

(2012) 07 BOM CK 0149

Bombay High Court (Aurangabad Bench)

Case No: Writ Petition No. 10099 of 2010

M/s. Sai Shradha Developers

APPELLANT

Vs

Ravindra Ganpatrao Bharitkar
and Others

RESPONDENT

Date of Decision: July 16, 2012

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 6 Rule 17, Order 8 Rule 1A

Citation: (2012) 6 ALLMR 121 : (2013) 3 BomCR 150

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

Bench: Single Bench

Advocate: A.S. Bajaj, for the Appellant; A.N. Nagargoje, Advocate for Respondent No. 2, Respondent Nos. 1, 3 and 4, for the Respondent

Final Decision: Allowed

Judgement

S.S. Shinde, J.

Rule. Rule made returnable forthwith. With the consent of parties heard finally. The petitioners herein, who are the original plaintiffs, have filed Special Civil Suit No. 35 of 2008 for specific performance of the agreement of sale against the respondents.

It is the case of the petitioners that, Ganpatrao Raoji Bharitkar, entered into an agreement of sale for consideration of Rs. 71,00,000/- and an earnest amount of Rs. 10,00,000/- was paid on 2nd June, 2005. Ganpatrao had executed agreement of sale on 9th June, 2005. Thereafter, the petitioners paid amount of Rs. 20,00,000/- by way of Demand Draft dated 9th June, 2005, Rs. 20,50,000/- vide Cheque dated 11th August, 2005 and further amount of Rs. 20,50,000/- vide Cheque dated 20th October, 2005 Total consideration paid was Rs. 71,00,000/-. However, unfortunately, before the sale deed can be executed, said Ganpatrao Bharitkar died on 8th November, 2005. The petitioners requested the respondents to execute the sale deed, however, the respondent Nos. 2 to 4 avoided to execute the sale deed and as

such, the petitioners were constrained to file suit. It is also stated by the petitioners that, the defendant No. 1 has executed the sale deed on 7th March, 2008.

2. The respondents appeared in the suit and contested the claim mainly on the ground that, the suit property was joint family property and Ganpatrao had no right to enter into the agreement of sale and execute the sale deed.

The trial Court framed the issues on 28th January, 2010. It is the contention of the Counsel for the petitioners that, on 13th April, 2010 the statement of the P. W. No. 1 came to be recorded. This fact is disputed by the Counsel appearing for the respondent No. 2 i.e. original defendant No. 2. He submits that, the said statement is recorded on 2nd June, 2010. However, the Counsel appearing for the petitioner has tendered across the bar the copy of the Roznama which shows that, on 13th April, 2010 the petitioners i.e. original plaintiffs filed affidavit in lieu of examination in chief. On 28th June, 2010 statement of P. W. 2 and 3 came to be recorded. On 5th July, 2010 statement of P. W. 4 came to be recorded. On 9th August, 2010 two applications were filed by the defendant No. 2 for setting aside "No Cross Order" and for recasting of issues. The said applications were allowed on 9th August, 2010. Thereafter, on 24th August, 2010 the suit was fixed for cross examination of the witnesses. On the same day, the application is filed by the defendant Nos. 2 and 4 for amendment of the Written Statement and same came to be allowed. Hence, this writ petition.

3. The learned Counsel appearing for the petitioners invited my attention to the contents of the application which was filed for amendment of Written Statement and submitted that, the mandate of proviso of Order 6 Rule 17 of the CPC has to be satisfied before such application is allowed by the concerned Court. It is submitted that, unless the Court records satisfaction that, the party could not have raised the matter before commencement of the trial in spite of due diligence, the application for amendment can be entertained and in appropriate cases, may be allowed. However, in the present case, in the entire application, nowhere it is stated by the defendant Nos. 2 and 4 that, in spite of their due diligence, they could not introduce amendment in main written statement before commencement of trial. The learned Counsel also invited my attention to the copy of the written statement which is annexed with writ petition, and in particular paragraph-A at page 28 and 29 of the compilation of the writ petition, and submitted that, in original written statement, nowhere it is mentioned that, there are other two legal heirs namely Manjulabai and Anjanabai to deceased Ganpatrao, and they are entitled for partition and share in the property of the deceased Ganpatrao. Therefore, according to the Counsel for the petitioners, by way of amendment, new defence is being taken by the defendants, which is not permissible. The said amendment will change the nature of the averments and the pleadings in the written statement, which would cause prejudice to the interest of the plaintiffs. It is submitted that, in paragraph-7 of the impugned order, the trial Court has observed that, the application filed by the

defendants is at belated stage and there are laches and negligence on the part of the defendants and therefore, according to the Counsel for the petitioners, in view of the said observations, the trial Court should not have proceeded to allow the application and should have rejected the application for amendment of the written statement.

The learned Counsel invited my attention to the reported judgment of the Supreme Court in the case of [Vidyabai and Others Vs. Padmalatha and Another](#), and in particular paragraph Nos. 10 and 19 of the said judgment and submitted that, if the ratio laid down in the said judgment is applied to the facts of the present case, certainly the impugned judgment and order cannot be sustained in law. It is submitted that, before entertaining the prayer for amendment of the written statement, the trial Court should have satisfied itself that, the applicants/defendants have shown due diligence and in spite of their due diligence, they could not bring the matter in main written statement before commencement of trial, which they want to incorporate by way of amendment in the written statement. The Counsel also invited my attention to the reported judgment of the Supreme Court in the case of [Chander Kanta Bansal Vs. Rajinder Singh Anand](#), and submitted that, the trial Court has not followed the mandate of proviso to Rule 17 Order 6 of the CPC and wrongly allowed the application filed by the defendants for amendment. Therefore, he submits that, the writ petition may be allowed.

4. On the other hand, the learned Counsel appearing for the respondent Nos. 2 and 4 i.e. original defendant Nos. 2 and 4 submits that, after issues were recast, it was necessary for the defendants to amend the written statement. It is farther submitted that, by way of amendment to the written statement, the defendant Nos. 2 and 4 only wanted to clarify what is stated in the main written statement, and the said amendment would not change the nature of the suit. It is submitted that, it is consistent stand of the defendant Nos. 2 and 4 that, they are entitled for 1/5th share. The learned Counsel also invited my attention to the application filed for the amendment, and that portion which was to be added in the written statement and submitted that, upon comparison of the pleadings, averments in the main written statement and the matter which the defendants wish to incorporate in the written statement, will not change the nature of the reliefs claimed or the nature of the averments in the written statement, as the case may be. The learned Counsel, in support of his contention that, while entertaining the prayer for amendment of the written statement, liberal approach is required to be adopted by the Court, placed reliance upon two expositions of the Hon"ble Supreme Court in the case of [Rajesh Kumar Aggarwal and Others Vs. K.K. Modi and Others](#), and [Andhra Bank Vs. ABN Amro Bank N.V. and Others](#), and in particular Head Note A of the said judgment.

The learned Counsel for the respondent No. 2 submits that, the trial Court has recorded sufficient reasons in paragraph Nos. 5 to 7 of the impugned judgment while allowing the application for amendment of the written statement. The

plaintiffs are compensated by way of directions to the defendant Nos. 2 and 4 to pay costs of Rs. 1000/- to the plaintiffs and therefore, this Court may not interfere in the impugned judgment and order passed by the trial Court. It is further submitted that, the defendant Nos. 2 and 4 deposited the costs amount of Rs. 1000/- and same has been accepted by the plaintiffs on the same day. Alternatively, the Counsel for the respondent No. 2 submits that, in case this Court is inclined to set aside the impugned judgment and order, the parties may be relegated back before the trial Court, and the trial Court may be directed to hear the application for amendment afresh by giving opportunity to the parties to put forth their contention.

5. With the able assistance of the Counsel appearing for the parties, I have perused the writ petition, annexures thereto, impugned judgment and order, written statement and also other documents which are placed on record by the parties. Since the application filed by the defendant Nos. 2 and 4 was under Order 6 Rule 17 and also Order 8 Rule 1A of the Code of Civil Procedure, it is apposite to reproduce herein below the said provisions, which reads thus:

Order 6 Rule 17

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.

ORDER 8 RULE 1A

1A. Duty of defendant to produce documents upon which relief is claimed or relied upon by him.--

(1) Where the defendant bases his defence upon a document or relies upon any document in his possession or power, in support of his defence or claim for set off or counter claim, he shall enter such document in a list, and shall produce it in court when the written statement is presented by him and shall, at the same time, deliver the document and a copy thereof, to be filed with the written statement.

(2) Where any such document is not in possession or power of the defendant, he shall, wherever possible, state in whose possession or power it is.

(3) A document which ought to be produced in Court by the defendant under this rule, but, is not so produced shall not, without the leave of the Court, be received in evidence on his behalf at the hearing of the suit.

(4) Nothing in this rule shall apply to documents--

(a) produced for the cross-examination of the plaintiff's witnesses, or

(b) handed over to a witness merely to refresh his memory.

The Supreme Court had occasion to consider the provisions of Order 6 Rule 17 proviso and provisions of Order 8 Rule 1A of the CPC in the case of [Vidyabai and Others Vs. Padmalatha and Another](#), . In the said case, the Supreme Court has also considered the legislative intent in bringing the said proviso to Rule 17 of Order 6 of the Code of the Civil Procedure, in paragraph-10 of the said judgment. Paragraph-10 of the said judgment reads thus:

10. By reason of the CPC (Amendment) Act, 2002 (Act 22 of 2002), Parliament inter alia inserted a proviso to Order 6 Rule 17 of the Code which reads as under:

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.

It is couched in a mandatory form. The court's jurisdiction to allow such an application is taken away unless the conditions precedent therefore are satisfied viz., it must come to a conclusion that in spite of due diligence the parties could not have raised the matter before the commencement of the trial.

Upon careful perusal of the observation of the Supreme Court in paragraph-10 reproduced herein above, of the judgment in the case of [Vidyabai and Others Vs. Padmalatha and Another](#), , it is abundantly clear that, the court's jurisdiction to allow the application for amendment is taken away unless the conditions precedent therefore are satisfied viz. the Court must come to the conclusion that in spite of due diligence the parties could not have raised the matter before the commencement of the trial.

The Supreme Court in paragraph-19 of the judgment in [Vidyabai and Others Vs. Padmalatha and Another](#), further held:

19. It is the primal duty of the court to decide as to whether such an amendment is necessary to decide the real dispute between the parties. Only if such a condition is fulfilled, the amendment is to be allowed. However, proviso appended to Order 6 Rule 17 of the Code restricts the power of the court. It puts an embargo on exercise of its jurisdiction. The court's jurisdiction, in a case of this nature is limited. Thus, unless the jurisdictional fact, as envisaged therein, is found to be existing, the court will have no jurisdiction at all to allow the amendment of the plaint.

6. The Supreme Court in the case of [P.A. Jayalakshmi Vs. H. Saradha and Others](#), held that, though the courts should be liberal in allowing applications for leave to amend pleadings but they also must bear in mind the statutory limitations brought about by reason of the CPC (Amendment) Acts; the proviso appended to Order 6 Rule 17

being one of them. Yet in another case of [Chander Kanta Bansal Vs. Rajinder Singh Anand,](#), while interpreting proviso to Order 6 Rule 17 of the Code of Civil Procedure, the Supreme Court held that, the entire object of the amendment to Order 6 Rule 17 as introduced in 2002, is to stall filing of application for amending a pleading subsequent to the commencement of trial, to avoid surprises and that the parties had sufficient knowledge of the other's case. It also helps in checking the delays in filing the applications. Once, the trial commences on the known pleas, it will be very difficult for any side to reconcile. In spite of the same, an exception is made in the newly inserted proviso where it is shown that in spite of due diligence, the party could not raise a plea, it is for the court to consider the same. It is further held that, the proviso limits the power to allow amendment after the commencement of trial but grants discretion to the court to allow amendment if it feels that the party could not have raised the matter before the commencement of trial in spite of due diligence. The Supreme Court, in paragraph-16 of the judgment, in the case of [Chander Kanta Bansal Vs. Rajinder Singh Anand,](#), has interpreted the word "diligence" and "due diligence". Paragraph-16 of the said judgment reads thus:

16. The words "due diligence" have not been defined in the Code. According to Oxford Dictionary (Edn. 2006), the word "diligence" means careful and persistent application or effort. "Diligent" means careful and steady in application to one's work and duties, showing care and effort. As per Black's Law Dictionary (18th Edn.), "diligence" means a continual effort to accomplish something, care; caution; the attention and care required from a person in a given situation. "Due diligence" means the diligence reasonably expected from, and ordinarily exercised by a person who seeks to satisfy a legal requirement or to discharge an obligation. According to Words and Phrases by Drain-Dyspnea (Permanent Edn. 13-A) "due diligence" means doing everything reasonable, not everything possible. "Due diligence" means reasonable diligence; it means such diligence as a prudent man would exercise in the conduct of his own affairs.

7. In the facts of the present case, upon perusal of the averments in the application filed for amendment of the written statement, it is abundantly clear that, the original defendant Nos. 2 and 4 i.e. the applicants in the said application, have not uttered single word why the defendant Nos. 2 and 4 did not bring the said matter in the written statement, which now, they wish to incorporate in the written statement. The trial Court ought to have satisfied itself that, in spite of due diligence, the defendant Nos. 2 and 4 could not bring the said matter, which now, they want to bring it by way of amendment, in the main written statement. Therefore, at that stage, as held by the Supreme Court in the aforesaid pronouncements, the Court is duty bound to follow the mandate of proviso to Rule 17 Order 6 of the Code of Civil Procedure. Unless the Court comes to the conclusion that, due diligence has been shown and in spite of due diligence, the party could not bring the said matter in the main pleadings, the Court should not proceed further to entertain the prayer for amendment of the suit or written statement, as the case may be.

8. In view of the proviso to Rule 17 Order 6 of the Code of Civil Procedure, the parties have to complete pleadings including filing of written statement before the first date of hearing. In [Vidyabai and Others Vs. Padmalatha and Another](#), the Supreme Court held that, the first date of hearing is the date on which the affidavit is filed by the plaintiff in lieu of examination in chief. In short, the trial commenced on the date on which the affidavit in lieu of examination is filed by the plaintiff. In the present case, admittedly, issues are framed by the trial Court on 28th January, 2010, as it is evident from the Roznama that the plaintiff has filed affidavit in lieu of examination in chief on 13th April, 2010 and thereafter, on 28th June, 2010 and 5th July, 2010, P. W. Nos. 1, 2, 3 and 4 are examined. Since the defendants did not cross examine the witnesses of the plaintiffs, no cross examination order came to be passed. However, the said order is recalled on the application filed by the defendant Nos. 2 and 4. However, on the date on which the matter was fixed for cross examination of the witnesses of the plaintiffs on 24th August, 2010, the application for amendment of the written statement was filed by the defendant Nos. 2 and 4. Therefore, the said application was at belated stage. The trial Court in paragraph-7 of the judgment has observed that, the defendant Nos. 2 and 4 were negligent in not filing the same within time. Paragraph-7 of the impugned judgment reads thus:

7. The present application is certainly filed at belated stage though the defendants could have been filed the same at the earliest opportunity which shows the laches & negligence on the part of the defendants but they cannot be punished for their negligence or mistake by which they cause irreparable loss on merit. However, the plaintiffs can be compensated for the said laches & negligence on the part of the defendants.

Upon careful perusal of the paragraph-7 of the impugned judgment, it would make abundantly clear that, the trial Court in unequivocal language has observed that, the defendants have filed the said application for amendment of the written statement at belated stage and they should have filed such application at the earliest opportunity, and since they have not filed said application at the earliest opportunity, that shows the laches and negligence on the part of the defendants. However, the trial Court went on observing that, but the defendants cannot be punished for their negligence or mistake by which they caused irreparable loss on merits. Therefore, upon careful reading of paragraph-7 of the impugned judgment, when the trial Court formed opinion that, the application is at belated stage and the defendant Nos. 2 and 4 have not shown due diligence, the trial Court was bound by the mandate of provisions of Order 6 Rule 17 proviso, of the Code of Civil Procedure. The Supreme Court in the case of [Vidyabai and Others Vs. Padmalatha and Another](#), has observed that, the said proviso is couched in a mandatory form. Therefore, the trial Court was duty bound to adhere to the provisions of Order 6 Rule 17 proviso, of the CPC and also the judgment of the Supreme Court cited supra.

9. It is true that, the Court should entertain the prayer for amendment liberally. However, the mandate of Order 6 Rule 17 proviso of the CPC cannot be given go bye, by the Court. Apart from what is observed hereinabove, in the facts of this case, on comparison of pleadings in Paragraph-A of the written statement at pages 28 and 29 of the compilation of the writ petition and the matter which the defendant Nos. 2 and 4 wish to incorporate in the written statement by way of amendment, it is abundantly clear that, names of two legal heirs namely Manjulabai and Anjanabai are mentioned in the matter which is to be inserted/incorporated in the written statement and though, it is not stated in express words that, they are entitled for the share in the property of Ganpatrao, however, on reading the whole paragraph, in substance, it is the contention of the defendant Nos. 2 and 4 that, those two ladies are also entitled for the share in the property of late Ganpatrao.

10. Therefore, for the reasons aforesaid in my considered opinion, viewed from any angle, in the facts of this case, the trial Court was not justified in allowing the application for amendment of the written statement without following the mandate of the provisions of Order 6 Rule 17 proviso, of the Code of Civil Procedure. Therefore, the impugned judgment and order is quashed and set aside. The writ petition is allowed to the above extent, same stands disposed of. Rule made absolute on the above terms, with no order as to costs.