

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO. 9877 OF 2017

1 Sau.Malanbai w/o Bhimrao Dalvi,
 Age : 49 years, Occupation : Business,
 R/o Kabad Galli, Beed,
 Taluka and District Beed.

2 Bhimrao s/o Haribhau Dalvi,
 Age : 54 years, Occupation : Business,
 R/o Kabad Galli, Beed,
 Taluka and District Beed.

...PETITIONERS

-VERSUS-

1 Sau.Sunita w/o Kalyan Pingle,
 Age : 46 years, Occupation : Household,
 R/o Pingle Galli, Beed,
 Taluka and District Beed.

2 Sau.Smita w/o Sunil Dhande,
 Age : 49 years, Occupation : Household,
 R/o Dhande Galli, Beed,
 Taluka and District Beed.

3 Anil s/o Suryabhan Dhande,
 Age : 56 years, Occupation : Agriculture,
 R/o Swarajya Nagar, Beed,
 Taluka and District Beed.

4 Sau.Vijaya w/o Surendra Kasat,
 Age : 40 years, Occupation : Household,
 R/o Subhash Road, Beed,
 Taluka and District Beed.

5 Varun s/o Uttamrao Misal,
 Age : 27 years, Occupation : Business,
 R/o Yeshwant Nagar, Beed,
 Taluka and District Beed.

...RESPONDENTS

**WITH
WRIT PETITION NO.9891 OF 2017**

- 1 Shaikh Masjid s/o Shaikh Mehboob,
Age : 40 years, Occupation : Business,
R/o Nagar Road, Opposite Girls' High
School, Mehboob Nursery, Beed,
Taluka and District Beed.
Presently R/o Balepeer, Beed,
Taluka and District Beed.
- 2 Shaikh Ibrahim s/o Shaikh Mehboob,
Age : 50 years, Occupation : Business,
R/o Nagar Road, Opposite Girls' High
School, Mehboob Nursery, Beed,
Taluka and District Beed.
Presently R/o Balepeer, Beed,
Taluka and District Beed.

...PETITIONERS

-VERSUS-

- 1 Sau.Vijaya w/o Surendra Kasat,
Age : 40 years, Occupation : Household,
R/o Subhash Road, Beed,
Taluka and District Beed.
- 2 Varun s/o Uttamrao Misal,
Age : 27 years, Occupation : Business,
R/o Yeshwant Nagar, Beed,
Taluka and District Beed.
- 3 Sau.Sunita w/o Kalyan Pingle,
Age : 46 years, Occupation : Household,
R/o Pingle Galli, Beed,
Taluka and District Beed.
- 4 Sau.Smita w/o Sunil Dhande,
Age : 49 years, Occupation : Household,
R/o Dhande Galli, Beed,
Taluka and District Beed.
- 5 Anil s/o Suryabhan Dhande,

Age : 56 years, Occupation : Agriculture,
R/o Swarajya Nagar, Beed,
Taluka and District Beed.

...RESPONDENTS

...
Advocate for the Petitioners : Shri Tungar Hrishikesh V.
Advocate for the Respondents : Shri Jadhavar Santosh S..
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CORAM: RAVINDRA V. GHUGE, J.

DATE :- 08th June, 2018

ORAL JUDGMENT :

1 Rule. Rule made returnable forthwith and heard finally by the consent of the parties.

2 The Petitioners are the original Plaintiffs, who are aggrieved by the common order dated 05.04.2017 delivered by the first Appellate Court by which, the applications Exhibits 25 and 24 in Regular Civil Appeal Nos.78 and 79 of 2016 seeking an amendment to the respective plaints in Special Civil Suit Nos.59/2014 and 03/2015, respectively, have been rejected.

3 I have considered the extensive submissions of the learned Advocates for the respective sides and have gone through the judgments cited.

4 The contention of the Petitioners, who are original Plaintiffs, is that in both the suits, they have specifically pleaded about the manner in which they took possession of the suit properties. It is pointed out

through paragraphs 3, 5, 6, 7, 8 and 9 that these Plaintiffs have taken possession of the suit properties and are enjoying the same from about 1981. The prayers set out in the plaints are with regard to the declaration that the Plaintiffs are the owners of the suit properties.

5 The Petitioners/ Plaintiffs concede that the plaints were amended on two occasions before the Trial Court. Additional pleadings were inserted, additional prayers were made and additional issues were also cast based on the said amendments. It is also conceded that the claim of the Plaintiffs of having perfected their title to the suit properties by adverse possession, dates back to 1981 and 12 years thereafter. It is further conceded that a specific averment that the Plaintiffs have perfected their title through adverse possession after illegally taking over possession of the property and having possessed the property for a continuous period of 12 years, has not been specifically made.

6 It is not in dispute that both the suits filed by these Plaintiffs have been dismissed by the judgments of the Trial Court and hence, Regular Civil Appeal Nos.78 and 79 of 2016 have been preferred by the Plaintiffs before the first Appellate Court.

7 It is strenuously submitted that as there are several pleadings in the plaints as regards the manner in which the Plaintiffs have taken possession of the suit property, it was necessary for the Plaintiffs to specifically plead adverse possession. It is also contended that though

there are pleadings which point, impliedly, towards adverse possession, a proper issue was not framed by the Trial Court and the Trial Court failed to consider the said averments of the Plaintiffs in paragraphs 3 and 5 to 9. As a consequence of non application of mind by the Trial Court, their two suits have been dismissed, is the submission.

8 The Plaintiffs rely upon the judgments of the Honourable Supreme Court in the matters of Chander Kanta Bansal vs. Rajinder Singh Anand, AIR 2008 SCW 3225, J. Samual and others vs. Gattu Mahesh and others, 2012 (4) Mh.L.J. 40 (SC), Chakreshwari Construction Pvt.Ltd. vs. Manohar Lal, 2017(5) Mh.L.J. 195 (SC) and the judgment of this Court in the matter of Sanjay Suganchand Kasliwal vs. Jugalkishor Chhaganlal Tapadia and another, 2015 (5) ALL MR 101. Specific reliance is placed upon the law laid down by the Honourable Supreme Court in paragraphs 13, 14, 15, 16 and 17 of the Chakreshwari Construction judgment (supra), which read as under :-

- "13) Having heard the learned counsel for the parties and on perusal of the record of the case, we are inclined to allow the appeals and while setting aside of the impugned orders, allow the aforementioned applications of the appellant.
- 14) The principle applicable for deciding the application made for amendment in the pleadings remains no more res integra and is laid down in several cases. In the case of Revajeetu Builders and Developers vs. Narayanaswamy & Sons and Others, (2009) 10 SCC 84, this Court, after examining the entire previous case law on the subject, culled out the following

principle in Para 63 of the judgment which reads as under:

“63. On critically analysing both the English and Indian cases, some basic principles emerge which ought to be taken into consideration while allowing or rejecting the application for amendment:

- (1) whether the amendment sought is imperative for proper and effective adjudication of the case;*
- (2) whether the application for amendment is bona fide or mala fide;*
- (3) the amendment should not cause such prejudice to the other side which cannot be compensated adequately in terms of money;*
- (4) refusing amendment would in fact lead to injustice or lead to multiple litigation;*
- (5) whether the proposed amendment constitutionally or fundamentally changes the nature and character of the case; and*
- (6) as a general rule, the court should decline amendments if a fresh suit on the amended claims would be barred by limitation on the date of application.*

These are some of the important factors which may be kept in mind while dealing with application filed under Order 6 Rule 17. These are only illustrative and not exhaustive.”

- 15) Applying the aforesaid principle of law to the facts of the case at hand, we are of the considered opinion that the amendment proposed by the appellant so also the permission sought for filing additional documents deserved to be allowed.*
- 16) It is for the reasons that firstly, the amendment proposed did not change the nature of the case originally set up by the appellant in the eviction petition; Secondly, the amendment did not introduce any fresh cause of action; Thirdly, the amendment was relevant for deciding the question of subletting and availability of alternative accommodation with the respondent; Fourthly, the facts proposed in the amendment not being in the personal knowledge of*

the appellant and having obtained from the concerned State department recently, the same could be allowed to be brought on record for its consideration; Fifthly, no prejudice was likely to be caused to the respondent, if the applications had been allowed because the respondent in such eventuality would have got an opportunity to make consequential amendment in his written statement and file additional documents in rebuttal; and lastly, in order to prove the case, the amendment proposed and permission to file documents should have been granted.

- 17) *It is true that there was some delay on the part of the appellant in filing the applications but, in our opinion, the appellant had explained the delay. One cannot dispute that in appropriate cases, the parties are permitted to amend their pleadings at any stage not only during the pendency of the trial but also at the first and second appellate stage with the leave of the Court provided the amendment proposed is bona fide, relevant and necessary for deciding the rights of the parties involved in the lis."*

9 The learned Advocate for the Respondents/ original Defendants submits that the proviso to Order 6 Rule 17 of the Code of Civil Procedure was introduced in 2002 by way of an amendment to ensure that the right to amend the pleadings should not be misused and should not be used to delay the matter. It is further canvassed that if the Plaintiffs have based their claim on the pleadings, which may have a semblance of adverse possession, they were never restrained from putting forth a specific averment that they have perfected their title over the suit property by adverse possession. Even today, whatever would be the pleadings in the plaint, would be considered by the Appellate Court.

Introducing a new cause of action of seeking declaration of ownership and title on the basis of adverse possession, would cause an irreparable harm, serious prejudice and manifest inconvenience to the Defendants.

10 It is further canvassed that when the Plaintiffs have amended their complaints on two occasions and by virtue of which, additional prayers were introduced and additional issues were cast, there is no explanation from the Plaintiffs in view of the proviso to Order 6 Rule 17 as regards due diligence. The applications Exhibits 24 and 25 do not, in any manner whatsoever, explain as to what were the circumstances that prevented the Plaintiffs from seeking an amendment in the nature of which is put forth in the said applications before the Trial Court when the complaints were amended on two occasions earlier.

11 I find that though the Plaintiffs have averred in several paragraphs as to the manner in which they acquired possession over the suit properties, it would be within the domain of the Appellate Court to consider such pleadings and conclude whether, the judgments of the Trial Court could be branded as being perverse or erroneous. It is the case of the Plaintiffs that their averments in the complaints were not properly appreciated by the Trial Court. If these factors are to be considered by the Appellate Court, permitting the Plaintiffs to introduce a specific cause of action in the form of adverse possession, would probably facilitate a remand of the matter to the Trial Court. This seems to be the design of the

Plaintiffs so as to acquire the remand of the suits indirectly by introduction of a cause of action which may not be directly possible. Even otherwise, if the contention of the Plaintiffs is that their pleadings point towards adverse possession and this aspect has not been considered by the Trial Court, this would be a subject matter of the appeals, which are pending.

12 Insofar as due diligence is concerned, there is no explanation of any nature whatsoever as to why did the Plaintiffs not cause an amendment before the Trial Court, which they now intend to. There is no explanation as to why the Plaintiffs did not seek this amendment when their two requests for amendment were allowed by the Trial Court. In this backdrop, I am of the view that the Appellate Court has rightly disallowed the amendment in the light of paragraph 63(2), (3) and (5) of the judgment delivered by the Honourable Supreme Court in the matter of Revajeetu Builders and Developers vs. Narayanaswamy and Sons and others, (2009) 10 SCC 84.

13 Considering the above, I do not find that the impugned orders could be termed as being perverse or erroneous. These Writ Petitions being devoid of merit are, therefore, dismissed. Rule is discharged.