

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 394 OF 2017

BABY SANJAY PATIL
VERSUS
VISHWAS BHIMRAO PATIL AND ANOTHER

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Advocate for Petitioner : Mr. Sonpethakar Pradeep N.

Advocate for Respondents : Mr. D.B. Thoke

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CORAM : V. K. JADHAV, J.
DATED : 7th NOVEMBER, 2017

PER COURT:-

1. By consent of the parties, heard finally at admission stage.
2. Being aggrieved by order dated 25.10.2016 passed by Civil Judge, Junior Division, Bhadgaon below Exh.41 in R.C.S. No. 16 of 2010, the petitioner-original plaintiff has preferred this writ petition.
3. The petitioner has filed R.C.S. No. 16 of 2010 for decree of perpetual injunction. During pendency of suit, the petitioner had applied for issuance of order of temporary injunction. The said application came to be rejected by the trial court and even said order is confirmed by the lower appellate court. By filing application Exh.41 the petitioner has contended before the trial court that respondents-defendants took disadvantage of rejection of application seeking order of temporary injunction and the petitioner was dispossessed

from the suit property. Thus, the petitioner prays for incorporation of prayer for declaration and recovery of possession and mesne profit. The learned Judge of the trial court by his impugned order, as stated above, rejected the said application. Hence, this writ petition.

4. Learned counsel for the petitioner submits that the merits of amendment sought in the plaint cannot be decided at the time of deciding application seeking proposed amendment. Learned counsel submits that the petitioner has specifically stated in application Exh.41 that after deciding the Misc. Civil appeal preferred against rejection of application seeking temporary injunction, by the District Court, the petitioner was forcibly dispossessed by the respondents herein. Learned counsel submits that whether the petitioner would succeed in the suit or not is altogether different question to be decided after full-fledged trial of the suit, however, while passing the impugned order, the trial court has given reference to the admissions given by the petitioner in criminal complaint and held that the petitioner was not in possession of the suit property at any time and therefore, dispossession does not arise for consideration. Learned counsel submits that the proposed amendment does not change the nature of suit and the said amendment required to be allowed to curtail the multiplicity of the proceedings.

5. Learned counsel for the petitioner, in order to substantiate his submissions, places reliance on the judgment in the case of ***Sampath Kumar vs. Ayyakannu and another, reported in AIR 2002 SC 3369(1).***

6. Learned counsel for the respondents-original defendants submits that the trial court has considered the pleadings of the parties. The trial court has also specifically referred the pleadings of the respondents-defendants where the respondents have asserted possession over the suit property. Even petitioner has failed to prove her possession over the suit property and therefore, the trial court has refused to grant application seeking temporary injunction. Learned counsel submits that the trial court has therefore, rightly rejected application. No interference is required.

7. In the case of ***Sampath Kumar (supra)*** relied upon by learned counsel for the petitioner, the Supreme Court held that during pendency of suit, the defendants have forcibly dispossessed the plaintiff and on such averment the plaintiff sought for relief of declaration of title to the suit property and consequential relief of delivery of possession and as such, the basic structure of the suit would not be altered by the proposed amendment and what is sought

to be changed is the nature of relief sought for by the plaintiff.

8. In the instant case, the petitioner-plaintiff has specifically stated in her application Exh.41 that after her appeal came to be dismissed by the lower appellate court, preferred against rejection of application seeking temporary injunction by the trial court, the respondents defendants have forcibly dispossessed her. While deciding application seeking amendment for incorporating the relief of declaration and recovery of possession, the Court is not required to see the merits of the proposed amendment. In this case, the trial court has unnecessarily referred certain other evidence and concluded that there is no question of dispossessing the petitioner when as per her own pleadings she was not in possession of the suit property.

9. In view of above discussion and in view of ratio of Supreme court in the case of ***Sampath Kumar (supra)***, I am inclined to allow this writ petition. Hence, the following order:-

O R D E R

I. Writ petition is hereby allowed. No costs.

II. The order dated 25.10.2016 passed below Exh.41 in R.C.S. No. 16 of 2010 by learned C.J.J.D. Bhadgaon is hereby quashed and set aside.

III. The application Exh.41 is hereby allowed in terms of its prayer clauses.

IV. Writ petition is accordingly disposed of.

(V. K. JADHAV, J.)

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