

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
BENCH AT AURANGABAD**

WRIT PETITION NO.4241 OF 2014

Musadik Abdul Kader Ali Sayyed,
Age 35 years, Occu.Agriculture,
R/o Miri Road, Shevgaon,
At and Post Shevgaon,
District Ahmednagar

..Petitioner
(Orig.Plaintiff)

Versus

1. Ahmednagar Jilha Maratha
Vidya Prasarak Samaj,
Through its President
Vilasrao Balaji Athare,
Age Major
2. Ramnath Laxmanrao Wagh
Age Major, Occu.Vice President,
3. Genjji Dagadaji Khandeshe,
Age Major, Occu.Secretary
4. Ramchandra Haribhau Dare,
Age Major, Occu.Jt.Secretary
5. Nandakumar Bhausahab Zaware,
Age Major, Occu.Treasurer
6. Dr.Mohanrao Gangaram Hapae,
Age Major, Occu.Trustee
7. Madharao Dagaduji Mule,
Age Major, Occu.Trustee
8. Sou.Deepalaxmi Sambhajirao Mhase,
Age Major, Occu.Trustee

All Major, Occu.Trustee,
All R/o Ahmednagar Zilha Maratha
Vidya Prasarak Samaj Karyalaya,
Residential High School Ground,
Ahmednagar
9. Yashwantrao Deorao Bhandare,
Deceased
10. Shriram Radhakisan Dhoot,
Age Major, Occu.Agriculture

11. Rameshwar Shriram Dhoot,
Age Major, Occu.Agriculture

12. Radhuji Dhondiram Damal,
Age Major, Occu.Agriculture

Resp.No.10 to 12 R/o Ambedkar
Chowk, Court road, Shevgaon,
Taluka Shevgaon,
District Ahmednagar

..Respondents
(Orig.Defendants)

Mr S.S.Kulkarni, Advocate for petitioner

Mr V.D.Hon, Senior Counsel i/b Mr A.V.Hon, Advocate for respondents
1 to 8

Ms Ruchi S.Wani, Advocate h/f Mr Nikhil Jaju, Advocate for
respondents No.10 and 11

CORAM : N.W. SAMBRE, J.

DATE : 6th January 2015

PER COURT

1. The petitioner – plaintiff filed Regular Civil Suit No.196/2003 on the file of Civil Judge, Junior Division, Shevgaon for removal of encroachment, which has reached at the stage of recording of evidence of the plaintiff's witnesses. At that point of time, the petitioner – plaintiff filed an application Exh.208 seeking amendment of plaint under Order VI, Rule 17 of the Code of Civil Procedure. The amendment that is sought, in the opinion of the petitioner, goes to the root of the matter, as by way of amendment the petitioner sought to incorporate the claim for demolishing the construction raised by the defendants by encroaching on his land, so also claims mesne profit, if the suit is decreed.

2. At this stage, learned Counsel for the petitioner submits that so far as mesne profit is concerned, the petitioner - plaintiff shall not claim the said relief and has given up the said claim.

3. The learned trial Court has rejected the application for amendment on two counts, (i) that the application is moved at belated stage; (ii) According to trial Court, the suit was initiated in 2004 and fact about encroachment was within the knowledge of the petitioner from 2007. The trial Court has observed that if the application is granted, the same will be granting premium on the negligent approach of the present petitioner, as the trial in the suit has already commenced.

4. Shri Kulkarni, learned Counsel for the petitioner – plaintiff while assailing the findings recorded by the trial Court submits that though the application for amendment is filed at belated stage, however, same needs to be granted in the interest of justice in view of the fact that it goes to the root of the matter. He further urged that suit claim even if as it is granted, the same has to be taken to its logical end and as such, the amendment is necessary. He further submits that since the amendment is sought in a suit which is initiated by him, no prejudice will be caused to the defendants – respondents and the time spent by the respondents can be compensated.

5. While opposing the above referred contentions, Shri Hon, learned Senior Counsel for respondents urged that the conduct of the petitioner is observed by the trial Court in its order and has sought to invite my attention to the observations made by the trial Court in paragraph 23 of the order impugned. He submits that since 2007, the fact as regards encroachment was very much within the knowledge of

the petitioner. He further urged that if the amendment is granted, same will result in permitting the petitioner – plaintiff to fill in the *lacunae* which are noticed by him after recording the evidence of Cadestral Surveyor. According to Shri Hon, the Court should not exercise equity in favour of the petitioner – plaintiff.

6. After considering the rival contentions of the parties, it is noticed that in the suit preferred by the present petitioner in December 2004, the plaintiff has prayed for measurement of the suit property and also production of the map demonstrating encroached portion. By way of amendment, what is sought by the plaintiff, is that if the encroachment is noticed, the defendants be directed to demolish the same.

7. The amendment sought for by the petitioner – plaintiff, in my opinion, is required for passing an effective decree in case if the plaintiff establishes his case for entitlement of such a relief before the trial Court. By passing simplicitor decree for declaration, no purpose will be served. Appropriate support can be drawn from the object of Section 34 of the Specific Relief Act.

8. The amendment to the extent of above referred submissions, in my opinion needs to be considered and granted, as the prayer made in the plaint is required to taken to its logical end. Merely giving a declaration that the respondents – defendants have encroached on the land of the petitioner herein will be of hardly any use to the

petitioner – plaintiff for deciding the real controversy in the suit. It will be in the fitness of the things that the amendment to the said extent needs to be granted. However, this Court cannot lose sight of the fact that the petitioner was not diligent in bringing the said amendment well in time, as the petitioner has approached the learned trial Court after commencing the trial.

9. The order dated 10th April 2014 below Exh.208 in Regular Civil Suit No.196/2004, passed by the learned Civil Judge, Junior Division, Shevgaon is hereby set aside and application Exh.208 filed by the petitioner – plaintiff for amendment is granted. However, in view of what has been observed herein above, it will be appropriate that the petitioner should pay costs of Rs.25,000/- to the respondents – defendants within a period of four weeks from today. The said amount shall be deposited in the trial Court which shall be condition precedent before carrying out the amendment.

10. This Court has also taken note of the statement made by the learned Counsel for the petitioner – plaintiff that the amendment sought in the plaint to the extent of claim for mesne profit is not pressed.

11. Writ Petition stands allowed in above terms.

(N.W. SAMBRE, J.)

(vvr/4241.14wp)