IN THE HIGH COURT OF JUDICATURE AT MUMBAI

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.276 OF 2016

Sadipan Changdeo Pund … Petitioner
Vs.
Amol Bhagwat Bhalekar and others … Respondents

Mr. Samir Kumbhakoni for Petitioner.

CORAM : R. G. KETKAR, J.
DATE : JANUARY 13, 2016

P.C. :

Not on Board. At the request of Mr. Kumbhakoni, learned Counsel for petitioner, taken up for admission.

2. By this Petition under Article 227 of the Constitution of India, original defendant No.2 has challenged the judgment and order dated 14.10.2015 passed by the learned Civil Judge, Senior Division, Barshi below exhibit 153 in Regular Civil Suit No.56 of 2012 (Old Special Civil Suit No.2 of 2007). By that order, the learned trial Judge allowed the application made by the respondent No.1, 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. Mr. Kumbhakoni strenuously contended that earlier plaintiff had filed application exhibit-73 on 09.08.2010 for amending the plaint under Order VI, Rule 17 C.P.C. Plaintiff incorporated paragraph to the effect that during the pendency of the Suit, defendants took possession of the property in dispute and therefore, plaintiff is entitled to claim possession of the suit property. It is therefore, necessary to amend the plaint and the proposed amendment does not change the nature of the Suit. By order dated 11.11.2010, the learned trial Judge allowed that application.

Mr. Kumbhakoni further submitted that thereafter plaintiff filed application exhibit-94 on 14.12.2011 under Order VI, Rule 17 C.P.C. for impleading Co-operative Credit Society, Pimpalgaon, Taluka Barshi as a defendant as also for recovery of possession of the suit property. By order dated 09.02.2012, the learned trial Judge rejected the application. It is thereafter, plaintiff filed present application exhibit-153 on 13.10.2015 claiming possession of the suit property from the defendants. By the impugned order, the learned trial Judge allowed the application. He submitted that once the application at exhibit-94 was rejected by the learned trial Judge, the learned trial Judge could not have allowed application claiming same relief. He submitted that though by order dated 11.11.2010, application exhibit-73 was allowed, in that application, plaintiff did not incorporate prayer for recovery of possession. On this ground also, the learned trial Judge was not justified in allowing the application.

4. I have considered the submissions made by Mr. Kumbhakoni. I have also perused the material on record. As noted earlier, plaintiff filed application dated 09.08.2010 incorporating paragraph to the effect that pending the Suit, defendants took possession. Plaintiff is, therefore, right to claim possession and for that purpose, it is necessary to amend the plaint. By the proposed amendment, the nature of the Suit does not change. By order dated 11.11.2010, the learned trial Judge allowed that application. In paragraph 3, the learned trial Judge observed that the plaintiff came with the case that defendants took undue advantage of order passed below application for temporary injunction and dispossessed him from the suit property. He proposed for amendment and asked for relief for recovery of possession. In paragraph 4, it was observed that the material question of possession is involved in the Suit. Proposed amendment appears to be necessary for determining the real

controversy between the parties. No prejudice will be caused to the defendant and he will get an opportunity to file written statement. It is not brought on record that defendants have challenged the order dated 11.10.2010. Plaintiff thereafter filed application exhibit-94 for impleading Society as party defendant as also for possession. By order dated 09.02.2012, the learned trial Judge rejected that application. Perusal of that order shows that the learned trial Judge did not even consider whether plaintiff is entitled to claim relief of possession as also the fact that earlier, application exhibit-73 was allowed on 11.11.2010.

5. In view thereof, I do not find any merit in the submission of Mr. Kumbhakoni that as earlier, the application at exhibit-94 was rejected, the learned trial Judge was not justified in allowing application exhibit-153. In fact, in paragraph 7 of the impugned order, the learned trial Judge specifically recorded that while rejecting the application, exhibit-94, the learned trial Judge did not deal with aspect of possession. In view thereof, no case is made out for invocation of powers under Article 227 of the Constitution of India. Petition fails and the same is dismissed.

6. 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 the memorandum of appeal as contemplated by Section 105(1) C.P.C.

(R. G. KETKAR, J.)

Minal Parab