

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 10274 OF 2015**

Kerba Gajendra Mohite & Ors

..Petitioners

Vs.

Revatibai Mahadeo Katmore & Ors

..Respondents

Mr. G. M. Savagave for the Petitioners

Mr. S. S. Chaudhari for the Respondents

CORAM : R. M. SAVANT, J.

DATE : 27th OCTOBER, 2015

P.C.

1 The Writ Jurisdiction of this Court is invoked against the order dated 1-8-2015 passed by the Learned Joint Civil Judge Senior Division, Barshi, by which order, the application Exhibit 149 filed by the Defendants to amend their counter claim was allowed and the counter claim was allowed to be amended in terms of the amendment sought vide the said application Exhibit 149.

2 The Suit in question has been filed by the Petitioners / Plaintiffs for perpetual injunction in respect of the suit property mentioned in paragraph 1 of the plaint. In the said Suit, the Defendants have after filing of their Written Statement raised a counter claim in respect of recovery of possession of 1H and 60 Ares portion described in paragraph 12 (e) of the said counter claim. The possession is sought on the basis of the alleged encroachment to the said extent

carried out by the Plaintiffs which was measured through M. R. No.2801 dated 8-1-2015.

3 It is required to be noted that pending the Suit, the Plaintiffs had filed an application to measure the land of the Plaintiffs as well as the Defendants pursuant to which the land was measured vide M.R. No.179 which disclosed that the Plaintiffs have made encroachment to the extent of 1H and 25 Ares of land. It seems that the Suit proceeded to trial. The Plaintiffs have filed their affidavit of examination in chief on 18-3-2015 and were also cross-examined on 9-4-2015. Thereafter the Defendants have filed the instant application Exhibit 149 on 18-6-2015 for amendment of the counter claim with permission to produce certain documents filed along with the list Exhibit 151. The said amendment sought was on the basis of the letter Exhibit 151/1 issued by the public information officer in the office of the Deputy Superintendent of Land Records, Barshi which information was provided vide letter dated 6-5-2015 which inter alia disclosed that the relevant record of M. R. No.2081 is destroyed which is part of the list enclosed with Exhibit 151/1, which list also includes some other documents, which also have been destroyed.

4 The Trial Court was of the view that since the information was provided on 6-5-2015 and since the court was on vacation during the said period, the application filed by the Defendants after the vacation got over on

18-6-2015, cannot be said to be belated. The Trial Court also rejected the contention urged on behalf of the Plaintiffs that the Defendants have not followed the due diligence test. The Trial Court was of the view that since the said amendment is sought on the basis of the information provided by the public information officer attached to the office of the Deputy Superintendent of Land Records, Barshi, the question of any delay or the due diligence test does not arise. The Trial Court was of the view that the question of due diligence would have arisen if the Defendants were already in the know of the said fact. The Trial Court lastly observed that the said amendment application is necessary to be granted to decide the real controversy between the parties. The Trial Court accordingly by the impugned order allowed the said amendment application.

5 The Learned Counsel for the Petitioners sought to assail the impugned order on the ground that the application Exhibit 149 was moved after the Plaintiffs were cross-examined and therefore unless the due diligence test is satisfied, the application for amendment of the counter claim could not be allowed. In support of the said contention, the Learned Counsel sought to place reliance on the judgment of the Apex Court in the matter of **Vidyabai & Ors. Vs. Padmalatha & Anr.**¹ as also the judgments of the two Learned Single Judges of this Court in the matter of **Anil s/o Vishwanath Jadhav Vs. Pankaj**

1 2009(1)ALL MR 471

s/o Indrajeet Bassi² and in the matter of Surjitsingh s/o Kanaksing Zalte Vs. State of Maharashtra & Ors.³

6 In my view, the said judgments would not further the case of the Petitioners / Plaintiffs in any manner in so far as their opposition to the amendment sought by the Defendants in their counter claim is concerned. It is required to be noted that the factum of M.R. No.2081 is already appearing in the counter claim as originally filed on the basis of which the Defendants in fact were seeking possession of 1H and 60 Ares. It is during the pendency of the Suit that another measurement was carried out i.e. M. R. No.179 in which the encroachment shown is to the extent of 1H and 25 Ares. What is sought to be placed on record by way of the amendment is only the factum of the record relating to M.R. No.2081 being destroyed. It is therefore not a case where for the first time a fact is sought to be brought on record which would prejudice the Plaintiffs having regard to the stage at which the Suit is at present. It is trite that an amendment which results in a complete and effectual adjudication of the Suit is required to be allowed. If the said test is applied then the impugned order passed by the Trial Court cannot be said to suffer from any error of jurisdiction or any other illegality of infirmity for this Court to interfere in its Writ Jurisdiction. The Writ Petition is accordingly dismissed.

2 2010(1) ALL MR 394

3 2010(1) ALL MR 398

7 Needless to state that the Plaintiffs i.e. Defendants to the counter claim would be entitled to file their Additional Written Statement to the counter claim within the time that will be stipulated by the Trial Court.

[R.M.SAVANT, J]