

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

WRIT PETITION NO. 13967 OF 2017

Shri Ramdas Pandurang Dhage & Ors.

.... Petitioners

Versus

Shri Kashinath Eknath Khirkade
(since deceased through L.Rs) & Ors.

.... Respondents

Mr. Girish R. Agrawal a/w Ms. Chitra S. Kane for Petitioners.
Mr. Dilip Bodake for Respondent No.3.

**CORAM : DR.SHALINI PHANSALKAR-JOSHI, J.
DATE : 20TH MARCH 2018**

P.C.

. Heard learned Counsel for the Petitioners and Respondent No.3.

2. By this Petition filed under Article 227 of the Constitution of India, the Petitioners are challenging the order dated 11th October 2017 passed by Civil Judge Junior Division, Dindori below Exh.127 in Regular Civil Suit No. 67 of 2007.

3. The application at Exh. 127 was filed by the present Respondents/Plaintiffs for amendment of the plaint under Order 6 Rule 17 of the Code of Civil Procedure. By the said amendment, Respondents

wanted to seek the possession of the encroached portion and the cause of action for the same was given that in the measurement carried out by the T.I.L.R. Dindori in the year 2009 it was noticed that Petitioners have made encroachment on the land in their possession. The trial court has allowed the said application for amendment and hence, the instant Writ Petition.

4. The facts of the case reveal that Respondents herein have filed the suit simplicitor for injunction way back in the year 2007. During the pendency of the suit, the suit property was measured by T.I.L.R. and he has submitted the map along with his report on 7/9/2009. Thereafter the Respondents have filed application for amendment of the plaint twice, first in the year 2013 and again in the year 2015. Both these applications for amendment were allowed.

5. The issues were framed on 12/6/2013 and now after the evidence of Respondent/Plaintiff is over and the evidence of his witness is in progress, this third application for amendment is filed, and that too, in respect of the cause of action which has arisen in the year 2009 itself when the land was measured by the T.I.L.R. The application for amendment is however conspicuously silent as to the explanation for seeking this amendment at such a belated stage when the suit is part-heard and when the cause of action for filing such application for amendment is that of the encroachment being noticed when the T.I.L.R. measured the land in the year 2009, and therefore, the possession of the encroached portion as shown in the map drawn by the T.I.L.R. is sought.

6. Thus, when the amendment in the plaint is sought after the trial has commenced and in the present case even the evidence of Respondent/Plaintiff and his witness is also over, then it is required that the application for amendment should contain atleast some explanation, because in such situation once the trial commences, proviso to the Order 6 Rule 17 of the Code of Civil Procedure comes into play. As per the said proviso, unless the Court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial, such amendment application cannot be allowed.

7. The Supreme Court in the case of ***Vidyabai & Ors. Vs. Padmalatha & Anr., reported in (2009) 2 SCC 409*** held that this proviso is a jurisdictional fact and unless this jurisdictional embargo is crossed by the party seeking the amendment, the court cannot allow such amendment application. Hence, in the present case, in the absence of due diligence shown by the Respondent/plaintiff for not seeking amendment earlier when his two previous applications for amendment were allowed with the gap of two years in between, such application for amendment should not have been allowed by the trial court as it is causing grave prejudice to the Petitioners in their defence.

8. It is true that normally the approach of the court is liberal in allowing the amendment in order to avoid multiplicity of proceedings, but then the liberal approach or the indulgence shown by the court should not be stretched to such an extent which may result in abuse of the process of law. The original suit for injunction is now being

converted into the suit for recovery of the possession. It is, therefore, not only changing the nature of the suit, but also it is being sought at a very belated stage, when the trial is almost at the stage of completion, because evidence of Respondent/Plaintiff and his witness is over.

9. In this respect, learned Counsel for the Petitioner has rightly relied upon the Judgment of Punjab & Haryana High Court in the case of *Lakmi & Ors. V/s Karam Singh, reported in 2009(4) CIVIL COURT CASES 768 (P&H)* and in the case of *Prem Chand V/s Chetan Dass, reported in 2006(2) CIVIL COURT CASES 41 (P&H)*, wherein the application for amendment seeking to convert the suit for injunction into a suit for possession came to be rejected on the ground that amendment will completely change the nature of the suit from mandatory injunction to that of the possession and amendment will cause great prejudice to the rights of the defendants.

10. Here in the present case also the trial is almost at the stage of completion and despite having earlier opportunities to amend the plaint and exhausting those opportunities by filing two applications, after the lapse of 11 years from the date of filing of the suit and 9 years from the measurement of the land, the Respondents are seeking amendment in the plaint which is changing the nature of the suit, such application for amendment cannot be allowed. It is as good as frustrating the very object of the proviso to Order 6 Rule 17 of the Code of Civil Procedure, and therefore, the order passed by the trial court needs to be quashed and set aside.

11. The Writ Petition is accordingly allowed.

12. The impugned order passed by the trial court is quashed and set aside. As a result, the application for amendment filed by the Respondents/Plaintiffs at Exh.127 stands dismissed.

[DR.SHALINI PHANSALKAR-JOSHI, J.]