

Dhansukhbhai Naranbhai Aahir vs Ramanbhai Naranbhai Aahir on 18 December, 2019

Equivalent citations: AIRONLINE 2019 GUJ 581

Author: A. P. Thaker

Bench: A. P. Thaker

C/SCA/14674/2018

JUDGMENT

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/SPECIAL CIVIL APPLICATION NO. 14674 of 2018

FOR APPROVAL AND SIGNATURE:

HONOURABLE DR.JUSTICE A. P. THAKER

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| 1 | Whether Reporters of Local Papers may be allowed to see the judgment ? | No |
| 2 | To be referred to the Reporter or not ? | Yes |
| 3 | Whether their Lordships wish to see the fair copy of the judgment ? | No |
| 4 | Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ? | No |

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DHANSUKHBHAI NARANBHAI AAHIR

Versus

RAMANBHAI NARANBHAI AAHIR

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Appearance:

MR ARPIT A KAPADIA(3974) for the Petitioner(s) No. 1

MR NV GANDHI(1693) for the Respondent(s) No. 1,2,3

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CORAM: HONOURABLE DR.JUSTICE A. P. THAKER

Date : 18/12/2019

ORAL JUDGMENT

1. By way of filing this petition under Articles 226 and/ or 227 of the Constitution of India, the petitioner who is the plaintiff in the Special Civil Suit No.28 of 2015 pending before the Principal Civil Judge, Bardoli, has sought for C/SCA/14674/2018 JUDGMENT the following relief:

"(A) Your Lordship may be pleased to admit and allow this petition;

(B) Your Lordship may be pleased to issue a writ of certiorari or a writ in the nature of certiorari or any other appropriate writ, order or direction to quash and set aside the order dated 21/08/2018 rendered by the Principal Senior Civil Judge, Civil Court, Bardoli below Exh□80 in Special Civil Suit No.28/2015 and further be pleased to allow the application Exh□80 by allowing the amendment in the plaint;

(C) Pending the admission, hearing and till the final disposal of the present petition, Your Lordship may be pleased to stay further proceedings of Special Civil Suit No.28/2015 pending before the Ld. Principal Senior Civil Judge, Bardoli. (D) Your Lordship may be pleased to pass such other and further reliefs as may be deemed just and proper in the interest of justice".

2. The brief facts of the case of the petitioner□plaintiff is that he has filed the Special Civil Suit No.28 of 2015 before the Civil Court, Bardoli for declaration and permanent injunction against 3 defendants who are respondents herein. That the plaintiff and the defendant No.1 are the real brothers and defendant No.1 has shifted to Panama for service and the plaintiff was looking after the ancestral property. It is alleged that defendant No.2 has instigated the wife of defendant No.1 and caused interference in the family matter. It is the say of the plaintiff that the Suit property which is described in Para□2 of the plaint are jointly owned by the plaintiff and defendant No.1. It is C/SCA/14674/2018 JUDGMENT alleged that the defendant no.1 and his wife had came back to India for social purpose and at that time exerted pressure and declared that he had partitioned his share and also made mutation entry no.2985 in the revenue record. It is alleged that no procedure was taken out thereof by the said defendant with respect to land came into the share of the plaintiff. It is also contended that he has filed the Suit for cancellation of agreement dated 29.5.2013 and also sought declaration and injunction.

2.1 That the defendants had appeared in the Suit and resisted the same by filing written statement vide Exh□5. According to the plaintiff, it is the stand of the defendants that the partition has taken place in view of the agreement dated 29.5.2013 and the defendants have taken the possession of their share of the property and also mutated their names in the revenue record. It is alleged by the plaintiff that he has moved an application for interim injunction Exh□5 however that application was rejected vide order dated 4.2.2017. According to him, the document produced by him at Mark□3/21 is alleged to have executed between the heris of Dhansukhbha Naranbhai Aahir - Smt. Jagrutiben Dhansukhbhai Aahir on one hand and the heir of Ramanbhai Naranbhai Aahir□Pannaben Ramanbhai Aahir on the C/SCA/14674/2018 JUDGMENT another hand. According to the petitioner□plaintiff, as the said document is not registered and it is on Rs.100/□Stamp paper, it

cannot be looked into. It is also contended that he moved an application under Section 80 for joining his own wife with others which include Jagrutiben wife of the appellant, Pannaben wife of Ramanbhai and son and daughter of Ramanbhai as defendant Nos. 4 to 7. He has also prayed to amend the plaint by inserting new para being 3A and 4A and Para 8(2)(A) and delete the alternative prayer. It is contended that the learned trial Court has dismissed this Application.

2.2 It is contended that the trial Court has not appreciated the fact and non-registration of the so called partitions and has also not considered the provisions of law and has ultimately rejected the application.

3. In the present matter, the affidavit in reply is filed by the original defendants respondents. It is alleged that due to partition deed dated 29.5.2013 the defendants had been put into physical possession and administration of the suit properties qua their shares. He has also contended that after gap of four years and six months, the petitioner plaintiff has preferred revenue proceedings and in that proceedings he C/SCA/14674/2018 JUDGMENT has failed. According to them, the trial Court has already framed issues at Exh 28 and the trial has commenced and the plaintiff has submitted examination in chief at Exh 38. It is contended that at that stage the plaintiff had changed his Advocate, and thereafter moved an application at Exh 30 seeking material amendment in plaint including cause title and prayer clause. It is contended that the proposed amendment would amount to change in basic structure, nature and character of the suit and it will prejudicially affect the defence of the defendants. While referring to the decision of the Apex Court in the matter of Vidyabai & Ors v/s. Padmalatha & Anr, reported in AIR 2009 SC 1433, it is contended that after commencement of the trial, amendment is not permissible. It is also contended that initially the nature of the suit is regarding declaration and permanent injunction only and if the proposed amendment is allowed then it will be converted into partition suit and suit for specific performance. It is also contended that there is already partition of the properties between the parties and there is no need of amendment to be allowed. According to them, the trial Court has properly appreciated the facts and rightly rejected the application.

4. Heard learned advocates for the parties.

C/SCA/14674/2018 JUDGMENT Perused the material placed on record and the decisions cited at bar.

5. Learned advocate Mr. Kapadia for the petitioner has vehemently submitted the same facts as narrated in the Memo of the Petition. Learned advocate Mr. Kapadia has also submitted that so called agreement is executed between Jagrutiben and Pannaben as heir of Dhansukhbhai and Ramanbhai respectively. According to him, when the husbands were alive, the wives cannot execute such a document. According to him, the entire document cannot be looked into for the purpose of partition.

5.1 While referring to plaint, he has submitted that the same has been filed for declaration and injunction and in alternative for specific partition of the suit property. He has submitted that the executant of the document at Page 41 are necessary parties as they have executed the same though

their husbands were alive. According to him, the dispute is between the real brother and at the relevant time their wives have not been shown as party. But in view of the document at Page 41, the said document has been executed between the two wives, they are necessary parties. He has also contended that if the amendment is allowed, as sought for, the nature C/SCA/14674/2018 JUDGMENT of the suit is not likely to be changed and no prejudice is likely to be caused to the defendants. While referring to the following decisions, he has submitted to allow the present petition by quashing order passed below Exh 80 by the trial Court and permit the petitioner to amend the plaint and to join new defendants in the Suit.

(1) Abdul Rehman and Another v. Mohd. Ruldu and Others, (2012) 11 SCC 341;

(2) Mohinder Kumar Mehra v. Roop Rani Mehra and Others, reported in (2018) 2 SCC 132; (3) Mahila Ramkali Devi and others v.

Nandram (dead) through
Representatives and Others, reported
(2015) 13 SCC 132.

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6. Per contra, learned advocate Mr. Gandhi for the original defendants have vehemently submitted that on comparison of the original plaint with the proposed amendment, it is clearly found that the plaintiff has tried to bring new facts and if the amendment is allowed then it will change the nature of the suit. While referring to the written statement filed by the defendants, he has submitted that the defendants have clearly took a stand that in reality there was partition of the property between the parties and there was writing made on 29.5.2013 and in that view of the C/SCA/14674/2018 JUDGMENT matter, the properties are in the possession of the respective parties. He has also contended that the defendants have also raised contentions regarding non-joinder of the parties. He has also contended that to get his name entered into revenue record it was for the plaintiff to take necessary action. He has also submitted that the proceedings taken by the plaintiff before revenue authority has resulted against the plaintiff and yet has not not filed any other proceedings against the order of the revenue authority and, therefore, the revenue entry mutated in the name of the defendants has become final.

6.1 While referring to the order passed below Exh 5 by learned trial Court (Page 65) learned advocate for the respondents/defendants have submitted that no prima facie case has been found by the trial Court for granting temporary injunction in favour of the plaintiff and the plaintiff has not carried the matter to the appellate Court. He has also submitted that the plaintiff cannot be permitted to fill up the lacuna on his part in the proceedings. According to him, the trial Court has not committed any error of fact and in dismissing the application at Exh 80 and, therefore, the present application may be dismissed.

6.2 The learned advocate has relied on the following decision:

- (1) Vidyabai & Ors v. Padmalatha & Anr., reported in AIR 2009 SC 1433;
- (2) Mashyak Grihnirman Sahakari Sanstha

Maryadit v. Usamn Habib Dhuka & Ors, reported in AIR 2013 SC 3188;

(3) Van Vibhag Karamchari Griha Nirman Sahakari Sanstha Maryadit (Regd) v. Ramesh Chander & Ors, reported in AIR 2011 SC 41.

7. In rejoinder, learned advocate for the petitioner has submitted that there is no malafide intention on the part of plaintiff and due to change of advocate, it was found that there is need of amendment and therefore the plaintiff has moved an application immediately, which ought to have been granted by the trial court. He has also submitted that there is no complete embargo on granting amendment in the plaint. According to him, the learned trial Court has rejected the application on the ground that trial has commenced and Order 6 Rule 17(2) does not provide for permitting amendment after trial being commenced. He has prayed to allow the petition.

C/SCA/14674/2018 JUDGMENT

8. In the case of Abdul Rehman and Another v. Mohd. Ruldu and Others (Supra) while dealing with the provisions of Order 6 Rule 17, the Apex Court has observed in Para 10 and 11 that: "10. Before considering the factual details and the materials placed by the appellants praying for amendment of their plaint, it is useful to refer Order VI, Rule 17 which is as under : "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."

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.

11. 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 C/SCA/14674/2018 JUDGMENT 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 v. Gattu Mahesh and others*, (2012) 2 SCC 300 : (AIR 2012 SC (Civ)

811) and *Rameshkumar Agarwal v. Rajmala Exports Pvt. Ltd. and others*, (2012) 5 SCC 337 : (AIR 2012 SC 1887). Keeping the above principles in mind, let us consider whether the appellants have made out a case for amendment.

It is also observed in Para 13 that it is settled law that if necessary factual basis for amendment is already contained in plaint, the relief sought on the said basis would not change the nature of the suit".

9. In case of *Mohinder Kumar Mehra v. Roop Rani Mehra and Others* (supra) while dealing with the provision under Order 6 Rule 17 the Hon'ble Apex Court, in paragraphs No. 16, 17, 18 and 22, has observed that:

"16. The judgment on which much reliance has been placed by learned counsel for the appellant is *Rajesh Kumar Aggarwal & Ors. Vs. K.K. Modi & Ors.* This Court had occasion to consider and interpret Order 6 Rule 17 CPC in Paras 15 and 16, in which following has been C/SCA/14674/2018 JUDGMENT held: (SCC pp. 392-393)" 15. The object of the rule is that the 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.

16. Order 6 Rule 17 consists of two parts. Whereas the first part is discretionary (may) and leaves it to the court to order amendment of pleading. The second part is imperative (shall) and enjoins the court to allow all amendments which are necessary

for the purpose of determining the real question in controversy between the parties."

17. Although Order VI Rule 17 permits amendment in the pleadings "at any stage of the proceedings", but a limitation has been engrafted by means of Proviso to the fact that no application for amendment shall be allowed after the trial is commenced. Reserving the Court's jurisdiction to order for permitting the party to amend pleading on being satisfied that in spite of due diligence the parties could not have raised the matter before the commencement of trial. In a suit when trial commences? Order 18 C.P.C. deal with "hearing of the suit and examination of witnesses". Issues are framed under Order 14. At the first hearing of the suit, the Court after reading the plaint and written statement and after examination under Rule 1 of Order 14 is to frame issues. Order 15 deals with "Disposal of the Suit at the first hearing", when it appears that the parties are not in issue of any question of law or a fact. After issues are framed and case is fixed for hearing and the party having right to begin is to produce his evidence, the trial of suit commences.

18. This Court in Vidyabai & Ors. Vs. Padmalatha & Anr., held that filing of an affidavit in lieu of examination ☐n ☐chief of C/SCA/14674/2018 JUDGMENT the witnesses amounts to commencement of proceedings. In para 11 of the judgment, the following has been held: (SCC p.143) "11. From the order passed by the learned trial Judge, it is evident that the respondents had not been able to fulfill the said precondition. The question, therefore, which arises for consideration is as to whether the trial had commenced or not. In our opinion, it did. The date on which the issues are framed is the date of first hearing. Provisions of the Code of Civil Procedure envisage taking of various steps at different stages of the proceeding. Filing of an affidavit in lieu of examination ☐n ☐chief of the witness, in our opinion, would amount to "commencement of proceeding"."

"22. The proviso to Order 6 Rule 17 CPC prohibited entertainment of amendment application after commencement of the trial with the object and purpose that once parties proceed with the leading of evidence, no new pleading be permitted to be introduced. The present is a case where actually before parties could lead evidence, the amendment application has been filed and from the order dated 14.2.2014, it is clear that the plaintiff's case is that parties has led evidence even on the amended pleadings and the plaintiff's case was that in view of the fact that the parties led evidence on amended pleadings, the allowing of the amendment was a mere formality. The defendant in no manner can be said to be prejudiced by the amendments since the plaintiff led his evidence on amended pleadings also as claimed by him."

10. In the case of Mahila Ramkali Devi and others v. Nandram (dead) through Legal Representatives and Others (supra) ☐while dealing with the provision under Order 6 Rule 17, in para ☐20, the Hon'ble Apex Court has held that:

"20. It is well settled that rules of procedure C/SCA/14674/2018 JUDGMENT are intended to be a handmaid to the administration of justice. A party cannot be refused just relief merely because of some mistake, negligence, inadvertence or even infraction of rules of procedure. The Court always gives relief to amend the pleading

of the party, unless it is satisfied that the party applying was acting mala fide or that by his blunder he had caused injury to his opponent which cannot be compensated for by an order of cost.

11. In case of Vidyabai & Ors v. Padmalatha & Anr. (supra), the Apex Court has, in Para 14, has observed that:

"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".

12. In case of Van Vibhag Karamchari Griha Nirman Sahakari Sanstha Maryadit (Regd) v. Ramesh Chander & Ors (supra), it was a case wherein suit was filed by the appellant against the respondent, wherein trial Court has rejected the Suit of the plaintiff on the ground that there was no relief sought for specific performance. Thereafter, the appellant called upon the respondent to execute a registered sale deed of C/SCA/14674/2018 JUDGMENT the disputed land in favour of the appellant. The same was denied by the respondent, but in the meanwhile the appellant filed appeal against the order of Civil Court before the learned Additional District Judge, Indore wherein the appellant moved an application for amendment of pleadings under Order 6 Rule 17 of the CPC. In a pending Civil Suit for inclusion of the relief of specific performance of contract, which was allowed by the trial Court. Against which the first respondent filed review petition, which was dismissed by the Court. Thereafter, plaint was filed before 6th Addl. District Judge, Indore with an application under Section 14 of the Limitation Act praying for the exclusion of the time spent in prosecution of the Suit in the concerned Court. The trial Court rejected the Suit and also dismissed the application under Section 14 of the Limitation Act. Being aggrieved the appellant filed writ petition before the High Court and ultimately dismissed the appellant's appeal. In view of the factual aspects, it was observed in Para 33 and 36, by the Hon'ble Apex Court, as under:

"33. This Court is, therefore, of the opinion that the appellant had the cause of action to sue for Specific Performance in 1991 but he omitted to do so. Having done that, he should not be allowed to sue on that cause of action which he omitted to include when he filed his suit. This Court may consider its omission to C/SCA/14674/2018 JUDGMENT include the relief of Specific Performance in the suit which it filed when it had cause of action to sue for Specific Performance as relinquishment of that part of its claim. The suit filed by appellant, therefore, is hit by the provisions of Order 2 Rule 2 of the Civil Procedure Code.

36. Here in this case, the inclusion of the plea of Specific Performance by way of amendment virtually alters the character of the suit, and its pecuniary jurisdiction had gone up and the plaint had to be transferred to a different court".

13. In case of Mashyak Grihnirman Sahakari Sanstha Maryadit v. Usamn Habib Dhuka & Ors (supra), the plaintiff filed suit against the respondent challenging the amalgamation of plots and seeking injunction restraining appellant society and developer from raising construction. Thereafter, the plaintiff sought amendment to incorporate relief of declaration regarding conveyance deed. Considering the factual scenario it was observed that such amendment was not only belated one but clearly an afterthought for obvious purpose to avert inevitable consequence. Therefore, order of the High Court allowing amendment of the petition was found to be erroneous and it was set aside by the Apex Court.

14. Considering the contention of learned advocates for both the sides and material placed on record as well as aforesaid decisions, it is admitted fact that the plaintiff and defendant C/SCA/14674/2018 JUDGMENT no.1 are real brothers. The plaintiff herein has filed suit for declaration as well as for partition of the property and permanent injunction against the 3 defendants. It is also averred by the plaintiff to cancel the agreement dated 29.5.2013 made between the parties and with a prayer that if the agreement is believed then the defendants may be directed to give possession of the property which has come to the share of the plaintiff. Now it is apparent from the pleadings of the plaintiff that at the time of filing of the suit, he has knowledge of the agreement dated 29.5.2013 between Jagrutiben, as heir of Dhansukhbhai Aahir and Pannaben, as heir of Ramanbhai Aahir. On perusal of this agreement (Page 41 to 48 in the paper book), it appears that the same bears the signature of the plaintiff himself as well as of the defendant no.1. There are names of other persons also. Thus the execution of the deed was within the knowledge of the plaintiff from the very beginning. At the time of filing of the suit, he was in complete knowledge of this agreement and yet at the initial stage, he did not joined the proposed party to the suit and even not made averment, which has been now sought by him in the application at Exh 80.

15. It is pertinent to note that, by filing C/SCA/14674/2018 JUDGMENT application at Exh 80, he wants to join his own wife as defendant. His wife could be a best witness for him but his wife cannot be joined as party defendant especially when he himself is a signatory of alleged agreement dated 29.5.2013. In a suit for partition of the Joint Family property between one branch against other branches, the heads of the branches alone are necessary parties and the member of the branch, though not necessary party, may be proper party in a given case. Now, admittedly, in this case, the property has to be divided between two brothers and brother is already joined as defendant no.1. Now, so far as the joining of the wife of the defendant no.1 is concerned, it is found that she has no independent right as her husband is alive. Further, the proposed defendant no.6 is concerned, he is son of defendant no.1. Now considering the averment made in the plaint, it was within the knowledge of plaintiff that proposed defendant no.6 is son of defendant no.1.

16. It is admitted fact that the plaintiff has filed the Suit on 19.5.2015 for declaration and injunction and in alternative to get possession as per the agreement dated 29.5.2013 whereas the application at Exh 80 for amendment of the plaint and joining of new defendants is filed in the year 2017 that too

after tendering his affidavit C/SCA/14674/2018 JUDGMENT in lieu of Chief Examination. Now, it is admitted fact that filing of affidavit in lieu of Examination in Chief of the witness would amount to commencement of proceedings. Legislature has also amended Order 6 Rule 17 of CPC by providing proviso which provides that after commencement of the trial no new pleadings be permitted to be introduced. Now, it is admitted in this case, as stated hereinabove, the plaintiff was having knowledge regarding alleged agreement between the parties, regarding partition of the properties and he was very well aware of that document that it was signed by his wife as well as wife of defendant no.1, but the plaintiff has not cared to join them at the time of filing the suit. Rather after commencement of the trial, he has filed the Application at Exh B for amendment of the plaint and for joining new defendants.

17. Now, it is not the case of the plaintiff/petitioner that he has no knowledge regarding the so called document and regarding the parties to be joined as defendants. The inaction on the part of the plaintiff, who has knowledge of everything at the time of institution of the suit, has waited till filing of affidavit in lieu of Examination in Chief. The conduct of the plaintiff is also required to be taken into consideration as he was in complete knowledge of C/SCA/14674/2018 JUDGMENT the alleged agreement at the time of filing of the suit. Under such circumstances, the observation of the learned trial Court regarding provisions of Order 6 Rule 7 proviso thereof and dismissing the application filed by the petitioner, cannot be termed as perverse. As such, the impugned order of the trial Court below Exh B is sustainable in the eye of law. The trial Court has not committed any error of facts and law in dismissing the application.

18. In view of the above, the present petition deserves to be dismissed and is dismissed accordingly. Rule discharged. No order as to costs. Interim relief stands vacated.

Sd/ (A. P. THAKER, J) saj FURTHER ORDER At this stage, learned advocate Mr. Kapadia for the petitioner seeks stay of this order for four weeks.

In view of the observations made in the order, the request is declined.

Sd/ (A. P. THAKER, J) saj