

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

901. WRIT PETITION No. 11063 of 2016

Tarabai Bankatlal Lodha,	... Petitioner
Versus	
Indrakumar Premraj Lodha and others	... Respondents

Mr. A.P. Bhandari, Advocate for petitioner.

Miss S.V. Salunke, Advocate, holding for Mr V. D. Salunke, Advocate
for respondent No.1

Mr. A.U. Chandel, Advocate for respondents No. 2, R/3/1 & 3/2

Coram : N.M. Jamdar, J.

Date : 7 December 2018.

ORAL ORDER:

1. The petitioner has challenged the order passed by the District Judge-1, Beed, dated 25 August 2016 rejecting the application for amendment of the plaint in the appeal.

2. The petitioner filed Regular Civil Suit No. 58 of 2007 for the declaration of ownership and for injunction. In the plaint, the petitioner asserted that the petitioner is the owner of the suit property and the defendant No.1 has sought certain illegal entries in the

records and was trying to assert the ownership right. The suit was filed on 26 February 2007. The respondent/defendant No.1 filed the written statement contesting the suit. The learned Civil Judge considered the evidence produced on record and dismissed the suit by judgment and order dated 4 May 2013.

3. The petitioner thereafter filed Regular Civil Appeal No. 93 of 2013 in the District Court, Beed. The appeal was filed on 19 July 2013. The appeal thereafter proceeded for hearing. On 9 September 2015, the petitioner moved an application Exhibit No. 21 to amend the plaint to incorporate the relief of possession and mesne profits from the respondent. The respondent filed his say and contested the application. The learned District Judge, relying on various decisions of the Apex Court and of this Court, came to the conclusion that there was absolutely no averment regarding any due diligence and grant of the amendment at this stage would cause a prejudice to the respondent and rejected the application.

4. The learned Counsel for the petitioner submitted that the Trial Court, even though dismissed the suit, has made observations that the petitioner is owner of the suit property and, therefore, based on these observations, amendment was sought and no prejudice is

caused to the respondent. The learned Counsel for the petitioner contended that there is no bar for amending the plaint at any stage of the proceedings and in case such an amendment is granted, it will be in furtherance of justice and will avoid multiplicity of the proceedings. The learned Counsel submitted that ample power exists under Section 153 of the Civil Procedure Code with the Court. The learned Counsel for the petitioner has relied upon the decision in the case of *Sampathkumar Versus Ayyakannu and another* ¹ to contend that if a separate suit can be filed, the amendment can be allowed. He also relied upon the decision in the case of the *L.J. Leach and Company Ltd. Versus Jardine Skinner and Co.*² to contend that if a party is entitled to a different relief then an amendment can be permitted even at a latter stage. The learned Counsel relying upon the decisions in the case of *Rajesh Kumar Aggarwal & others Versus K.K. Modi & Others*³, *State Bank of Hyderabad Versus Town Municipal Council*⁴, *North East Railway Administration, Gorakhpur Versus Bhagwan Das*,⁵ and *Revajeetu Builders and Developers Vs. Narayanswamy and sons and others* ⁶; and contended that merits of the amendment are not to be gone into and amendment at the Appellate stage is permissible.

1. AIR (SC) 3369 2. (1957) AIR (SC) 357 3. AIR 2006 SC 1647 4. [(2007) 1 SCC 765] 5. AIR 2008 SC 2139

6. (2009) 10 SCC 84

5. The learned Counsel for the respondent No.1, on the other hand, supported the impugned order and submitted that grave prejudice will be caused to the respondent if the amendment is allowed at this stage and there has been no due diligence on the part of the petitioner. The learned Counsel for respondent No.1 relied upon decisions in the case of :

*Vidyabai & others Versus Padmalatha & another*⁷ ;
*Mount Mary Enterprises Versus Jivratna Medi Treat Pvt. Ltd.*⁸ ;
*ChanderKanta Bansal Versus Rajinder Singh Anand*⁹ ;
*Gangubai Baban Kadam and another Versus Vidya Vijay Joshi (Dr.)*¹⁰ .

6. Extensive amendments were carried out to the Code by the Civil Procedure (Amendment) Act of 2002. The Amendment was brought about because of the chronic problem of pendency of the civil suits and the inordinate delay in disposal. The litigants are expected to be vigilant about their rights and the casual grant of indulgence to amend the pleadings was sought to be streamlined. The proviso in the Order VI Rule 17 of the Civil Procedure Code is couched in a mandatory form. The conditions precedent thereunder must be satisfied that is the Court comes to conclusion that inspite of due diligence of the parties, an amendment could not

7. 2009 AIR (SC) 1433 8. 2015(5) Mh.L.J. 214 9. 2008 AIR (SC) 2234 10. 2015(5) All M.R. 238

have been carried out. The decisions in the cases of *Sampathkumar* and *L.J. Leach* relied upon by the petitioner, are prior to the amendment. It cannot be disputed that the power of the Court to amend the pleadings is not taken away, but when the power of the superintendence of this Court is invoked, it will have to be seen whether the learned District Judge committed any jurisdictional error or whether there was any perversity.

7. The petitioner had claimed the ownership rights. It is the petitioner, who had approached the Court. A litigant, who approaches the Court, is expected to be aware of the factual situation, which led to instituting the proceedings in the Court. In the present case, the petitioner has claimed the declaration of ownership. The petitioner when sought the declaration of the ownership, should have been certain whether she is in possession or not. When the petitioner filed the suit on 26 February 2007, she claimed only ownership and did not claim possession from the respondent. When the suit was dismissed by the learned Civil Judge, the learned Civil Judge observed that though the petitioner/plaintiff proved her title, she is not entitled to get the declaration as an owner. This judgment and order was passed on 4 May 2013. An Appeal was filed in the year 2013. It is in 2015, after two years, the petitioner moved the application for

amendment in the plaint.

8. The main question is whether there was any due diligence on the part of the petitioner. What is the factum of due diligence is pleaded, and if it is pleaded, whether it deserves consideration. In the present case, the second contingency does not arise as the petitioner has not mentioned anything at all as to why the petitioner could not seek the same relief when the suit was instituted. When the learned Counsel for the petitioner was confronted with this position, he had to admit that the application does not contain any explanation whatsoever. As stated by the Apex Court in the decision in the case of *Vidyabai* (supra), a factum of due diligence is a jurisdictional requirement. Least that was expected of the petitioner is to state a reason why the relief could not have been sought earlier. The relief, which could have easily been pleaded at the time of institution of the suit in the year 2007, is now sought to be incorporated, almost a decade thereafter, that too, in the appeal.

9. The learned Counsel for the respondent is right in relying on the decision in the case of *North Eastern Railways Administration*, (supra), in which the Apex Court has held that one of the conditions, that has to be kept in mind, of not working injustice

to the other side and where the other party cannot be placed in the same position and that the amendment should not cause any injury. In the present case, it is the petitioner, who has been totally negligent, having lost in the trial Court, in an appeal, is seeking to incorporate a new relief. This will certainly work to the prejudice of the respondent. The question of limitation would arise. The defence of the respondent will be prejudiced. Merely contending that under Section 153 of the Civil Procedure Code, the Court has power or the multiplicity of the proceedings be avoided, the amendment, as sought for, could not have been granted. This is not a mere error in the procedure that is being corrected. There is no error in the view taken by the learned District Judge that for want of any pleadings whatsoever regarding any kind of due diligence, the jurisdictional requirements were not met. It is not possible to interfere with the impugned order under the power of superintendence.

10. The writ petition is accordingly rejected.

N.M. Jamdar, J.