

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY.
CIVIL APPELLATE JURISDICTION.**

WRIT PETITION NO. 3754 OF 2015

Shri. Mahipati Shripati Patil	... Petitioner
V/s.	
Jaybhunabi Babaso Mullanni & Ors.	... Respondents

Mr. Amit Borkar for the Petitioner.
Mrs. Shakuntala Murbidri for the Respondent Nos. 1 & 2.

**CORAM : K. K. TATED, J.
DATED : 19/07/2016**

PC.:

. Heard learned Counsel for the parties.

2 By this petition under Article 227 of the Constitution of India the Petitioner plaintiff is challenging the order dated 07.03.2015 passed by learned Principal District Judge, Kolhapur below Exh. 39 in Regular Civil Appeal No. 30 of 2011 rejecting plaintiff's application for carrying out amendment in plaint so as to incorporate the averments regarding decree in Regular Civil Suit No. 156 of 1957 and Regular Civil Appeal No. 268 of 1959 having void and non-est in the law in view of order in Tenancy Case No. 101 of 1963 passed by the Tenancy Court. The petitioner further prayed to amend the plaint to incorporate the relief of possession of the suit lands in the event it is found that the plaintiff is not in the possession of the suit land.

3 In the present proceeding, initially the plaintiff filed Regular Civil Suit No. 214 of 2001 in the Court of Civil Judge, Senior Division,

Kolhapur for an order of injunction restraining the respondent/defendant from disturbing his possession in respect of suit property i.e. C.T.S. No. 1112 Hissa No.2 area 66R and C.T.S. No. 1112 Hissa No. 3 area 85 R. That suit came to be dismissed by order dated 16.10.2010 holding that plaintiff failed to prove his possession in respect of suit property. Hence, there is no question of granting perpetual injunction against the respondent defendant.

4 Being aggrieved by the judgment and decree dated 16.10.2010 passed by Trial Court, the petitioner plaintiff preferred Regular Civil Appeal No. 30 of 2011 before the learned District Judge, Kolhapur on 06.01.2011. In that appeal, the plaintiff preferred application below Exh.39 dated 20.01.2015 under Order VI Rule 17 of Code of Civil Procedure, 1908 for carrying out amendment in the plaint. By way of amendment, plaintiff wanted to add paragraph 4(a) giving the details of earlier proceedings in Regular Civil Suit No. 156 of 1957, Regular Civil Suit No. 268 of 1959 and Tenancy Case No. 101 of 1963. The plaintiff also prayed to add prayer clause 11(aa) i.e. for possession of the suit property.

5 In that application, the respondent defendant filed their Affidavit-in-Reply dated 02.02.2015 and opposed the same.

6 After hearing both the sides, the Appellate Court by reasoned order dated 17.03.2015 rejected plaintiff's application for carrying out amendment on the ground that the amendment changes the entire nature of the suit itself. The Appellate Court held that initially the plaintiff filed the suit for injunction and by way of amendment plaintiff

wanted to convert the injunction suit into a suit for declaration and possession. Hence, the present Writ Petition.

7 The learned counsel Mr. Amit Borkar appearing on behalf of Plaintiff submits that the impugned order passed by the Appellate Court is against justice, equity and good conscience and same is liable to be set aside. He submits that the Appellate Court erred in coming to the conclusion that because of amendment the entire nature of the suit is going to change. He submits that the plaintiff by way of amendment wanted to add one more prayer for possession. He submits that in the suit for injunction plaintiff can make alternate prayer for possession. He submits that even the observations made by the Appellate Court about the possession, is also affecting plaintiff's right in case, plaintiff decide to file separate suit. Hence, those observations required to be set aside.

8 In support of this contention, the learned counsel for the plaintiff relied on judgment in the matter of *Shakuntala w/o Balasaheb Balsaraf (through deceased) through LRs. V/s. Ramdas s/o Laxman Balsaraf & Ors. reported in 2013(2) Mh. L.J. 760*, particularly paragraph 8. He submits that in the interest of justice, this Hon'ble Court be pleased to set aside the impugned order passed by the Appellate court and allow the plaintiff to carry out amendment in the plaint. He submits that if the present Writ Petition is not allowed, irreparable loss will be caused to the plaintiff.

9 On the other hand, the learned counsel Mrs. Shakuntala

Mudbidri appearing on behalf of Respondent Nos. 1 & 2/defendants vehemently opposed the present Writ Petition. She submits that when the Trial Court passed decree and rejected plaintiff's suit for injunction, there is no question of allowing plaintiff to carry out amendment in the plaint seeking declaration and possession. She submits that if the amendment is allowed, the entire nature of the suit is going to change. Those facts were properly considered by the Appellate Court at the time of passing the impugned order. Hence, there is no question of entertain the present Writ Petition.

10 I heard both the sides at length. I have gone through the papers and proceeding which were placed on record by the petitioner. It is no dispute that in the present proceeding initially plaintiff filed the suit for simplicitor injunction and same came to be dismissed by the Trial Court. Thereafter, the plaintiff filed Appeal before the learned District Court, Kolhapur. During the pendency of the Appeal, the plaintiff made application for carrying out amendment in the plaint. By way of amendment, the plaintiff wants to add prayer for possession and for declaration. By way of amendment, the plaintiff was seeking to change the entire nature of the suit itself. The plaintiff wanted to convert the suit for injunction into the suit for declaration and possession. That cannot be permitted at all. In the matter of ***Shakuntala w/o Balasaheb Balsaraf*** (supra), Court has allowed the plaintiff to carry out amendment for possession, because in that case the original suit was for setting aside the Sale Deed. It is to be noted that once Sale Deed is set aside, the plaintiff can claim the possession over the suit property. That is not case in the present proceeding. Hence, it is not

applicable to the facts and circumstances of the present case.

11 Considering the above mentioned fact, I do not find any substance in the present Writ Petition.

12 Hence, Writ Petition stands rejected. No order as to costs.

(K.K.TATED, J.)