

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION No. 2937 OF 2016

Baban Kashinath Desai & Ors. ... Petitioners
Vs.
Prakash Balkrushna Nalawade & Ors. ... Respondents

Mr. Satyajeet Rajeshirke, for the Petitioners.

Mr. Ravi Kadam, AGP for the Respondent No. 3 - State.

CORAM : R.D. DHANUKA, J.

DATE : OCTOBER 30, 2018

P.C.

1. By this petition filed under Article 227 of the Constitution of India, the petitioners who are the original plaintiffs have challenged the order dated 2.2.2016 passed below application (Exhibit 81), filed under Order VI, Rule 17 of the Code of Civil Procedure, 1908 *inter alia* praying for amendment of the plaint, by the trial court in Regular Civil Suit No. 61 of 2008.

2. The original suit was filed for declaration and perpetual injunction on 7.2.2008. Written-statement was filed

on 20.2.2008. The trial court granted interim relief in favour of the petitioners by passing order below Exhibit 5. It is case of the petitioners that during pendency of the suit and after grant of interim reliefs in favour of the petitioners, the respondents carried out certain construction, in breach of the order passed by the trial court and thus, it became necessary to seek amendment to include prayer of permanent injunction to remove the unauthorised construction, allegedly carried out by the defendants.

3. It is not in dispute that the evidence of the plaintiffs is concluded on 19th August, 2014. Cross-examination of his witness, who was his son, is completed on 27th October, 2014. The plaintiffs thereafter filed pursis for closing the evidence. The respondents (original defendants) filed affidavit in lieu of examination-in-chief.

4. It is case of the petitioners that amendment is necessary in view of the subsequent events transpired after commencement of the trial, and thus, amendment ought to have

been granted by the trial court.

5. Learned counsel for the petitioners invited my attention to some of the photographs and also the panchanama drawn by the municipal authorities in support of the submission that the respondents have carried out new construction after passing of the interim order by the trial court in favour of the petitioners.

6. The learned counsel for the respondents, on the other hand, submits that petitioners were fully aware of the construction. It is the case of the respondents that no new construction was carried out after passing of the interim order by the trial court. It is submitted by the learned counsel that after filing of evidence close pursis by the petitioners, defendants filed affidavit of evidence and the witness has to be cross-examined by the petitioners. He submits that in these circumstances, learned trial judge was justified in passing the order of rejection of application filed under Order VI, Rule 17 of the Code of Civil Procedure, 1908. By an order dated 1st April, 2016 this court

was pleased to grant ad-interim relief in terms of prayer clause (d), and thereby stayed the proceeding of Regular Civil Suit No. 61/2008.

7. The question was as to whether alleged construction carried out by the defendants was prior or subsequent to the date of suit. The issue was decided by the trial court after giving opportunities to both the parties to lead evidence on that issue. It is not in dispute that for mandatory injunction to remove unauthorised construction, the petitioners have filed a separate suit. A perusal of documents produced by the petitioners prima-facie show that there is some substance in the submissions made on their behalf. The proceeding of the suit is already stayed by this Court since last more than two years. So far as issue of limitation raised by the learned counsel for the respondents is concerned, in this case, it is not possible to render any conclusive finding as to whether prayer in amendment is within limitation or not. The said issue is kept open. I am, therefore, inclined to accept the submissions made on behalf of the petitioners. Hence,

the following order.

ORDER

- (i) The impugned order dated 2.2.2016 passed by the learned trial court below application (Exhibit 81) filed in Regular Civil Suit 61/2008 is quashed and set aside.
- (ii) The application (Exhibit 81) filed by the petitioners is allowed. Amendment to be carried out within 4 weeks, and copy of the amended plaint be served on the respondents simultaneously.
- (iii) The respondents would be entitled to file additional written-statement within two weeks thereafter, and copy thereof to be served on the petitioners simultaneously.
- (iv) The additional issues based on amended / additional pleadings of the parties shall be framed by the learned trial judge within one week from the date of parties filing their additional pleadings.
- (v) The petitioners are at liberty to lead additional evidence on the additional issues that may be framed by the learned trial judge. After completion of

evidence of petitioners, respondents also would be entitled to lead evidence on additional issues.

- (v) It is made clear that grant of application for amendment may not be construed that respondents have admitted the contents thereof. All contentions of the parties on merits of the matter are kept open.
- (vi) The writ petition is disposed of in the aforesaid terms.

Sd/-
[R. D. DHANUKA, J.]