

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 1330 OF 2016**

Vishnu Gopal Pendharkar

Petitioner

Vs

Rajendra R. Bendre

.. Respondent

Mr. Mandar Limaye a/w Mr Mahendra Agvekar, Advocate for
Petitioner.

CORAM : R.G.KETKAR,J.

DATE : 09/02/2016

PC:

1. Not on Board. At the request of Mr. Limaye, taken up for admission. Heard Mr. Mandar Limaye, learned counsel for the petitioner at length.

2. By this Petition under Article 227 of the Constitution of India, the petitioner has challenged the Judgment and order dated 17.7.2015 passed by the learned 20th Jt. Civil Judge, Junior Division below Exh.82 in R.C.S. No. 1306 of 2010. By that order, the learned trial Judge rejected the application Exh.82 made by the petitioner, hereinafter referred to as plaintiff, under Order VI Rule 17 of C.P.C. for amending the plaint.

3. Mr. Limaye submitted that the plaintiff instituted suit claiming damages of Rs.50000/- together with interest at the rate of 18% per annum from the date of institution of the suit till realization; for perpetual injunction restraining defendants no. 1 and 2 from entering into terrace as also parking scooter and

other vehicles in front of the plaintiff's vehicle, among other prayers. The respondent resisted the suit by filing written statement.

4. During pendency of the suit, the plaintiff filed application Exh.82 under Order VI, Rule 17 for amending the plaint. The plaintiff intends to incorporate paragraph 8(A) in the plaint. In the proposed paragraph 8(A), the plaintiff asserted that his daughter is residing in Grinsbaro North Karolina in USA. The nature of the duties of his daughter and son-in-law are outdoor nature. She has one son. In order to look after her son (grand son of the plaintiff), the plaintiff has to visit USA for 4 months every year. In paragraph 8B, the plaintiff wants to incorporate that under American Laws keeping the child alone is treated as serious offence and if the police authorities find that child is staying alone, they are taken in custody and sent to children's Hostel and parents are arrested and proceedings are initiated against them. On these, among other grounds, the plaintiff wanted to incorporate paragraphs 8(A) to (F) and instead of claiming Rs.50000/- as original claim, the plaintiff claimed damages of Rs. 6 Lacs.

5. By the impugned order, the learned trial Judge rejected it on two grounds, namely, the plaintiff had visited USA in 2002, 2003, 2006 and 2010. Mr. Limaye submitted that in fact in paragraph 2 of the application, the plaintiff specifically asserted

that because of nuisance caused by the defendant, he could not visit USA after 2011. Apart from that, the finding recorded by the learned trial Judge that the claim made by the plaintiff is contradictory as also the alleged economic loss is caused to his daughter and not to the plaintiff. The learned trial Judge also held that the plaintiff has filed his examination in chief affidavit on 15.2.2012 and in view of the proviso to Order VI, Rule 17, even otherwise the plaintiff is not entitled to amend the plaint as no case of due diligence is made out.

6. With the assistance of Mr Limaye I have perused the original plaint as also application for amendment. In my opinion, apart from the fact that the application is made after commencement of the trial, the proposed amendment also changes the nature of the suit. The learned trial Judge also rightly observed that the alleged loss is to the daughter of the plaintiff and not to the plaintiff himself. In view thereof, no case is made out for invocation of powers under Article 227 of the Constitution of India. The petition fails and the same is dismissed.

7. It is, however, expressly made clear that where a decree is appealed from by the petitioner, any error, defect or irregularity in the impugned order, affecting the decision of the case, may be set forth as a ground of objection in memorandum of Appeal as contemplated by Section 105(1) of C.P.C.

(R.G.KETKAR, J.)