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Court : Mumbai Goa

Decided On : Mar-01-2013

Judge : F.M. Reis

Appeal No. : Writ Petition No. 81 of 2013

Appellant : Harishkumar Sachdeva

Respondent : Smt. Madhavi Jain and Others

Judgement :

Oral Judgment:

Heard Shri A. R. Kantak, learned counsel appearing for the petitioner, Shri P. P. Singh, learned counsel appearing for the respondent nos. 1 and 2 and Shri Shane Dias Sapeco, learned counsel appearing for the respondent no.3.

2. Rule. Heard forthwith by the consent of the learned counsel.

3. The learned counsel appearing for the respective respondents waive service.

4. The above petition challenges an order passed by the learned Civil Judge Senior Division, Mapusa, dated 30.11.2012 whereby an application for amendment filed by the petitioner to amend the plaint came to be rejected.

5. Briefly, the facts of the case are that the petitioner filed a suit against the respondents inter-alia seeking a direction to execute a deed of rectification to the

sale deed executed in favour of the petitioner and other reliefs. The suit came to be decreed by an ex-parte decree dated 12.01.1996. Thereafter, the respondents filed an application to set aside the ex-parte decree and ultimately, the decree came to be set aside by the learned District Judge by judgment dated 06.01.2012. Subsequently, the respondents were permitted to file their written statement to the suit. After such written statement was filed, the petitioner found it necessary to amend the plaint to rectify the sale deed as according to him there are some defects in the plaint which are more clarificatory in nature. The learned judge by the impugned order dated 30.11.2012 rejected the said application. Being aggrieved thereof, the petitioner has preferred the above petition.

6. Shri A. R. Kantak, learned counsel appearing for the petitioner has assailed the impugned order on the ground that the learned Judge has dismissed the application essentially on two counts. One is that the power of attorney was not produced and that the affidavit in support of the application for amendment was not filed. The learned counsel has taken me through the application for amendment and pointed out that such affidavit was in fact filed by the duly constituted attorney of the petitioner. The learned counsel further pointed out that in case there was any defence to the application for the failure to produce such power of attorney, it was always open to the learned Judge to call upon the petitioner to produce such power of attorney. The learned counsel thereafter has taken me through the application for amendment and pointed out that the amendment is essentially of a clarificatory in nature as the cause of action is not changed nor the amendment is inconsistent with the original pleadings. The learned counsel further pointed out that it is the contention of the petitioner that in the sale deed executed in favour of the petitioner a different plot from the one agreed to be sold was purported to be sold to the petitioner. The learned counsel further pointed out that it is well settled by the Apex Court that the amendment which is of a clarificatory in nature can always be permitted at any stage of the proceedings. The learned counsel has relied upon the judgment of the Apex Court reported in **(2005) 13 SCC 89** in the case of **SajjanKumar V/s Ram Kishan**. The learned counsel as such submits that the impugned order be quashed and set aside.

7. On the other hand, Shri P. P. Singh, learned counsel appearing for the respondent nos. 1 and 2 has pointed out that the application has been filed with much delay of nearly 20 years and according to him, the learned Judge was justified to exercise its discretion in rejecting the application. The learned counsel further pointed out that the proposed amendment was not at all necessary to decide the matter in dispute as according to him the sale deed executed by the respondents is in terms of the agreement between the parties. The learned counsel has taken me through the proposed amendment and pointed out that the petitioner is only interested to change the nature of the suit and incorporate therein a different property which is not the subject matter of the suit. The learned counsel thereafter has taken me through the relief clause and pointed out that the petitioner is changing the relief sought in the original plaint. The learned counsel as such submits that there is no reason for interference by this Court in the impugned order and consequently the petition be rejected. The learned counsel in support of his submissions has relied upon the judgment of the Apex Court reported in **(2007) 0 AIR(SCW)7308** in the case of **ShivGopal Sah alias Shiv Gopal Sahu V/s Sita Ram Saraugi**. The learned counsel has also relied upon the judgment of the Apex Court reported in **(2004)2 JT 613** in the case of **T. N. Alloy Foundry Co. Ltd., V/s T. N. Electricity Board and Ors.**

8. I have carefully considered the submissions of the learned counsel and I have also gone through the records. The learned Judge was not at all justified to reject the application on the ground that no affidavit was filed in support of the application. On bare perusal of the application an affidavit in support of the said application was indeed filed by the petitioner. The next ground to reject the application was on account of the fact that no power of attorney was produced is also not justified. In case of any dispute with that regard, the learned Judge could have always call upon the petitioner to produce such power of attorney.

9. On perusal of the application for amendment as well as the proposed amendment, I find that the application is merely clarificatory in nature. It is not in dispute that the application was filed much before framing of issues. The record also reveals that the ex-parte decree was set aside only after nearly more than 16 years from the date of the filing of the proceedings. In such circumstances, I find

that the learned Judge was not justified to reject the application on the ground of laches.

10. Apart from that, the Apex Court in the recent judgment dated 27.09.2012 in **Civil Appeal no. 7043 of 2012** in the case of **Abdul Rehman and Anr. vs. Mohd. Ruldu and Ors.**, after considering the amendment to Order 6 Rule 17 of the Civil Procedure Code, has observed at paras 7, 8 and 15, thus:

7) It is clear that parties to the suit are permitted to bring forward amendment of their pleadings at any stage of the proceeding for the purpose of determining the real question in controversy between them. The Courts have to be liberal in accepting the same, if the same is made prior to the commencement of the trial. If such application is made after the commencement of the trial, in that event, the Court has to arrive at a conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial.

8) The original provision was deleted by Amendment Act 46 of 1999, however, it has again been restored by Amendment Act 22 of 2002 but with an added proviso to prevent application for amendment being 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. The above proviso, to some extent, curtails absolute discretion to allow amendment at any stage. At present, if application is filed after commencement of trial, it has to be shown that in spite of due diligence, it could not have been sought earlier. The object of the rule is that Courts should try the merits of the case that come before them and should, consequently, allow all amendments that may be necessary for determining the real question in controversy between the parties provided it does not cause injustice or prejudice to the other side. This Court, in a series of decisions has held that the power to allow the amendment is wide and can be exercised at any stage of the proceeding in the interest of justice. The main purpose of allowing the amendment is to minimize the litigation and the plea that the relief sought by way of amendment was barred by time is to be considered in the light of the facts and circumstances of each case. The above principles have been reiterated by this Court in *J. Samuel and Others vs. Gattu Mahesh and*

Others, (2012) 2 SCC 300 and Rameshkumar Agarwal vs. Rajmala Exports Pvt. Ltd. and Others, (2012) 5 SCC 337. Keeping the above principles in mind, let us consider whether the appellants have made out a case for amendment.

(emphasis supplied)

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.

11. Considering the ratio laid down by the Apex Court in the said judgment, it is now well settled that the Court should be liberal in granting the application for amendment in case such application is filed before the recording of evidence. Apart from that, it is not in dispute that the proposed amendment is with regard to the disputed property which is the subject matter of the original suit. In the proposed amendment, there is no relief clause which is substituted or added by the petitioner. The judgments of the Apex Court relied upon by Shri P. P. Singh, learned counsel appearing for the respondent nos. 1 and 2 are not applicable to the facts of the present case. In the first judgment, the Apex Court was considering an application for amendment to incorporate a relief which was hopelessly time barred. In the other case, the Apex Court was considering the amendment for enhancing the claim of damages which was originally claimed. In the background of such facts, the observations of the Apex Court are not at all applicable in the present petition.

12. Considering the facts and circumstances of the case and taking note of the ratio laid down by the Apex Court in the said judgment, I find that the learned Judge has erroneously exercised its discretion in refusing leave to amend the plaint. No doubt, such leave can be granted only on payment of costs. Such costs are quantified at Rs.5000/- to be paid by the petitioner to the respondents.

13. In view of the above, I pass the following :

ORDER

- (i) The impugned order dated 30.11.2012 is quashed and set aside.
- (ii) The petitioner is permitted to amend the plaint as prayed for subject to payment of costs of Rs.5000/- to the respondents as condition precedent.
- (iii) All contentions of the respondents on merits in respect of the proposed amendment are left open.
- (iv) Rule is made absolute in above terms.
- (v) The petition stands disposed of accordingly.

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