

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 12793 OF 2017

POPAT ANNA PATIL
VERSUS
BABAN ZIBRU PATIL AND OTHERS

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Advocate for Petitioner : Shri Patil J.V.
h/f Shri Katneshwarkar P.R.
Advocate for Respondents 1 & 2 : Shri Deshmukh A.I.

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CORAM : RAVINDRA V. GHUGE, J.
Dated: June 19, 2018

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PER COURT :-

1. The petitioner is aggrieved by the order dated 18.11.2016 delivered by the trial Court in RCS No.36 of 2011, by which, application Exhibit 89 preferred by the petitioner / plaintiff seeking addition of paragraphs based on subsequent events and consequential prayers has been rejected.

2. The learned counsel for the respondents / defendants 1 and 2 has strenuously supported the impugned order. Respondent No.3, though served, has failed to cause an appearance. Respondent Nos. 4 to 6, who are defendant Nos.4 to 6, have been deleted from these proceedings as they are formal parties.

3. Learned counsel for the above defendants places reliance upon the judgment of the Honourable Apex Court in the matter of Chakreshwari Construction Private Limited Vs. Manohar Lal [(2017) 5 SC 212], and Revajeetu Builders and Developers Vs. Narayanaswamy and Sons [(2009) 8 MLJ 907- (SC)] = (2009) 10 SCC 84]. The Honourable Apex Court in Revajeetu (supra) has culled out certain principles for dealing with the applications for amendment under paragraph No.67, which read as under:-

“67. On critically analyzing 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.”

4. It is, therefore, canvassed that the suit filed by the petitioner was purely for seeking declaration of encroachment and a mandatory injunction in relation thereto. By the proposed amendment, the plaintiff relies upon the report of the Court Commissioner and seeks to introduce the prayer for removal of encroachment. The nature of the cause of action has changed. The trial has commenced and hence, the trial Court has rightly rejected Exhibit 89. It is further prayed that this petition be dismissed by imposing heavy costs.

5. I have gone through the plaint put forth by the plaintiff, wherein, he has specifically voiced a serious apprehension that the defendants are preparing for causing an encroachment. They have dug pits. The material required for erecting RCC pillars in the said pits has also arrived. It is prayed that they should be restrained from erecting such pillars and indulging in construction until the decision in the suit.

6. A Court Commissioner was appointed, who has tendered his report. The report reveals that the defendants had caused the encroachment to the extent of 21.74 sq. meters. The encroachment was upto 9.5 ft. in the area claimed by the plaintiff. After this aspect was revealed, the plaintiff desired to add the paragraph pertaining to how the encroachment has been done during the pendency of the suit and then had sought to introduce the prayer for removal of the encroachment.

7. I am of the view that when the plaintiff has expressed serious apprehension of encroachment and has brought it to the notice of the Court the likelihood of the defendants erecting RCC pillars, he has rightly sought the removal of such RCC pillars, which have been erected by the defendants during the pendency of the suit. The proposed prayer is in continuation with the cause of action and is pursuant to the apprehension of the plaintiff coming true.

8. The trial Court, without appreciating the prayers putforth on the basis of the pleadings and the proposed prayer which is based on the serious apprehension voiced which came true, has lost sight of the connection between the pleadings putforth in the plaint, the acts committed by the defendants, which proved the

apprehension true and the relief of removal of encroachment. On one hand, the trial Court has observed in paragraph No.4 of the impugned order that it would deal with all the rights and grievances of the plaintiff including removal of alleged encroachment while deciding the suit and on the other hand, it has rejected Exhibit 89 on the ground that a different cause of action is introduced.

9. Considering the above, this petition is allowed. The impugned order dated 18.11.2016 is quashed and set aside and application Exhibit 89 is allowed. I am not awarding costs to the defendants since their alleged encroachment has compelled the plaintiff to seek an amendment. Needless to state, the plaintiff shall carry out the amendment within four weeks from today and shall proceed to lead evidence in the matter. The defendants would be at liberty to file additional Written Statement before commencement of the recording of oral evidence.

(RAVINDRA V. GHUGE, J.)

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