

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Writ Petition NO. 1432 OF 2017

Shri. Ashok Lalchand Jain
And Ors.

...Petitioners

Versus

Shri. Padmakar Laxman Madiwale
And Ors.

...Respondents

....

Mr.M.N. Sandhyanshiv, Advocate for the Petitioners.

Mr.V.B. Shivarkar, Advocate for Respondents No.14 to 19.

....

CORAM : R. G. KETKAR, J.

DATE : 16th FEBRUARY, 2017

P.C.

1. Not on board. At the request of Mr.Sandhyanshiv taken up for admission.

2. Heard Mr.M.N. Sandhyanshiv, learned Counsel for the petitioners and Mr.V.B. Shivarkar, learned Counsel for respondents No.14 to 19, at length.

3. By this Petition under Article 227 of the Constitution of India, the petitioners, hereinafter referred to as the 'plaintiffs' have challenged the judgment and order dated 14.11.2016 passed by the learned Civil Judge, Senior Division, Malegaon below Exhibit-151 in R.C.S. No.251/2014. By that order, the

learned trial Judge rejected the application made by the plaintiffs under Order VI Rule 17 of C.P.C. for amendment of the plaint.

4. Mr. Sandhyanshiv submitted that the plaintiffs have instituted suit for declaration that the so called possession of the defendants in Gat Nos.107/1 and 107/2 situate at Sayane (Kh) is illegal; for perpetual injunction restraining defendants No.14 to 20 from creating third party interest on the basis of the illegal possession as also causing obstruction to the plaintiffs possession. He submitted that pending the suit, the plaintiffs took out application Exhibit-151 under Order VI Rule 17 of C.P.C. for amending the plaint. By the impugned order, the learned trial Judge has rejected the application on the ground that by the proposed amendment, the plaintiffs want to withdraw the admissions given in the cross-examination of the plaintiffs witnesses as also want to fill up the lacunae.

5. Mr.Sandhyanshiv invited my attention to paragraphs-9 and 11 of the plaint as also prayer clauses (a) and (b) of the suit. He submitted that it is the case of the plaintiffs that the defendants are in unlawful possession and, therefore, by the

proposed amendment, the plaintiffs are seeking relief of possession and also carry out suitable amendment in the plaint.

6. On the other hand Mr. Shivarkar has taken me through the cross-examination of the plaintiffs witness. He submitted that the plaintiffs witness was confronted with plaint in R.C.S. No.512/2012. The plaintiffs witness admitted that in that suit it was specifically contended that defendants No.1 to 7 are in possession of the suit property. Defendants No.1 to 7 are defendants No.14 to 20 in the present suit. It was further admitted that in the column of 'crop cultivation', names of defendants No.14 to 20 are recorded. He, therefore, submitted that the learned trial Judge rightly rejected the application.

7. I have considered the rival submissions advanced by the learned Counsel appearing for the parties. I have also perused the material on record. In paragraph-9 of the plaint, the plaintiffs specifically asserted that defendants No.14 to 20 are not in possession of the suit property. Apart from that in earlier part the plaintiff specifically contended that they are in possession of the suit property and, therefore, defendants No.14 to 20 should not cause obstruction to their possession. In the

later portion, the plaintiffs averred that the defendants are in so called possession of the suit property. Even in prayer clause (b), initially the plaintiffs prayed for injunction against defendants No.14 to 20 from creating third party interest on the basis of their illegal possession but in later portion sought injunction restraining defendants No.14 to 20 from causing obstruction to their possession. In paragraphs-9 and 11 and prayer clause (b) shows that the plaintiffs have pleaded inconsistent case in the suit itself. *Prima facie* perusal of the cross-examination also shows that the plaintiffs have admitted possession of defendants No.14 to 20. In view thereof, I do not find that the learned trial Judge has committed any error in observing in paragraph-8 that the plaintiffs witness has given admission in their cross-examination and by the proposed amendment the plaintiffs want to fill up the lacunae. Apart from that the learned trial Judge also held that the trial has commenced and the plaintiff has not made out case of diligence. In view thereof, no case is made out for invocation of powers under Article 227 of the Constitution of India. Petition fails and the same is dismissed.

8. It is made clear that where a decree is challenged by

the petitioner, any error, defect or irregularity in impugned order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of the proposed proceedings as contended by section 105(1) of C.P.C.

(R. G. KETKAR, J.)

Deshmane (PS)