

Girish Vs. Ambadas

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Court : Mumbai

Decided On : Dec-01-2014

Judge : Ravindra V. Ghuge

Appeal No. : Writ Petition No. 6715 of 2014

Appellant : Girish

Respondent : Ambadas

Judgement :

Oral Judgment:

1. Heard. Rule. Rule made returnable forthwith and heard finally by the consent of the parties.
2. The petitioner has raised a grievance on account of the application under Order VI Rule 17 of the Code of Civil Procedure, having been rejected by the impugned order dated 10-07-2014.
3. The petitioner is the original defendant in R.C.S. No. 176 of 2008. Upon the institution of the said suit, the petitioner filed his written statement along with a counter claim on 05-07-2008. Prayers made in the written statement and the counter claim indicate that the petitioner had reserved a right to amend the written statement and the counter claim, in the event a T.I.L.R. is appointed and pursuant to the local inspection carried out by the T.I.L.R., it is revealed that the respondent/

plaintiff has encroached upon the land of the petitioner/ defendant.

4. The respondent/ plaintiff had stated in its plaint that a T.I.L.R. would be required to be appointed for carrying out measurement of the suit properties, for fixing the boundaries and submitting a report along with a map. Application dated 02-05-2008 Exhibit 7 was also filed by the respondent herein for the said purpose.

5. The petitioner placing reliance on prayer clause 6-B in the written statement and counter claim, submits that the respondent/plaintiff moved the application Exhibit 7 dated 02-05-2008 seeking appointment of a T.I.L.R. as Court Commissioner under Order XXVI Rule 9. The petitioner offered his reply at Exhibit 16 to the said application Exhibit 7, on 05-07-2008 along with the written statement. In the said reply, the petitioner reiterated that the Court Commissioner shall mention in his report and indicate in his map, any encroachment caused by the respondent/ plaintiff on the land of the petitioner/ defendant.

6. It is undisputed that the T.I.L.R. was appointed by order dated 12-09-2008 and he has submitted his report on 16-07-2009 along with a map. It is also not disputed that both the parties have the knowledge about the report and the map.

7. The petitioner moved an application below Exhibit 64 on 07-11-2013 seeking amendment to the written statement and the counter claim by invoking order VI Rule 17 of the Code of Civil Procedure. It is undisputed that the respondent/ plaintiff has filed an affidavit in lieu of examination-in-chief on 05-08-2013.

8. The application filed by the petitioner Exhibit 64 was rejected by the impugned order dated 10-07-2014. Grievance of the petitioner is that the Trial Court has lost sight of a material aspect in the matter, which is, that the petitioner had reserved his right to amend the written statement and counter claim and thus exercised his right by preferring application Exhibit 64. It is, therefore, canvassed that neither can the petitioner be said to have delayed the proceedings, nor could it be said that the petitioner was not diligent.

9. Further submission of the petitioner is that when the examination-in-chief is filed on 05-08-2013, Exhibit 64 filed on 07-11-2013 can, at the most, be said to have

been filed after three months from commencement of the trial. It is, therefore, canvassed that a period of three months can be said to be a minor delay and the respondent could be compensated with costs by condoning three months delay.

10. It is further submitted by the petitioner that the ultimate object of law in a trial ought to be that ends of justice are met and no party is subjected to any prejudice on account of technicalities if the merits involved in the matter are overwhelming. Ultimately, it has to be ensured that there is no permanent deficiency or dent left in the trial.

11. The petitioner has relied upon the judgment of the Apex Court in the case of ChanderKanta Bansal Vs. Rajinder Singh Anand, reported at 2008 (0) BCI 305. Paragraph Nos. 9 and 10 of the said judgment have been specifically pointed out. It is prayed that the petition be allowed by quashing the impugned order and Exhibit 64 be allowed in order to enable the petitioner to amend the written statement and the counter claim.

12. Shri Brahme, learned Advocate appearing on behalf of the sole respondent has vehemently opposed the petition. Contention is that the petitioner has in fact advanced prayers in the prayer clause of the written statement which tantamount to be prayers made in the alternative. The petitioner by filing the amendment application Exhibit 64 intends to delay the matter so as to tire out the respondent/ plaintiff.

13. He further submits that in the reply filed by the petitioner to application Exhibit 7 (filed by the respondent for seeking an appointment of a T.I.L.R.) it is sufficiently canvassed that the T.I.L.R. should observe in his report and indicate in his map any encroachment committed by the respondent/ plaintiff on the land of the petitioner/ defendant. Shri Brahme further submits that in prayer clause 6-B to the written statement, it is further prayed by the petitioner that the agricultural yield of that portion of the land on which the respondent may have caused an encroachment, should also be recovered from the respondent/ plaintiff and be paid to the petitioner/ defendant.

14. Shri Brahme further submits that the petitioner should have preferred Exhibit 64 in the event an amendment was seriously required after the T.I.L.R. submitted his report on 16-07-2009. The petitioner has waited for 4 years and 3 months for moving the said application which can only be said to be on account of delaying the matter.

15. The respondent has placed reliance upon the judgment of the Apex Court in the case of Vidyabai and Ors. Vs. Padmalatha and Anr., reported at 2008 (0) BCI 555. My attention is drawn to the observations made in paragraph 8 as well as the observations in paragraph 43 of the Salem Advocate Bar Assn. Vs. Union of India, reported at [(2005) 6 SCC 344]. Further reliance is placed upon paragraph 12 to 15 in Vidyabai and others judgment (supra). It is, therefore, prayed that the petition be rejected with costs.

16. So far as the factual matrix involved in the matter is concerned, there is no dispute as regards the dates and events narrated by the petitioner. The issue, therefore, is as to when did the cause of action arise so as to prompt the petitioner to file an application seeking amendment to the written statement and counter claim.

17. It is undisputedly clear from the contentions of the petitioner and which have been admitted by the respondent that the written statement and counter claim was filed on 05-07-2008. The reply Exhibit 16 to the application for appointment of T.I.L.R. Exhibit 7 was also filed on 05-07-2008. The prayer clause 6-B set out in the written statement and the prayer made in the reply of the petitioner Exhibit 16 clearly indicate that the petitioner was aware about the possible appointment of the T.I.L.R. and the possibility that the encroachment caused by the respondent/defendant could be evident from the report and the map.

18. In fact, the reply to the application for appointment of a Court Commissioner is in the nature of consenting to the appointment of T.I.L.R. as a Court Commissioner, with a request that any encroachment as may be visible in the local inspection caused by the T.I.L.R. should be set out in the report and should be indicated in the map.

19. In my view, therefore, it could not be said that the petitioner was unaware about the contents of the T.I.L.R.'s report and its effect. The prayers made in the written statement as well as in the reply to the appointment of T.I.L.R. application, clearly indicate that the petitioner was geared up to meet the situation of encroachment becoming visible from the report of the T.I.L.R. and for that purpose the petitioner had reserved his right to amend the written statement and the counter claim.

20. In order to entertain the contention of the petitioner that this petition be allowed, the issue that needs to be decided is as regards due diligence. It needs to be scrutinised as to whether the petitioner has offered any explanation for not moving an application for amendment immediately after the report dated 16-07-2009 was filed by the T.I.L.R. and whether it could be stated that despite due diligence, it could not have dawned upon the petitioner for 4 years and 3 months that an amendment would be necessary to the counter claim.

21. In my view, upon going through the application Exhibit 64 and the prayer clauses set out in the written statement as well as say Exhibit 16, it needs to be concluded that the petitioner was aware of the situation and in fact was prepared to meet the situation.

22. The application Exhibit 64 filed for seeking amendment does not in any manner explain away the time wasted by the petitioner from 16-07-2009 till 05-08-2013 when the respondent/plaintiff led evidence through an affidavit. There is no whisper in application Exhibit 64 to justify two things, firstly, what prevented the petitioner from not moving the application for the said period of four years and three months and secondly, whether the petitioner could not have moved the said application despite due diligence.

23. I find that the application Exhibit 64 is totally silent on these aspects which are decisive and material in this case. Neither any explanation is forthcoming as to why the application was not moved for more than four years, nor has the petitioner explained as to what were the circumstances which prevented him from filing the application despite exercising due diligence.

24. In the ChanderKanta Bansal's case (supra), the conclusions drawn by the Apex Court in paragraph 9 and 10 are as follows:-

9) With a view to shorten the litigation and speed up the trial of cases Rule 17 was omitted by amending Act 46 of 1999. This rule had been on the statute for ages and there was hardly a suit or proceeding where this provision had not been used. That was the reason it evoked much controversy leading to protest all over the country. Thereafter, the rule was restored in its original form by amending Act 22 of 2002 with a rider in the shape of the proviso limiting the power of amendment to some extent. The new proviso lays down that no application for amendment shall be allowed after the commencement of trial, 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. But whether a party has acted with due diligence or not would depend upon the facts and circumstances of each case. This would, to some extent, limit the scope of amendment to pleadings, but would still vest enough powers in courts to deal with the unforeseen situations whenever they arise.

10) The entire object of the said amendment is to stall filing of applications for amending a pleading subsequent to the commencement of trial, to avoid surprises and the parties had sufficient knowledge of the others 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, he could not raise a plea, it is for the court to consider the same. Therefore, it is not a complete bar nor shuts out entertaining of any later application. As stated earlier, the reason for adding proviso is to curtail delay and expedite hearing of cases. I am in respectful agreement with the view of the Apex Court.

25. The Apex Court has thus held that unless the Court comes to the conclusion that despite due diligence a party could not have raised the matter before commencement of trial, no amendment be permitted. It is also observed that the aspect of due diligence would depend upon the facts and circumstances of each

case. As such, while concluding that there is no complete bar on the powers of the Trial Court to allow any application for amendment after trial, the note of caution indicated by the Apex Court is visible in paragraph Nos. 9 and 10 of the ChanderKanta Bansal's case (supra).

26. In the case of Vidyabai and Ors. (supra), the conclusions drawn by the Apex Court from paragraph Nos. 12 to 14 are as under:-

12. Reliance, however, has been placed by Ms. Suri on Baldev Singh and Others v. Manohar Singh and Another [(2006) 6 SCC 498], wherein it was opined:

"17. Before we part with this order, we may also notice that proviso to Order 6 Rule 17 CPC provides that amendment of pleadings shall not be allowed when the trial of the suit has already commenced. For this reason, we have examined the records and find that, in fact, the trial has not yet commenced. It appears from the records that the parties have yet to file their documentary evidence in the suit. From the record, it also appears that the suit was not on the verge of conclusion as found by the High Court and the trial court. That apart, commencement of trial as used in proviso to Order 6 Rule 17 in the Code of Civil Procedure must be understood in the limited sense as meaning the final hearing of the suit, examination of witnesses, filing of documents and addressing of arguments. As noted hereinbefore, parties are yet to file their documents, we do not find any reason to reject the application for amendment of the written statement in view of proviso to Order 6 Rule 17 CPC which confers wide power and unfettered discretion to the court to allow an amendment of the written statement at any stage of the proceedings.

It is not an authority for the proposition that the trial would not be deemed to have commenced on the date of first hearing. In that case, as noticed hereinbefore, the documents were yet to be filed and, therefore, it was held that the trial did not commence.

13. Reliance has also been placed by Ms. Suri on Pradeep Singhvi and Another v. Heero Dhankani and Others [(2004) 13 SCC 432]. Therein, the suit was filed in the year 1995 and, therefore, the proviso appended to Order VI, Rule 17 of the Code

of Civil Procedure had no application. Reliance has also been placed by Ms. Suri on *Rajesh Kumar Aggarwal and Others v. K.K. Modi and Others* [(2006) 4 SCC 385]. No doubt, as has been held by this Court therein that the court should allow amendments that would be necessary to determine the real question of the controversy between the parties but the same indisputably would be subject to the condition that no prejudice is caused to the other side.

14. 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 VI, 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.

27. The Apex Court has thus, placing reliance upon the Salem Advocate Bar Assn.'s case (*supra*) and in the case of *Rajesh Kumar Aggrawal and others V. K.K. Modi and others*, reported at [(2006) 4 SCC 385], has concluded that the real controversy if can be resolved by an amendment, needs to be permitted. However, it is also cautioned that the Court would not have the jurisdiction to allow the application if it is noticed that there is an absence of due diligence as it would disentitle the concerned litigant from seeking an amendment.

28. In the light of the above, I find that this petition is devoid of merit. However, in the light of the prayers in paragraph 6-B of the written statement, an amendment may not be strictly required. As such, while disposing of this petition without causing interference in the impugned order, ends of justice could be met by observing that prayer clause 6-B can be pressed into service in so far as the reliefs that the petitioner is seeking from the Court.

29. With these observations, the petition is disposed off. Rule is discharged with no order as to costs.