

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.3362 OF 2019

MOHAN VITTHAL KADAM
VERSUS
DNYANOBA SOPANRAO KADAM AND OTHERS

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Advocate for Petitioner : Shri Chaudhari Nitin K.
Advocate for Respondents 1 & 2 : Shri Kuptekar Sachin V.
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CORAM : RAVINDRA V. GHUGE, J.
Dated: July 01, 2019
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PER COURT :-

1. The petitioner / plaintiff in RCS No.2 of 2014 is aggrieved by the impugned order dated 4.9.2018 passed by the trial Court, vide which, application Exhibit 45, seeking amendment to the plaint has been rejected on the ground that the trial has commenced and no multiplicity of litigation would be created if Exhibit 45 is rejected.

2. The learned Advocate for the respondents / defendants 1 and 2 has strenuously opposed this petition. Contention is that the nature of the suit would change as the suit has been filed for declaration of ownership and perpetual injunction. Now that the plaintiff has developed an apprehension that there is an encroachment at the hands of defendants 1 and 2, a prayer for recovery of possession has been made. There is no encroachment at the hands of the said

defendants. They are in possession of their respective shares of land on the basis of an oral partition.

3. I find from the pleadings in the plaint at paragraph No.4 that the plaintiff has averred that he has a doubt that after the partition, these defendants have encroached upon some of the lands of the plaintiff's share. After measurement of the suit land, it would be clear whether these defendants have encroached on his share.

4. In paragraph No.5, it is stated that the measurement sought by the plaintiff could not fructify as the Tahsildar, Manwat advised the plaintiff to approach the Civil Court and he cannot direct the measurement since the parties are at dispute.

5. In the written statement filed by these defendants, they have stated that they possessed land admeasuring 2 Hectares and 60 Ares in Gut No.177 and the plaintiff has 2 Hectares and 40 Ares in his possession. The plaintiff realized on the basis of such averment that there is an encroachment to the extent of 20 Ares land, since his share is admeasuring 2 Hectares 60 Ares.

6. It is in the above backdrop that application Exhibit 45 has been filed for seeking addition of pleadings and the relief of removal

of encroachment and recovery of possession.

7. The Honourable Apex Court has consistently held that if a completely new cause of action is proposed by an amendment and if such a cause is barred by the law of limitation, an amendment cannot be allowed since a separate suit would be barred. However, if the amendment is in addition and continuation of the cause of action and which is not otherwise barred by the law of limitation, such an amendment can be permitted.

8. I find that the plaintiff has averred in the plaint that he seriously suspects encroachment at the hands of the defendants. He has, therefore, prayed for perpetual injunction in order to restrict these defendants from encroaching upon his share. Having noticed such encroachment in the light of the pleadings in the written statement, he moved the Court for seeking leave to amend and add a prayer for removal of encroachment and recovery of possession. I do not find that this request would change the nature of the cause of action or is a completely distinct and different cause of action. The trial Court has rejected Exhibit 45, purely on the ground that the trial has commenced since issues have been cast.

9. In view of the above, this petition is allowed. The impugned

order dated 4.9.2018 is quashed and set aside and application Exhibit 45 is allowed, subject to the following directions.

(A) The plaintiff shall deposit an amount of Rs.3,000/- before the trial Court, in RCS No.2 of 2014 on/or before 20.7.2019.

(B) Defendants 1 and 2, who have appeared in this matter, shall withdraw the said amount without conditions in equal proportion. Defendant No.3 shall not receive any costs as he has not appeared in this matter despite service of Court notice.

(C) The plaintiff shall carry out the amendment in the plaint and shall tender such amendment along with a freshly typed amended plaint before the trial Court on/or before 20.7.2019.

(D) Non-compliance of any of the above conditions would result in recalling of this order and the impugned order passed by the trial Court, would then stand restored.

(RAVINDRA V. GHUGE, J.)

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