

IN THE HIGH COURT OF JUDICATURE AT MUMBAI
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.9466 OF 2013

Tulsidas Chunilal Lala (decd.) through
Amit Tulsidas Agarwal and another ... Petitioners
Vs.
Chiranjilal Chunilal Lala (decd.) through
Vijay Chiranjilal Agarwal and others ... Respondents

Mr. Sudhir Hardikar for Petitioners.
Mr. Vishwanathan Aiyar for Respondents No.1/1, 1/2 and 1/3.

CORAM : R. G. KETKAR, J.
DATE : 22ND JULY, 2015

P.C. :

Heard Mr. Hardikar, learned Counsel for petitioners and Mr. Aiyar, learned Counsel for respondents No.1/1, 1/2 and 1/3 at length. Rule. At the request and by consent of the parties, Rule is made returnable forthwith and the Petition is taken up for final hearing.

2. By this Petition under Article 227 of the Constitution of India, original plaintiffs have challenged the judgment and order dated 13.08.2013 passed by the learned Joint Civil Judge, Senior Division, Thane below exhibit-129 in Special Civil Suit No.874 of 1996. By that order, the learned trial Judge rejected the application moved by the petitioners, hereinafter be referred to as plaintiffs, under Order VI, Rule 17 of the Code of Civil Procedure, 1908 (for short 'C.P.C.') for amending the plaint.

3. Plaintiffs, instituted Suit for declaration, injunction and removal of unauthorised construction. The Suit was instituted in the year 1996. Plaintiffs took out application for amendment. Defendant No.1/1 opposed the application on the ground that there is no substance in the

application and once the recording of evidence has commenced, Law does not permit granting of such amendment. It was further contended that if the proposed amendment is allowed, it will change the nature of the Suit. By the impugned order, the learned trial Judge rejected the application on the ground that the proposed amendment is not necessary for deciding the real controversy between the parties. The learned trial Judge was also of the view that since the trial has commenced, plaintiff has to satisfy the ingredients laid down in proviso to Order VI, Rule 17 C.P.C. However, no such case is made out by the plaintiffs.

4. The learned trial Judge observed in paragraph 8 that the proposed amendment is not necessary for deciding the real dispute between the parties. He, however, did not consider the dispute raised in the unamended plaint and the proposed amendment. Merely in paragraph 8, the learned trial Judge observed that the proposed amendment is not necessary. In paragraph 9, the learned trial Judge observed that plaintiffs have to satisfy the requirements laid down in Proviso to Order VI, Rule 17 C.P.C. It was observed that plaintiffs did not establish that inspite of due diligence, they could not have raised the matter before the commencement of trial. The learned trial Judge failed to consider that the Suit is instituted in the year 1996 and obviously, is not governed by Amendment of 2002, and in particular amendment to Order VI, Rule 17. The trial Court will have to decide the application for amendment on the basis of the unamended Order VI, Rule 17 which reads thus,

“Order VI, Rule 17 - The Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties.”

5. On this ground alone, the impugned order cannot be sustained and as such, is liable to be set aside. Hence, Petition succeeds and the

same is disposed of in the following terms:

- a. The impugned judgment and order dated 13.08.2013 is quashed and set aside;
- b. Application at exhibit-129 is restored to the file of the learned trial Judge. The learned trial Judge will dispose of the same in accordance with law and in the light of the observations made herein;
- c. Rule is made absolute in the aforesaid terms with no order as to costs.

(R. G. KETKAR, J.)

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