

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION (STAMP) NO. 23997 OF 2015

M/s. Rank Recreation .. Petitioner
vs.
Shri Mahendra Kantilal Patel @
Shri Mahendra Kantibhai Patel & Anr. .. Respondents

Mr. Sanjeev R. Singh for Petitioner.
None for Respondents.

CORAM : M. S. SONAK, J.
DATE: 20 JULY 2016

P.C :

- 1] Heard Mr. Singh for the petitioner.
- 2] The challenge in this petition is to the order dated 14 August 2015 below Exhibit '13, by which, the Court of Small Causes at Bombay (trial court) has granted the respondents herein (original plaintiffs) leave to amend the plaint, *inter alia* by way of impleadment of five trustees, in addition to the two trustees already impleaded as defendants to the suit.
- 3] Mr. Singh, learned counsel for the petitioner has contended that no sooner, the plaint was filed, the petitioner (original defendant) in the written statement raised an objection to the very maintainability of the suit for want of impleadment of all the trustees

as is required under Order XXXVII Rule 2 of the CPC. Notwithstanding such objection, the original plaintiffs took no steps to implead the trustees and it is only after a period of four years that amendment was applied for. Mr. Singh submitted that there is absolutely no explanation for the inordinate delay. That apart, Mr. Singh submitted that the trial Judge, by allowing the amendment at the belated stage, has taken away rights accrued in favour of the plaintiffs, namely, to insist that the suit itself should have been dismissed for want of joinder of all the trustees, who were necessary parties to the suit. In this regard, Mr. Singh placed reliance upon the decision of this court in the case of ***Hanumandas Vallabhdas and Sons vs. Pitambar Bhatu Chaudhary deceased since his LRs Sarubai w/o. Pitambar Chaudhary & Ors.***¹

4] On due consideration of the submissions made by the learned counsel for the petitioner, perusal of the record as well as the impugned order, in my judgment, there is no case made out to interfere with the impugned order. The brief reasons for this are as follows.

5] In the first place, it is required to be noted that the leave to amend, in the present case, was applied for before the commencement of the trial. In such circumstances, the rigour of the

1 2007 (4) Mh.L.J. 721

proviso to Order VI Rule 17 of the CPC will not apply. No doubt, in this case, the petitioner had raised the objection as to non joinder at an early stage and normally the respondents ought to have applied for leave to amend, no sooner such objection had been raised. However, the delay in the present case was not such as would entail denial of leave to amend. The prejudice, if any, was compensable by costs. The trial Judge has therefore, awarded costs in favour of the petitioner.

6] This is also not a case of taking away of any accrued rights as contended by the petitioner. In terms of the provisions contained in Order XXXVII Rule 2 of the CPC, all the trustees were required to be made parties. Rather than permit the suit to be defeated on the grounds of non joinder of such necessary parties, leave to amend was applied for before the commencement of the trial and such leave has been granted by the trial court. There is no question of any vested or accrued rights involved in a situation of this nature.

7] The decision in the case of ***Hanumandas Vallabhdas*** (supra) is distinguishable on facts. In the said case, the defendant had claimed ownership and title by relying upon registered sale deed in relation to the suit property. At a belated stage, however the very same defendant, applied for leave to amend and raised the

plea of adverse possession. This has virtually amounted to withdrawal of admission and it is in that sense that this court has observed that leave to amend cannot be granted so as to take away rights accrued in favour of the other party. Such a situation does not arise in the facts and circumstances of the present case.

8] There is no jurisdictional error in the making of the impugned order. The impugned order is also not vitiated by any perversity. Accordingly, this petition is dismissed. There shall however be no order as to costs.

(M. S. SONAK, J.)

Chandka