

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

WRIT PETITION NO. 7053 OF 2012

Namdeo s/o. Ganu Khairnar
Deceased through his L.Rs.

1. Yamunabai Namdeo Khairnar
Age 62 yrs. Occu. Nil,
2. Smt. Shobha d/o. Namdeo Khairnar
Age 49 yrs. Occu. Service

Both R/o Kholgalli,
Dhule, Tq. & Dist. Dhule.

... Petitioners

Versus

1. Balaprasad s/o. Vishnuprasad Kakade
Age 74 yrs, Occu. Nil,
R/o. CTS No. 1692, Galli No. 4,
Dhule, Taluka and District Dhule.
2. Dhule Municipal Corporation,
Dhule.
(The notice to be served on the
Commissioner of Dhule Municipal
Corporation, Dhule.

(Orig. Def Nos. 1 and 2)

3. Manohar s/o. Namdeo Khairnar
Age 49 yrs. Occu. Business,
4. Vijay s/o. Namdeo Khairnar
Age 47 yrs. Occu. Labour,
5. Rajendra s/o. Namdeo Khairnar
Age 46 yrs. Occu. Business,

R.Nos. 3, 4, 5 All r/o. Kholgalli,
Dhule, Tq. & Dist. Dhule.

... Respondents

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Mr. H. V. Tungar, Advocate for petitioners
Mr S. H. Tripathi, Advocate for respondent No. 1
Mr. V. S. Bedre, Advocate for respondent No. 2
Mr. V. P. Raje, Advocate for respondent Nos. 3 to 5

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CORAM : V. K. JADHAV, J.

Date of reserving Judgment : 01.10.2015
Date of pronouncing Judgment : 07.10.2015

JUDGMENT :-

1. Rule. Rule made returnable forthwith. By consent of learned counsel for the parties, matter is taken up for final hearing at admission stage itself.

2. The petitioners and respondent Nos. 3 to 5 are the legal heirs of original plaintiff namely Namdeo Khairnar who had filed Regular Civil Suit No. 182 of 2009 before Civil Judge Junior Division, Dhule, for the relief of perpetual injunction in respect of house property bearing CTS No. 1692 situated within the Municipal limits of Dhule. It is the case of the original plaintiff that he was in possession of suit property as a tenant since 50 years on monthly rent basis. At the instance of some rich businessmen and even at the instance of defendant Nos. 1, defendant No. 2-Municipal Corporation, Dhule had issued notice to the plaintiff on 06.08.2009 for

demolition of the building, as it is in dilapidated condition. According to the plaintiff, this is only with an intention to evict the plaintiff from the suit premises. During pendency of the said suit, an application at Exh. 5 was filed for temporary injunction restraining the defendants from demolishing the construction raised on the suit property. The said application came to be rejected by the trial court. However, in a Miscellaneous Civil Appeal, preferred by the petitioners, who are legal heirs of the original plaintiff, the learned District Judge, Dhule partly allowed the appeal and granted injunction against the respondent/original defendant No.1. However, during pendency of the said appeal, the respondent Municipal Corporation, Dhule, demolished the building.

3. Under these circumstances, the petitioners/plaintiffs filed an application at Exh. 34 for amendment in the plaint as detailed in the application. The said application was resisted by respondent/defendant No. 1 by filing say at Exh. 36 and by respondent/defendant No. 2-Municipal Corporation by filing say at Exh. 44. The learned Civil Judge J.D., Dhule, by the impugned order dated 07.02.2012, rejected the said application at Exh. 34. Hence this writ petition.

4. The learned counsel for the petitioners submits that the amendment sought by way of filing application at Exh. 34 is in the nature of alternate pleading consequent upon the pursis filed by respondent/defendant No. 1 to the effect that the suit has become infructuous. The learned counsel further submits that the proposed amendment would not change the nature of the suit, nor it amounts to bringing anything new on record. The learned counsel further submits that during pendency of the suit, the respondents/defendants, by joining hands, demolished the entire building with an intention to evict the petitioners. The learned counsel further submits that in order to allow the prayer for amendment, merit of the amendment is hardly a relevant consideration and it is always open to respondents/defendants to raise objection with regard to the amended plaint by making corresponding amendments in their written statement. The learned trial court, in the impugned order, considered the merit of the proposed amendment and observed that since the suit property is not in existence, the very purpose of the suit is frustrated. The learned counsel further submits that the approach of the trial court is erroneous. Thus, the impugned order is liable to be quashed and set aside and the application at Exh. 34 deserves to be allowed. The learned counsel for the petitioners, in support of

his submissions, places reliance on a judgment in a case of ***Usha Devi v/s Rijwan Ahmad and Others, reported in 2008 (5) Mh.L.J. 82.***

5. The learned counsel for respondent No. 1 submits that the property occupied by the deceased Namdeo Khairnar was in dilapidated condition and some part of the property was already collapsed on 09.07.2007. Considering the said position, the respondent/defendant No. 1 filed an application before Municipal Corporation, Dhule, praying therein to take appropriate action. The Miscellaneous Civil Appeal was disposed of by learned District Court by order dated 17.07.2010. However, on 06.04.2010, during pendency of the said appeal itself, respondent No.2-Corporation demolished the suit property. In that view of the matter, the very purpose of the suit as well as the Miscellaneous Civil Appeal is frustrated. Therefore, respondent No. 1 filed a pursis to the effect that the suit has become infructuous. The learned counsel further submits that by way of amendment, the plaintiff is trying to make alternate pleading, which is not permissible. The suit is instituted for simplicitor injunction and now, by way of amendment, the petitioner is praying for mandatory injunction. The same would cause serious prejudice to the

defence raised by respondent No.1.

6. The learned counsel for respondent No. 1, in support of his submissions, places reliance in a case of ***Lilabai Maruti Holkar v/s Smt. Chaturabai Siddheshwar Javery, reported in 2009(2) Mh.L.J. 194***, wherein, it is held that there cannot be subsisting tenancy where the property is not in existence and that there is no provision or even otherwise, whereby the landlord can be compelled to reconstruct the room for the tenant in a situation like this.

7. The learned counsel thus submits that the learned Judge of the trial court has rightly rejected the application at Exh. 34. The writ petition is devoid of any merits and thus, liable to be dismissed with costs.

8. I have also heard the learned counsel for the respondent No. 2/Municipal Corporation.

9. It is well settled that the purpose and object of Order VI Rule 17 of C.P.C. is to allow either party to alter or amend his pleadings in such manner and on such terms as may be just. It is true that the amendment cannot be claimed as a matter of

right and under all circumstances. However, it is equally true that in order to allow prayer for amendment, merit of the amendment is hardly a relevant consideration.

10. On perusal of the judgment and order passed by the lower appellate court in Miscellaneous Civil Appeal No. 31 of 2009, more particularly paragraph No. 12, wherein the lower appellate court has observed that, from the panchnama, copy of which is filed, it appears that the southern side part of the structure is in dilapidated condition and may fall at any time. It thus appears that the whole building was not in a dilapidated condition. Whether the landlord had been trying to evict the petitioners by demolishing the suit premises through Municipality, is a question of fact depending upon the merits of the suit. However, in order to allow the prayer for amendment, merit of the amendment is hardly a relevant consideration and it would be open to the defendants to raise their objections in this regard.

11 So far as the judgment in the case of **Lilabai Maroti Holkar** (*supra*) relied upon by the learned counsel for the respondents/defendants is concerned, it appears that the room in the old house made-up of mud was in a dilapidated

condition and was collapsed and thereafter, the petitioner therein filed a suit for mandatory injunction praying for directions to reconstruct the room for her. However, in the case in hand, during pendency of the suit, and even though only the southern side part of the construction was in dilapidated condition, the entire building came to be demolished by the respondent Municipal Corporation, Dhule. On this backdrop, in my considered opinion, the proposed amendment would not change the nature of the suit. It would open for the respondents/defendants to raise their objections with regard to the amended plaint by making corresponding amendments in their written statements, including the ground of objection that there could not be a subsisting tenancy when the property is not in existence. Needless to say that the same would be dealt with by the trial court on its own merits.

12. In view of the above discussion, I proceed to pass the following order :

ORDER

- I. The impugned order dated 07.02.2012 passed below Exh. 34 in Regular Civil Suit No. 182 of 2009 is hereby quashed and set aside.

- II. The application at Exh. 34 is hereby allowed. The petitioners are permitted to carry out the amendment as detailed in paragraph Nos. 4 and 5 of application at Exh. 34.
- III. The respondents/defendants are at liberty to make corresponding amendments in their written statement with regard to the amended plaint.
- IV. Rule is made absolute in the above terms. Writ Petition is disposed of accordingly.
- V. In the circumstances, there shall be no order as to costs.

(V. K. JADHAV, J.)

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