

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 11509 OF 2018

Shankar Krishna Atole

..... Petitioner

VERSUS

Paruibai Shambhu Langute

..... Respondent

Mr.Drupad S. Patil for the Petitioner.

Mr.G.N.Salunkhe, i/b. Mr.Ranjit Shivaji Hatkar for the Respondent no.1.

CORAM : R.D. DHANUKA, J.

DATE : 11th OCTOBER, 2018

P.C.

By this petition filed under Article 227 of the Constitution of India, the petitioner (original plaintiff) has impugned the order dated 31st August,2018 passed by the learned District Judge, Satara below Ex.36 in an application in Regular Civil Appeal No. 80 of 2008 and also below Ex.33 seeking permission to rely upon additional documents.

2. The petitioner has filed a suit for declaration of ownership and injunction. There was an averment in the plaint that the petitioner was in possession of the suit property. In the written statement the respondent (original defendant) has disputed the possession of the petitioner and asserted their possession. The learned trial judge has rendered a finding in favour of the petitioner insofar as the declaration in respect of the ownership is concerned, however rendered a finding

that the petitioner was not in possession of the suit property. Both the parties filed appeals against the said judgment and decree. The appeal filed by the defendants came to be allowed whereas the appeal filed by the petitioner came to be rejected. Even in the said order passed by the first appellate court, the finding of the possession was rendered against the petitioner. The petitioner preferred second appeal before this court.

3. By an order dated 20th February, 2018, this court disposed of the said second appeal and was pleased to set aside the order dated 25th February, 2016 passed by the first appellate court and remanded the matter back before the first appellate court to decide the matter afresh in accordance with law and on its own merit. This court directed that the appeal court to take into consideration the effect of the order dated 3rd December, 2015 by which the first appellate court had permitted the petitioner to produce on record the additional evidence by resorting the provisions of Order XLI Rule 27 of the Code of Civil Procedure. This court clarified that all contentions of all parties were left expressly open.

4. Pursuant to the said order passed by this court, the petitioner herein filed two separate applications i.e. one for seeking amendment to the plaint and to add the prayer for possession in respect of the suit property and another application under Order 41 Rule 27 of the Code of Civil Procedure, 1908 *inter alia* praying for relying upon additional documents for the period subsequent to the decree passed by the learned trial court.

5. Both the applications filed by the petitioner came to be rejected by the learned first appellate court by passing an order on 31st August, 2018. The appeals filed by both the parties are still pending.

6. Insofar as the application for amendment to add the prayer for possession is concerned, Mr. Patil, learned counsel for the petitioner would submit that his client was all throughout in possession of the suit property. The findings rendered in favour of the defendant was only on the basis of the mutation entry. He submits that the first appellate court while rejecting the appeal filed by the petitioner and allowing the appeal filed by the defendant came to the conclusion that though the petitioner had proved the relief of ownership, the said relief could not be granted by the appeal court on the ground that there was no consequential prayer for possession sought in the plaint by the petitioner.

7. It is submitted that in view of such finding rendered by the first appellate court, the petitioner had filed an application for seeking amendment of the plaint and to add the prayer for possession in the event of the appellate court coming to the conclusion that the defendants were in possession.

8. Insofar as the application under Order 41 Rule 27 of the Code of Civil Procedure is concerned, it is submitted that some of the documents are already allowed to be produced by the appellate court however the petitioner had sought to rely upon subsequent documents after passing of the decree by the trial court and thus those documents

would be relevant. He submits that the said part of the appeal order shall also be set aside and an opportunity to be rendered to the petitioner to rely upon the additional documents in view of the fact that both the appeals filed by the respective parties are still pending before the first appellate court. He submits that no prejudice would be caused to the defendant.

9. It is lastly submitted that since the petitioner can file a separate suit for recovery of the possession, on this ground itself the first appellate court ought to have allowed the application of the amendment in the plaint and to insert prayer for possession.

10. Mr. Salunkhe, learned counsel appearing for the respondent on the other hand submits that the respondent had already asserted their possession in respect of the suit property in the written statement itself which was filed in the year 2004. The petitioner did not file any application for the amendment of the plaint at that stage. He submits that the trial court had rendered a finding of possession in favour of the defendants. The petitioner had filed an appeal against the said order under section 96 of the Code of Civil Procedure, 1908. Even at that stage the petitioner did not seek any amendment to the plaint. The first appellate court has dismissed the appeal filed by the petitioner. Even at the stage of the second appeal, he did not apply for amendment. He submits that only after the remand of the appeal filed by both the parties by this court, the petitioner belatedly filed an application for amendment.

11. Insofar as the application under Order 41 Rule 27 of the Code of Civil Procedure, 1908 is concerned, learned counsel submits that the petitioner cannot rely upon the additional documents relating to the prayer for possession for the subsequent period after passing of the decree by the trial court. He submits that since the petitioner has not acted with due diligence in making an application for amendment of the plaint at the earliest point of time, the first appellate court had rightly rejected the said application for amendment. He submits that both the courts below have rendered finding of possession in favour of the respondent and thus rights accrued in favour of the respondent even otherwise could not have taken away by allowing such application for amendment. In support of this submission, learned counsel placed reliance on the judgment of Supreme Court in case of ***Abdul Rehman and another vs. Mohd. Ruldu and others*, (2012) 11 SCC 341.**

12. It is an undisputed position that there was no prayer for possession though the plaintiff had asserted possession in respect of the suit property. The two courts below have already rendered *prima facie* finding in favour of the defendant and against the petitioner insofar as possession is concerned. In view of the remand of those two appeals by this court, the correctness of the order passed by the trial court is yet to be decided by the first appellate court. The view taken by the first appellate court that though the petitioner had proved the case insofar as the possession for declaration is concerned, in view of the said order having been set aside by this court, the first appellate court will have to independently consider the rival contentions of both the parties on the issue of declaration, ownership as well as possession. In my view, the

first appellate court even otherwise thus could not have considered the prayer for amendment seeking possession of the property.

13. I do not propose to go into the issue whether the petitioner could have pressed for possession at this stage during the pendency of both the appeals preferred by both the parties before the first appellate court. Till the disposal of the appeal on the issue of ownership as well as possession is decided by the first appellate court, in my view the application for amendment of the plaint is premature.

14. It is made clear that if the petitioner succeeds in the appeal filed before the first appellate court and the respondent fail in that appeal and if the matter is remanded back to the learned trial judge for considering the matter afresh, at that stage it is for the plaintiff to decide whether to make an application for amendment and to seek prayer for possession or not or to file a separate suit for possession. I am thus not inclined to interfere with the impugned order passed by the first appellate court insofar as application for amendment is concerned.

15. Insofar as prayer for for seeking reliance on the additional documents by invoking the Order 41 Rule 27 of the Code of Civil Procedure, 1908 is concerned, in my view since those additional documents were sought to be relied upon in support of the prayer for possession, since the said prayer is deferred depending upon the outcome of the appeal filed by the respective parties before the first appellate court, in my view no interference is warranted in the said order also at this stage.

16. If the petitioner succeeds in the appeal preferred before the first appellate court and if the matter is remanded back, the petitioner would be at liberty to seek amendment in the plaint and to seek liberty to rely upon the additional documents.

17. It is made clear that this court has not expressed any views on the merits as to which party is in possession of the suit property. All these issues can be considered by the first appellate court on its own merits.

18. Writ petition is disposed of in the aforesaid directions. There shall be no order as to costs.

[R.D. DHANUKA, J.]