

(2017) 11 BOM CK 0053
In the Bombay High Court
Case No : 865 of 2017

Shri Paresh Shah

APPELLANT

Vs

Bhonsle dairy, & Ors.

RESPONDENT

Date of Decision : 29-11-2017

Acts Referred:

Constitution of India, Article 227 -
Power of superintendence over all courts by the High Court
Code of Civil Procedure, 1908, <a href=3859 — Order 6Rule
17>Order 6Rule 17, <a href=3859-O

Citation : (2017) 11 BOM CK 0053

Hon'ble Judges : C. V. Bhadang

Bench : SINGLE BENCH

Advocate : Shivan Desai, Jatin Ramaiya, Sudesh Usgaonkar, R. Pereira

Judgement

1. Rule, made returnable forthwith. Learned counsel for the contesting respondent no.6 waives service. Heard finally by consent of parties.
2. The challenge in this petition, under Article 227 of the Constitution of India, is to the order dated 30/8/2017 (below Exhibit D/115), passed by the learned Addl. Senior Civil Judge at Margao in RCS NO.247/2010/II. By the impugned order, application for amendment of plaint filed by the petitioner/plaintiff seeking to incorporate an alternate prayer clause, has been rejected.
3. The brief facts necessary for the disposal of the petition may be stated thus: That the petitioner has filed the aforesaid suit for declaration, injunction and other consequential reliefs. The petitioner inter alia seeks a declaration that he is the absolute owner and in possession of the suit plot and for cancellation of the deed of sale dated 12/2/2010 to the extent it purports to sell a portion of the suit plot and for declaration of the said deed of sale as null and void.
4. Indisputably there is an order of temporary injunction operating in favour of the petitioner. It is further undisputed that the petitioner has filed an application for breach of injunction under Order 39 Rule 2 (A) of the Code of Civil Procedure

1908, which is pending before the learned trial court. A perusal of the plaint would show that it has all along been the case of the petitioner that he is in possession of the suit plot. Be that as it may, at the stage when the evidence of both the parties is concluded and the suit is fixed for arguments, the petitioner filed an application for amendment of plaint thereby seeking incorporation of the following prayer clause: "(CC) In alternative to relief prayed at prayer clause (C) grant relief of recovery of possession to the plaintiff herein and direct the defendant no.6 to handover and delivery vacant possession of the suit plot to the plaintiff." Except this, there is no other amendment sought. The petitioner in para 9 of the application for amendment has made a categorical statement that the petitioner does not intend to lead any evidence in support of the amendment. According to the petitioner, he could not file the application at an earlier stage and it was only when the petitioner was given legal advice to seek such an alternate relief that the application for amendment came to be made. This according to the petitioner is sufficient to show due diligence for not filing the application prior to commencement of the trial.

5. The application was opposed on behalf of the respondents inter alia on the ground that it belated and that there is no satisfaction of the proviso to Rule 17 of Order 6 of C.P.C.

6. The learned trial court found that mere filing of the application for contempt/breach of injunction, would not absolve the petitioner from seeking necessary amendment at the earlier stage. The learned trial court found that in the application for taking action for breach of the order of injunction the petitioner has stated that somewhere in September 2010 the original defendant no.6 had carried out construction activity and as such, it was necessary for the petitioner to seek amendment at an earlier stage. The learned trial court also found that except the prayer clause there are no supporting pleadings in the body of the plaint. Lastly, the Court has found that the petitioner has failed to show due diligence.

7. I have heard Shri Desai, the learned counsel for the petitioner and Shri Usgaonkar, the learned counsel for the contesting respondent no.6. Perused record.

8. It is submitted by Shri Desai, the learned counsel for the petitioner that the amendment sought is an innocuous amendment and is sought by way of abundant caution, and in the event the trial court comes to the conclusion that the petitioner is not in possession of the suit property. It is submitted that the proposed amendment neither introduces any new case nor changes the nature of the suit or cause of action. In so far as the aspect of due diligence is concerned, it is submitted that the petitioner can justifiably rely on the legal advice and it is on legal advice having been received that the application for amendment was made. It is submitted that the petitioner does not want to reopen the evidence and no prejudice will be caused to the respondents if the proposed amendment is allowed. The learned counsel has placed reliance on the following decision:

(i) Shakuntala w/o Balasaheb Balsaraf since deceased through Lrs. Vs. Ramdas s/o. Laxman Balsaraf & Others. (2013) (2) ALL MR 298.

9. On the contrary it is submitted by Shri Usgaonkar, the learned counsel for the respondent no.6 that the amendment is belated and is also moved after the commencement of the trial. It is thus submitted that the petitioner is required to satisfy the requirements of the proviso to Rule 17 of Order 6 of C.P.C which the petitioner has failed to do in this case. The learned counsel has strenuously urged that the satisfaction of the proviso is *sine qua non* and is a jurisdictional fact and in absence thereof, the trial court cannot grant the amendment which has rightly been rejected. The learned counsel has referred to the cross examination of Mr. Paresh Shah in order to submit that the said witness has admitted way back in February 2014 that it is the respondent no.6 (defendant no.6) who is in possession of the suit plot. It is, therefore, submitted that the application ought to have been made earlier. The learned counsel submits that the cases relied upon are distinguishable. (i) J. Samuel and Others Vs. Gattu Mahesh and Others (2012) 2 SCC 300.

(ii) Rajkumar Gurawara (Dead) Through Lrs. Vs. S. K. Sarwagi and Company Private Limited and anr. (2008) 14 SCC 364. (iii) Dnyandev Ramlal Patil Vs. Sanjeev Bhavlal Patil and others 2014 (6) Mh.L.J.

(iv) Vidyabai and Others Vs. Padmalatha and anr. (2009) SC 409.

10. I have given my anxious consideration to the rival circumstances and the submissions made.

11. As noticed earlier, the only amendment sought is by way of an alternate prayer clause (CC) for the relief of recovery of possession. It is undisputed that the case made out in the plaint is that the petitioner is in possession of the suit plot and there is also an order of temporary injunction operating in favour of the petitioner. It is further a matter of record that an application for taking action for breach of injunction filed by the petitioner is pending before the trial court. The suit is essentially for declaration of the sale deed dated 12/2/2010 as null and void and for cancellation of the same and consequential relief of permanent injunction. The question is whether in such a case the petitioner could be allowed to introduce the alternate prayer by way of an amendment and that too at a stage when the evidence of both the parties is concluded.

12. The proviso to Rule 17 of Order 6 of C.P.C states 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 the trial. It can thus be seen that for grant of amendment at a stage, subsequent to the commencement of trial, the party has to satisfy that in spite of due diligence, it could not have raised the matter before the commencement of the trial.

13. In the present case, the reason shown is that the petitioner was legally

advised to seek such an amendment by way of alternate prayer clause and thereafter the application for amendment came to be moved. The question whether there is such due diligence shown by the party seeking amendment would obviously depend upon facts and circumstances of each case. It is neither possible nor appropriate to lay down any straight jacket formula which can be used while determining whether the party has shown sufficient cause and due diligence which is required by the proviso to Rule 17 of Order 6 of C.P.C. However, there cannot be any manner of dispute with the proposition that existence of such due diligence is a *sine qua non* and would be a jurisdictional fact for the trial court to exercise the discretion to grant the amendment.

14. Coming back to the present case, it is true that the petitioner has stated in the year 2014 that the respondent no.6 is forcibly occupying the suit plot, however, the application for amendment is made in the year 2017. The short question is whether the petitioner can rely on the ground of legal advice for showing compliance with of the requirement of the proviso. Before considering the question it needs to be noted that the whole object of the introduction of the proviso is that the trial of suit has to proceed expeditiously and no unnecessary amendments are sought for, particularly at the stage after the commencement of the trial. The basic principle on which an application for amendment is considered is that the amendment is necessary for deciding the real controversy in the suit and also for avoiding multiplicity of proceedings. The normal rule is that the Court can allow any such amendment which in its opinion is necessary for deciding the real controversy in dispute and such amendment can be granted at any stage, albeit subject to compliance with the proviso to Rule 17 of Order 6 of C.P.C. The question of existence of due diligence or otherwise, would also, would depend upon the nature of the amendment sought. There may be cases where the amendment sought is of an innocuous nature. For instance, correction of typographical/arithmetical errors or names of the parties and there may be cases where the amendment is of a sweeping and substantial nature. The question of the satisfaction with the requirement of the proviso will have to be considered in the context of the overall circumstances.

15. Here is a case where by way of an abundant caution, the petitioner has sought an introduction of an alternate relief of possession in the event the trial court comes to the conclusion that the petitioner has either lost possession or is not in possession of the suit plot. In an adversarial system in which the parties are represented by advocates, a party is justified in placing reliance on legal advice on the basis of which they prosecute the cases before the Court. The question of the existence of due diligence as noticed earlier has to be considered in the facts and circumstances of each case and on a pragmatic view. In my considered view the petitioner is entitled to say that the application was made when he was legally advised to seek an alternate relief of possession in the event the Court comes to the conclusion that the petitioner is no longer in possession or has lost possession. In my considered view the requirement of the proviso to Order 6 Rule 17 of C.P.C is satisfied in this case.

16. The matter can be looked at from another angle. It is well settled that the Court can in appropriate case, mould the relief, so as to do complete justice between the parties. We cannot envisage a situation where on one hand the court declares the sale deed to be invalid and on the other hand, the Court would be precluded from granting the decree of possession for want of a specific prayer clause to that effect. It would create a incongruous situation where on one hand the sale deed would stand declared invalid, however, the petitioner would not be entitled to possession on the technical ground of absence of a prayer clause to that effect. Thus considered from any angle and in particular to avoid multiplicity of the proceedings and looking to the nature of the amendment and the cause shown, I find that this is a case where the amendment ought to have been granted.

17. A brief reference at this stage can be made to the decision cited on behalf of the respondents. Before advertng to the individual cases, let me reiterate that the existence of the due diligence as required by the proviso to Order 6 Rule 17 of C.P.C is a jurisdictional fact and there cannot be any dispute on this proposition. However, as noticed earlier, whether or not the test of due diligence is satisfied would depend upon the facts and circumstances of each case.

18. In the case of J. Samuel and Others (supra), the plaintiff had failed to incorporate a specific plea as mandated by section 16 (c) of the Specific Relief Act, 1963. The said plea was sought to be introduced on the ground that it was a "typing mistake". Section 16 (c) of the Specific Relief Act requires the plaintiff to plead that he has performed and was always ready and willing to perform his part of the contract and which is an essential requirement to be pleaded in a suit for specific performance. That pleading was lacking which was sought to be introduced on the ground of it being a typographical error which was not accepted.

19. In the case of Rajkumar Guraware (supra), the petitioner/ plaintiff in the suit had prayed for a declaration of his exclusive right to do mining operation and to use and sell the suit scheduled property. The petitioner sought an amendment for recovery of possession and damages which in the facts of that case was not allowed. The Supreme Court has inter alia held that the application for amendment cannot be granted in the following circumstances: (i) If the nature of the suit is changed by permitting the amendment;

(ii) When the amendment results in introducing new cause of action and tends to prejudice the other party;

(iii) Allowing the amendment, defeats, the law of limitation. It has inter alia been held that the rational behind the proviso to Order 6 Rule 17 of C.P.C is that there is lesser degree of prejudice caused in pre-trial amendments as distinguished from the amendments brought after commencement of trial. Thus, the prejudice likely to be caused to the other side determines the degree of liberality in allowing the amendment in terms of statutory limitation in the proviso to Order 6

Rule 17 of C.P.C.

20. In the present case the proposed amendment neither changes the nature of the suit nor the cause of action.

21. The case of Dnyandev Ramlal Patil (supra) also turned on its own facts. A perusal of para 24 would show that it was nowhere pleaded as to when did the petitioner acquire the knowledge of his dispossession. It would further be significant to note that in that case the suit was not for injunction.

22. In the case of Vidyabai and Others (supra), there was a suit for specific performance of contract, which was fixed for cross examination of the plaintiff. At that stage, the respondent/defendant sought to amend the written statement and produce additional documents. Both these applications were allowed by the trial court. The High Court while upholding the rejection of the amendment of the written statement allowed the production of the documents. The Hon"ble Supreme Court remanded the matter back to decide whether the documents could be allowed to be produced after the commencement of the trial when the amendment of the written statement was not allowed. In my opinion the case would be clearly distinguishable.

23. A brief reference could be made to the decision of this Court in the case of Shakuntala Balsaraf (supra). In that case the plaintiff had filed a suit for declaration of the sale deed executed by the respondent no.1 in favour of the respondent no.2 and 3 as null and void and for injunction. The petitioner/plaintiff sought amendment on the ground that during the pendency of the suit, the respondent nos.2 and 3 have taken possession of the suit land with police aid and sought restoration of possession. This Court held that the amendment needs to be allowed as otherwise it will lead to multiplicity of litigation. This Court also came to the conclusion that the amendment of the nature as was sought, does not change the nature of the suit, particularly in the light of the prayer for declaration of the sale deed as null and void. In my considered view the case has a close resemblance to the facts of the present case. This Court in the case of Shakuntala Balsaraf (supra) has relied upon the decision of the Supreme Court in the case of Abdul Rehman and another Vs. Mohd. Ruldu and others (2012) 11 SCC 341, in which the Hon"ble Supreme Court held 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)

24. It can thus be seen that a change in the nature of relief (and more so when it is an alternate relief) shall not be considered as change in the nature of the suit. The power to allow amendment should be exercised in the larger interest of doing full and complete justice between the parties.

25. In such circumstances, the petition is allowed. The impugned order is hereby set aside. The application (Exhibit D/115) is allowed as prayed. Rule is made absolute in the aforesaid terms with no order as to costs.