

(2009) 09 BOM CK 0171

In the Bombay High Court

Case No : Writ Petition No. 3807 of 2004 and Civil Application No's. 7349 of 2005 and 6166 of 2007

Prakash Ratanlal @ Ratansa Kasari

APPELLANT

Vs

Bhika Dhage and Sunil Dhage

RESPONDENT

Date of Decision : 23-09-2009

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 6 Rule 17
Constitution of India, 1950 — Article 227

Citation : (2010) 3 CivCC 53 : (2010) 1 MhLj 810

Hon'ble Judges : S.S. Shinde, J

Bench : Single Bench

Advocate : R.D. Deshpande, for the Appellant; Manjusha A. Deshpande holding for A.S. Deshpande, for the Respondent

Final Decision : Dismissed

Judgement

S.S. Shinde, J.—This writ petition is filed challenging the order dated 12.12.2003 below Exh.25 in R.C.S. No. 370/2002 by which the application filed by the petitioner herein for amendment of the plaint under Order VI Rule 17 proviso of the CPC has been rejected.

2. The background facts of the case are as under:

The petitioner herein filed R.C.S. No. 370 of 2002 on 29.10.2002 for issue of perpetual injunction restraining the respondents from obstructing in his possession over agricultural land Gat No. 224 admeasuring 3 H. 73 R. situated at Siraswadi, taluka and District Jalna. In the said suit, the respondents filed their written statement on 9th December, 2002 and denied the claim of the petitioner herein.

3. It is further case of the petitioner that during pendency of the suit and after going through the facts stated in the written statement and after perusing village record and consolidation record, the petitioner claims to have known that despite

securing permission u/s 47 of the Hyderabad Tenancy Act from Deputy/Collector, Jalna vide Exh.C, the owners did not execute sale deed and since respondents had left the village and petitioner was minor during relevant period, the petitioner could not bring suit for specific performance of agreement for sale executed in favour of Ratanlal by the owners. So he applied for amendment of plaint vide Exh.25 on 5.9.2003 before commencement of evidence, to seek relief of specific performance of agreement for sale, to implead Tulsabai Bandu Dhage as defendant No. 3 and to plead material facts suitably as stated in para a4 of Exh.25.

4. On 12.12.2003 after hearing both parties, the trial Judge concluded that the amendment was at belated stage and it will change the nature of suit and the cause of action and rejected the application filed by the present petitioner. Hence, this petition.

5. This writ petition was heard for admission and this Court was pleased to issue Rule and interim relief in terms of prayer Clause (C) of the petition.

6. The learned Counsel for the petitioner submitted that the plea of oral mortgage relied upon by the respondents is not in conformity with any law and supports the agreement for sale which came to knowledge of the petitioner after going through the written statement at Exh.B before the trial Court and after perusal of village record and consolidation record. It is further submitted that the application for amendment was filed before the commencement of the trial and addition of relief of specific performance of agreement for sale could not be held to be belated because title was denied by the respondents for the first time when they prayed for possession of the land before the Tahsildar and pleaded non execution of sale deed in the written statement. It is further submitted that when permission to alienate disputed property was granted u/s 47 of the Hyderabad Tenancy Act by the competent authority and it is an admitted position that Ratanlal during his life time since 1963 until his death in 1984 and after his death, petitioner has been enjoying possession of disputed land lawfully in pursuance of the agreement for sale, the petitioner was entitled to amendment sought which did not change the nature of the suit and even if it did, it was just and necessary to be allowed for adjudication of real point in controversy and for avoiding multiplicity of litigation. It is further submitted that the Consolidation Officer after holding necessary inquiry made relevant entries about possession of the petitioner in the Consolidation Record and as such, the same was not objected to since 1965 to 2003 for a period of 38 years and as such respondents were not entitled to oppose amendment sought by the petitioner. Therefore, the learned Counsel submitted that amendment as prayed should have been allowed by the trial Court. It is further submitted that no reasons are assigned by the trial Court while rejecting the prayer of the petitioner for amendment of plaint. The learned Counsel invited my attention to the impugned order passed by the trial Court and submitted that the impugned order is without assigning any reasons and to resolve the controversy in the suit, the amendment should have

been allowed. The learned Counsel appearing for the petitioner invited my attention to the contents of the application which was filed before the trial Court for amendment of the plaint and more particularly, paragraph 3 of the said application and submitted that sufficient cause was shown by the petitioner herein before the trial Court as to why the matter could not be brought in the plaint in spite of due diligence. The learned Counsel, in support of his contention, placed reliance on the reported judgment of the Apex Court in the case of *Vidyabai and Ors. v. Padmalatha and Anr.* 2009 (1) ALL MR 471 and submitted that the amendment should be liberally allowed. Even the amendment can be allowed at the appellate stage if case is made out by the party.

7. The learned Counsel appearing for the respondents vehemently opposed the petition and submitted that the trial Court has given reasons in support of the impugned order in paragraphs 6, 7, 8, and 11 of the impugned judgment. Therefore, the contention of the petitioner that the impugned order is without assigning reasons is required to be rejected. The learned Counsel for the respondents further submitted that no sufficient cause has been disclosed in the application below Exh.25 by the petitioner that he was prevented by sufficient cause to bring the matter in the main plaint. Therefore, the application for amendment of the plaint does not fulfill the requirement of the provisions of Order VI, Rule 17 of the Code of Civil Procedure. It is further submitted that the trial Court has rightly held that if the amendment application is allowed then the entire nature of the suit will be changed and it will cause prejudice to the respondents. The learned Counsel for respondents submitted that the original suit is for perpetual injunction and by way of amendment, new prayer is being tried to be introduced for specific performance which would change the nature of the suit. She further submitted that the application filed by the petitioner for amendment of the plaint is time barred. She invited my attention to the contents of the application for amendment and submitted that no sufficient cause has been shown in the application so as to specify the requirement of Rule 17 proviso of Order VI of C.P.C. He supported his contention by relying on reported judgment of Apex Court in case of *Ashutosh Chaturvedi Vs. Prano Devi @ Parani Devi and Others*, and *Chander Kanta Bansal Vs. Rajinder Singh Anand*, . Relying on *Ashutosh Chaturvedi (supra)*, the learned Counsel for respondents submitted that the application for amendment if brought at belated stage, it is required to be rejected. The learned Counsel placed reliance on the Head Note of the aforesaid judgment and submitted that preferential right can ordinarily be claimed within one year. Relying on the case of *Chanderkanta Bansal (supra)*, the learned Counsel submitted that the proviso to Rule 17, Order VI of C.P.C. Limits the power to allow amendment after commencement of trial but grants discretion to the Court to allow amendment. Therefore, the Counsel would submit that the power to allow amendment after commencement of the trial is restricted by proviso. The learned Counsel therefore, contended that the writ petition deserves to be rejected.

8. I have given anxious consideration to the rival submissions advanced on

behalf of the petitioner and respondents and, I am of the considered view that the impugned judgment and order below Exh.25 needs no interference for the following reasons:

The perusal of para 6 of the judgment would show that the trial Court has considered documents on record produced on behalf of the defendants, possession of the plaintiff is unlawful and plaintiff has no title to the suit land and is also not entitled to claim possession. In paragraph 7 the trial Court has recorded that in 7/12 extracts, there is note against Section 47 of the Hyderabad Tenancy Act. The contention of the plaintiff that he came to know about the real facts of the case only after reading the contents of written statement does not appear true. It appears that plaintiff has suppressed the real facts which he could not continue to do so upon the disclosure of the same through written statement. In paragraph 8 the trial Court has recorded the submissions of the Counsel appearing for the plaintiff. The trial Court in paragraph 9 has recorded submissions of the Advocate appearing for the defendants that the claim of specific performance, which is sought to be added by way of amendment, is necessarily based on new cause of action and the amendment changes the cause of action and the same cannot be allowed. The trial Court has considered number of reported judgments of this Court as well as the Honourable Apex Court and ultimately, in paragraph 11, has reached to the conclusion that in case proposed amendment is allowed then it will entirely change nature of the suit and also it will cause prejudice to the defendants and ultimately, the trial Court rejected the application for amendment of the plaint.

9. On careful perusal of the impugned judgment and order, it clearly appears that the matter which the petitioner wanted to bring by way of amendment in the plaint was within the knowledge of the petitioner on the date of filing the suit. The trial Court has rightly recorded in regard to the above point in para 7 that the 7/12 extract clearly shows a note against Section 47 of the Hyderabad Tenancy Act and, therefore, the matter which he wanted to bring by way of amendment was within the knowledge of the plaintiff at the time of filing the suit.

10. The Court has also recorded the arguments advanced by the learned Counsel for the respondents that in case amendment is allowed, then it would be entertaining fresh cause, which would prejudice the interest of the defendants. The original suit was filed by the petitioner for perpetual injunction. The amendment which the petitioner wanted to bring to the plaint was for specific performance of contract to execute a sale deed regarding the suit land. Therefore, the original suit was for perpetual injunction and by way of amendment, the plaintiff introduced new prayer for specific performance. Therefore, certainly if the amendment is allowed, it would change nature of the suit.

11. When the application for amendment of the plaint was filed, the issues were already framed. Therefore, unless the requirement under Rule 17 proviso of Order VI of C.P.C. is satisfied, it was not permissible for the trial Court to allow

the amendment as prayed for by the petitioner ? plaintiff. On careful reading of the application for amendment of the plaint, it clearly appears that no sufficient cause was shown in the said application to come to the conclusion that in spite of due diligence shown by the petitioner, the matter could not be brought in the original plaint itself. The Honourable Supreme Court in case of Vidyabai and Ors. (supra), in paragraph 7 of the judgment, held as under:

By reason of the CPC (Amendment) Act, 2002 (Act 22 of 2002), the Parliament inter alia inserted a proviso to Order 6, Rule 17 of the Code, which reads as under:

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.

It is couched in a mandatory form. The court's jurisdiction to allow such an application is taken away unless the conditions precedent therefore are satisfied, viz., it must come to a conclusion that in spite of due diligence the parties could not have raised the matter before the commencement of the trial.

In paragraph 8 of the said judgment, the Supreme Court has held thus,

8. ...The date on which the issues are framed is the date of first hearing. Provisions of the CPC envisage taking of various steps at different stages of the proceeding. Filing of an affidavit in lieu of examination in chief of the witness, in our opinion, would amount to `commencement of proceeding?.

12. Therefore, on careful reading of paragraphs 7 and 8 of the aforesaid judgment, it is clear that the jurisdiction of court to allow the application for amendment is not permissible unless the condition precedent under Rule 17 proviso of Order VI of C.P.C. is satisfied i.e. the court must come to the conclusion that in spite of due diligence the party could not raise the matter before commencement of the trial. The Apex Court has further held that Order VI, Rule 17 proviso is couched in mandatory form. I find considerable substance in the arguments advanced by the learned Counsel appearing for respondents that the amendment application has not been filed at appropriate stage and the same was filed at belated stage.

13. Taking overall view of the matter, it appears that the application filed below Exh.25 for amendment of the plaint does not show sufficient cause as required under Rule 17 proviso of Order VI of C.P.C. and also the application was filed at belated stage. That apart, if the amendment application is allowed, certainly it would change nature of the suit as well as cause prejudice to the defendants. The trial Court, on the strength of the evidence brought on record by the parties as well as after appreciating the contentions of the respective parties to the suit, as come to the correct conclusion. The trial Court has taken a reasonable and possible view of the matter. No interference is called for in extraordinary

jurisdiction of this Court under Article 227 of the Constitution of India.

14. Therefore, writ petition is dismissed. Rule is discharged. Interim relief stands vacated. Civil Applications stand disposed of.