

(2005) 12 BOM CK 0021

In the Bombay High Court

Case No : Writ Petition No. 3846 of 2005

Vijaykumar Narayanrao Dixit

APPELLANT

Vs

Uday Griha Nirman Samasya Niwarak Sanstha

RESPONDENT

Date of Decision : 01-12-2005

Acts Referred:

Bombay Tenancy and Agricultural Lands (Vidarbha Region) Act, 1958 — Section 89
Constitution of India, 1950 — Article 226, 227
Easements Act, 1882 — Section 60

Citation : (2006) 2 ALLMR 662 : (2006) 3 CivCC 235 : (2006) 3 MhLj 676

Hon'ble Judges : B.P. Dharmadhikari, J

Bench : Single Bench

Advocate : S.V. Manohar, for the Appellant; H.D. Dangre, for the Respondent

Judgement

B.P. Dharmadhikari, J.—In this writ petition under Articles 226 and 227 of Constitution of India, challenge is to the order dated 18-7-2005 passed below exhibit 50 in Special Civil Suit No. 1258 of 1993 by Forth Joint Civil Judge, Senior Division, Nagpur allowing application for amendment of respondent plaintiff after his examination-in-chief and cross-examination was over.

2. Considering the fact that said suit is of year 1993 and the controversy involved, parties have been heard finally at the stage of admission itself. I have heard advocate Manohar for petitioner/original defendant and advocate Dangre, for respondent/original plaintiff.

3. Advocate Manohar has contended that the amendment allowed has the effect of filling in lacuna and of withdrawing admission and prejudicially affects the defence of present petitioner. He invites attention to the plaint as filed originally, to the evidence of plaintiff and thereafter to the amendment application. He contends that the amendment as allowed has the effect of filing new suit and further points out that on earlier occasion an application for amendment was moved which came to be allowed. He states that change of lawyer cannot be the reason for permitting such amendment. He further points out the original

agreement for sale is not placed on record and no document signed by defendant/petitioner acknowledging any payment towards sale consideration is placed on record. He further argues that standards applied by reported judgments in this respect are overlooked by the trial Court by observing that the same consider cases of amendment to written statement by defendant. He relies upon the judgment of Hon''ble Apex Court reported at B.K.N. Narayana Pillai Vs. P. Pillai and Another, and Shri Tertuliano Renato de Silva and Another Vs. Shri Francisco Lourenco Bettencourt de Silva and Another, in support.

4. Advocate Dangre, for respondent/original plaintiff supports the impugned order by pointing out that earlier advocate had not drafted the suit for specific performance correctly and did not disclose necessary details. He states that upon change of lawyer the respondent discovered the defect and hence the details as apparent from record are only sought to be pleaded by amendment. He argues that no new facts which are not within the knowledge of petitioner are sought to be included by amendment and as such there is no question of any prejudice to him in the matter. He also invites attention of Court to the original pleadings, the amendment and the evidence on record. He relies upon the judgment of Hon''ble Apex Court at B.K.N. Narayana Pillai Vs. P. Pillai and Another, (relied upon by petitioner also) and Fritiz T.M. Clement and Another Vs. Sudhakaran Nadar and Another, Although the xerox copies of rulings of Hon''ble Apex Court reported at 2001(2) SCC 472 between Ragu Tilak v. Rayappan and on this Court at 2002(4) MkJ. 382 between Chanchalben v. Municipal Corporation of Greater Mumbai are supplied on record, no references made to these rulings in the arguments, Fritiz T.M. Clement and Another Vs. Sudhakaran Nadar and Another, has been heavily relied upon in support impugned order.

5-A. It will be first appropriate to consider the ruling of Hon''ble Apex Court on which both the parties have placed reliance. In B.K.N. Narayana Pillai Vs. P. Pillai and Another, , the appellant before Hon''ble Apex Court initially took a plea in written statement that he was lessee and opposed the claim for his eviction. Later on he wanted to raise alternative plea that in case he was found to be licensee as contended by respondent/plaintiff, his licence had become irrevocable in view of Section 60(b) of Indian Easements Act, 1882. The amendment was not allowed by trial Court as also by High Court on the ground that it was mutually destructive and permitted appellant/defendant to withdraw admission in written statement. The Hon''ble Apex Court has observed thus in paragraph 4 and paragraph 5:

4...The principles applicable in the amendments of the plaint are equally applicable to the amendments of the written statements. The Courts are more generous in allowing the amendment of the written statement as question of prejudice is less likely to operate in that event. The defendant has a right to take alternative plea in defence which, however, is subject to an exception that by the proposed amendment other side should not be subjected to injustice and that any admission made in favour of the plaintiff is not withdrawn. All amendments

of the pleadings should be allowed which are necessary for determination of the real controversies in the suit provided the proposed amendment does not alter or substitute a new cause of action on the basis of which the original lis was raised or defence taken. Inconsistent and contradictory allegations in negation to the admitted position of facts or mutually destructive allegations of facts should not be allowed to be incorporated by means of amendment to the pleadings. Proposed amendment should not cause such prejudice to the other side which cannot be compensated by costs. No amendment should be allowed which amounts to or relates in defeating a legal right accruing to the opposite part on account of lapse of time. The delay in filing the petition for amendment of the pleadings should be properly compensated by costs and error or mistake which, if not fraudulent, should not be made a ground for rejecting the application for amendment of plaint or written statement.

5. In the appeals the appellant-defendant wanted to amend the written statement by taking a plea that in case he is not held a lessee, he was entitled to the benefit of Section 60(b) of the Indian Easements Act, 1882. Learned Counsel for the appellant is not interested in incorporation of the other pleas raised in the application seeking amendment. The plea sought to be raised is neither inconsistent nor repugnant to the plea already raised in defence. The alternative plea sought to be incorporated in the written statement is in fact the extension of the plea of the respondent-plaintiff and rebuttal to the issue regarding liability of the appellant of being dispossessed on proof of the fact that he was a licensee liable to be evicted in accordance with the provisions of law. The mere fact that the appellant had filed the application after a prolonged delay could not be made a ground for rejecting his prayer particularly when the respondent-plaintiff could be compensated by costs. We do not agree with the finding of the High Court that the proposed amendment virtually amounted to withdrawal of any admission made by the appellant and that such withdrawal was likely to cause irretrievable prejudice to the respondent.

B. In between Fritz T.M. Clement and Another Vs. Sudhakaran Nadar and Another, , on which respondent/plaintiff has placed the reliance, the Hon'ble Apex Court had stated the law as under:

3. A suit was filed for recovery of a sum of Rs. 5,86,268 with future interest towards "path-way fee" and "quarrying fee" for various periods. The amendment application was filed at a stage when the suit was ripe for trial. In the affidavit filed in support of the amendment application, it is stated that certain omissions and mistakes crept into the plaint inadvertently and on account of the wrong advice given by the previous counsel engaged by the plaintiffs.

4. The learned trial Judge was of the view that the application was highly belated and moreover the proposed amendments were based on new cause of action and had the effect of changing the entire pleadings. It was further observed that the amendments would change the very nature and character of the suit. It was also commented that the plaintiffs were trying to withdraw some admissions in the

original plaintiff. As an example, the trial Court mentioned that "in the original plaintiff, they had claimed amount as per the counter-claim granted by the Court (in an earlier suit) and now they want to deviate from that plea.

5. The High Court was also of the view that the nature and character of the suit is sought to be changed by amending the plaintiff. At the same time, the High Court observed that there was no change in the cause of action or the total amount claimed. The High Court pointed out that the rate of passage fee per lorry was increased from Rs. 10/- to Rs. 14/- (Rs. 40/- mentioned in the judgment seems to be a mistake). Moreover, according to the High Court, if the deletions and additions in respect of paras 4 and 4(a) of the original plaintiff are allowed, they will contradict the averments in para 3 of the original plaintiff. The learned Judge then observed that the amendments, if allowed, will be prejudicial to the respondents on account of the "change in the main character of the suit." Though the High Court correctly noted the principle that liberal approach has to be adopted while deciding an amendment application and the possibility of prejudice to the other party is one of the considerations to be kept in mind, we are of the view that the High Court's conclusion is not in keeping with these principles. Having perused the averments, pleadings and the relief claimed in the original plaintiff as well as the amendment application coupled with the undisputed agreement mentioned in the original plaintiff/1.A,, we are of the view that the proposed amendments are not impermissible in law. The trial Court as well as the High Court proceeded on a wrong premise that by introducing the amendments, a new case is being made out or a new relief is being sought for. Nor can it be said that any of the pleadings in the amendment application have the effect of retracting from any admissions made in the original plaintiff. At fresh blush, it might appear that by the proposed amendments which undoubtedly expand the length of the plaintiff and seek substitution of certain figures in the relief portion, new pleas and reliefs are sought to be raised; but, on deeper analysis, it is not so. Unfortunately, the original plaintiff, though set out the main basis of the suit is rather cryptic and lacking in relevant particulars. There is a bare reference to the agreement which is the foundation for appellant's claim. Not only that, the basic terms of the agreement are not accurately stated in the original plaintiff. Even the specific date of the agreement dated 12-7-1987 (which is the basis of the claim in the suit) has not been mentioned; instead only year is mentioned. All this would lend credence to the appellant's contention that sufficient care was not taken in drafting the plaintiff. The party shall not be penalized for that reason. It is significant to note that the said agreement between the appellants-plaintiffs and the 1st respondent/1st defendant entered into on 12-7-1987 is an undisputed document, as is evident from the written statement. What are the rights and obligations under the said agreement and whether the terms of the agreement have been violated by the defendants and whether the appellants have legally enforceable claim based on the agreement could be the matters of controversy in the suit. But, as already observed, most of the averments barring those pertaining to the relief portion center round the

undisputed agreement. In one of the paragraphs, an earlier agreement dated 5-9-1972 allegedly entered into between plaintiff's-father and one Enose Nadar has been referred to, but it was only to furnish the background for the agreement dated 12-7-1987.

6. In paras 4(a) and 4(b) of which mention was made in the impugned judgment of the High Court, the alleged stipulation in the agreement regarding the rate and mode of payment of quarrying fee and path-way fee to the appellants and Enose Nadar, and the said Enose Nadar making construction on the motorable road in October, 1989 on his portion of land and thereafter the respondents using the portion of the B Schedule road situated in the land of the appellants-plaintiffs and another Sukumaran Nadar and the payment being made to the appellants as well as to the said Sukumaran Nadar are mentioned. There is nothing in these two sub-paras which changes the basis and character of the suit. Nor can they have any prejudicial effect vis-a-vis the defence of respondents. The other paragraphs added seem to be in elaboration of the appellants-plaintiffs case based on the agreement and the circumstances in which the Suit No. 122/1992 was filed and the events in the aftermath of it which highlight the alleged unjustified refusal of respondents-defendants to pay the fee to the appellants-plaintiffs despite making use of the quarry and the path-way. Some of these averments may at best be considered unnecessary but do not tantamount to setting up a new case or cause of action. So also, the mere fact that in regard to quantification of the fee some changes are sought to be introduced while retaining the total amount claimed in the original plaint does not mean that the nature of relief claimed has undergone a material change. Therefore, the grounds of rejection of amendments are legally unjustified and based on non-application of mind to the exact nature of amendments. We reiterate that no prejudice could possibly be caused to the respondents. In fact, by reason of clarification and elaboration of the appellants-plaintiffs' claim before the trial has started, the respondents-defendants will be in a better position to know the exact case of the plaintiffs and proceed accordingly. On the other hand, it would result in miscarriage of justice if the amendments are not allowed and the appellants-plaintiffs are compelled to go to trial on the basis of an ill-drafted plaint with cryptic and inaccurate averments. However, we would like to record that in the course of arguments, the learned Counsel for the appellants has fairly conceded that certain allegations in the proposed para 4(d) can be deleted as they are unnecessary for the purpose of the case. They are as follows:

...in collusion with the aforesaid Enose Nadar and incorporating utter falsehood and making the said Enose Nadar the 3rd defendant who had hand in glove with the defendants and, their illegal and fraudulent acts. It was the defendants who engaged Advocate for the 3rd defendant and met the expenses of the litigation for the 3rd defendant. In consequence of that, the defendants made the 3rd defendant take false contentions and let in false evidence through the 3rd defendant so as to suit the case of the defendants (plaintiffs in O. S. 122/92).

C. Look at Shri Tertuliano Renato de Silva and Another Vs. Shri Francisco Lourenco Bettencourt de Silva and Another, , relied upon by petitioner, shows that therein the application for amendment of written statement was moved after examination-in-chief of plaintiff was over and during his cross examination and after six years of filing of original written statement. After examining the original pleadings and the amendment, this Court has not permitted part of amendment which had the effect of displacing the admission made or of non-suiting the plaintiff. The relevant observations in this respect can be stated thus:

9. Bearing in mind all the above referred facts, and applying the law laid down by the Apex Court, as regards the amendment to the written statement. It is clear that the defendant though entitled to take contrary or contradictory stand in his defence, such plea cannot be allowed to be introduced in the form of amendment, when it results in irreparable injury to the plaintiff either by way of displacing the admission made by the defendant in the original written statement or when it amounts to non-suiting the plaintiff inasmuch as the plaintiff being made aware of the case which he has to meet in answer to the defence raised by the defendant in the original written statement and having taken a particular stand and led evidence in respect thereof, it is not permissible thereafter to allow the defendant to introduce a totally contradictory plea in defence to the prejudice of the plaintiff. The law in that regard has been well settled from the time of the decision of the Apex Court in the matter of Modi Spinning and Weaving Mills (supra). Undoubtedly, the said decision in the case of Modi Spinning and Weaving Mills (supra) was by a Bench of three Judges and has been followed by the Apex Court in the recent decision in the matter of Heeralal v. Kalyan Mal (supra). The Apex Court has clearly distinguished the decision in its earlier case namely Basvan Jaggu Dhobi (supra) by observing thus: "It has to be appreciated that in that case even though inconsistent stand was permitted to be taken by the defendant, the stand by itself did not seek to displace any admission on the part of the defendant in favour of the plaintiff. The defendant from the inception contended that the plaintiffs suit should be dismissed but the ground on which dismissal was claimed was sought to be changed by an alternative plea. Therefore, there was no question of any prejudice to the plaintiff if such an inconsistent stand was allowed. That is how this Court in the aforesaid decision held that such amendment in written statement could have been granted. Such is not the case before us. Here if the amendment is granted, the whole case of the plaintiff qua admitted joint family properties would get displaced as the defendants themselves had in clear terms admitted that in 7 items of properties in Schedule-A plaintiff had 1/3rd undivided interest. On that basis even preliminary decree could have been passed by the Court at that stage. As that right which had accrued to the plaintiff, as noted earlier, would be irretrievably lost if such amendment is allowed qua five of these seven items of Schedule-A of the plaint for which by the impugned amendment the earlier admissions were sought to be recalled.

D. Respondent has relied upon Chanchalben Shah and Others Vs. Municipal

Corporation of Greater Mumbai and Another, which is decided by same Hon''ble Judge of this Court who decided *Tertuliano Renato v. Francisco Lourenco* (supra) and in it, landlord has been permitted to amend his eviction application at Appellate stage when cause of action for seeking eviction on such additional grounds arose during pendency of proceedings. I find that observations in paragraphs 5 and 6 are important and the same read:

5. In fact, the law as regards the amendment to the pleadings is well settled. The amendment has to be for the purpose of determining real question in controversy between the parties to the proceedings. The power to allow the parties to amend their pleadings is to be exercised judiciously on consideration of the circumstances of each case. The Apex Court in *Pirgonda Hongonda Patil Vs. Kalgonda Shidgonda Patil and Others*, , had approved the ruling of this Court in *Kisandas Rupchand v. Rachappa Vithoba Shilwant* reported in ILR XXXIII Bom. 644 to the effect that amendment which does not work injustice to the other side and to the extent necessary to determine the real question in controversy between the parties is to be allowed.

6. Equally it is well established that every suit has to be tried on the original cause of action stated in the plaint and this principle applies to the appeals as well. However, there are few exceptions to the rule. At times, the relief claimed in the plaint becomes inappropriate and insufficient with passage of time or it turns out to be infructuous with changes brought about either by law or on account of certain events happenings during the pendency of the suit or appeal.

6-A. In this background it is necessary to find out whether the amendment allowed by impugned order works any injustice upon the present petitioner. Again for that purpose comparison of original plaint, amendment and the evidence led by present respondent/plaintiff becomes essential. The suit filed in December, 1993, is for specific performance of contract and after describing the plaintiff, defendant and the suit property it is stated that the defendant (present petitioner) was unable to manage said property and therefore he agreed to sale it to plaintiff on 15-5-1986 at the rate of Rs. 15,000/- per acre and till 13-5-1993 plaintiff society paid amount of Rs. 60,162/- to him. It is stated that thereafter the defendant is refusing to receive balance amount and to turn agreement into sale deed. It is further stated that since the day of agreement plaintiff made a layout and started selling, plots therefrom. It is stated that defendant is avoiding to execute sale deed and hence plaintiff issued a telegraphic notice on 12-12-1993. The defence of present petitioner in his written statement is that agricultural land is being claimed by plaintiff on the basis of alleged agreement for non-agricultural purpose. It is stated that the land is in green zone and cannot be purchased by co-operative housing society like plaintiff and it violates Section 89 of Bombay Tenancy and Agricultural Lands (Vidarbha Region) Act. It is further stated that suit is filed after seven years and it is barred by limitation. Thereafter defendant has pointed out that plaint is not properly verified or presented. It is denied that defendant agreed to sale suit property or plaintiff.

Possession of plaintiff or preparation of layout is also denied. It is stated that plaintiff could not have sold plots from suit property and such sales are not binding upon defendant. It is admitted that there was an agreement for sale which was reduced into writing on 12-5-1986. It is stated that defendant was paid amount of Rs. 20,000/- towards part consideration and payment of Rs. 60,162/- as contended by plaintiff is denied. Even last payment as alleged on 13-5-1993 is also denied. It is contended that this date and event is fabricated only to bring suit within limitation. It is stated that agreement stood cancelled by efflux of time. It is stated that a telegraphic notice was properly replied and plaintiff ought to have accepted refund of earnest money. It is stated that plaintiff has not paid any amount after 7-5-1987. In specific pleadings, petitioner/defendant has stated that plaintiff never had bona fide intention to perform his part of contract and he did not obtain necessary permission from authorities. It is further stated that plaintiff did not make payment as per Schedule and it is contended that from pleadings of plaintiff as well as documents filed by him the suit is untenable and lacks in basic ingredients. This written statement is filed on 20-3-1995 and the Court below thereafter framed issues on 20-12-1995. On 12-8-1996, plaintiff moved one amendment application and added the fact that defendant gave statement to Urban Land Ceiling department and disclosed the suit land as sold.

B. Examination-in-chief of respondent/plaintiff is very short. He has spoken about entering into agreement on 12-5-1986, payment to defendant of Rs. 60,172/- and notice issued by client if on 24-4-1993 to defendant to execute sale deed. He has further stated that layout was prepared and plots were sold. In cross examination, he has admitted that suit land is still an agricultural land and cannot be purchased without permission of SDO. He has further stated that plaintiff society has applied for permission in this respect to SDO and said authority has refused the permission. He has further stated that original agreement for sale is not on record and no document is filed on record to show payment of Rs. 60,178/- to defendant and only audited accounts of society are placed on record. No document showing handing over of possession are also filed. This evidence is recorded on 20-9-2000.

C. In application for amendment moved on 5-10-2000 the plaintiff has stated that earlier advocate (name disclosed) engaged by him was given necessary instructions and details, material particulars about execution of agreement or refusal by defendant and the same have been missed by said advocate and hence, society decided to engage another advocate and to amend the plaint. The amendment speaks about the agreement of sale dated 12-5-1986, the dates on which from time to time payment was made to defendant, total amount of Rs. 57,162/- only paid to defendant till 8-5-1989 (inclusive of Rs. 17,162/- only paid by cheque and other amount in cash), first notice issued by defendant on 6-9-1989 that suit land is under green zone, contact of defendant by plaintiff thereafter and an assurance by defendant to withdraw said notice, payment thereafter of Rs. 3000/- only in cash on 13-5-1993. It is further contended that

on each occasion defendant sought time to get the land converted into non-agricultural land and ultimately did not get it so converted and failed to perform his part of agreement. It is further stated that on 28-4-1993 plaintiff served legal notice and called upon defendant to execute sale deed and the notice had been replied on 3-5-1993 taking false stand. It is stated that limitation is to be counted from 3-5-1993 and suit filed is within limitation. It is further stated that the irregularity under Tenancy Act can be regularised and such transactions are not prohibited. The prayer clauses are also sought to be amended by seeking direction to defendant to execute sale deed and by seeking permanent injunction prohibiting the defendant from disturbing possession of plaintiff and from creating third party interest in suit land.

D. The norms crystallising after various judgments mentioned above need to be applied now to the facts of present case. The perusal of evidence reveals that the said earlier advocate has not exhibited the agreement dated 12-5-1986, the notices exchanged between parties. Not only this, even the details of payment made to defendant are not brought on record in examination-in-chief. The point of limitation appears to have been overlooked in said examination-in-chief. It is to be noticed that the agreement is not in dispute between parties. The exchange of notices is also not in dispute. The true facts about the breach of said agreement and person responsible therefore can be gathered through these documents. The perusal of plaint above reveals that plaint is also very cryptic and does not contain appropriate details to lay foundation for specific performance. The defendant has admitted receipt of amount of Rs. 20,000/- only. In his original plaint, in amendment application as also in evidence, plaintiff has disclosed total payment of Rs. 60,172/- only. Thus, by amendment the plaintiff is not raising any new case in this respect. The only debatable issue is about the conversion of suit land from agricultural to non-agricultural purpose and who was responsible to get it done. This also can be gathered from agreement and exchange of correspondence/notices between parties. The admission of plaintiff that such permission is refused by SDO is already on record and the trial Court can evaluate it appropriately. The defendant has nowhere given any suggestion to plaintiff to bring it on record that it was the duty of plaintiff to procure such permission. Even in the absence of impugned amendment, it is open to present plaintiff to bring evidence on record from the office of SDO that such permission has not been factually refused. Further, what is the effect of absence of such permission from SDO on suit transaction is question of law and it cannot be decided on the strength of answer given by plaintiff in cross examination. Thus by allowing amendment, it cannot be said that the learned trial Court has permitted plaintiff to withdraw or retract any admission. On the contrary, discussion above reveals that otherwise plaintiff would be deprived of his right to ? claim specific performance on the basis of undisputed agreement and disputed payment of Rs. 20,000/- only to defendant only on account of fault of his earlier advocate. It is not the case of present petitioner that original defendant is in any way responsible for such an error in

pleadings. The issue involved in this petition is covered by Fritiz T.M. Clement and Another Vs. Sudhakaran Nadar and Another, .

E. It is thus clear that the defence of present petitioner is not being prejudiced in any manner and the amendment allowed is in fact necessary to decide real controversy between the parties. The plaintiff has not incorporated any new cause of action, and has not added any inconsistent or contradictory plea with its earlier/unamended plaint. Present respondent/plaintiff has discovered the mistakes of its earlier counsel after recording of evidence of its first witness and the application for amendment has been moved immediately thereafter by changing counsel. Merely because evidence of said witness is recorded, it does not mean that the plaintiff cannot be permitted to take corrective measures particularly when such measures are to incorporate facts which can be verified from records and are not a new story evolved for the first time to defeat the defence. Though the order of trial Court is short, it has made reference to case law on the point and thereafter has found that the nature of suit does not undergo any change. It has further found that no admission is being withdrawn by plaintiff. It has therefore allowed the amendment after imposing cost of Rs. 300/-only upon plaintiff. Except for quantum of cost, I do not find any non-application of mind or jurisdictional error in this approach. Considering the fact that the extensive amendment in plaint is sought after examination-in-chief and cross examination of witness for plaintiff, I am inclined to raise the costs to Rs. 3000/-only.

7. I am not therefore inclined to interfere in writ jurisdiction in the matter. The order of trial Court allowing the amendment in plaint is maintained and only figure of cost mentioned as "Rs. 300/-" therein is modified to read "Rs. 3000/-". In effect present respondent shall pay cost of Rs. 3000/- only to present petitioner/original defendant for its amendment within period of four weeks from today. With this modification, the writ petition stands disposed off.