

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO.5818 OF 2013

- | | | |
|----------------------------------|---|----------------|
| 1) Smt. Dropadi Jalindar Kamble |] | |
| Age 73 years, Occu-Household |] | |
| R/at. Udgaon, Tal-Shirol |] | |
| District-Kolhapur. |] | |
| 2) Ravindra Jalindar Kamble |] | |
| Age 31 years, Occu-Agriculturist |] | |
| R/at. Udgaon, Tal-Shirol |] | |
| District-Kolhapur. |] | |
| 3) Kondiba Jalandhar Kamble |] | |
| Age 33 years, Occu-Agriculture |] | |
| R/o Udgaon, Tal-Shirol |] | |
| District- Kolhapur. |] | |
| 4) Sau. Rukmini Namdev Kamble |] | |
| Age 39 years, Occu-Household |] | |
| R/at. Alivat, Tal-Shirol |] | |
| District-Kolhapur. |] | ...Petitioners |

v/s.

- | | | |
|---------------------------------|---|----------------|
| 1) Sau. Yamabai Shamrao Kamble |] | |
| Age 40 years, Occu-Household |] | |
| R/at. Haroli, Tal-Shirol |] | |
| District-Kolhapur. |] | |
| 2) Kinkar Santu Kamble |] | |
| Age 72 years, Occu-Agriculture |] | |
| R/at. Udagaon, Tal-Shirol |] | |
| District-Kolhapur. |] | |
| 3) Balu Kinkar Kamble |] | |
| Age 32 years, Occu-Painter |] | |
| R/at. Poorgrast Housing Society |] | |
| Udagaon, Tal-Shirol |] | |
| District-Kolhapur. |] | ...Respondents |

Mr. Vijay Killedar for the Petitioners.

Mr. Manoj A. Patil for the Respondent Nos.2 and 3.

CORAM : R. M. SAVANT, J.

DATE : 5th MARCH, 2015.

ORAL JUDGMENT:

Rule, with the consent of the learned counsel for the parties made returnable forthwith and heard. The respondent no.1 is a formal party being the daughter of the original plaintiff Jalindar Kamble.

2] The writ jurisdiction of this Court is invoked against the order dated 4th January, 2013 passed by the learned Civil Judge, Senior Division, Jaysingpur, by which order the application Exhibit 31 for amendment of the plaint came to be rejected. The suit in question being Regular Civil Suit No.180/2010 has been filed by the Plaintiffs for mandatory and perpetual injunction. The injunction sought is for restraining the Defendants from carrying out construction or for digging the suit property more specifically described in the plaint. The mandatory injunction sought is for removal of the unauthorized construction which is carried out by the Defendants in the suit property. It has been averred in the paragraph 3 of the plaint that in the portion marked as "ABCD" the defendants have carried out unauthorized construction by way of a toilet and bathroom. The dimensions of the toilet and bathroom have been mentioned in the said paragraph 3. The

defendants i.e. Respondent No.2 and 3 herein have filed their written statement and accepted the fact that construction has been carried out by them but it is their contention that the construction is not in the Plaintiffs property and that the construction has been carried out with the permission of the Gram Panchayat. The written statement was filed by the defendants sometime on 18th February, 2011. The Plaintiffs filed the instant application Exhibit 181 seeking amendment of the plaint in terms of the amendment sought vide the said application. The Plaintiffs seek the incorporation of paragraph No.3A, 6AA as also the paragraph relating to the Court fees which are more specifically mentioned in the application Exhibit 181. The sum and substance of the amendment sought is that the Plaintiffs seek to bring on record the factum of the Defendants carrying out construction beyond the bathroom and toilet in the nature of constructing septic tank dimensions thereof are also mentioned in the amendment sought. The said application Exhibit 181 was replied on behalf of the defendants. It was contended on behalf of the Defendants that they had filed their written statement on 18th January, 2012 and it is after almost a period of one year 9 months that is the instant application Exhibit 181 came to be filed and, therefore, the said application suffers from delay and laches. The Trial Court considered the said application and as indicated above, has by the impugned order dated 4th January, 2013 has rejected the same. The

rejection is on the ground that there is a delay in filing the application and that since the Plaintiffs have already prayed for removal of the construction there is no necessity to incorporate the averments which have been sought vide the said application Exhibit 181.

3] Heard the learned counsel for the parties. The learned counsel for the Petitioners would contend that the Trial Court has erred in observing that since relief in respect of the removal has already been sought there is no necessity to incorporate the facts which are sought to be incorporated by way of the amendments. The learned counsel would contend that the amendment sought is to put on record that the construction which has been carried out beyond the toilet and bathroom by way of the septic tanks being constructed the learned counsel would contend that since there is already an averment and a prayer sought in the plaint that of removal of the unauthorized construction, no prejudice would be caused to the Defendants if the amendment is allowed. The learned counsel for the Defendant Nos.2 and 3 i.e. original Plaintiffs would reiterate the case of the Defendants which was urged in the Trial Court, namely, the amendment is not necessary and that there is a delay in filing the application.

4] Having heard the learned counsel for the parties, I have

considered the rival contentions. As indicated above, by the amendment what is sought is to bring on record the factum of the construction carried out beyond the bathroom and toilet, the said construction which is sought to be brought on record is different than the construction which is already on record which finds place in paragraph 3. Since the Plaintiff has already founded the suit on the alleged unauthorized construction made by the Defendants, allowing the instant application in my view, would cause no prejudice to the Defendants inasmuch as the alleged factual position on site would come on record which is the alleged additional construction carried out by the Defendants. The Trial Court has erred in rejecting the application on the ground that there is a delay between the filing of the written statement wherein the defendants have accepted the fact that they have carried out construction and the filing of the application. As indicated above, the amendment sought is in respect of the additional construction and not the construction acceptance of which finds place in the written statement. It is well settled that a Court should be liberal in allowing a pre-trial amendment, more so, an averment which is required to render a complete and effectual adjudication of the lis between the parties. In that view of the matter, the impugned order dated 4th January, 2013 is required to be quashed and set aside, and is accordingly quashed and set aside, resultantly the application Exhibit 31 would stand allowed.

Amendment in the plaint to be carried out within 4 weeks from today. The Defendants would be entitled to file their additional written statement as would be directed by the Trial Court. The Petition is allowed to the aforesaid extent. Rule is accordingly made absolute in the aforesaid terms with parties to bear their respective costs of the above Petition.

(R. M. SAVANT, J.)