

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
CIVIL APPELLATE JURISDICTION**

**WRIT PETITION NO.1439 OF 2017**

Mr. Dilip Raghunath Sonawale

..Petitioner.

Vs

Shri Kashinath Dhondiba Dangat  
and Anr.

.. Respondents

Mr. Mandar Limaye, Advocate for Petitioner.

**CORAM : R.G.KETKAR,J.  
DATE : 22/02/2017**

**PC:**

1. Heard Mr. Mandar Limaye, learned counsel for the petitioner at length.

2. By this Petition under Article 227 of the Constitution of India, the petitioner, hereinafter referred to as 'defendant', has challenged the Judgment and order dated 15.10.2016 passed by the learned 23<sup>rd</sup> Jt. Civil Judge, Jr. Dn., Pune below Exhibit 35 in Regular Civil Suit No. 1091 of 2013. By that order, the learned trial Judge allowed the application made by the respondents, hereinafter referred to as 'plaintiffs', under Order VI, Rule 17 of C.P.C for amending the plaint.

3. In support of this petition, Mr. Limaye submitted that initially respondent no.1 instituted suit only against the petitioner-defendant for injunction simplicitor. During pendency of this suit, plaintiff had filed application at Exhibit-5 for injunction. That was rejected by the trial Court. Aggrieved by that

decision, the plaintiff preferred Misc.Civil Appeal that was dismissed. After the Appeal was dismissed, respondent no.2 filed application under Order I, Rule 10(2) of C.P.C. for his impleadment as defendant in the suit. Respondent no.2 is real brother of the plaintiff. The plaintiff did not oppose that application and respondent no.2 was impleaded as defendant no.2. Subsequently, the application was filed for transposing defendant no.2 as plaintiff no.2. That was also allowed. He submitted that the application was made by plaintiff no.2 under Order VI, Rule 17 for amending the plaint. He invited my attention to the reply filed on behalf of the defendant and in particular paragraph 6 thereof. He submitted that having regard to the nature of the unamended plaint and proposed amendment, the nature of the suit has changed. Whereas earlier the suit was for injunction simplicitor, by the proposed amendment, the plaintiffs are claiming possession of the alleged encroached portion. He submitted that this is nothing but an attempt on the part of the plaintiffs to fill up lacunae. He, therefore, submitted that the impugned order deserves to be set aside.

4. With the assistance of Mr.Limaye, I have perused the unamended plaint, application for amendment, reply filed by the defendant and impugned order. Perusal of the plaint and in particular paragraphs 4, 5 and 6 shows that in the unamended

plaint the plaintiffs specifically asserted that the defendant is trying to encroach upon the suit property and on the basis of that he is in possession, relief of perpetual injunction was sought.

5. In the application for amendment and in particular paragraph 2, the plaintiffs have asserted that during the pendency of the suit, the defendant has encroached upon the suit property and carried out unauthorized construction. It is, therefore, necessary to amend the plaint so as to claim possession of the encroached portion by demolishing unauthorised construction. The learned trial Judge has allowed the application. In paragraph 6, the learned trial Judge has referred to the measurement carried out by Deputy Superintendent of Land Records, Haveli as also the order passed in appeal by District Superintendent of Land Records. In paragraph 8, the learned trial Judge has referred to order dated 23.6.2014 passed by the Deputy Superintendent of the Land Records regarding cancellation of measurement made under Measurement Register No. 1555 of 2010. The order was confirmed on 27.5.2015. The learned trial Judge observed that all these are subsequent developments after filing of the suit. The learned trial Judge further observed that the proposed amendment is for prayer for removal of encroachment and possession of the property. The learned trial Judge allowed that application by observing that the proposed amendment does not

change the nature of the suit and is also necessary for final determination of the suit on merits. For the reasons recorded in paragraphs 6, 8, 9 and 10, I do not find any error is committed by the learned trial Judge. Hence, Petition fails and the same is dismissed. 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) of C.P.C.

(R.G.KETKAR, J.)