

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 1035 OF 2014

Shri Dagdu Rambhau Vidhate .. Petitioner
VS.
Shri Shantaram Genu Thete & Ors. .. Respondents

Mr. Rahul D. Motkari for Petitioner.
Mr. P. B. Shah with Mr. Mahesh Rawool i/b. Mr. K. P. Shah for
Respondent Nos. 1, 2(a) to 2(d), 3 and 4.

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

P.C :

1] Rule. Rule is made returnable forthwith with the consent of
and at the request of the learned counsel for the parties.

2] The challenge in this petition is to the order dated 14 October
2013 made by the 2nd Joint Civil Judge, Senior Division, Nasik,
below Exhibit '80' in Regular Civil Suit No. 387 of 2002.

3] By the application at Exhibit '80', the petitioner, who is the
original plaintiff, had applied for impleadment of Kisanrao Tidke,
Balasaheb Kisanrao Tidke and Rajendra Kisanrao Tidke as
defendants in the suit. In the plaint as originally filed, the petitioner
had impleaded the respondents herein as defendants alleging that
they have encroached upon the petitioner's property (suit property).

The Commissioner came to be appointed and the said Commissioner has submitted his report vide letter at Exhibit '77'. It is the case of the petitioner that the Commissioner's report indicates that not only the original defendants have encroached upon the petitioners property but even the aforesaid three persons have also encroached upon the petitioner's property. Hence, the application at Exhibit '80' seeking impleadment of the said three persons.

4] The trial Judge, by impugned order dated 14 October 2013 has rejected the application at Exhibit '80', *inter alia* by observing that the amendment if granted, would change both the subject matter as well as cause of action in the suit as originally instituted.

5] Mr. Shah, learned counsel for the respondents (original defendants) has defended the impugned order by contending that the Commissioner's report in fact states that the original defendants have not at all encroached upon the petitioner's property. If this be so, Mr. Shah contended that there is absolutely no point in continuing the suit against the original defendants. The cause of action, if any, as against the parties who are proposed to be impleaded as defendants is quite different and distinct and for that purpose, the petitioner may institute a separate suit against the said persons. Mr. Shah was at pains to point out that continuing the

suit against the original defendants will virtually amount to harassment. For all these reasons, Mr. Shah submitted that the present petition may be dismissed.

6] Having considered the submissions of the learned counsel for the parties, perused the record, as also the impugned order, in my judgment, the impugned order warrants interference, particularly with a view to avoid multiplicity of proceedings.

7] The suit as originally instituted by the petitioner complains about encroachment of his property. It is true that in the plaint, the encroachment was alleged against the original defendants only. Thereafter, the Commissioner's report has indicated that the three persons other than the original defendants have also encroached upon the petitioner's property. There is a dispute as to whether the Commissioner has exonerated the original defendants in the matter of charge of encroachment. In any case, the Commissioner's report, it is *per se*, is not final evidence in the suit. The petitioner maintains that the original defendants have also encroached upon the property and in addition to the same, the three persons referred to in the Commissioner's report have also encroached upon his property. Ultimately, the suit is for the purposes of removal of such encroachment. The cause of action in the suit is the encroachment.

If the matter is viewed from this perspective, it cannot be said that there is going to be a substantial change in the cause of action or for that matter the subject matter of the suit. In fact, in order to avoid multiplicity of proceedings, the application at Exhibit '80' ought to have been granted. No doubt, if it is ultimately found that the original defendants who are now represented by Mr. Shah have not at all encroached upon the petitioner's property, they will have suffered prejudice in the meanwhile. Such prejudice can always be compensated by way of costs at the stage of disposal of the suit. Besides, Mr. Shah is also right to a certain extent in his submission that original defendants have been made to suffer, on account of improper frame of the suit by the petitioner in the first instance. Such prejudice can also be compensated by way of costs. Even if, the application at Exhibit '80' made by the petitioner is disallowed, it is not as if the suit as against original defendants will come to a conclusion merely on the basis of the report of the Court Commissioner. All these factors are required to be taken into consideration and further, with a view to avoid multiplicity of proceedings, it is necessary that the petitioner's application at Exhibit '80' is allowed, though subject to payment of costs to the original defendants.

8] Accordingly, the impugned order dated 14 October 2013, is hereby set aside. The petitioner's application at Exhibit '80' is hereby allowed. Necessary amendment to be carried out within six weeks. The petitioner to pay costs of Rs.10,000/- (Rupees Ten Thousand) to the respondents within the said period of six weeks. The trial court to ensure that the costs are paid within the said period. In case the costs are not paid, this petition shall be deemed to have been dismissed.

9] Rule is made absolute to the aforesaid extent.

10] All concerned to act on basis of authenticated copy of this order.

(M. S. SONAK, J.)

Chandka