

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 2094 OF 2018

RAJKUMAR MOHANRAO DEVANE AND ANOTHER
VERSUS
BALAJI NARSINGHRAO DEVANE AND OTHERS

Advocate for Petitioners : Ms. M.D. Thube-Mhase.

CORAM : RAVINDRA V. GHUGE, J.
DATED : 23rd February, 2018

PER COURT :

1. The petitioners/original plaintiffs are aggrieved by the impugned order dated 04/12/2017, passed by the Trial Court, by which, application Exhibit 44, filed by the defendants seeking leave to amend the written statement in R.C.S. No. 94/2014, has been allowed.

2. Grievance of the petitioners is that the suit was filed by them for seeking removal of encroachment. There were measurements conducted prior to the lodging of the suit. It was noticed through such measurement that the defendants had encroached upon 17 Ares of land. After lodging of the suit, a Court Commissioner was appointed, who again measured the land and confirmed encroachment to the extent of 17 Ares of land.

3. Learned counsel for the petitioners strenuously contends that defendants have proposed through the amendment that the portion of the suit land came to their share on account of a partition between the family members, which had taken place about 80 to 100 years ago. Such partition occurred in between their Great Grand Parents. It, is therefore, contended that if the said partition had occurred as long as about 80 years ago, the defendants should have indicated as to what were the circumstances that prevented them from mentioning these factors in their written statements. The due diligence expected under Order VI Rule 17 of the Civil Procedure Code, would render the proposed amendment impermissible.

4. Reliance is placed upon the judgment of the Hon'ble Apex Court in the matter of **S. Malla Reddy & Others Versus Future Builders Co-operative Housing Society & Others [2013 AIR (SC) 3693]**.

Paragraph Nos. 22, 23 and 24 of the said judgment read as under :

“22. Order VI Rule 16 CPC has been substituted by the CPC (Amendment) Act, 1976. This provision deals with the amendment or striking out of the

pleadings, which a party desires to be made in his opponent's pleadings. In other words, the plaintiff or the defendant may ask the court for striking out pleadings of his opponent on the ground that the pleadings are shown to be unnecessary, scandalous, frivolous or vexatious. This Rule is based on the principle of *ex debito justitiae*. The court is empowered under this Rule to strike out any matter in the pleadings that appears to be unnecessary, scandalous, frivolous or vexatious or which tends to prejudice, embarrass or delay the fair trial of the suit.

23. On the other hand, Order VI Rule 17 CPC empowers the court to allow either party to alter or amend his own pleading and on such application the court may allow the parties to amend their pleadings subject to certain conditions enumerated in the said Rule.

24. Although the defendant-appellants filed the petition for striking out their own pleading i.e. written statement, labelling the petition as under Order VI Rule 16 CPC, but in substance the application was dealt with as if under Order VI Rule 17 CPC inasmuch as the trial court discussed the facts of the case and did not permit the

defendants to substitute the written statement whereunder there was an admission of the suit claim of the plaintiff-Society. The relevant portion of the order quoted hereinabove reveals that the trial court while rejecting the aforementioned petition held that the defendant-appellants cannot be allowed to substitute their earlier written statement filed in the suit whereunder there was an admission of the claim of the plaintiff-Society (respondent herein). Similarly in the revision filed by the defendants, the High Court considered all the decisions referred by the defendants on the issue as to whether the defendants can withdraw the admission made in the written statement and finally came to the conclusion that the defendant-appellants cannot be allowed to resile from the admission made in the written statement by taking recourse to Order VIII Rule 9 or Order VI Rule 16 CPC by seeking to file a fresh written statement. In the aforesaid premises, filing of a fresh petition by the defendants under Order VI Rule 17 CPC after about 13 years when the hearing of the suit had already commenced and some of the witnesses were examined, is wholly misconceived. The High Court in the impugned order has rightly held that filing of subsequent application for the same relief is an abuse of the process of the court. As noticed above, the relief sought for by the defendants in a subsequent petition under Order VI Rule 17 CPC was elaborately dealt with on the two earlier petitions filed by the defendant-appellants under Order VI

Rule 16 and Order VIII Rule 9 CPC and, therefore, the subsequent petition filed by the defendants labelling the petition under Order VI Rule 17 CPC is wholly misconceived and was not entertainable.”

5. It is well settled law that an amendment sought in a written statement is to be considered more liberally and the strictness that is attracted with reference to an amendment sought in the plaint, would not be applicable to an application seeking an amendment to a written statement. It is equally settled that inconsistent stands can be taken by the defendants in their written statement.

6. Issue is that in the face of the suit preferred by the plaintiffs seeking removal of encroachment, the defendants have proposed through the amendment that a portion of the suit land came to their share under a partition between their predecessors in title. In a suit for seeking removal of encroachment, reasonable opportunity needs to be extended to the defendants to point out as to whether the land, said to be encroached, would really amount to an encroachment or whether they could exhibit a right over the said land so as to

indicate that the theory of encroachment is rebuttable. The Hon'ble Apex Court has consistently held that in order to avoid multiplicity of litigation and to do complete justice, an opportunity cannot be denied to a litigating side to put forth its pleadings and evidence.

7. Moreover, merely because the defendants contended that the encroached portion belongs to them, would not mean that the suit filed by the plaintiffs would be dismissed. Merits of the amendment would always be subject to recording of evidence and final adjudication. The onus and burden would be on the defendants to prove that they have a subsisting title over the land which is said to be encroached. The plaintiffs can meet the said amended portion by filing a counter, as may be permissible in law.

8. In so far as due diligence is concerned, the Trial Court has imposed cost of Rs. 1,500/- on the defendants. Though, the said amount appears be meager, it has been imposed taking into account that these are agriculturists who are before the Court.

9. In my view, in order to extend every opportunity

to the defendants to put-forth their case, the amendment which is permitted would not amount to causing gross injustice to the plaintiffs, keeping in view the law laid down by the Hon'ble Apex Court in the matter of **Syed Yakoob Versus K.S. Radhakrishnan and others (AIR 1964 SC 477)** and **Surya Dev Rai Versus Ram Chander Rai and others [(2003) 6 SCC 682]**. As such, this petition being devoid of merit, is therefore, dismissed.

(RAVINDRA V. GHUGE, J.)

S.P.C.