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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.4807 OF 2016

Smt.Janabai S. Raut & Anr.

...Petitioners

V/s.

Girish B. Shirke & Ors.

...Respondents

Mr.Prathamesh B. Bhargude for the Petitioners.

Mr.Nitin Mulye for the Respondent No.1.

Ms.Manjiri S. Parasnis for the Respondent Nos.2 to 4.

CORAM : R.D. DHANUKA, J.

DATE : 29TH OCTOBER, 2018.

P.C. :-

1. By this petition filed under under Article 227 of the Constitution of India, the petitioners (original defendants) have impugned the order dated 23rd March, 2016 passed below Exhibit – 77 filed by the respondent nos.1 and 2 (original plaintiffs) *inter-alia* praying for amendment of the plaint and to include the prayer for recovery of possession of the suit property in the event of the learned Trial Court coming to conclusion that the plaintiffs were not in possession of the suit property.

2. Admittedly the suit was filed for declaration and injunction in respect of the suit property in the year 2010. The written

statement was filed by the petitioners on 19th March, 2011 contending that the petitioners were in possession of the suit property and not the original plaintiffs. The issues were framed by the learned Trial Court on 12th September, 2011. The evidence of the parties is closed on 26th June, 2013. The matter is now placed for argument.

3. On 17th November, 2015, the original plaintiffs made an application for amendment so as to insert the prayer for possession of the suit property on the ground that an incident took place on 29th September, 2015 when the plaintiffs were allegedly threatened by the petitioners that they would dispossess the plaintiffs. The application for amendment was resisted by the petitioners. By an order dated 23rd June, 2016, the learned Trial Court allowed the Application below Exhibit – 77 holding that there was no change in the cause of action by seeking amendment by the original plaintiffs and that the original plaintiffs had not acted with due diligence in making the application for amendment.

4. Learned counsel for the petitioners invited my attention to the averments made in the plaint, in the written statement and in the oral evidence of the original plaintiffs and would submit that the issue of possession was raised also in the oral evidence. He submits that the plaintiffs were specifically asked the question in the cross-

examination and after a suggestion that the plaintiffs were not in possession of the suit property, the witness examined by the plaintiffs deposed that he was not aware as to who was in possession. He submits that the arguments are being advanced now before the Trial Court. The oral evidence is already concluded and thus at this stage to fill up the lacuna in the pleadings and evidence an application for amendment was made. Learned trial Judge could not have permitted the plaintiffs to seek amendment to insert the prayer for possession. He submits that since they have filed the written statement as far back as in the month on 19th March, 2011, asserting their possession, the plaintiffs ought to have acted with due diligence and ought to have prayed for possession immediately. In support of this submission, Mr. Bhargude placed reliance on the judgment of the Supreme Court in case of **J. Samuel & Ors. vs. Gattu Mahesh & Ors. (2012) 2 SCC 300** and in particular paragraph 18, the judgment of this Court in case of **Dnyandev Ramanlal Patil vs. Sanjeev Bhavlal Patil & Ors., 2014(6) Mh.L.J. 400** and in particular paragraphs 2, 5 and 22 to 24. He also placed reliance on an unreported judgment of this Court delivered on 10th September, 2018 in case of **Archana Ashok Amburle vs. Smt. Arpana Shankar Dhudham & Ors.** in Writ Petition No.8717 of 2018 and in particular paragraphs 12 and 15. He submits that after the amendment to

Order VI Rule 17 of the Code of Civil Procedure, 1908 after commencement of trial, the applicant has to satisfy that the applicant has acted with due diligence which the plaintiffs in this case had miserably failed to prove.

5. Learned counsel for the original plaintiffs on the other hand would submit that the prayers in the suit were for declaration and injunction. The plaintiffs were staying outside the village where the suit property was situated. It was also through out the case of the plaintiffs that they were in possession of the suit property however, in view of the fact that an incident took place in the year 2015 i.e. after recording of evidence, when the petitioners had threatened the plaintiffs to dispossess, it became necessary to insert the prayer for possession. He submits that it was the case of his clients even before the Trial Court that the defendants were in possession of the property and not the plaintiffs. He submits that his clients have acted with due diligence while making an application for seeking amendment to plaint under Order VI Rule 17 of the Code of Civil Procedure, 1908.

6. Learned counsel placed reliance on the judgment of the Hon'ble Supreme Court in case of **Pankaja & Anr. vs. Yellappa & Ors. (2004) 6 SCC 415** and in particular paragraph 14, the judgment of this Court in case of **Kisan Amrut Pawar vs. Sarangdhar Baban**

Dhore & Anr., AIR 1983 Bombay 442 and in particular paragraph 3, the judgment of this Court in case of **Mohan Maluram Agrawal vs. Kaladevi wd/o Sawarmal Agrawal & Anr. 2007(2) Mh.L.J. 74** and in particular paragraph 3 and another judgment of this Court in case of **Baburao Sahebrao Deshmukh vs. Maharashtra Insecticides Limited, Akola & Ors. 2004(2) Mh.L.J. 717** and in particular paragraph 15.

7. It is submitted by the learned counsel that it is not the case of the petitioners that the plaintiffs would not be able to file a separate suit for possession in the event of the plaintiffs succeeding in their plaint seeking the prayer for declaration and injunction. To avoid the multiplicity of proceedings, the plaintiffs were fully justified in making application for amendment and pray for recovery of possession in the event of the learned Trial Court coming to the conclusion that the plaintiffs were not in possession but the defendants were in possession.

8. Learned counsel appearing for the respondent nos.2 to 4 supported the case of the original plaintiffs and would submit that no prejudice of any nature whatsoever would have been caused to the petitioners in view of the learned Trial Court having allowed the application for amendment filed by the original plaintiffs.

9. It is not in dispute that in the original plaint, the plaintiffs

never prayed for declaration and possession of the suit property. The suit was filed in the month of April, 2010. The written statement was filed by the petitioners herein in the month of March, 2011. The petitioners have specifically asserted their possession in respect of the suit property in the said written statement in the month of March, 2011. The issues were framed on 12th September, 2011. Both the parties led oral evidence as well as documentary evidence. In the cross-examination of the witness examination by the plaintiffs, the witness deposed that he was not aware as to who was in possession in respect of the suit property. The evidence is already concluded in the month of June, 2013. The matter is now placed on board before the learned Trial Court for advancing arguments of both the parties.

10. On perusal of the application for seeking amendment of the plaint filed by the original plaintiffs indicates that the original plaintiffs have alleged an incident of the year 2015 referred to aforesaid. Learned Trial Judge has allowed the said application mainly on the ground that it would not change the cause of action and that the plaintiffs had acted with due diligence in filing an application for amendment on 17th November, 2015.

11. There is no dispute that the plaintiffs can file a separate suit for possession in the event of the petitioners succeeding in the suit for declaration and injunction. However, in view of amendment

to Order VI Rule 17 of the Code of Civil Procedure, 1908 by the Act of 2002, the Court is empowered to permit a party to seek amendment in the plaint or in the written statement after commencement of trial provided such party has acted with due diligence in making an application for amendment. Applying this test after interpreting the amendment to Order VI Rule 17 by the Act, 2002, it is repeatedly held by the Hon'ble Supreme Court and by this Court that unless the applicant shows before the learned Trial Court that he has acted with due diligence and the amendment could not be sought before commencement of trial, such amendment cannot be permitted by the learned Trial Court. The Supreme Court in case of **J. Samuel & Ors.** (supra) has decided the issue of due diligence and has held that a party requesting a relief stemming out of a claim is required to exercise due diligence and it is a requirement which cannot be dispensed with.

12. This Court in case of **Dnyandev Ramanlal Patil** (supra) has considered the identical facts and has held that if there was no pleading, as to when did the petitioner acquire the knowledge of his dispossession and as regards due diligence on his part in bringing this to the notice of the Court at the earliest, such applicant cannot be shown indulgence by the Court. The judgment of the Hon'ble Court in case of **J. Samuel & Ors.** (supra) and in case of **Dnyandev**

Ramanlal Patil (supra) squarely apply to the facts of this case.

13. In another judgment of this Court delivered on 10th September, 2018 in case of **Archana Ashok Amburle** (supra), this Court has considered identical facts and has set aside the order of the learned Trial Court allowing amendment. The judgment of this Court in case of **Archana Ashok Amburle** (supra) squarely applies to the facts of this case. The facts of this case and the facts before this Court in the said judgment were identical.

14. Insofar as the judgments of various Courts relied upon by the learned counsel for the original plaintiffs is concerned, all these judgments are the judgments considering the unamended provision of Order VI Rule 17 of the Code of Civil Procedure, 1908 and thus would not assist the case of the plaintiffs.

15. Be that as it may, in the facts and circumstances of this case, the petitioners have already asserted their possession as far back as in the month of March, 2011. In the oral evidence of the plaintiffs, there was a suggestion put by the petitioners that the plaintiffs were not in possession of the suit property. Even at that stage, the plaintiffs were not aware whether the plaintiffs were in possession of the suit property or not. The oral evidence is already concluded as far back as in the month of June, 2013. The matter is ready for arguments of both the parties.

16. A perusal of the application for seeking amendment indicates that the applicant has not shown having acted with due diligence as contemplated under amended Order VI Rule 17 of the Code of Civil Procedure, 1908. In my view, the plaintiffs thus could not seek amendment and seek possession after more than six years of the knowledge of possession of the defendants. The application for amendment was admittedly made for the first time on 17th November, 2015. In these circumstances, in my view, the learned Trial Court could not have rendered the finding that the plaintiffs had acted with due diligence in making an application for amendment on 17th November, 2015. By allowing an amendment, a party cannot be allowed to cure the defect or to fill up lacuna in the oral and documentary evidence already laid. The vested rights cannot be taken away by an amendment. The impugned order passed by the learned Trial Judge is contrary to law laid down by the Hon'ble Supreme Court and this Court in the judgments relied upon and the learned counsel for the petitioners.

17. I therefore, pass the following order :-

a). The impugned order dated 23rd March, 2016 passed below Exhibit – 77 by the learned Trial Judge is quashed and set aside. The Application (Exhibit – 77) filed by the original plaintiffs is dismissed.

b). The writ petition is allowed in aforesaid terms. There shall be no order as to costs.

c). The parties are directed to proceed with the arguments in the suit expeditiously.

18. Learned counsel appearing for the original plaintiffs seeks stay of the proceedings before the Trial Court to enable his clients to approach the Hon'ble Supreme Court. The Trial Court is directed not to proceed with the suit for a period of eight weeks from today. If any Special Leave Petition is filed, a copy thereof shall be served upon the petitioners' advocate in advance.

(R.D. DHANUKA, J.)