

(2014) 02 BOM CK 0138
Bombay High Court (Nagpur Bench)
Case No: Writ Petition No. 1322 of 2013

Smt. Jayashree Subhash
Kalbande and Shri Dnyaneshwar
Arjunrao Kalbande

APPELLANT

Vs

Shri Bhaurao Nagorao Derkar
and Others

RESPONDENT

Date of Decision: Feb. 18, 2014

Citation: (2014) 3 ALLMR 605 : (2015) 2 BomCR 786 : (2015) 1 BomCR 403 : (2014) 4 MhLj 168

Hon'ble Judges: R.K. Deshpande, J

Bench: Single Bench

Advocate: S.A. Kalbande, for the Appellant; S.U. Nemade, for respondent Nos. 1 to 4, Shri A.S. Jaiswal, Assisted by Shri Sharma, for the Respondent

Final Decision: Allowed

Judgement

R.K. Deshpande, J.

Rule made returnable forthwith.

Heard the matter finally by consent of the learned counsels appearing for the parties.

The challenge in this petition is to the order dated 18.01.2013 passed by the learned Civil Judge, Junior Division, Hingna, allowing the application Exh. 154 for amendment of written statement filed by the original defendant nos. 5 and 6 in Regular Civil Suit No. 86/2012. The trial court has recorded the finding that the application for amendment has been moved after affidavit in lieu of examination in chief was filed by the respondent no. 5 on 02.05.2009. On the question of due diligence, it has been held that defendant nos. 5 and 6 are blaming their earlier advocate for not making sufficient and elaborate pleadings and there is a dispute going on between defendant Nos. 5 and 6 and their counsel. It has been held that due to the mistake

of counsel, the parties cannot be made to suffer or denied the fair trial of the suit by putting forth their defence. It has been held that the amendment proposed is not a new and it is just explanatory of the original pleadings and clarifies the facts appearing on the record from the documents. It has also been held that the amendment proposed is necessary for deciding the real controversy involved in the suit.

2. The suit is for specific performance of contract dated 02.03.2003, filed by the petitioners, who are the original plaintiffs, alleging that the defendant nos. 1 to 4 have agreed to sell the property to them for total consideration of Rs. 4,50,000/- and an amount of Rs. 1,08,300/- was paid upto 02.07.2004. The sale deed was to be executed in the year 2005 i.e., after about 11/2 years from the date of execution of the contract. However, on 02.07.2004, the defendant nos. 1 to 4 have executed a sale deed in favour of defendant no. 5 for total consideration of Rs. 1,60,000/-. The plaintiffs issued notices to all the defendant nos. 1 to 6 on 28.07.2004 and after receipt of their reply on 17.08.2004, the suit was filed on 24.01.2005.

3. During the pendency of the suit, an order of injunction was passed, restraining the defendants from creating any third party interest over the suit property. On 14.03.2005, defendant nos. 5 and 6 filed their written statement at Exh. 45, through their counsel Shir Ulhas Ambadas Dhabe and the issues were framed on 15.01.2008. The plaintiff no. 2 entered the witness-box on 28.08.2008. His cross was completed on 01.10.2008. He examined two more witnesses and their cross was also completed on the same day. The plaintiffs filed pursis dated 01.10.2008 closing their side of evidence. Defendant Nos. 1 to 4 filed their affidavit in lieu of examination in chief on 23.10.2008 and cross examination was held on 27.11.2008. Defendant No. 5 filed his affidavit in lieu of examination in chief on 02.05.2009 (Exh. 142).

4. At this stage, a joint Vakalatnama was filed for the defendant Nos. 5 and 6 by two counsels, one Shri Ulhas Ambadas Dhabe (who was already defending them) and another Shri Shrikant Badge, at Exh. 144. On 18.07.2009, an application at Ex. 148 was filed by Shri Shrikant Badge, Advocate, for seeking permission to file fresh affidavit. The matter was thereafter adjourned on 32 occasions and on 16.03.2011, the court granted permission to file fresh affidavit. Instead of filing fresh affidavit, an application for amendment at Exh. 154 came to be filed by defendant nos. 5 and 6 on 11.04.2011 through counsel Shri Shrikant Badge. It was opposed by filing reply by the plaintiffs. Shri Shrikant Badge, counsel for respondent no. 5 thereafter filed pursis on 03.05.2012, reporting "no instructions from his client". On 18.01.2013, the court passed an order impugned in this petition, allowing application for amendment.

5. Shri Kalbande, the learned counsel appearing for the petitioners has urged that no case of due diligence has been made out. The mistake on the part of the counsel to take certain points in defence cannot be a ground to allow the application for amendment. He submits that the facts as are alleged in the proposed amendment

were well within the knowledge of defendant nos. 5 and 6 and they have failed to exercise due diligence.

6. On merits, he submits that the amendment proposed takes away the admissions given in the written statement and in the affidavit by the defendants. According to him, in the original written statement, the fact of execution of agreement dated 02.03.2003 was admitted and the pleadings in the written statement proceeded on the footing that in fact the agreement was executed. He submits that the proposed amendment denies even the execution of the agreement and hence, the trial Court should have rejected the application. He has relied upon the following decisions.

[1] [Vidyabai and Others Vs. Padmalatha and Another,;](#)

[2] [Ajendraprasadji N. Pande and Another Vs. Swami Keshavprakeshdasji N. and Others,;](#)

[3] [J. Samuel and Others Vs. Gattu Mahesh and Others,;](#)

[4] [Bollepanda P. Poonacha and Another Vs. K.M. Madapa,;](#)

[5] [Mashyak Grihnirman Sahakari Sanstha Maryadit Vs. Usman Habib Dhuka and Others,;](#)

[6] [Chhabubai Haribhau Badakh Vs. Shri S.H. Khatod and Sons,;](#)

[7] [Anil Jadhav Vs. Pankaj Bassi,;](#)

[8] [Smt. Dimple Chopra Vs. Sh. Vishal Swara and Another](#)

[9] [Sasa Detergent Division Shri Mahila Griha Udyog Lijjat Papad Vs. Shri Damodar S Mudliyar and Others, .](#)

[10] [Hanumandas Vallabhdas and Son Vs. Shri Pitambar Bhatu Chaudhary, Deceased \(since His Legal Representatives Smt. Sarubai Chaudhari and Others\) and Others, .](#)

7. Shri Anand Jaiswal, the learned Senior Advocate, assisted by Shri Sharma, Advocate, for the respondent nos. 5 and 6, has supported the order impugned in this petition of allowing the application for amendment and has relied upon the following decision to urge that there was no delay in making the application for amendment.

[1] [Dondapati Narayan Reddy Vs. Duggirddey Venkatanarayana Reddy and Others,;](#)

[2] [Usha Balashaheb Swami and Others Vs. Kiran Appaso Swami and Others,;](#)

[3] [Andhra Bank Vs. ABN Amro Bank N.V. and Others,;](#)

[4] Judgment in Chamber Summons No. 867 of 2012 in Suit NO. 603, 2005, delivered by the Principal Bench of Bombay High Court in case of Rohit A. Kapadia and another vrs. Perviz J. Modi, on 20th March, 2013.

[5] Judgment in W.P. No. 722 of 2013 and connected matters, delivered by the Nagpur Bench of Bombay High Court in case of Walchandnagar Industries Limited vrs. Indraprastha Developers and others, on 25th September, 2013.

He has relied upon the decision of the learned Single Judge of this Court delivered in Chamber Summons No. 867/2012 in Suit No. 603/2005, on 20th March, 2013. He has taken me through the said decision to point out that different criteria needs to be applied for allowing the application for amendment of plaint and that of the written statement. He submits that the amendment of written statement has to be more liberally allowed and inconsistent pleas are also permitted. He submits that there is no prejudice or injustice caused if the application for amendment is allowed. He has also invited my attention to paragraph 20 of the said decision, wherein the learned Single Judge of this Court has held that the averment that in spite of due diligence the party could not have raised the matter before commencement of trial is not decisive in itself and the application cannot be simply dismissed on the ground of absence of such pleading. Shri Jaiswal, the learned senior counsel has also invited my attention to the finding of the reasonable diligence which this Court has recorded in the said judgment, considering the fact that the party was not mindful of the consequences of taking the stand.

8. In the judgment delivered in W.P. No. 722/2012 and connected matters on 25.09.2013, after taking into consideration the various decisions of the Apex Court and of this Court, the law on due diligence has been summarized in paragraph 87 as under;

87. The law on "due diligence" developed till this date is summarized as under:

(a) "Due diligence" means careful and persistent application and effort. It means the diligence as a prudent man would exercise in the conduct of his own affairs. Unless the party takes prompt steps, mere action cannot be accepted after the commencement of the trial. The due diligence determines the scope of party's constructive knowledge of the claim. It is a kind of reasonable investigation, which is necessary before claiming the relief.

(b) The due diligence is distinct from ignorance. In spite of knowledge, ignorance by a party or an Advocate cannot be a matter of due diligence. The neglect to perform an action, which one has an obligation to do, cannot be called as a mistake.

(c) The degree of prejudice to the other side by an amendment after the commencement of the trial is greater than one at pre-trial stage.

(d) Without recording finding on the question of due diligence, the Court shall not get jurisdiction either to allow or disallow an amendment in the pleadings after the commencement of the trial.

(e) The Court while allowing an amendment must record a finding that in spite of due diligence, the party could not have raised the matter before the

commencement of the trial or that the events sought to be brought on record by way of an amendment have occurred subsequent to the commencement of trial.

(f) The facts and grounds in the application for amendment must be clearly stated to bring out a case that the delay caused was beyond the control and diligence of the party proposing amendment.

(g) Where a party had acted with due diligence or not, would depend upon the facts and circumstances of the case and no hard and fast rule or strait-jacket formula can be laid down.

9. Keeping in view the aforesaid test, the application for amendment in question needs to be seen. In paragraph 4, the averments are made as under;

4. That, the defendant Nos. 5 and 6 filed their written statement vide EXH. 45. The defendant Nos. 5 and 6 also filed their evidence on affidavit. However, having dissatisfied with the services provided by their earlier counsel, the defendant Nos. 5 and 6 engaged another counsel and for the first time come to know that their counsel has not properly prepared the written statement and also in the evidence on affidavit had inserted certain new set of facts which had no place in the original pleadings in the written statement.

In paragraph 7, the following averments are made;

7. That, while making preparation of fresh affidavit, it is revealed that the earlier counsel for the defendant Nos. 5 and 6 prepared a vague written statement and certain facts which goes to very root of the case and which ought to have been specifically pleaded and elaborated, are missing.

Except the aforesaid averments, there is no pleading that the facts which are incorporated in the proposed amendment were not within the knowledge of the defendant nos. 5 and 6 when written statement at Exh. 145 was filed. It is not the case made out in the application for amendment that the facts stated in the proposed amendment were in fact brought to the notice of the counsel, but in spite of it, the counsel Shri U.A. Dhabe either deliberately or otherwise did not incorporate it in the earlier written statement. The trial court has recorded the finding that for the mistake of the counsel the party cannot be made to suffer. The law laid down by the Apex Court as is summarized in clause (b) in the earlier para, clearly indicates that the due diligence is distinct from ignorance. In spite of knowledge, ignorance by party or an advocate cannot be a matter of due diligence. The neglect to perform an action which one has an obligation to do cannot be called as a mistake. The Apex Court has also taken a view that the degree of prejudice to the other side by an amendment after the commencement of trial is greater than one at pre-trial stage. Unless this hurdle is crossed of due diligence, it is not permissible to allow the application for amendment after the commencement of trial. In the absence of a case of due diligence being made out in the pleadings, the

trial Court could not have allowed the application for amendment.

10. The question as to whether due diligence has been established or not is an essentially a question of fact which is required to be determined by taking into consideration the facts and circumstances of each case. Taking into consideration the facts and situation occurring in the judgment delivered by the learned Single Judge of this Court in case of Perviz J. Modi, relied upon by Shri Jaiswal, the learned senior counsel, for respondent nos. 5 and 6, a view has been taken that a case of "due diligence" was made out. It was a case made out that the party was not mindful of the consequences of taking the stand. This is not the case here. The stand here in this case is that the counsel has not properly prepared the written statement and no details are given or pleaded. Hence, the same is of no help to the learned senior counsel. In view of above, this writ petition is allowed. The order dated 18.01.2013 passed by the learned Civil Judge, Junior Division, Hingna, below Exh. 154 in Regular Civil Suit No. 86/2012 is hereby quashed and set aside. The application Exh. 154 for amendment of written statement filed by respondents/defendants No. 5 and 6 is rejected. No orders as to costs.