

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 10951 OF 2016

SUSHILKUMAR SUDHAKAR SHETE
VERSUS
JAYSING BALBHIM DEOVKATE AND OTHERS

Advocate for Petitioner : Shri K.K. Kulkarni.

CORAM : RAVINDRA V. GHUGE, J.
Dated : 07th July, 2017

PER COURT :

1. The petitioner / plaintiff is aggrieved by the order dated 22/06/2016, delivered by the learned Additional Sessions Judge, Osmanabad, by which, application Exhibit 21, seeking an amendment, has been rejected in Regular Civil Appeal No. 55/2011.

2. Learned Counsel for the petitioner has strenuously criticized the impugned order on the ground that when his suit R.C.S. No. 156/2008, was filed for seeking permanent injunction, he had pleaded that he is in possession of the suit property. The claim over the suit property is based on a registered sale deed which is also on record. As the suit was

dismissed by judgment dated 28/02/2011, he has preferred the appeal which is pending final adjudication.

3. He submits that the proposed prayer is put forth in the alternative. It is only to ensure that if the Court comes to a conclusion that he is not in possession, he will be able to seek possession by introducing additional paragraphs and by putting forth a prayer for recovery of possession. He has relied upon the judgment of Hon'ble Supreme Court Mount Mary Enterprises Versus Jivratna Medi Treat Private Limited [(2015) 4 SCC 182], to support his contention that even if the suit is to be transferred to another Court on account of change in pecuniary jurisdiction, it would not be a ground to deny the amendment.

4. He has then relied upon Sumer Builders Pvt. Ltd. Versus Sadhana Textiles Mills Pvt. Ltd. and others. [2015 (1) All M.R. 795], to contend that the dominant purpose of allowing an amendment is to minimize litigation and it is open to the Court to disregard the delay and allow the amendment.

5. He has then relief upon *Dela Gurudal Vanjari Versus Uddhal Govardhan Rathod [2012 (3) Mh.L.J. 940]*, to contend that an amendment can be allowed as the interest of the defendants can be safe guarded. An amendment putting forth a claim for recovery of possession in a suit for injunction would not change the nature of the suit.

6. In the instant case, the suit preferred by the petitioner has been dismissed by the judgment which was impugned before the Appellate Court. The proposed prayers are as under :

“Para No. 4-A

That, in alternative it is submitted that, if this Hon’ble Court comes to conclusion that, Plaintiff is not in possession of the suit land, and defendants are in possession of suit land, then plaintiff submits that, as plaintiff is being legal owner of suit land, by virtue of registered sale-deed dt. 17/08/2007, defendants may kindly be directed to hand over, possession of suit land to plaintiff, as possession of defendants is not legal, valid.

Para No. 5-A :

That, for the purpose of alternative relief of possession, present suit is valued at Rs. 1,000/-, and required court

fees of Rs. 200/- is paid.

In pray paras :

c) In alternative decree for possession in respect of suit land, may kindly be passed against defendants, in favour of plaintiff, by directing the defendants to hand over possession of suit land, to plaintiffs.”

7. It is obvious from the proposed paragraphs that the petitioner / plaintiff desires to introduce a prayer in the alternative so as to enable him to seek possession of the suit land on the basis of a registered sale deed. The said sale deed was subject matter of adjudication before the Trial Court. Evidence was led on the issues cast. One of the issues (ad verbatim) was “*Whether plaintiffs prove that, he is in lawful possessor of suit field?*” The Trial Court on the basis of oral and documentary evidence has concluded that the plaintiff is not in lawful possession of the suit field. While arriving at the said conclusion, the Trial Court has also recorded that after the temporary injunction was refused concluding that the plaintiff is not in possession as on the date of institution of the suit, he has not challenged the order below Exhibit 5. The Trial Court has

come to a conclusion that the defendants were said to be ploughing the suit field and have resorted to agricultural activities as per the claim of the plaintiff.

8. It was in the above backdrop, that the Trial Court concluded that the plaintiff could not establish his legal possession over the suit land.

9. The Hon'ble Apex Court in Revajeetu Builders & Developers Versus Narayanaswamy & Sons [(2009) 10 SCC 84] and in Chakreshwari Construction Private Limited Versus Manohar Lal [(2017) 5 SCC 212], has held that while entertaining an application for amendment, the following aspects need to be considered :

- “(1) Whether the amendment sought is imperative for proper and effective adjudication of the case;
- (2) Whether the application for amendment is bona fide or mala fide;
- (3) The amendment should not cause such prejudice to the other side which cannot be compensated adequately in terms of money;

(4) Refusing amendment would in fact lead to injustice or lead to multiple litigation;

(5) Whether the proposed amendment constitutionally or fundamentally changes the nature and character of the case; and

(6) As a general rule, the Court should decline amendments if a fresh suit on the amended claims would be barred by limitation on the date of application.”

10. The issue, therefore, is whether the amendment sought is necessary for the proper adjudication of the case and whether the application for amendment was filed bona fide.

11. The suit before the Trial Court was adjudicated upon in 2011. No application for addition of the prayer was put forth in the suit after the Trial Court came to a conclusion while deciding exhibit 5 that the plaintiff is not in possession. The said order should have awakened the plaintiff that the injunction has been refused since it is concluded that he is not in possession and as such he would have to take steps for

recovery of possession. For all those many years, he did not move the Trial Court seeking permission for addition of a prayer and the proposed paragraphs.

12. In this backdrop, I am of the view that the petitioner, in order to overcome the conclusion of the Trial Court that he is not in possession, has preferred exhibit 21. This facet of the case would fall within the ambit of “whether the application for amendment has been made with a bona fide intention?”

13. Considering the peculiar facts as above and as the petitioner has not shown due diligence under the proviso to Order VI Rule 17 of Code of Civil Procedure, I do not find that the impugned order could be termed as perverse or erroneous. The Hon’ble Apex Court in the matter of Syed Yakoob Versus K.S. Radhakrishanan & Others [**AIR 1964 SC 477**] and Surya. Dev Rai Versus Ram Chander Rai & Others [(**2003**) **6 SCC 675**]. has held that merely because a second view is possible, the High Court would not be justified in causing interference in the impugned order, unless the said order can be said to have

caused grave injustice to a litigant.

14. Considering the above, this petition is dismissed.

15. Needless to state, these observations and the observations of the Appellate Court in the impugned order are with regard to Exhibit 21 and the appeal before the Appellate Court would naturally be decided on it's own merits without being influenced by these observations.

(RAVINDRA V. GHUGE, J.)

S.P.C.