

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

CIVIL APPLICATION NO.352 OF 2016

IN

WRIT PETITION NO.12048 OF 2015

M/s. Aparna Developers and another ... Applicants

Vs.

Punal Mangalya Kadu and others ... Respondents

Mr. Roshan D'souza i/b. Flavia Legal for Applicants / Petitioners.

Mr. R. P. Hake-Patil i/b. Mr Sanjeev Kadam for Respondent No.1

CORAM : R. G. KETKAR, J.

DATE : FEBRUARY 27, 2017

P.C. :

Heard Mr. D'souza, learned Counsel for applicants-petitioners and Mr. Hake-Patil for respondent No.1 at length.

2. This is an application for amending the Writ Petition so as to challenge the judgment and order dated 29.12.2014 passed by the learned Joint Civil Judge, Junior Division, Dahanu below exhibit-52 in Regular Civil Suit No.43 of 2009. By that order, the learned trial Judge allowed the application made by the respondent No.1, hereinafter referred to as 'plaintiff', under Order VI, Rule 17 of the Code of Civil Procedure, 1908 (for short 'C.P.C.') for amending the plaint. As the Petition is pending admission, leave as prayed for is granted. Civil Application is allowed in terms of prayer clause (a) with no order as to costs. Amendment shall be carried out within one week from today.

WRIT PETITION NO.12048 OF 2015

By this Petition under Article 227 of the Constitution of India,

petitioners, original defendants No.1, have challenged the - (i) judgment and order dated 29.12.2014 below exhibit-52 as also (ii) judgment and order dated 30.10.2015 below exhibit-58 in Regular Civil Suit No.43 of 2009. By order dated 29.12.2014, below exhibit-52, the learned trial Judge allowed the application for amendment made by the respondent No.1, hereinafter referred to as 'plaintiff', under Order VI, Rule 17 of C.P.C. for amending the plaint. By order dated 30.10.2015, below exhibit-58, the learned trial Judge allowed the application made by the plaintiff under Order XXVI, Rule 9 of C.P.C.

2. In support of this Petition, Mr. D'souza submitted that plaintiff had earlier filed application at exhibit-18 for appointment of Court Commissioner. By order dated 12.03.2012, the learned trial Judge rejected that application. Subsequently, plaintiff filed similar application at exhibit-41A under Order XXVI, Rule 9 of C.P.C. for appointment of Court Commissioner. By order dated 02.09.2014, the learned trial Judge rejected that application. Plaintiff did not challenge these orders. He submitted that plaintiff, instead of challenging these orders, filed application exhibit-52 for amending the plaint. He has taken me through the unamended plaint and the proposed amendment to contend that there are no subsequent developments warranting plaintiff filing application for amendment. In particular, he invited my attention to paragraphs (kh) and (ch) to contend that plaintiff had alleged in unamended plaint that defendant No.1 has encroached in the lane and has started laying of electric wiring and pipeline as also constructing transformer and septic tank. He, therefore, submitted that the learned trial Judge was not justified in allowing the application exhibit-52 for amending the plaint as also appointing Court Commissioner as per order dated 30.10.2015.

3. On the other hand Mr. Hake-Patil supported the impugned orders. He invited my attention to the prayers made in the unamended plaint and the proposed amendment. In the unamended plaint, by prayer clause 1, plaintiff sought perpetual injunction restraining defendants from carrying out any construction in the lane as also causing obstruction to the plaintiff's user. He submitted that thereafter plaintiff filed application for amendment, which was allowed on 29.12.2014. By prayer clause 1-A of the amended plaint, plaintiff has sought mandatory injunction for removal of the construction of transformer, septic tank so that the land is made available for plaintiff's user. He, therefore, submitted that the learned trial Judge was justified in allowing the amendment as also appointing Court Commissioner.

4. I have considered the rival submissions advanced by the learned Counsel appearing for the parties. I have also perused the material on record. As noted earlier, plaintiff has claimed only relief of perpetual injunction restraining the defendants from carrying out any construction in the common lane / road as also causing obstruction to the plaintiff's user of the said common land / road. During the pendency of the Suit, plaintiff filed application at exhibit-5 for temporary injunction. By order dated 14.11.2009, the learned trial Judge rejected the application. Plaintiff thereafter filed application at exhibit-52 for amending the plaint inter alia contending that defendants have carried out unlawful construction and made encroachment in the common lane and also carried out construction of septic tank. While allowing the application for amendment, in paragraph 9, the learned trial Judge noted that during the pendency of the Suit, defendants have carried out work of encroachment. As these are the subsequent developments, the same can be brought on record by way of amendment. For the reasons recorded in paragraph 9 of the order dated 29.12.2014, I do not think that the learned

trial Judge has committed any error in allowing the application.

5. As far as the impugned order dated 30.10.2015 below exhibit-58 is concerned, it is no doubt true that plaintiff had earlier filed application under Order XXVI, Rule 9 of C.P.C. for appointment of Court Commissioner. That application was rejected on 12.03.2012. Perusal of paragraph 7 of that order shows that the learned trial Judge rejected the application principally on the ground that plaintiff has sought only injunction in the Suit and has not claimed possession of the encroached portion.

6. In so far as the order dated 02.09.2014 below exhibit-41A is concerned, in paragraph 8, the learned trial Judge noted that plaintiff filed application for appointment of Court Commissioner for finding out the location of septic tank and transformer alleged to have constructed or installed in the disputed 12 feet wide way, which will amount to collection of evidence. Thus, the learned trial Judge has rejected the applications on 12.03.2012 and 02.09.2014 on the basis of the unamended plaint. After the amendment, by amended prayer clause 1A, plaintiff has now sought relief of removal of unauthorized construction so that the disputed common lane / road is made available for the user. In paragraph 7 of order dated 30.10.2015, the learned trial Judge has referred to the allegations made by the plaintiff as regards encroachment made by the defendants. For the reasons recorded in paragraphs 7 and 8 of the impugned order, I do not find that the learned trial Judge has committed any error in appointing the Court Commissioner. The earlier orders will not come in the way of the plaintiff in view of the subsequent developments as also having regard to the amended prayer 1-A. Hence, Petition fails and the same is dismissed.

7. It is, however, made clear that where a decree is challenged 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.)

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