

(2013) 02 BOM CK 0093

In the Bombay High Court

Case No : Writ Petition No. 7611 of 2012

Shakuntala Balsaraf, Since deceased through her Legal Heirs,
(Balasaheb Balsaraf and Others)

APPELLANT

Vs

Ramdas Balsaraf, Nandu Gaikwad, Suresh Gaikwad and
Dnyaneshwar Balsaraf

RESPONDENT

Date of Decision : 01-02-2013

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 6 Rule 17

Citation : (2013) 2 ABR 586 : (2013) 2 ALLMR 298 : (2013) 2 BomCR 207 :
(2013) 2 MhLj 760

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

Bench : Single Bench

Advocate : S.S. Dixit, for the Appellant; A.N. Nagargoje, Advocate for
Respondent Nos. 1 to 3 and Served, for the Respondent

Judgement

S.S. Shinde, J.—Rule. Rule made returnable forthwith. Heard finally with the consent of the parties. This writ petition takes exception to the order dated 9th August, 2012 passed below Exhibit-137 in Regular Civil Suit No. 310 of 2000 by the Civil Judge, Junior Division, Akole, District Ahmednagar.

2. The back ground facts as disclosed in the petition are as under:-

The petitioners herein, are the original plaintiffs and the respondents herein, are the original defendants in Regular Civil Suit No. 310 of 2000. The said suit is filed for declaration and injunction against respondent Nos. 1 to 3. In the said suit, the petitioners herein, filed application for amendment in the plaint, which came to be rejected by the impugned order. Hence, this writ petition.

3. Learned Counsel appearing for the petitioners invited my attention to the averments in the plaint and submitted that, the suit property was earlier owned by one Ashok Narayan Shete, and father of petitioner NO. 1A Dhondiba Anand Balsaraf was in possession of the suit property under tenancy right. It is submitted that, there was dispute in respect of the tenancy of the suit property,

later on, there was compromise between the parties and the original plaintiffs and respondent No. 4 purchased the suit property from Ashok Narayan Shete. Respondent No. 1 is a nephew of petitioner No. 1 in whose name 17 Are land out of 36 Are of the suit property of the petitioners was mutated only as a family arrangement, however, actual possession of 17 Are land was never given to respondent No. 1. Respondent No. 1 taking disadvantage has mutated his name for 17 Are land from the suit property and sold the same to respondent No. 2 by executing the sale deed dated 2nd December, 1997. It is further submitted that, on the strength of said void sale deed, respondent Nos. 2 and 3 are disturbing possession of the petitioners and respondent No. 4 over the suit property. Hence, the petitioners filed suit for declaration and injunction.

4. It is submitted that, by way of amendment in the plaint, the petitioners want to contend that, "the plaintiffs have filed suit against the defendants for declaration that the sale deed executed by defendant No. 1 in favour of defendant Nos. 2 and 3 may be declared as null and void and possession taken by defendant Nos. 2 and 3 of 17 Are land from the western portion of the suit property with the aid of the police should be restored back to the petitioners." It is further submitted that, by way of amendment, the petitioners want to contend that, "the possession of 17 Are land from western side of the suit property from defendant No. 2 and 3 should be restored back to the plaintiffs since their possession is on the basis of void sale deed and same is taken with the aid of the police." It is submitted that, the said amendment was of technical nature and cannot change the nature of the suit. It is submitted that, if such amendment is not allowed, the plaintiffs will have to institute another proceedings for recovery of possession. It is submitted that, therefore, relief of declaration that, the sale deed executed by defendant No. 1 in favour of defendant Nos. 2 and 3 should be declared as null and void in respect of 17 Are land from the western portion of the suit property is main relief sought in the suit. Therefore, by way of amendment, the petitioners are claiming only possession of 17 Are land from western portion of the suit property from defendant Nos. 2 and 3 since such possession is taken by them on the basis of void sale deed and with the aid of police. It is submitted that, the amendment in the plaint can be allowed even after commencement of trial if questions in controversy can be set at rest by allowing said amendment. It is submitted that, to avoid multiplicity of litigations, the application filed by the petitioners for amendment of the plaint ought to have been allowed by the trial Court. It is submitted that, if the petitioners are allowed to amend the plaint, it will not change the nature of the suit.

Learned Counsel appearing for the petitioners invited my attention to the reported judgment of this Court in the case of Lalit Kabra vs. Bombay Stock Exchange and others [2002 (Supp. 2) Bom.C.R. 808] and submitted that, this Court in Paragraph-5A and 5B of the aforesaid judgment held that, if the events are happened subsequent to filing the suit by the plaintiff, the plaintiff is entitled to amend the plaint. Learned Counsel pressed into service reported judgment of this Court in the case of Krishnaji Shankar Moghe Vs. Sitaram Gangadhar

Shende, and submitted that, this Court in the facts of that case held that, subsequent events which have occurred after initiation of the proceedings sought to be introduced by way of amendment to the pleadings and if such events are in relation to the subject matter of the dispute between the parties and necessary to decide real controversy, merely delay in filing the application for amendment or because a party to the proceedings will have to lead evidence consequent to the amendment of the pleadings, cannot be a justification for refusal of the application for amendment. Therefore, learned Counsel appearing for the petitioners relying upon the contentions in the application for amendment, grounds taken in the writ petition, annexures thereto and afore mentioned judgments of this Court, would submit that, this petition may be allowed.

5. On the other hand, learned Counsel appearing for respondent Nos. 1 to 3 vehemently opposed the prayer in the petition and submitted that, the application for amendment of the plaint is filed at belated stage when the matter is fixed for final arguments. It is submitted that, if such amendment is allowed, certainly proposed amendment will change the nature of the suit itself since the suit is not instituted for recovery of possession. It is submitted that, the suit filed by the plaintiffs i.e. petitioners herein, is simpliciter suit for declaration and perpetual injunction and therefore, by way of proposed amendment, nature of the suit will be changed. Learned Counsel for the respondent Nos. 1 to 3 invited my attention to the reasons recorded by the trial Court and submitted that, the trial Court has given cogent reasons for rejecting the application for amendment in the plaint. It is submitted that, no due diligence has been disclosed in the application for amendment of the plaint and therefore, the trial Court has rightly turned down the application for amendment, therefore, this Court may not interfere in the impugned order. Therefore, the Counsel appearing for respondent Nos. 1 to 3 relying upon the written statement filed before the trial Court and the reasons recorded by the trial Court while rejecting the application below Exhibit-137 would contend that, this petition is devoid of any merits and same may be rejected.

6. I have given careful consideration to the rival submissions. It appears that, the petitioners herein filed civil suit in the year 1998. 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 came into force after aforesaid amendment.

7. Upon careful perusal of the contention of the application for amendment, in fact, the plaintiffs are seeking relief of restoration of possession of 17 Are land from respondent Nos. 2 and 3. It is the case of the plaintiffs that, initially the relief of injunction was sought, however, respondent Nos. 2 and 3 have taken possession of the suit land with the police aid and therefore, it was necessary to seek amendment to the plaint and prayer for additional relief of restoration of possession. The main prayer that, the sale deed executed by respondent No. 1 in favour of respondent Nos. 2 and 3, in respect of the suit land is without having

any authority to respondent No. 1 to execute such sale deed and therefore, said sale deed should be declared null and void, is incorporated in main suit. In the main suit, there are pleadings to the effect that, the sale deed executed by respondent No. 1 in favour of respondent Nos. 2 and 3 in respect of 17 Are land should be declared null and void. By way of amendment, the plaintiffs are only seeking relief of restoration of possession. If such amendment is not allowed, the plaintiffs will have to file another suit seeking the said relief, which would increase the multiplicity of the litigation. By allowing such amendment, the nature of the suit will not change. As already observed, there is main prayer for declaration that, the sale deed executed by respondent No. 1 in favour of respondent Nos. 2 and 3 should be declared null and void.

8. The Supreme Court in the case of Abdul Rehman and Another Vs. Mohd. Ruldu and Others, in the facts of that case, held that, voidness of sale deeds was implicit in the factual matrix set out in the unamended plaint and relief of cancellation of sale deeds as sought by amendment does not change the nature of the suit. Paragraph Nos. 10 and 15 of the said judgment reads thus:

10) Next, we have to see whether the proposed amendments would alter the claim/cause of action of the plaintiffs. In view of the same, we verified the averments in the un-amended plaint. As rightly pointed out by Ms. Manmeet Arora, learned counsel for the appellants that the entire factual matrix for the relief sought for under the proposed amendment had already been set out in the un-amended plaint. We are satisfied that the challenge to the voidness of those sale deeds was implicit in the factual matrix set out in the un-amended plaint and, therefore, the relief of cancellation of sale deeds as sought by amendment does not change the nature of the suit as alleged. It is settled law that if necessary factual basis for amendment is already contained in the plaint, the relief sought on the said basis would not change the nature of the suit. In view of the same, the contrary view expressed by the trial Court and High Court cannot be sustained. It is not in dispute that the relief sought by way of amendment by the appellants could also be claimed by them by way of a separate suit on the date of filing of the application. Considering the date of the sale deeds and the date on which the application was filed for amendment of the plaint, we are satisfied that the reliefs claimed are not barred in law and no prejudice should have been caused to respondent Nos. 1-3 (defendant Nos. 1-3 therein) if the amendments were allowed and would in fact avoid multiplicity of litigation.

15) We reiterate that all amendments which are necessary for the purpose of determining the real questions in controversy between the parties should be allowed if it does not change the basic nature of the suit. A change in the nature of relief claimed shall not be considered as a change in the nature of suit and the power of amendment should be exercised in the larger interests of doing full and complete justice between the parties.

(emphasis supplied).

9. In the facts of the present case, voidness of sale deed is implicit in the pleadings in the plaint and the plaintiffs have sought relief of restoration of possession of the suit land since according to them, possession of suit land is taken by defendant Nos. 2 and 3 with the police aid during the pendency of the suit.

10. Upon careful perusal of the impugned judgment and order, it appears that, the trial Court has only referred order below Exhibit-5 passed by the Civil Court on 20th March, 1999. However, the trial Court has not taken into consideration the order passed by the trial Court below Exhibit-44 in Regular Civil Suit No. 310 of 2000. The said application was filed on behalf of defendant No. 2 for temporary injunction, however, same came to be rejected by the order dated 16th February, 2005. There are certain observations by the trial Court in paragraph-6 of the said order that, the order by the Tahsildar holding possession of 17 Are portion of the defendants, is subsequently cancelled by the decision of the Sub Divisional Officer. Therefore, taking overall view of the matter, in my opinion, the application for amendment below Exhibit-137 should have been allowed by the trial Court to avoid multiplicity of the litigation and to set at rest the questions in controversy involved in the suit. It is true that, there is a belated attempt by the plaintiffs to bring such amendment, however, the defendants can be compensated by awarding the costs. Accordingly, in the aforesaid back ground, the following order is passed.

:ORDER:

(1) The writ petition is allowed in terms of prayer clause (B);

(2) The petitioners i.e. original plaintiffs should be allowed to amend the plaint as per amendment application at Exhibit-137. However, the plaintiffs are directed to deposit Rs. 6000/- (Rs. Six thousand only) towards costs in the trial Court, within two weeks from today. Upon such deposit of costs amount, defendant Nos. 1 to 3 will be entitled to withdraw the same in proportionate, unconditionally.

(3) The deposit of costs amount of Rs. 6000/- by the plaintiffs is a pre-condition for allowing the amendment, to be carried out in the plaint. After depositing the costs amount, the plaintiffs shall carry out amendment immediately within one week. The respondents will have liberty to file additional written statement, if any, to the amended portion in the plaint within one week from actual amendment in the plaint. The whole exercise should be done by the parties within five weeks from today.

(4) Since the suit is pending from 1998, the trial Court after allowing the amendment to the plaint and written statement, if any, by the respondents to the amended plaint, shall proceed to hear and decide the suit, as expeditiously as possible, however, within three months from today.

(5) Rule is made absolute on above terms.