

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

WRIT PETITION NO.8717 OF 2018

Archana Ashok Amburle	)	
Age: 67 years, Occ: Household	)	
Residing at Harne, Taluka : Dapoli,	)	
District : Ratnagiri.	)	.. Petitioner

Versus

1. Smt.Arpana Shankar Dudham	)	
age : 56 years, Occ: Household	)	
2. Shri.Devendra Shankar Dudham	)	
age : 38 years, Occ: Fish Seller	)	
3. Shri.Shailendra Shankar Dudham	)	
age : 36 years, Occ: Scooter Mechanic	)	
4. Shri.Surendra Shankar Dudham	)	
age : 34 years, Occ: Service	)	
5. Swati Shankar Dudham	)	
age : 30 years, Occ: Service	)	
All residing at Harne (Old Bazarpeth)	)	
Taluka Harne, District Ratnagiri	)	.. Respondents

Mr.Sumit S. Kothari for the petitioner.

Mr.Saurabh S. Butala for the respondent nos.1 to 5.

CORAM : R.D. DHANUKA, J.

DATE : 10th September 2018

Judgment :-

. By this petition filed under Article 227 of the Constitution of India, the petitioner (original plaintiff) has impugned the order dated 10th July 2018 passed by the learned Civil Judge, Junior Division, Dapoli

thereby rejecting the application Exhibit-77 filed by the petitioner inter alia praying for recasting of the issue no.1 and also seeks to challenge the order dated 25th April 2018 passed by the learned Civil Judge, Junior Division, Dapoli below Exhibit-71 filed under Order VI Rule 17 of the Code of Civil Procedure, 1908 (for short “the said Code”) inter alia praying for amendment to the plaint and for adding relief of possession. Some of the relevant facts for the purpose of deciding this petition are as under : -

2. The suit land is bearing Survey No.999 admeasuring 178.2 sq.mtrs. situated at Village Harne, Taluka Dapoli, District Ratnagiri and House bearing No.518 including a toilet. On 10th January 2012, the petitioner filed a Regular Civil Suit No.6 of 2012 before the learned Civil Judge, Junior Division, Dapoli inter alia praying for seeking mandatory injunction for removal of House No.518 along with toilet constructed on the suit property. It was the case of the petitioner that he is the owner of the entire suit property and had purchased the suit property from the original owner Shri Khatavkar vide registered sale deed executed on 1st April 2009. The learned Civil Judge, Junior Division, Dapoli passed an order for issuance of summons upon the respondents (original defendants) for filing written statement. On 15th June 2012, the defendant

nos.1 to 3 and 5 filed their composite written statement denying the claim of the petitioner. It was the case of the defendants that father of the defendants was in possession of the suit property and those defendants had constructed the suit house and a toilet structure on the suit property. The defendant no.4 filed a pursis accepting the written statement of the defendant nos.1 to 3 and 5. On 5th August 2012, the petitioner filed an affidavit of evidence before the learned trial Judge in the said suit.

3. On 15th September 2012, the learned Civil Judge, Junior Division, Dapoli framed five issues in the said suit. The issue no.1 was as to whether the plaintiff proves that she was the owner of the suit house and toilet constructed on the suit property. On 5th August 2015, the petitioner was extensively cross-examined by the advocate of the defendants. On 20th June 2016, the defendant no.2 filed his affidavit in lieu of examination-in-chief. The witness summons was issued to Grampanchyat, Gram Sevak Adhikari.

4. On 15th February 2017, the petitioner examined Shri Jagannath Vasudeo Zodpe, Grampanchyat, Gram Sevak Adhikari, Harne who was cross-examined by the learned Advocate for the defendants. On 5th August 2017, the defendants examined Grampanchyat, Gram Sevak

Adhikari Shri Jagannath who was cross-examined by the learned Advocate for the petitioner. On 12th March 2018, the petitioner had filed an application under Order VI Rule 17 of the said Code inter alia praying for amendment to the plaint and to add prayer for possession of the suit property from the defendants. The said application was resisted by the defendants. On 25th April 2018, the learned Civil Judge, Junior Division, Dapoli rejected the said application (exhibit-71) filed by the petitioner under Order VI Rule 17 of the said Code.

5. On 5th June 2018, the petitioner had filed an application (exhibit-77) inter alia praying for recasting of issue no.1 on the ground that the burden of proof of the ownership was wrongly cast on the petitioner. The said application was also opposed by the respondents. On 20th June 2018, the defendant no.2 filed his affidavit in lieu of examination-in-chief before the learned trial Judge in the said suit. The learned trial Judge passed an order dated 10th July 2018 dismissing the application (exhibit-77) filed by the petitioner. The petitioner has impugned these orders i.e. the orders dated 25th April 2018 and 10th July 2018 passed by the learned trial Judge dismissing both the applications in this petition filed under Article 227 of the Constitution of India.

6. Mr.Kothari, learned counsel for the petitioner invited my attention to the prayers in the plaint, a composite written statement filed by the defendant nos.1 to 3 and 5 and pursis filed by the respondent no.4 adopting the written statement filed by the remaining respondents. It is submitted by the learned senior counsel that the learned trial Judge could not have rejected the application filed by the petitioner under Order VI Rule 17 of the said Code inter alia praying for amendment to the plaint and to include the prayer for possession. He submits that the petitioner had already prayed for mandatory injunction in respect of the suit property against the respondents. The application for amendment was filed with a view to avoid multiplicity of the proceedings. He submits that such application for amendment for inclusion of an additional prayer in respect of the same suit property could have been filed even after the written statement already filed by the respondents and affidavits of evidence were filed and cross-examination of witnesses had commenced.

7. In support of this submission, learned counsel for the petitioner placed reliance on the judgment of the Supreme Court in the case of ***Abdul Rehman & Anr.Vs.Mohd. Ruldu & Ors., (2012) 11 SCC 341*** and in particular paragraphs 10 to 13 thereof. He submits that instead of filing a separate suit inter alia praying for possession of the suit

property, the plaintiff had rightly applied for seeking amendment to the plaint and to include the said prayer for possession in the said suit.

8. In so far as the order passed by the learned trial Judge rejecting the application (exhibit-77) filed by the petitioner for recasting of issue no.1 is concerned, it is submitted by the learned counsel that the respondents had disputed the ownership of the petitioner in respect of the suit structure. It is submitted that the petitioner herself had admitted in the plaint that the defendants had constructed an illegal structure and thus the burden of proof was on the respondents and not upon the petitioner. He submits that the learned trial Judge has wrongly held that the application (exhibit-77) was in respect of the house no.421 which was owned by the petitioner. He submits that since in the issue no.1, the learned trial Judge has wrongly cast burden upon the petitioner to prove the ownership and the possession in respect of the property in question, the petitioner could apply for recast of the issue under Order XIV Rule 5 of the said Code any time prior to passing of a decree by the learned trial Judge.

9. It is submitted that the learned trial Judge could not have rejected the the application Exhibit-77 filed by the petitioner inter alia

praying for recasting of the issue no.1 in view of the learned trial Judge having been framed a fundamental defective issue. He submits that the impugned order is contrary to Order XIV Rule 5 of the said Code. Learned counsel placed reliance on the judgment of the Orissa High Court in the case of ***Kishorelal Gupta Vs. Devilal Kalwar alias Gowalla, AIR 1971 Ori 191*** and in particular paragraph 7 thereof.

10. Mr. Butala, learned counsel appearing for the respondent nos.1 to 5 (original defendants), on the other hand, submits that the suit was admittedly filed on 10th January 2012 inter alia praying for mandatory injunction for removal of house no.518 and toilet block. The learned trial Judge had already framed the issues as far back as on 15th September 2012. He submits that the application for recast of issue, however, was made only after more than 6 years from the date of framing such issues and after the application of the petitioner dated 12th March 2018 for seeking amendment to the plaint for adding relief of possession having been rejected by the learned trial Judge on 25th April 2018. He submits that on the basis of the issues framed including the issue no.1 by the learned trial Judge as far back as on 15th September 2012, both the parties have led oral and documentary evidence. The petitioner thus could not have filed an application for recast of issue at

this stage. He submits that the learned trial Judge has rightly rejected the application for recast of the issue no.1 after recording detailed reasons and this Court thus shall not interfere with the said order.

11. In so far as the order dated 25th April 2018 passed by the learned trial Judge rejecting the application (exhibit-71) filed by the petitioner under Order VI Rule 17 of the said Code is concerned, it is submitted by the learned counsel that the said application for amendment was also filed after more than 5 years and 9 months from the date of framing the issues. The evidence had already commenced much earlier by both the parties. He submits that the original prayer in the Regular Civil Suit No.6 of 2012 was for seeking mandatory injunction for removal of house no.518 and toilet block whereas the application for amendment to the plaint was for seeking possession of the said property. Such application for amendment of the plaint could not have been made after conclusion of evidence and the suit having been placed for arguments. He submits that the petitioner has not pleaded any due diligence in not filing the application under Order VI Rule 17 of the said Code for around 6 years in the application filed by the petitioner. He submits that the learned trial Judge has rightly rejected the said application for amendment on the ground of delay and also on the ground

that if the amendment would be allowed, it would change the cause of action. He submits that in both the orders, various findings of facts were rendered by the learned trial Judge and those findings being not perverse, this Court cannot interfere with those findings under Article 227 of the Constitution of India.

REASONS AND CONCLUSIONS :-

12. In so far as the application for amendment under Order VI Rule 17 of the said Code filed by the petitioner is concerned, it is not in dispute that the original prayer is for mandatory injunction for removal of the suit structure. The respondents had filed a detailed written statement opposing the said relief. The learned trial Judge had accordingly framed the issues considering the pleadings filed by both the parties. The parties thereafter led oral evidence. The witness examined by both the parties were extensively cross-examined by the opponents. It is not in dispute that by the said application for seeking amendment under Order VI Rule 17 of the said Code, the petitioner had prayed for inclusion of prayer for possession of the said property.

13. A perusal of the order passed by the learned trial Judge clearly indicates that the learned trial Judge has after considering the

record and after considering several judgments relied upon by both the parties has rejected the said application for amendment on the ground that there was no due diligence either pleaded or proved by the petitioner in the application filed by the petitioner under Order VI Rule 17 of the said Code for seeking amendment to the plaint. The said application has been also rejected on the ground that there would be a change of cause of action. The matter has already been placed for final argument. In my view, the learned trial Judge has rightly rejected the application for seeking amendment at the stage of final argument and that also the amendment by which the original cause of action would be changed.

14. In so far as the judgment delivered by the Hon'ble Supreme Court in the case of ***Abdul Rehman & Anr.(supra)*** relied upon by the learned counsel for the petitioner is concerned, it is held by the Hon'ble Supreme Court that if the application for amendment was made after commencement of trial, the Court has to arrive at a conclusion that inspite of due diligence, the plaintiff could not have raised matter before commencement of trial. The Hon'ble Supreme Court held that it is not in dispute that the relief sought by way of an amendment could be claimed by way of a separate suit on the date of filing of the application.

15. A perusal of the application filed by the petitioner for seeking amendment under Order VI Rule 17 of the said Code clearly indicates that it is not the case of the petitioner that inspite of due diligence, the petitioner could not pray for possession of the suit property before commencement of trial. Admittedly the suit was filed on 10th January 2012. The issues were framed by the learned trial Judge on 15th September 2012. The written statement was already filed by the respondents in the year 2012 itself. Since 'due diligence' was neither pleaded nor proved before the learned trial Judge in the application for seeking amendment under Order VI Rule 17 of the said Code, though the petitioner could have filed a separate suit inter alia praying for possession of the suit property, in my view, the learned trial Judge has rightly rejected the said application in absense of any plea of due diligence or proof thereof. There is no dispute about the principles of law laid down by the Hon'ble Supreme Court in the said judgment in the case of ***Abdul Rehman & Anr.(supra)***. In my view the said judgment, however, is clearly distinguishable in the facts of this case. The said judgment would not assist the case of the petitioner but would assist the case of the respondents.

16. In so far as the judgment of Orissa High Court in the case of ***Kishorelal Gupta (supra)*** relied upon by the learned counsel for the petitioner is concerned, in my view, the facts before the Orissa High Court in the said judgment in the case ***Kishorelal Gupta (supra)*** were totally different and clearly distinguishable in the facts of this case. The said judgment would not assist the case of the petitioner even remotely.

17. In so far as the impugned order dated 10th July 2018 passed by the learned trial Judge rejecting the application for recast of the issue no.1 is concerned, it is not in dispute that the issues were already framed by the learned trial Judge on 15th September 2012. After framing of five issues including the said issue no.1 which was sought to be recast by the petitioner, the petitioner had already filed an affidavit of evidence as far back as on 2nd August 2012. The said application for recast of issue no.1 was filed after rejection of the application filed by the petitioner for seeking amendment of the plaint i.e. by an order dated 25th April 2018. Both the parties have already led evidence based on the issues framed by both the parties. The matter is now placed for final argument. Learned counsel for the respondent nos.1 to 5 submits that he has no objection if the issue no.1 is partly modified in so far as the issue of possession is

concerned. Statement made by the learned counsel for the respondent nos.1 to 5 is accepted.

18. A perusal of the order passed by the learned trial Judge clearly indicates that the said application below Exhibit-77 has been rejected by a reasoned order. The suit was already posted for final argument and has been adjourned from time to time on one or the other grounds. The learned trial Judge has also considered the pleadings filed by both the parties in this regard and has held that the said issue no.1 was framed after considering the pleadings. The petitioner never raised any objection when the said issue no.1 was framed by the trial Court as far back as on 15th September 2012 till filing of an application on 5th June 2018.

19. In so far as the submission of the learned counsel for the petitioner that the issue could be recast at any stage prior to the decree passed by the learned trial Judge under Order XIV Rule 5 is concerned, in my view, since the issue was framed properly after considering the pleadings filed by both the parties which was not challenged by the petitioner for last 6 years, the petitioner could not be allowed to file such application and after the order passed by the learned trial Judge placing

the matter on board for final argument. The entire evidence is already led by both the parties based on the original issue no.1. In these circumstances, no interference is warranted with the orders passed by the learned trial Judge in this petition under Article 227 of the Constitution of India.

20. I therefore pass the following order :-

- (i) Writ petition is devoid of merit and is accordingly dismissed except to the extent that the issue of possession mentioned in issue no.1 stands deleted. The learned trial Judge shall consider all the issues including the issue no.1 modified to this extent.
- (ii) There shall be no order as to costs.

R.D. DHANUKA, J.