
(2011) 12 BOM CK 0042
In the Bombay High Court
Case No : Writ Petition No. 4518 of 2011

Raju Shinde

APPELLANT

Vs

Yusufbhai Fakir Mohamad Bagwan

RESPONDENT

Date of Decision : 12-12-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 6 Rule 17
Specific Relief Act, 1963 — Section 26, 26(4)

Citation : (2012) 1 ALLMR 686 : (2012) 2 BomCR 605 : (2012) 2 MhLj 721

Hon'ble Judges : S.V. Gangapurwala, J

Bench : Single Bench

Advocate : V.D. Sapkal, for the Appellant; N.V. Gaware, for the Respondent

Judgement

S.V. Gangapurwala, J.—Rule. Rule returnable forthwith. With the consent of parties taken up for final hearing.

2. The present respondent/original plaintiff filed a suit for specific performance of contract purportedly on the basis of agreement of sale dated 03.10.2007 in respect of property bearing gat No. 159 to the extent of 1H 20R. During the pendency of the suit the plaintiff filed an application for amendment U/Order 6 Rule 17 of the CPC thereby seeking amendment in the plaint so also in the agreement. The said application is allowed. Aggrieved thereby the present petition is filed.

3. Shri Sapkal, the learned counsel for the petitioner/original defendant contends that the Court could not have allowed the amendment in the plaint so also in the agreement. The Court has no jurisdiction to allow the amendment in the agreement U/Order 6 Rule 17 of the CPC Code. The plaintiff in his application had very specifically sought amendment in the plaint to the effect that instead of gat No. 159 the same should be referred as gat No. 459 and also in the agreement of sale executed between the parties which is the basis for the suit, i. e. the said agreement of sale be amended and instead of gat No. 159 the same should be written as gat No. 459. The Court could not have allowed the application seeking

amendment in the agreement. The same was beyond the jurisdiction of the Court. The learned counsel further submitted that no reasons are given for allowing the amendment in the plaint also. In such circumstances, the order cannot be sustained.

4. Shri Gaware, the learned counsel for the respondent/plaintiff submits that the Court has the authority and jurisdiction to allow amendment in the plaint, so also in the agreement of sale between the party by virtue of Section 26 of the Specific Relief Act. The learned counsel relies on the judgment of the Apex Court in the case of Puranram Vs. Bhaguram and another reported in 2008 B.C.I. 181 and another judgment of the Apex Court in a case of Commissioner of Income Tax, Kanpur Vs. Kamla Town Trust, . The learned counsel further contends that the said amendment does not change the nature of the suit and in a suit for specific performance such a relief can be claimed. The learned counsel supports the order passed by the Trial Court.

5. With the assistance of learned counsel I have gone through the pleadings, the application for amendment and the order passed by the Trial Court. Before I advert to the submissions canvassed by learned counsel, it would be appropriate to refer to the relevant provisions.

CODE OF CIVIL PROCEDURE

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ORDER VI Pleadings Generally

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[17. Amendment of pleadings. 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.]

SPECIFIC RELIEF ACT 1963

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26. When instrument may be rectified.(1) When, through fraud or a mutual

mistake of the parties, a contract or other instrument in writing (not being the articles of association of a company to which the Companies Act, 1956 (1 of 1956), applies) does not express their real intention, then

(a) either party or his representative in interest may institute a suit to have the instrument rectified; or

(b) the plaintiff may, in any suit in which any right arising under the instrument is in issue, claim in his pleading that the instrument be rectified; or

(c) a defendant in any such suit as is referred to in clause (b), may, in addition to any other defence open to him, ask for rectification of the instrument.

(2) If, in any suit in which a contract or other instrument is sought to be rectified under subsection (1), the court finds that the instrument, through fraud or mistake, does not express the real intention of the parties, the court may, in its discretion, direct rectification of the instrument so as to express that intention, so far as this can be done without prejudice to rights acquired by third persons in good faith and for value.

(3) A contract in writing may first be rectified, and then if the party claiming rectification has so prayed in his pleading and the court thinks fit, may be specifically enforced.

(4) No relief for the rectification of an instrument shall be granted to any party under this section unless it has been specifically claimed:

Provided that where a party has not claimed any such relief in his pleading, the court shall, at any stage of the proceeding, allow him to amend the pleading on such terms as may be just for including such claim.

6. Bare perusal of Order 6 Rule 17 of the CPC it is manifest that the said provision empowers the Court to allow the amendment to the pleadings. Order 6 Rule 17 of the C. P. C. does not extend beyond amendment to the pleadings.

7. An agreement between the parties is a voluntary act of the parties. The parties on their own volition enter into an agreement. Sec. 26 of the Specific Relief Act permits a suit to be instituted for the purpose of rectification of instrument if through fraud or mutual mistake of the parties the agreement/instrument is executed. The party in his suit may claim relief that instrument be rectified. Proviso to Sub Section 4 of Sec. 26 further deals with the powers of the Court to allow the amendment to the pleadings to claim any such relief with regard to the rectification of the instrument and if the rectification is permitted by the Court, then the plaintiff may further plead that the said rectified document be specifically enforced. There is nothing in the provisions of the statute i. e. Sec. 26 of the Specific Relief Act or Order 6 Rule 17 of the CPC to allow or to empower the Court to allow amendment in the agreement before adjudication by invoking the powers of Order 6 Rule 17 of the C. P. C.

8. Sec. 26 of the Specific Relief Act lays down that a prayer can be made in the

plaint for rectification of the document in view of that the party may claim amendment in the pleading regarding the facts necessary for rectification or amendment of the document and prayer for rectification of document. But by way of an order on an amendment application cannot direct amendment in the document itself. In the present case, precisely the respondent has sought amendment in the plaint and in the document. The amendment application filed by the plaintiff is in vernacular language i. e. Marathi and one of the amendment claimed can be read in English as under :

In the agreement of sale dated 4th April, 2008 executed between plaintiff and defendant, wherever gat No. 159 appears, the same should be deleted and in its place gat No. 459 be written in the original agreement of sale. So also in the boundaries Pedgaon road be written towards the East.

The said amendment sought is reproduced as under in Marathi.

9. Even in para 10 which deals with the prayer, the plaintiff had prayed that the application be allowed and the amendment in the plaint and the document be permitted.

10. The learned Trial Judge has allowed the application and has also tried to interpret the judgment of the Apex Court in a case of Puranram Vs. Bhaguram and another referred supra as it empowers the Court to allow the amendment in the document.

11. The manner in which the said judgment is interpreted by the Trial Court is improper. Perusal of the said judgment of the Apex Court in Puranram Vs. Bhaguram and another case, it is manifest that the Apex Court in para 12 of the said judgment has held as under :

From a plain reading of the provisions u/s 26 of the Act, there is no reason why the prayer for amendment of the agreement to correct a part of the description of the suit property from Chak No. 3 SSM to Chak No. 3 SLM, later on converted to Chak No. 3 SWM could not be granted. In our view, it is only a correction or rectification of a part of the description of the suit property, which cannot involve either the question of limitation or the change of nature of suit. In our view, the suit shall remain a suit for specific performance of the contract for sale and a separate independent suit is not needed to be filed when the proviso to Section 26 itself clearly permits either party to correct or rectify the description of the suit property not only in the plaint but also in the agreement itself.

It is sufficient to observe that it was not necessary for the appellant to file a separate suit for that purpose as contended by the learned counsel for the respondent. It is open to the appellant to claim the relief of rectification of the instrument in the instant suit.

12. It would be manifest that the Apex Court has observed that it is permissible even in a suit for specific performance to claim the relief of rectification of the instrument.

13. In view of the above, there is no hesitation to hold that the Court cannot allow the amendment in the document at this stage. The order impugned to the extent of allowing the amendment in the agreement is quashed and set aside. The order to the extent of allowing the amendment in the pleadings i. e. the plaint is maintained. The plaintiff can file necessary amendment application seeking relief of rectification of the agreement. If such an application is filed the Trial Court shall consider such application on its own merits.

Rule is accordingly made absolute in above terms, however, with no order as to costs.