

IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
CIVIL APPELLATE JURISDICTION

**Writ Petition NO. 8644 OF 2016**

|                                  |               |
|----------------------------------|---------------|
| Shri. Manjunath Tukoba Revankar  | ...Petitioner |
| <i>Versus</i>                    |               |
| Shri. Mansingh Gajansingh Labana | ...Respondent |

....

Mr.V.V. Pethe i/b. Balkrishna Joshi, Advocate for the Petitioner.  
Mr.Rajeshchandra M. Kanojiya, Advocate for the Respondent.

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CORAM : R. G. KETKAR, J.

DATE : 22<sup>nd</sup> NOVEMBER, 2016

P.C.

1. Heard Mr.Pethe, learned Counsel for the petitioner and Mr.Kanojiya, learned Counsel for the respondent, at length.
2. Rule. Mr. Kanojiya waives service. At the request and by consent of the parties as also having regard to the short controversy raised in the Petition, Rule is made returnable forthwith and the petition is taken up for final hearing.
3. By this Petition under Article 227 of the Constitution of India, the petitioner, hereinafter referred to as the plaintiff (respondent in the appeal) has challenged the judgment and order dated 30.4.2016 passed by the learned District Judge-3, Kalyan below Exhibit-21 in Civil

Appeal No.100/2015. By that order, the learned District Judge allowed the application made by the respondent, hereinafter referred to as the defendant under Order VI Rule 17 of C.P.C. for bringing on record the subsequent events after filing of the appeal.

4. In support of this Petition, Mr. Pethe invited my attention to the description of the suit property given in (1) paragraph-5 of the plaint in Regular Civil Suit No.364/2001, (2) in paragraph-8 of the reply filed by the plaintiff opposing application for amendment and (3) paragraph-6(a) of the proposed amendment. He submitted that paragraph-5 of the plaint refers to the encroachment made by the defendant in open space admeasuring 25 ft. X 50 ft. and the unauthorized construction made by the defendant to the extent of 10 ft. X 8 ft.. In other words, the plaintiff came with the case that the defendant encroached upon the open space admeasuring 25 ft. X 50 ft. and made construction of 10 ft. X 8 ft. As against this, the proposed amendment in paragraph-6(a), the defendant has described the premises allegedly demolished as admeasuring 8 ft. X 15 ft. known as room No.3, Municipal No.1669, Ward No.15. In paragraph-8 of the reply, the plaintiff specifically contended that room No.3 was illegally occupied by the defendant. He instituted R.C.S. No.76/1987. In pursuance of the decree passed therein, he filed R.D. No.16/1996 and obtained possession of the suit property on 10.2.2016. On

15.2.2016, the Executing Court disposed of the Darkhast after recording that decree was fully satisfied in respect of room No.3. The plaintiff further contended that the defendant gave false description of the suit property for restoration of the same. The learned District Judge, however, has not considered this aspect at all.

5. On the other hand, Mr.Kanojiya supported the impugned order and submitted that as after filing of the appeal the events took place, the defendant filed application for amendment which was rightly allowed by the learned District Judge.

6. I have considered the rival submissions advanced by the learned Counsel appearing for the parties. I have also perused the material on record. In paragraph-9 of the impugned order, the learned District Judge observed thus:-

“9] Considering the scope and object of the provisions of Order-6 Rule-17 of CPC I am inclined to allow the proposed amendments as prayed for being relevant to the pleadings of the appellant/defendant. I am aware the proviso clause of Rule-17 that no application for amendment shall be allowed after the trial has commenced unless the court comes to the conclusion that inspite of due deligence the party did

not have raise the matter before the commencement of trial. In the present case the fact of demolition occurred during pendency of appeal. The other side has challenged it submitting that it was due to natural calamity occurred in November 2015 for which respondent/plaintiff is not responsible. This controversy regarding occurrence of incidence can be resolved after granting opportunity of hearing. Hence the appellant/defendant cannot be prevented from amending this pleading on the bare words of respondent/plaintiff.”

7. Perusal of paragraph-9, extracted hereinabove, shows that the learned District Judge did not consider the description of the suit property described in paragraph-5 read with paragraph-3 of the plaint in Regular Civil Suit No.364/2001, (2) in paragraph-8 of the reply filed by the plaintiff opposing application for amendment and (3) paragraph-6(a) of the proposed amendment. The impugned order does not show consideration of the case of the plaintiff. The impugned order cannot be sustained and is liable to be set aside. Hence, following order :

[i] Impugned order dated 30.4.2016 passed by the learned District Judge-3, Kalyan below Exhibit-21 in Civil

Appeal No.100/2015 is set aside. Application Exhibit-21 is restored to the file of the learned District Judge for deciding the same in the light of the observations made in this order.

- [ii] Rule is made absolute in aforesaid terms with no order as to costs.

(R. G. KETKAR, J.)

Deshmane (PS)