

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

WRIT PETITION NO.10672 OF 2016

Vilas Nanasaheb Aher & Ors.	.. Petitioners
Vs.	
Pushparaj Arun Sawant & Ors.	.. Respondents

Mr.Rishikesh Soni a/w Mr.Prabhakar M.Jadhav for the petitioners.
Mr.Ashutosh Gole, for the respondent nos.1 to 3.
Mr.Siddharth C. Wakankar for the respondent no.4.

CORAM : R.D. DHANUKA, J.
DATE : 1st October 2018

P.C.:

1. By this petition filed under Article 227 of the Constitution of India, the petitioners have impugned the order passed by the learned trial Judge rejecting the application filed by the petitioners (original plaintiffs) under Order VI Rule 17 of the Code of Civil Procedure, 1908 (for short "the said Code") seeking amendment to the plaint by inserting prayer for possession and for impleadment of a third party as party-defendant and for other reliefs.

2. The petitioners had filed a suit for declaration and for other reliefs. There was no prayer for possession in the original plaint. It is the case of the petitioners that during the pendency of this petition, the defendant nos.1 to 3 have dispossessed the petitioners and have created third party rights by executing a sale deed in favour of the respondent no.5. The petitioners also sought impleadment of the parties in whose favour, the third party rights are created by the respondent nos.1 to 3.

3. Writ petition is opposed by the respondent nos.1 to 3 on the ground that there was an averment in the plaint filed by the petitioners themselves that the defendant nos.1 to 3 were in possession of the suit property and also on the ground that in the application below Exhibit-44 filed by the defendant nos.1 to 3, the trial Court has rendered various prima facie findings about the possession of the defendant nos.1 to 3 and has granted injunction against the petitioners from dispossessing the respondent nos.1 to 3.

4. A perusal of the plaint indicates that in paragraph 5 of the plaint, it has been alleged by the petitioners that the suit property admeasuring 50 Ares was illegally occupied by the defendants. At the same time, it is also averred by the petitioners in paragraph 13 of the plaint that the petitioners were put in vacant and peaceful possession of the suit property and they are in possession.

5. In so far as the application for amendment filed under Order VI Rule 17 of the said Code is concerned, it was the case of the petitioners that during the pendency of the suit, the respondent nos.1 to 3 dispossessed the petitioners and have created third party rights in favour of the respondent no.5. The petitioners had filed an application on 22nd July 2015 before the learned trial Judge inter alia praying for withdrawal of the said suit with liberty to file fresh suit against the defendants for possession and other reliefs in respect of the suit property. It is not in dispute that the said application for seeking withdrawal of the suit with liberty to file fresh suit against the defendants for possession and other reliefs in respect of the suit property has been rejected by the learned trial

Judge. The defendant nos.1 to 3 have also filed a counter claim in the said suit and has been granted interim relief in their favour.

6. Mr.Wakankar, learned counsel for the respondent no.4 does not dispute that the petitioners could have filed a separate suit for seeking relief of possession and declaration in respect of the suit property and the alleged sale deed executed by the respondent nos.1 to 3 in favour of the respondent no.5 is void and illegal. In my view, to avoid multiplicity of the proceedings and in view of the fact that the petitioners had alleged in the plaint that they were in possession and had also applied for various permission from the authority though also had alleged that the defendants are in possession, the learned trial Judge ought to have permitted the petitioners to seek amendment in the application below Exhibit-44 under Order VI Rule 17 of the said Code. If the petitioners could have filed a fresh suit for reliefs which were sought to be impleaded in the application for amendment and the trial has not commenced, the learned trial Judge ought to have allowed the said application.

7. In so far as the submission of the learned counsel for the respondent no.4 that the petitioners had not brought on record the application seeking amendment and even the time and manner in which the defendant nos.1 to 3 had allegedly dispossessed the petitioners and the allegations being without particulars and vague and on that ground also, the learned trial Judge has justified in allowing the application is concerned, in my view, the allegations of prayer in the application for amendment, the learned trial Judge would consider such plea if raised

by the defendants in the additional written statement if filed while considering the relief for possession prayed for by the petitioners. In my view, merely because the amendment is permitted, interim orders which are already passed in favour of the respondents would not be affected and the averments made in the application for amendment could not be deemed to have been proved.

8. I therefore pass the following order :-

- (i) The impugned application dated 22nd July 2015 passed before the learned trial Judge is quashed and set aside.
- (ii) The application below Exhibit-44 filed by the petitioners under Order VI Rule 17 of the Code of Civil Procedure, 1908 is allowed.
- (iii) Writ petition is allowed in aforesaid terms. No order as to costs.
- (iv) Amendment to be carried out within four weeks from today. Amended copy of the plaint shall be served upon the respondents including the newly added parties.
- (v) The respondents are permitted to file written statement within one week from the date of service of the amended copy of the plaint.
- (vi) It is made clear that merely because the amendment is permitted to the petitioners, correctness of the allegations made in the application for amendment are not accepted by the defendants and would be subject to proof at the time of trial.
- (vii) Interim relief granted in favour of the defendants by the learned trial Judge could not be affected merely because the amendment is permitted.
- (viii) All contentions on merit of the averments made by the petitioners in the application for amendment which is allowed by this Court

are kept open.

- (ix) It is made clear that the amendment permitted by this Court would not relate back to the application filed by the petitioner below Exhibit-44. All the issues including the issue of limitation, if any, raised by the defendants in the additional written statement are kept open.
- (x) If any appeal is already preferred against the interim order passed in favour of the respondents below Exhibit-26, the appeal Court shall decide the said appeal on its own merit without being influenced by the fact that the application for amendment filed by the petitioners is allowed by this Court.

R.D. DHANUKA, J.