

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION (ST.) NO.20574 OF 2015

Swaroop Balkrishna Kulkarni, deleted and
substituted as 'Ravindra Ganesh Kulkarni' ... Petitioner
Vs.
Ashok Anna Kalokhe (Decd) through LR's and others ... Respondents

Mr. T. D. Deshmukh for Petitioner.

CORAM : R. G. KETKAR, J.
DATE : FEBRUARY 08, 2017

P.C. :

Heard Mr. Deshmukh, learned Counsel for petitioners at length.

2. By this Petition under Article 227 of the Constitution of India, petitioner, hereinafter referred to as 'defendant No.2', has challenged the judgment and order dated 07.11.2012 below exhibit-120 passed by the learned Joint Civil Judge, Junior Division, Islampur as also the judgment and order dated 02.07.2014 below exhibit-127 passed by the learned 7th Joint Civil Judge, Junior Division, Islampur in Regular Civil Suit No.329 of 2010. By order dated 07.11.2012, below exhibit-120, the learned trial Judge allowed the application made by the plaintiffs under Order VI, Rule 17 of the Code of Civil Procedure, 1908 (for short 'C.P.C.') for amending the plaint. By order dated 02.07.2014, below exhibit-127, the learned trial Judge rejected the application filed by defendants No.1 to 4 under Section 114 r/w. Order LVII, Rule 1 of C.P.C. for review of the order dated 07.11.2012.

3. Mr. Deshmukh has invited my attention to the prayers made by the plaintiffs in the unamended plaint as also the amended plaint. In unamended plaint, plaintiffs sought declaration that he be declared as owner by adverse possession and for perpetual injunction. Plaintiffs

filed application for injunction at exhibit-6. By order dated 24.01.2011, the learned trial Judge rejected the application. After rejection of that application, plaintiffs filed application under Order XXIII, Rule 1(3) of C.P.C. on 25.04.2011 (exhibit-105) for withdrawal of the Suit with liberty to file fresh Suit on the same cause of action. By order dated 29.06.2011, the learned trial Judge rejected that application. Aggrieved by that decision, plaintiffs instituted Writ Petition No.8641 of 2011 in this Court. By order dated 01.12.2011, this Court declined to interfere with the order and dismissed the Petition. It was further observed that dismissal of the Petition would not preclude the petitioners (plaintiffs) for filing application for amendment of the plaint by invoking Order VI, Rule 17 of C.P.C. If such application was filed, the trial Court was directed to consider the same on its own merits and in accordance with law.

4. Mr. Deshmukh submitted that plaintiffs thereafter filed present application under Order VI, Rule 17 of C.P.C. for amending the plaint. By the proposed amendment, plaintiffs deleted prayer for declaration of ownership by adverse possession and substituted that prayer by seeking declaration that plaintiffs are cultivating the lands described in paragraph 1-A of the plaint on the basis of the tenancy rights and that sale deed dated 12.08.2010 executed by defendants No.1 to 5 in favour of defendants No.6, 8, 10, 12 and 14 is not binding on them as also for perpetual injunction restraining the defendants. He submitted that by the proposed amendment, the entire nature of the Suit is changed. He further submitted that in fact, plaintiffs had earlier approached the Court inter alia contending that their predecessor in title was tenant of the petitioners herein and the surrender was effected under the provisions of the Bombay Tenancy and Agricultural Lands Act, 1948 (for short 'Act'). Despite surrender before the authorities under the Act, they continued in

possession of the suit lands and thereby became owner by adverse possession. By the proposed amendment, plaintiffs are now claiming declaration that they are cultivating the suit lands on the basis of tenancy rights. The Tenancy Authorities have already held against the plaintiffs in that regard. He, therefore, submitted that the learned trial Judge was not justified in allowing the application for amendment.

5. I have considered the submissions advanced by Mr. Deshmukh. I have also perused the material on record. In paragraph 6 of the order dated 07.11.2012, the learned trial Judge observed that in paragraphs 3 to 7 of the plaint, plaintiffs have made reference to their tenancy rights. In these paragraphs, plaintiffs have averred that since 1910, they are cultivating the lands on tenancy rights. In other words, the learned trial Judge was of the view that by the proposed amendment, the nature of the Suit does not change. No fault can be found with the reasoning given by the learned trial Judge in paragraph 6 of the order. In the case ***Abdul Rehman Vs Mohd. Ruldu, (2012) 11 SCC 341***, the Apex Court has held that “making clear and explicit what was already implicit in plaint is permissible and nature of suit does not change. It is further held that all amendments which are necessary for purpose of determining real questions in controversy between the parties should be allowed if it does not change basic nature of suit”.

6. Perusal of paragraphs 3 to 7 of the plaint shows that plaintiffs have averred about their tenancy rights. In other words, the foundation is already laid in the Suit. In view thereof, no fault can be found in the order dated 07.11.2012. Consequently, I do not find that the learned trial Judge committed any error in dismissing the Review Petition by order dated 02.07.2014. Hence, Petition fails and the same is dismissed. However, it is 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 the proceedings as contemplated by Section 105 (1) of C.P.C. Defendants shall file written statement to the amended plaint within 4 weeks from today, if not already filed. Order accordingly.

(R. G. KETKAR, J.)

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