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(2017) 04 BOM CK 0066

In the Bombay High Court

Case No : 123 of 2017

Shri Subash Jagdev Pangam Son of late Jagdev Rajaram Pangam (deceased) presented by his legal representatives, & Ors. — APPELLANT

Vs

Mr. Sujit Thomas Keeranchira — RESPONDENT

Date of Decision : 12-04-2017

Acts Referred:
Code of Civil Procedure, 1908, Order 6Rule 17

Citation : (2017) 04 BOM CK 0066

Hon'ble Judges : M. S. Sonak

Bench : SINGLE BENCH

Advocate : P. Kamat, A. D. Bhobe

Judgement

1. Rule.

2. At the request of and with the consent of the learned counsel for the parties, rule is made returnable forthwith.

3. The challenge in this petition is to the order dated 27/8/2016 by which the learned trial judge has permitted the respondents/defendants to produce on record two additional documents i.e. an agreement dated 19/9/2003 along with a plan annexed to and a private surveyor''s report/plan dated 17/3/2016.

4. Ms. Kamat, the learned counsel for the petitioner submits that the trial in the suit is at an advanced stage. Evidence of the plaintiff stands concluded. The defendant has also examined himself though, the witnesses of the defendants are yet to be examined. She submits that at a stage when the trial in the suit had commenced, the respondents/defendants by application dated 8/12/2011 had applied for leave to amend the written statement. In the schedule to the proposed amendment, reference was sought to be made to the agreement dated 19/9/2003. The learned trial judge by detailed order dated 15/2/2012 declined

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leave to amend, inter alia, on the ground that the respondents/defendants had not demonstrated any due diligence in applying for leave to amend after the commencement of the trial. After the respondent was unsuccessful in amending the written statement, precisely in order to circumvent the effect of the order dated 15/2/2012, the defendant has belatedly applied for leave to produce additional documents on record. There is no explanation whatsoever as to what prevented the defendants from producing such documents at the appropriate stage. The learned trial judge without considering the relevant parameters has almost mechanically granted leave to produce such documents by observing that the petitioners will have an opportunity to cross examine the defendant witnesses. Ms. Kamat submits that the impugned order is in excess of jurisdiction and in any case the exercise of discretion is unreasonable. Therefore, for all these reasons, she submits that the impugned order warrants interference.

5. Mr. Bhobe, the learned counsel for the respondents submits that a parameters for grant of leave and to produce the documents on record and to permit amendment of pleadings are substantially different. He submits that in the context of leave to produce additional documents, what is vital, is the relevancy of the documents. In this case it is not even the contention of the petitioners that the documents are irrelevant or that the documents will not assist in the effective adjudication of the controversy between the parties. Mr. Bhobe submits that the impugned order is discretionary and the discretion has to be exercised reasonably. This is not a case of jurisdictional error. He relied upon the following decisions in support of his submissions: (i) Vitorino Rodrigues & Others Vs. Smt. Nirmalabai Shivajirao Desai (deceased) Through L.R.s & Ors (2010) (6) ALL MR 208

(ii) Mrs. Vera Lelisa Viegas Pereira Vs. Agnelo Caetano Colaco & Others (2013 (6) ALL MR 347

(iii) Smt. Chitrakala Fal Dessai Vs. Shri Balu Marathe alias Mane s/o, Jyotiba Marathe (2006) (5) ALL MR 438.

6. The rival contentions now fall for determination:

7. There is absolutely no explanation as to why the agreement dated 19/9/2003, which is now sought to be produced on record was not produced on record earlier. There is some vague reference to this agreement in the original written statement, however the reference was not in same form as was sought to be projected in the schedule of amendment accompanying the application seeking leave to amend the written statement filed on 8/12/2011. The learned trial judge by detailed order dated 15/2/2012 has rejected the respondent''s application seeking leave to amend inter alia on the ground that the predicates of proviso to order VI Rule 17 of C.P.C are not fulfilled. This means that it was held that the respondent was not diligent in taking steps to place on record whatever material the respondents deemed appropriate or necessary for adjudication in the suit.

8. The learned trial judge by now permitting this agreement to be produced on

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record has virtually diluted the effect of its earlier order dated 15/2/2012. The impugned order has virtually permitted the respondents to achieve indirectly what the respondent could not achieve directly on the earlier occasion.

9. In so far as the survey report is concerned, again it is the case of the respondent that such a document was vital and relevant, nothing prevented the respondent from producing such a document at the very first instance or in any case, before the commencement of the trial. It is to be noted that this is the document is prepared after the commencement of the trial. From the application to produce documents, it is quite clear that the respondents have been quite casual in their approach even so far as this document is concerned.

10. In this case the discretion cannot be said to have been exercised reasonably or after adverting to all the relevant parameters which will apply to such a case. The learned trial judge has failed to appreciate that the petitioner plaintiffs have already closed evidence. If the documents which are now sought to be produced were already on record, certainly the plaintiff would have adverted to such documents in order to comment upon the same in the course of evidence. It is also possible that the plaintiffs would have led evidence from some other surveyor or produced a survey report before the commencement of the trial. To say that the petitioner can always cross examine the surveyor or some other witnesses for the defence, in the facts and circumstances of the case, is to pay only lip service to the requirements of fair procedure. There is substance in the contention of M. Kamat that the application for leave to produce additional documents was only to circumvent the effect of the order dated 15/2/2012, by which leave to amend the written statement was declined to the respondents. Admittedly, the order dated 15/2/2012 was not challenged by the respondents.

11. The decisions relied upon by Mr. Bhobe turns on their own facts. The facts situation in the present case hardly offers a parallel to the fact situation as was prevailing in the decisions relied upon by Mr. Bhobe.

12. Upon cumulative consideration of the facts and the law, the impugned order dated 22/8/2016 is set aside. Rule is made absolute in terms of prayer clause (a) of the petition. The interim relief for stay of further proceedings in the suit is vacated. There shall however be no orders as to costs.

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