

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.11530 OF 2016

Bhimraj Vishawanath Pujari & others

Petitioners

Versus

Kamalakar S/o Rama Pujari & others

Respondents

Mr. N.P. Patil Jamalpurkar advocate for the petitioners

Mr. G.L. Deshpande advocate for Respondent No.1 & 2

CORAM : RAVINDRA V. GHUGE, J

(Date : 10th July, 2017.)

PER COURT :-

1 The petitioners are aggrieved by the order dated 5.10.2016, by which the Trial Court has rejected Application Exhibit 129, refusing leave to defendant Nos.1 to 4, who are petitioners herein, from amending the written statement for raising the plea of adverse possession.

2 I have heard the submissions of the learned Advocates appearing for both the sides.

3 The plaintiffs have preferred RCS No.560/2001 for recovery of possession of the encroached land and for future mesne profits. The record reveals that the suit was once decreed and was remanded to the trial Court by the Appellate Court with certain

directions. After remand, the plaintiffs carried out amendment in the plaint. The defendants filed a Written Statement on the amended plaint.

4 The Trial Court had ordered measurement of the suit property. The Commissioner's report indicates specifically, encroachment made by the defendants. It was after noting these measurements that, the plaintiffs had amended the plaint. Issues were recast on 3.10.2012. The Commissioner's report dated 7.6.2016 is also on record and there is no dispute that, the amendment to the plaint and filing of the written statement occurred thereafter.

5 On 23.9.2016, the defendants filed Application Exhibit 133. The only prayer put-forth was that, the proposed paragraph 10-B be allowed to be added as the defendants desired to take the stand that, they have perfected their title over the suit property on the basis of adverse possession. Learned counsel for the petitioner makes a specific statement on instructions that after the plaint was amended, followed by the written statement of the defendants, further evidence has not been adduced by the plaintiff or defendants.

6 The Honourable Apex Court in the matter of **Revajeetu Builders & Developers versus Narayanswamy & others** ((2009) 10 SCC 84) and in the matter of **Chakreshwari Construction Private Limited versus Manohar Lal** (2017, 5 SCC 212) has laid down certain principles for considering an amendment application. Considering the earlier view and the principles culled out by the Honourable apex Court, it is observed in Chakreshwari Construction's case as under:-

" 63 On critically analysing both the English and Indian cases, some basic principles emerge which ought to be taken into consideration while allowing or rejecting the application for amendment:

- (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. "

7 I find that the Court Commissioner's report was filed on 7.6.2016. The plaintiff petitioners were granted leave to amend their plaint by order dated 8.7.2016. Thereafter the amended plaint was filed within 14 days. The defendants then filed application Exhibit 133 on 23.9.2016 for taking up the plea of adverse possession.

8 It is trite law that the delay cannot be the only ground for refusing the amendment in the light of the Judgment of the Honourable Apex Court in the case of **Andhra Bank Vs. ABN Amro Bank N.V. & Ors.: AIR 2007 SC 2511**. So also, an application for amendment to the written statement can be allowed if the cause of action is not being altered, if a completely different case is not being put forth, if a claim which is not otherwise untenable on the ground of law of limitation and if the plea for amendment would lead to adjudication of all the issues involved.

9 It is equally settled that the merits of the amendment are not to be assessed at the time of considering the application and if the amendment can lead to deciding all the claims of the parties and if it can avoid multiplicity of litigation, the same can be allowed.

10 The comparative hardship suffered by the plaintiff and the inconvenience caused due to amendment causing delay in the matters, keeping in view that the suit is of 2001, the trial Court could have imposed costs on the defendants so as to suitably compensate the three plaintiffs.

11 Considering the above, this petition is partly allowed.

The impugned order dated 5.10.2016 is quashed and set aside.

Application Exhibit 133 is allowed, thereby permitting the defendants to add paragraph 10-B within a period of 21 days from today and by depositing costs of Rs.7,500/- before the Trial Court on or before the 31st day of July, 2017 which the plaintiffs shall withdraw in equal proportions without conditions. If either of the above directions are not complied with by the defendants, it would amount to their giving up the right to amend their written statement.

(RAVINDRA V. GHUGE , J)