

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

WRIT PETITION NO.4168 OF 2019

Pravin Nanalal Shah ... Petitioner
Vs.
Mukesh Tokarsi Dand & Anr. ... Respondents

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Mr. Rohit D. Joshi for the Petitioner.

Ms. Aruna G. Koli for the Respondent Nos.1 & 2.

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CORAM : M. S. KARNIK, J.

DATE : 26th AUGUST, 2019.

P. C.:

1. Heard learned counsel for the petitioner and learned counsel for the respondents.

2. The petitioner is the original plaintiff has filed a suit in the year 2005 against the respondents for seeking declaration of his ownership, for injunction, possession and for other reliefs in respect of the suit properties. In the suit it is the contention of the petitioner that by encroaching upon the suit property on the western side the respondents have constructed a house in the suit property belonging to the plaintiff.

3. The written statement was filed by the respondents denying the claim of the petitioner that the suit house is situated on the western side of the suit property.

4. During the pendency of the suit and after issues are framed the plaintiff filed an application under Order VI Rule 17 of the Code of Civil Procedure seeking amendment to the plaint. After the Court Commissioner filed the report and even after the land was measured by the private surveyor it was found that the encroachment is on southern side of the suit property. The plaintiff therefore filed an application Exhibit 42 for amending the plaint. The plaintiff wanted to amend the plaint contending that the encroachment is on southern side instead of western side. The Trial Court rejected the said application. The Trial Court was of the opinion that it can not be said that the plaintiff was unaware about this fact at the time of filing of the present suit. The Trial Court further observed that the suit is more than 12 years old and is unnecessarily prolonged. For all these reasons the application is rejected.

5. Learned counsel for the petitioner submitted that the only amendment sought in the plaint was that instead of stating that the encroachment is on western side, necessary amendments are sought that the encroachment is on the southern side.

The amendment is only to this extent. In submission of the learned counsel for the petitioner the amendment will not change the nature of the suit as the suit is still for removal of encroachment and recovery of possession.

6. Learned counsel for the respondents opposed the application. She would submit that the petitioner is a literate person and even at the time of filing of the suit was aware about this fact. She would submit that the petitioner awaited the report of the Court Commissioner and also the measurement made by the private surveyor which found the encroachment is on the southern side of the suit property. She would further submit that the application is made almost after 12 years which can not be permitted. She would further submit that the petitioner wants to amend the plaint by contending that the encroachment is on southern side instead of western side. She would further submit that in view of the law laid down by the Apex Court and since the issues are framed, the application filed by the plaintiff for amendment after framing of the issues should not be entertained.

7. Heard learned counsel for the petitioner. No doubt the issues have been framed. The suit is filed by the plaintiff for

removal of encroachment and recovery of possession. In the plaint it is averred by the plaintiff that the encroachment is on western side. Further by the amendment the plaintiff only sought to amend the plaint by contending the encroachment is on southern side. The evidence is yet to be recorded. In my opinion, for the delay in filing the application the respondents can be compensated with cost. In any case no prejudice would be caused to the defendant as the nature of the suit will not change as the suit is still for removal of encroachment and recovery of possession.

8. In this view of the matter, the present petition deserves to be allowed. The impugned order passed by the Trial Court is set aside. The application Exhibit 42 is allowed. Necessary amendments to be carried out within four weeks from today subject to payment of cost of Rs.10,000/- to the respondents within a period of two weeks from today.

9. Considering the suit is of the year 2005, the Trial Court is requested to expedite the suit and decide the same as expeditiously as possible and preferably within a period of one year from today.

10. It is made clear and even the petitioner on instructions undertakes that the plaintiff would not seek any unnecessary adjournments and will co-operate with the Trial Court in expeditious disposal of the suit.

(M. S. KARNIK, J.)