

IN THE HIGH COURT OF JUDICATURE AT MUMBAI
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.1643 OF 2014

Suvarnaprabha Vilas Kamble through POA
Holder Vilas Babu Kamble ... Petitioner
Vs.
Rajkumar Gulabchand Shah and others ... Respondents

Mr. Sanjiv A. Sawant for Petitioner.
Mr. J. P. Kharge for Respondent No.1.
Ms S. D'souza i/b. Mr. Arjun Singh Thakur for Respondent No.2.

CORAM : R. G. KETKAR, J.
DATE : APRIL 04, 2016

P.C. :

Heard Mr. Sawant, learned Counsel for petitioner, Mr. Kharge, learned Counsel for respondent No.1 and Mr. D'souza, learned Counsel for respondent No.2 at length. Office remark shows that respondent No.3 is served. None appears for respondent No.3, despite service. Hence, Rule. Learned Counsel for respective respondents waive service. 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, petitioner has challenged the order dated 15.01.2014 passed by the learned Civil Judge, Junior Division, Palus below exhibit-58 in Regular Civil Suit No.44 of 2011. By that order, the learned trial Judge rejected the application made by the petitioner, hereinafter referred to as plaintiff, under Order VI, Rule 17 of the Code of Civil Procedure, 1908 (for short 'C.P.C.') for amending the plaint.

3. Plaintiff has instituted Suit on 24.06.2011 against the respondents, hereinafter referred to as defendants, for possession of open space, more

particularly described in paragraph 1 of the plaint. During the pendency of the Suit, plaintiff took out application dated 09.04.2013 for amending the plaint. By the proposed amendment, plaintiff wants to incorporate paragraph 12-A after paragraph 12 and further wants to amend paragraph 14 of the plaint so as to contend that after 2005, plaintiff demanded possession of open space from the defendants. Defendants denied handing over possession. Thus, the cause of action accrued in the year 2005. From the year 1998 till 2011, the cause of action is accruing.

4. Respondents resisted the application by filing reply and by the impugned order, the learned trial Judge rejected the application on the ground that the proposed amendment is with a view to bringing the Suit within the period of limitation. The learned trial Judge further held that if the application is allowed, it will change the nature of the Suit and will cause prejudice to the defendants.

5. Mr. Sawant submitted that the issues are framed and the trial is yet to commence. He submitted that by the proposed amendment, plaintiff wants to bring on record the fact that earlier he had instituted, Suit against the previous owner - Raosaheb Jadhav in the year 1998. During the pendency of that Suit, said Jadhav sold the suit property to defendants No.1 to 3. Plaintiff took out application for impleading them as party defendants. However, he thereafter applied for withdrawal of the Suit with liberty to institute fresh Suit. That application was allowed on 18.10.2005. Plaintiff wants to incorporate this paragraph after paragraph 12. He submitted that the proposed amendment does not change the nature of the Suit and essentially remains Suit for possession.

6. On the other hand, Mr. Kharge opposed on the ground that though

the Suit is instituted in the year 2011, the application is taken out in the year 2013. There is no explanation for taking application belatedly. He further submitted that the proposed amendment also changes the nature of the Suit. In support of this submission, he relied upon decision of this Court in the case of ***Prakash Ratanlal @ Ratansa Kasari Vs. Bhika, 2010 (1) Mh.L.J. 810*** and in particular paragraph 11 thereof. He further submitted that the proposed amendment is also barred by limitation.

7. I have considered the rival submissions advanced by the learned Counsel appearing for the parties. I have also perused the material on record. It is not in dispute between the parties that the issues are framed and the affidavit of evidence of the witness is not filed. In the case of ***Prakash Ratanlal Kasari (supra)***, this Court considered the decision of ***Vidyabai Vs. Padmalatha, 2009 (1) ALL MR 471***, and in particular paragraphs 7 and 8 thereof. In paragraph 7, the Apex Court has held that proviso to Order VI, Rule 17 of C.P.C. is couched in a mandatory form. The Court's jurisdiction to allow such an application is taken away unless the conditions precedent therefor are satisfied, namely, it must come to a conclusion that inspite of due diligence, the parties could not have raised the matter before the commencement of the trial. In paragraph 8, the Apex Court has held that the date on which the issues are framed is the date of first hearing. Provisions of C.P.C. envisage taking of various steps at different stages of the proceeding. Filing of an affidavit in lieu of examination-in-chief of the witness would amount to 'commencement of proceeding'.

8. As noted earlier, in the present case, issues are framed and it is not in dispute that the affidavit in lieu of examination-in-chief of the witness is not filed. In view thereof, proviso to to Order VI, Rule 17 of C.P.C. will have no application to the facts of the present case. As noted

earlier, the Suit is instituted for recovery of possession against the defendants. It is also not in dispute that the plaintiff had filed a Suit against the predecessor in title of the defendants - Raosaheb Jadhav in the year 1998 and during the pendency of that Suit, said Jadhav sold the suit property to defendants No.1 to 3. Plaintiff wants to incorporate that fact by the proposed amendment. In addition to that, plaintiff wants to add plea relating to cause of action in paragraph 14 of the plaint. The learned trial Judge rejected the application mainly on the ground that the proposed amendment is barred by limitation as also on the ground that nature of the Suit changes. As far as the finding given by the learned trial Judge that the nature of the Suit changes cannot be sustained. The Suit essentially is for recovery of possession. That apart, as far as the finding that the application is made with a view to bringing the Suit within the period of limitation is concerned, the learned trial Judge could have kept the issue of limitation open and could have framed issue of limitation along with the other issues.

9. In the case of **Prakash Ratanlal Kasari** (*supra*), originally, the Suit was instituted for perpetual injunction and by proposed amendment, the plaintiff introduced new prayer for specific performance. The Court, therefore, held that the proposed amendment would change nature of the Suit. In view thereof, the reliance placed by Mr. Kharge on the decision of **Prakash Ratanlal Kasari** (*supra*) does not advance the case of the respondent No.1. In view thereof, Petition deserves to be allowed and the impugned order deserves to be set aside. Hence, the following order:

- a. Impugned order dated 15.01.2014 is set aside;
 - b. Exhibit-58 filed by the petitioner-plaintiff stands allowed.
- Amendment shall be carried out forthwith within 14 days from today;

- c. The learned trial Judge will frame issue as to whether the Suit is barred by limitation, if not the said issue is already framed and this issue shall be tried along with the other issues.
- d. Rule is made absolute in the aforesaid terms with no order as to cost.

(R. G. KETKAR, J.)

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