

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

WRIT PETITION NO. 7145 OF 2015

1. Pamabai W/o Raghu Surwase @ Suryawanshi,
Age: Major, Occu. Household,
2. Satish S/o Raghu Surwase @ Suryawanshi,
Age: 35 yrs., Occ. Household.
3. Navnath S/o Raghu Surwase @ Suryawanshi,
Age 30 yrs, Occ. Agri.
All R/o Borphal, Tq. Ausa, Dist. Latur. ...PETITIONERS

versus

1. Salimbegum W/o Aref Shaikh,
Age: 42 yrs, Occu. Household,
R/o Ausa, Tq. Ausa, Dist. Latur.
2. Mahesh Subhash Chatte,
Died through L.Rs.
Kamalbai W/o Subhash Chatte,
Age 55 yrs, Occ. Household,
R/o Humnabad, Tq. Humnabad,
Dist. Bidar, State Karnatka.
3. Abdulnabi S/o Gulam Sarvar Shaikh,
Age : 66 yrs, Occu. Agri,
R/o Khadkpura, Ausa,
Tq. Ausa, Dist. Latur. ...RESPONDENTS

.....
Mr. V.S. Gundre, Advocate for Petitioners
Mr. M.L. Dharashive, Advocate for respondent No. 1
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CORAM : SUNIL P. DESHMUKH, J.

DATED : 11th AUGUST, 2015

ORAL JUDGMENT :-

1. Rule. Rule made returnable forthwith. Heard learned counsel for parties finally, with consent.
2. The petitioners - legal heirs of original defendant No. 3 are before this court aggrieved by order dated 02-04-2015, on Exhibit-98, in regular

civil suit no. 90 of 2007, passed by civil judge, junior division, Ausa, whereunder application of present respondent No. 1 - original plaintiff for amendment to the plaint has been allowed.

3. Plaintiff is a landlady, who had initially filed suit seeking injunction in respect of the property described in the plaint. Plaintiff claims that the suit property, pursuant to certain litigation, had come to her share and as such, she is in possession of the property and that record has also been maintained in her favour accordingly. It appears that subsequently the suit was dismissed in default for want of prosecution on 20-11-2008 and the matter with regard to its restoration had been pending till 2014 and on 18-01-2014 the suit was restored. During pendency of this proceeding lot of events occurred according to the contentions of the plaintiff. According to her, parties were also added. Under application Exhibit-98, plaintiff is seeking recovery of possession. It is contended that during pendency of the suit, after dismissal of suit in default, the defendants had unauthorizedly carried out some construction taking advantage of the position and, as such, amendment had been sought.

4. The court after considering rival submissions including resistance by the defendants to amendment, had allowed the application, thus the petitioners are before this court.

5. Mr. Gundre learned counsel for petitioners submits that averments made in the application, are far away from facts, which is filed after expiry of period of limitation as per section 6 of the Specific Relief Act. He further contends that taking into account the citations which are relied on, on behalf of petitioners by the trial court ought to have considered that the application shall be liable to be rejected. He submits that in the present

case the plaintiff has placed her affidavit of examination-in-chief on record, in such a case, for want of due diligence the application should not have been considered. He, therefore, submits that writ petition deserves to be allowed and impugned order deserves to be set aside.

6. On the other hand, Mr. Dharashive, learned counsel for plaintiff submits that in view of the decision of Supreme Court relied on by the trial court that mere presentation of affidavit of examination-in-chief would not tantamount to commencement of trial and as such, test of due diligence would hardly be applicable and the law is fairly settled that amendment application generally be considered liberally. According to him, amendment sought is in respect of fact which had taken place subsequent to dismissal of the suit in default and as such, the application is after its restoration. As such, no fault can be found in the impugned order. Resistance to amendment on the ground of provisions of section 6 of the Specific Relief Act, does not hold water for the reason that said amendment is referable to section 5 rather than section 6 of the Specific Relief Act, he therefore, submits that amendment sought is well within limitation under the Limitation Act. He submits that having regard to aforesaid, the petition does not deserve any consideration.

7. On perusal of order, it emerges that the trial court has considered that suit was dismissed in default in 2008 and plaintiff has referred to various events, which have occurred thereafter till its restoration in the year 2014 including purported construction over the suit property at the instance of original defendants and the ones who were subsequently added. The court had further referred to various citations relied on and has taken into account the decision reported in the case of *2015(1) All MR*,

795 in the case of Sumer Builders Pvt. Ltd. Vs. Sadhna Textile Mills Pvt. Ltd. , wherein it appears that it has been considered that amendment applications are to be liberally construed. Having regard to aforesaid, the order does not appear to be erroneous.

8. Writ petition, as such, stands dismissed. Rule is discharged. Needless to refer to that it is for the petitioners - original defendants, if they so desire, to file amended written statement.

Sd/-

(SUNIL P. DESHMUKH, J.)

MTK
