

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 4494 OF 2015

Daji Tirsingh Pawar

...Petitioner

versus

Dattu Vanaji Gawali and another

...Respondents

.....
Mr. Ujjawal S. Patil, advocate for the petitioner
Mr. K.C. Sant advocate for respondent No.1
.....

CORAM : V. K. JADHAV, J.

**Date of Reserving
the Order : 10.02.2016**

**Date of pronouncing
the Order: 17.02.2016**

PER COURT :-

1. Heard finally with consent of the parties at admission stage.
2. The petitioner-original defendant had filed an application below Exh.104 R.C.S. No. 229 of 2008 for carrying out amendment in the written statement. Learned 5th Joint Civil Judge, Junior Division, Dhule by the impugned order dated 14.11.2014 rejected the said application Exh.104.
3. The brief facts giving rise to the present writ petition are as

follows:

The respondents-original plaintiffs instituted suit bearing R.C.S. No. 229 of 2008 for recovery of possession of encroached area of plot and for decree for perpetual injunction. The respondents-plaintiffs have claimed the said relief in respect of two properties as detailed in para 2-a and b of the plaint. According to the plaintiffs, so far as plot 4 out of survey No.2 measuring 180 sq. meters is concerned, the defendant has encroached upon the portion of northern-western corner measuring 12 ft south-north and 6 ft east west, 72 sq. ft. in total and made permanent construction thereon. The respondents-plaintiffs had further pleaded that so far as the plot No.3 out of survey No.3 admeasuring 180 sq. meters is concerned, the defendant encroached upon the portion of said plot measuring 12 ft. south-north and 4 ft. east-west and also raised permanent construction thereon. It is further contended that the defendant has made construction without obtaining permission from Gram Panchayat.

The petitioner-defendant has strongly resisted the suit by filing written statement. It has contended by way written statement that the said construction is not in the suit property and construction is made by the defendant on the property within Gram Panchayat limits.

It has further contended that said construction is in existence since 30 to 35 years. It has further pleaded that the aforesaid construction is ancestral property of the petitioner-defendant and the respondents-plaintiffs have no concern with it. It has also pleaded that the Gram Panchayat house No. 172 is ancestral property of the petitioner-defendant and there is residential house on the said property which is in existence since his forefathers. It has also contended that no new construction was made on the said property and the respondents-plaintiffs are misleading the Court. However, in the year 2014 by Exh.104 the petitioner-defendant has filed an application for carrying out amendment in the written statement. The petitioner-defendant has contended in the said application that inadvertently plea of adverse possession was not raised in the written statement. The learned Judge of the trial court by impugned order dated 14.11.2014 rejected the said application. Hence, this writ petition.

4. Learned counsel for the petitioner submits that the petitioner-defendant has already raised a plea that he is in possession of the constructed portion since his forefathers. The proposed amendment is enabling the petitioner-defendant to elaborate upon his defence or to take additional pleas. Learned counsel submits that the leave to amend may be granted at any stage of the proceeding and even the

amendment is allowed at the appellate stage in appropriate cases. Learned counsel submits that the proposed amendment would not cause any prejudice to the respondents-plaintiffs. Mere delay is not a ground for refusing amendment. Learned counsel submits that the proposed amendment is necessary in order to avoid multiplicity of litigation.

Learned counsel for the petitioner in order to substantiate his submissions, places reliance on the judgments of this court in the cases of Sharad Dinkar Padalkar and others vs. Smt. Sugandha Balasaheb Jadhav and Anr. reported in 2013(6) All MR 155 and Mahendrakumar Bhagwatiprasad Agrawal vs. Virendra Bhagwatiprasad Agrawal and Anr. reported in 2014(6) All MR 674.

5. Learned counsel for the respondents-plaintiffs submits that the proposed amendment is delayed one and clearly afterthought for the purpose of avoiding inevitable consequence. Learned counsel submits that if the proposed amendment is allowed that would cause prejudice to the respondents-plaintiffs. Learned counsel submits that by way of proposed amendment, the petitioner-defendant raised counter claim and the same is not permissible at such belated stage. Learned counsel submits that as per proviso to Order VI Rule 17 of C.P.C. no application for amendment shall be allowed after trial is

commenced and the same is permissible only if the Court comes to the conclusion that inspite of due diligence the party could not have raised the matter before the commencement of trial. Learned counsel submits that even though the suit was pending since 2008 and even though the petitioner-defendant has cross-examined the witnesses of the plaintiff, the written statement was placed on record in the year 2013 and the same was allowed by the trial court. Learned counsel submits that in the application at Exh.104 no reasons are given for such inordinate delay in raising the plea of adverse possession by way of amendment and it is simply stated in the application that inadvertently the said plea was not raised at the time of filing of the written statement. Learned counsel submits that the trial court has rightly rejected application Exh.104. Thus, the impugned order calls for no interference and the writ petition is liable to be dismissed.

6. The principles applicable to the amendments of the plaint are equally applicable to the amendment of the written statements. However, the courts are more generous in allowing the application for amendment of the written statement as the question of prejudice is less likely to operate in that event. It is well settled that the Court must be liberal in granting prayer for amendment. In the case in hand, the petitioner-defendant has raised plea that he is in possession of constructed portion since his forefathers and said

constructed portion has been given house number in the Gram Panchayat record. The petitioner-defendant has raised specific plea that he resides in the said residential constructed house since 30 to 35 years, which is numbered as Gram Panchayat House No.172. The respondents-plaintiffs had approached the court with a plea that there are two plots one is from survey No.2 and another is from survey No.3, admeasuring 180 sq. meters each owned and possessed by him. It is clear from the pleadings that the said property is situated within the limits of Gram Panchayat. It appears from the pleadings that the said plots are part of survey No. 2 and 3 respectively. On perusal of boundaries of the said two plots, it appears that Gram Panchayat house No.172 is no way shown at any site of the said plots. It is true that the merits of the proposed amendment are not required to be examined at this stage. It appears that the petitioner-defendant has filed frivolous application for carrying out amendment with an intention to cause delay in the trial.

7. In the case of Salem Bar Association vs. Union of India, reported in 2005 CJ (SC) 1164, the Supreme Court held that the protection granted in proviso to Rule 17 prevents frivolous application for amendment initiated only to delay the trial. In the given set of facts, in my considered opinion, the proposed amendment is not necessary for just and proper adjudication of the suit. The order

impugned thus calls for no interference. Writ petition is devoid of any merits. Hence, following order:-

ORDER

- I. Writ petition is dismissed.
- II. In the circumstances, there shall be no order as to costs.

(V. K. JADHAV, J.)

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