

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
Writ Petition NO. 332 OF 2017

Shri. Ganpati Bira Masal

...Petitioner

Versus

Smt. Housabai Rama Masal (decd)

And Ors.

...Respondents

....

Mr. Umesh Mankapure, Advocate for the Petitioner.

....

CORAM : R. G. KETKAR, J.

DATE : 15th FEBRUARY, 2017

P.C.

1. Heard Mr.Umesh Mankapure, 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 No.1', has challenged the judgment and order dated 8.8.2016 passed by the learned Civil Judge, Junior Division, Jat below Exhibit-53 in R.C.S. No.112/2012. By that order, the learned trial Judge allowed the application made by respondents No.1 to 3, hereinafter referred to as the 'plaintiffs', under Order VI Rule 17 of C.P.C.
3. The plaintiffs have instituted the suit against defendant No.1 and respondent No.4, hereinafter referred to as 'defendant

No.2' for cancellation of the registered sale deeds dated 12.11.2010, 12.11.2010 and 3.1.2011 and for perpetual injunction restraining the defendants from causing obstruction to the plaintiffs peaceful possession over the suit property. During pendency of the suit, the plaintiffs took out application for temporary injunction. By order dated 3.5.2011, the learned trial Judge rejected the application. While rejecting the application, the learned trial Judge *prima facie* observed that the defendants are in possession of the suit property.

4. The plaintiffs thereafter filed application Exhibit-53 on 4.3.2013 for amending the plaint for deleting plaintiff No.1 who died on 25.11.2012 and also on the ground that plaintiffs No.2 and 3 are legal representatives of plaintiff No.1 who are already on record. The plaintiffs have further claimed possession of the suit property on the ground that after rejection of application Exhibit-5, they have been dispossessed from the suit property.

5. By the impugned order, the learned trial Judge has allowed the application.

6. In support of this Petition, Mr.Mankapure submitted that the plaintiffs have instituted the suit for cancellation of the sale deeds and for perpetual injunction on the footing that they are in

possession. He submitted that in fact the plaintiffs are not in possession. The learned trial Judge rejected the application Exhibit-5. The plaintiffs did not challenge that order. The plaintiffs falsely contend that as injunction application was rejected, they have been dispossessed. In fact they were never in possession of the suit property. He submitted that by the proposed amendment, nature of the suit is changed as the plaintiffs are claiming relief of possession.

7. I have considered the submissions of Mr.Mankapure. I have also perused the material on record. The plaintiffs have instituted suit on 28.3.2011 for cancellation of the sale-deeds of 2010 and 2011. The plaintiffs have also claimed perpetual injunction against the defendants on the premises that they are in possession. The plaintiffs have now filed application for amendment for recovery of possession and by paragraph-1A of the proposed amendment, the plaintiffs have contended that because of the circumstances beyond their control, they could not prefer appeal against the rejection of the application for injunction. The defendants have taken advantage of the situation and have taken possession of the suit property.

8. In my opinion, it cannot be said that the nature of the

suit changes as in addition to the relief of cancellation of the registered sale-deeds, the plaintiffs have claimed relief of possession. Application for amendment is affirmed on 4.3.2013. In other words, the relief of possession also cannot be said to be barred by limitation. Perusal of the impugned order also does not indicate that the trial has commenced. In paragraph-3, the learned trial Judge has observed that the proposed amendment does not change the nature of the suit and the defendants will get an opportunity to file written statement. For the reasons recorded in paragraph-3 of the impugned order, no fault can be found with the impugned order. Hence, Petition fails and the same is dismissed reserving liberty to the petitioners to file additional written statement to amended plaint within four weeks from today.

9. 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.)