on the Court to allow the said amendment. The relevant words used in the proviso "the Court shall", clinches the issue. The word "shall" used in the proviso is mandatory.

10. The learned Counsel appearing for the petitioners, Shri Vaishnav, has placed

reliance on a judgment of the Apex Court reported in Babu Lal Vs. Hazari Lal Kishori Lal and Others, . The said judgment considers the true nature and scope of the provision contained in Section 22 of the Specific Relief Act, so also, the legislative intent in enacting the said provision, in the light of the divergent views which held the field prior to the enactment of the Specific Relief Act, 1963. Taking a retrospect of the conflicting legal decisions rendered by various High Court, the Apex Court proceeded to observe thus :

"Section 22 enacts a rule of pleading. The Legislature thought it will be useful to introduce a rule that in order to avoid multiplicity of proceedings the plaintiff may claim a decree for possession in a suit for specific performance : even though strictly speaking, the right to possession accrues only when suit for specific performance is decreed. The Legislature has now made a statutory provision enabling the plaintiff to ask for possession in the suit for specific performance and empowering the Court to provide in the decree itself that upon payment by the plaintiff of the consideration money within the given time, the defendant should execute the deed and put the plaintiff in possession.

The section enacts that a person in a suit for specific performance of a contract for the transfer of immovable property, may ask for appropriate reliefs, namely, he may ask for possession, or for partition or for separate possession including the relief for specific performance. These reliefs he can claim, notwithstanding anything contained in the Code of Civil Procedure, 1908, to the contrary, Sub-section (2) of this section, however, specifically provides that these reliefs cannot be granted by the Court, unless they have been expressly claimed by the plaintiff in the suit. Sub-section (2) of the section recognised in clear terms the well established rule of procedure that the Court should not entertain a claim of the plaintiff unless it has been specifically pleaded by the plaintiff and proved by him to be legally entitled to. The proviso to this Sub-section (2), however, says that where the plaintiff has not specifically claimed these reliefs in his plaint, in the initial stages of the suit, the Court shall permit the plaintiff at any stage of the proceedings, to include one or more of the reliefs, mentioned above by means of an amendment of the plaint on such terms as it may deem proper. The only purpose of this newly enacted provision is to avoid multiplicity of suits and that the plaintiff may get appropriate relief without being hampered by procedural complications."

In the case before the Apex Court, judgment and order passed by the Allahabad High Court in execution second appeals were challenged. By the said orders, the High Court had granted decree for possession in the execution second appeals, though the same was not claimed in the plaint and though there was no application for amendment of the plaint. While dealing with the said issue, in the context of the provisions contained in Section 22 of the Specific Relief Act, the Apex Court held that an amendment claiming possession can be allowed at any stage of the suit which includes the stage of execution, as well. The Apex Court further held that it is not incumbent upon the plaintiff in every case, for specific

performance of contract of immovable property to claim possession but the same has to be prayed in an appropriate case. The Apex Court held that, as a normal rule, a decree for specific performance of contract would entitle the decree holder to claim possession also though no such prayer is made in the plaint if the property is in possession of the vendor (contracting party) alone. The Apex Court then observed that when the property is in joint possession of the contracting party and some other person and/or when third party is in possession, then in that situation, a prayer for possession has to be made. The judgment of the Delhi High Court reported in AIR 1976 Delhi 56, in the case of Ex-Servicemen Enterprises (P) Ltd. v. Sumey Singh, has been referred to by the Apex Court, with approval, holding that at any stage of the proceedings, the plaintiff can claim possession by making an application for amendment.

11. In a similar situation, a learned Single Judge of this Court (Coram : Jamdar, J.), in the judgment reported in Lotu Bandu Sonavane Vs. Pundalik Nimba Koli, , in para 8 of the judgment, observed thus :

"Proviso to Sub-section (2) of Section 22 of the Specific Relief Act permits the plaintiff who has not claimed any such relief contemplated by Clause(a) or (b) of Sub-section (1) of Section 22 to amend the plaint for including a claim for such relief. The amendment can be sought at any stage of the proceeding and if the plaintiff moves for such an amendment the Court is bound to allow him to do so, of course on such terms as may be just."

12. In the result, the following conclusions emerge :

(i) that, Section 22 of the Specific Relief Act, 1963, overrides the provisions contained in the proviso to Rule 17 of Order VI of the Civil Procedure Code.

(ii) the court has no jurisdiction to reject an application filed by the plaintiff seeking to amend the plaint for claiming relief of possession in a suit for specific performance of contract of immovable property by placing reliance on the proviso to Rule 17 of Order VI of Civil Procedure Code.

(iii) the court cannot refuse such an amendment on the ground that the amendment application has been filed after the commencement of the trial, though the plaintiff could have with due diligence filed the same prior to the commencement of the trial."

This being the position in law, the order passed by the trial court has to be quashed and set aside.

13. Before I part with the judgment, I am constrained to opine that the reason for rejection of the application for amendment relied upon by the trial Court viz. contradiction in the alleged date and month of dispossession cannot have any bearing in deciding the question, as to whether an application for amendment should be allowed or not. As the basis for rejection of application for amendment is itself ill-founded, even on that count, the order has to be held to be illegal.

14. In the result, I pass the following order :

The writ petition is allowed.

The impugned order dated 17-6-2003, passed by the IIIrd Joint Civil Judge (Senior Division), Aurangabad, below Exhibit 87 in Special Civil Suit No. 202/1988, is quashed and set aside. The application filed by the petitioners for amendment, to the extent it makes a claim for possession, as envisaged by Section 22 of the Specific Relief Act, 1963, is allowed.

15. The learned Counsel appearing for the respondents, at this stage, submits that the suit is pending since the year 1988 and the same be directed to be disposed of expeditiously.

I hope and trust, that the trial Court will proceed to decide the suit expeditiously.

16. Rule made absolute in the above terms. In the circumstances of the case, there shall be no order as to costs.