

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

912 WRIT PETITION NO. 8629 OF 2015

SAYYED RASHID ALI SAYYED MEER
VERSUS
SAYYED AYUB ALAM

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Advocate for Petitioner : Mr. Karpe Rahul R.
Advocate for Respondent-sole : Mr. Gaware Niteen V.

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CORAM : V. K. JADHAV, J.
DATED : 08th MARCH, 2018

PER COURT:-

1. Heard finally with consent at admission stage.
2. The petitioner/original plaintiff has instituted a suit for a decree of perpetual injunction in respect of the lane situated towards the southern side of the property bearing City Survey No.718. The respondent/defendant has strongly resisted the suit by filing written statement and also preferred a counter claim. It is the contention of the respondent/defendant that the petitioner/plaintiff himself has encroached upon the common lane situated towards the southern side of the property City

Survey No. 718 and he has planted certain trees and also erected an iron gate. In the counter claim, the respondent/defendant has prayed for a decree of mandatory injunction to remove the said encroachment and the construction in the form of erection of the iron gate.

3. During pendency of the suit, the petitioner/plaintiff has filed an application Exhibit 24 seeking permission to amend the plaint to the extent that the other side constructed the iron gate over the said lane and closed it during existence of the order of temporary injunction. The respondent/defendant has strongly resisted the said application by filing say. The learned Joint Civil Judge, Junior Division, Karjat, by the impugned order dated 10.06.2015, rejected the application Exhibit 24. Hence this Writ Petition.

4. The learned counsel for the petitioner/original plaintiff submits that the petitioner has instituted the suit for a decree of perpetual injunction with a specific pleading that the defendant, having no right over the lane situated towards the southern side of the property City Survey No. 718, is obstructing the same and

further started erecting an iron gate over the said lane. The petitioner/plaintiff has also filed an application Exhibit 5 for issuance of order of temporary injunction and by order dated 01.08.2013, the trial court has also issued *ex parte* temporary injunction restraining the defendant from carrying out any kind of construction over the southern side lane. The learned counsel submits that though subsequently the said application Exhibit 5 was not pursued, the respondent/defendant has erected an iron gate on the said lane and closed the said lane. The petitioner/plaintiff has therefore, by way of the proposed amendment, incorporated the relief of mandatory injunction in the plaint to the extent of removal of the said iron gate erected by the respondent/defendant on the portion of the lane. The learned counsel submits that the trial court has rejected the application Exhibit 24 mainly on the ground that no specific date has been mentioned about erection of the said iron gate in the application Exhibit 24 and as such, the petitioner/plaintiff is not entitled to amend the plaint. The learned counsel submits that considering the original pleadings of the petitioner/plaintiff, the proposed amendment would not change the nature of the suit in any manner. On the basis of a subsequent event, the

petitioner/plaintiff is seeking permission to amend the plaint. However, the learned Judge of the trial court has not considered the same and rejected the application without any reason.

5. The learned counsel for the respondent/defendant submits that the respondent/defendant has strongly resisted the suit by filing written statement and also preferred a counter claim. It is the case of the respondent/defendant that there is a common lane towards the southern side of the property City Survey No. 718. On the other hand, the petitioner/plaintiff has made an encroachment over the said portion of the common lane by planting trees and also by erecting iron gate. The learned counsel submits that the respondent/defendant has filed the counter claim on 05.10.2013 and thereafter, the petitioner/plaintiff has filed the application Exhibit 24 with a story of erection of iron gate on the portion of the lane by the respondent/defendant as a subsequent event and accordingly, sought amendment in the plaint. Learned counsel submits that the learned Judge of the trial court has rightly considered the same and accordingly, rejected the application Exhibit 24. No interference is required. The learned counsel submits that it is

settled law that grant of application for amendment be subject to certain conditions, namely, when the nature of suit is changed by permitting the amendment and when the amendment would result introducing new cause of action and intends to prejudice the other party. The learned counsel submits that in the instant case, the amendment, if allowed, would result in introducing a new cause of action intending to prejudice the respondent/defendant especially when the respondent/defendant has preferred counter claim seeking a specific relief of mandatory injunction in respect of the said lane which is, according to the respondent/defendant, a common lane.

6. The learned counsel for the respondent, in order to substantiate his contentions, placed reliance on the decisions in the following two cases:

1. ***Revajeetu Builders & Developers vs Narayanaswamy & Sons & Ors.***, reported in (2009) 10 SCC 84 and
2. ***Rajkumar Gurawara (Dead) Thr. L.Rs. Vs S. K. Sarwagi & Co. Pvt. Ltd & Anr.***, reported in (2008) 14 SCC 364.

7. It appears that the petitioner/plaintiff has instituted the suit for a decree of perpetual injunction in respect of the lane situated towards the southern side of the suit property bearing City Survey No. 718. The petitioner has specifically pleaded that in the said lane situated towards the southern side of the suit property, the respondent/defendant has encroached upon the said lane and trying to construct and erect an iron gate on the said lane. On the other hand, it is the case of the respondent/defendant, which appears in the counter claim, that in fact, the said lane is a common lane and the petitioner/plaintiff has encroached upon the said common lane by planting trees and the petitioner/plaintiff has erected an iron gate on the portion of the lane. The respondent/defendant has thus, claimed relief of mandatory injunction for removal of the said trees as well as the iron gate. It thus appears that in respect of the same lane, there are two stories put forth by the contesting parties and the petitioner/plaintiff has come with a subsequent event that the respondent/defendant has erected an iron gate on the said lane when the order of temporary injunction was in force. I do not think that this amendment would change entirely the nature

of the suit as well the petitioner/plaintiff is introducing a new cause of action intending thereby to prejudice the respondent/defendant. In the instant case, it is for the parties to substantiate their respective cases by leading oral and documentary evidence. Only on the basis of the amendment in the plaint, when the same is sought before commencement of trial of the suit, no prejudice is likely to be caused to the other side. Even assuming that the respondent/defendant has raised certain grounds by way of counter claim and sought relief of mandatory injunction, however, all the provisions of filing of written statement in respect of the plaint are equally applicable to the counter claim and the petitioner/plaintiff can very well resist the said contention by filing a written statement. However, even if the said averments made in the counter claim are strongly resisted by the petitioner/plaintiff, obviously the question would arise that the petitioner/plaintiff has not claimed any relief in respect of the said gate if it is erected subsequently as per the story put forth by the petitioner/plaintiff or even otherwise.

8. In view of the above, I find that the approach of the trial

court is not correct. The learned Judge of the trial court has rejected the application Exhibit 24 merely on the ground that no specific date has been mentioned about erection of the iron gate on the portion of the lane. I do not think that the same is significant considering the original pleadings of the petitioner/plaintiff in the suit. I do not think that the petitioner/plaintiff has introduced a totally new cause of action. That is in consonance with the original pleadings because, in the original pleadings, the petitioner/plaintiff has stated that the respondent/defendant is trying to erect a gate on the portion of the lane and also trying to make construction over the portion of the lane. At this stage, it is not necessary to go into the merits of the contention raised by way of the proposed amendment and it is for the trial court to deal with it during the course of full-fledged trial of the suit. It would be inappropriate for this Court to accept the submissions made in this regard at this stage and observe about the merits of the aforesaid amendment compared with the averments made in the counter claim. Hence the following order:

ORDER

- I. The Writ Petition is hereby allowed. No costs.

- II. The impugned order dated 10.06.2015 below Exhibit 24 in Regular Civil Suit No. 121 of 2013 passed by the Joint Civil Judge, Junior Division, Karjat, is hereby quashed and set aside.
- III. The application Exhibit 24 is allowed in terms of its prayer clause.
- IV. Needless to say that if such amendment is carried out, the respondent/defendant is at liberty to file an additional written statement, if required.
- V. The Writ Petition is accordingly disposed of.

(V. K. JADHAV, J.)

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