

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

WRIT PETITION NO.1511 OF 2012

Tukaram Mahadeo Rampure and Ors. ... Petitioners

V/s.

Vijay Vasudeo Salgar and Ors. ... Respondents

Mr.Ajay A. Joshi for the petitioners

Mr.Vishwanath Talkute for the respondent nos.1, 3 and 4

CORAM: K.K. TATED, J.

DATED : FEBRUARY 6, 2019

P.C. :

1 Heard.

2 This court by order dated 12.06.2012 issued notice to the Respondent stating that if time permits matter may be heard and disposed of finally at the stage of admission. In spite of service, some of the respondents remained absent when the matter was called out.

3 Considering the earlier order dated 12.06.2012 passed by this court, matter is taken for final hearing at the stage of admission itself.

4 By this petition under Article 227 of the Constitution of India, the Petitioner original plaintiff is challenging the order dated 06.08.2011 passed by II, Joint Civil Judge, Senior Division, Sangola, Solapur below Exhibit-44 rejecting their application for carrying out amendment in the plaint.

5 The learned counsel for the Petitioner submits that plaintiff filed Regular Civil Suit No. 110 of 2008 in the court of Civil Judge, Junior Division, Sangola for an order of injunction restraining the Respondents from disturbing his right of way. He submits that petitioner original plaintiff preferred Application below Exhibit-5 for an order of injunction restraining the Respondents original defendants from obstructing their right of way. He submits that the said Application below Exhibit-5 was decided by Trial Court by order dated 24.07.2008 and rejected the same.

6 The learned counsel for the Petitioner submits that the Trial Court rejected their Application below Exhibit-5 observing that there is no prayer in the Suit for mandatory injunction directing Respondent original defendant to remove the obstruction committed by him in his right of way. Therefore, Petitioner original plaintiff decided to make appropriate Application for amendment in the plaint. Hence, after taking advise from the Advocate, Petitioner filed Application below Exhibit-44 for carrying out amendment in the plaint by adding prayer for mandatory injunction. He submits that Petitioner filed the said Application on 18.06.2011. He submits that court below rejected their Application under Order VI Rule 17 of the Code of

Civil Procedure, 1908 for carrying out amendment in the plaint on the ground that the order was passed on Exhibit-5 on 24.07.2008 and plaintiff filed Application for amendment on 18.06.2011 i.e. nearly three years later. Trial Court also recorded that it is impossible to believe that inspite of due diligence, plaintiff could not have raised the issue about the mandatory injunction before commencement of trial. Hence, the present Writ Petition.

7 The learned counsel for the Petitioner submits that the court below erred in coming to the conclusion that the Petitioner failed to make out a case for carrying out amendment in the plaint. He further submits that the Trial Court erred in coming to the conclusion that after commencement of the trial, there is no question of allowing application under Order VI Rule 17 of the Code of Civil Procedure for carrying out amendment. He submits that admittedly, the trial is not started in the present proceeding. He submits that on the basis of the order passed by the court below Exhibit-5, court came to the conclusion that trial began. Therefore, on this ground the order passed by the Trial Court rejecting their application under Order VI Rule 17 of the Code of Civil Procedure, 1908 is required to be set aside.

8 The learned counsel for the petitioner submits that the trial court ought to have held that because of amendment there is no question of any change in the nature of the Suit. He submits that by way of amendment, petitioner wants to carry out amendment as per the observation made by the court in its order dated 24.07.2008 at the time of deciding Exhibit-5 Application.

9 The learned counsel for the petitioner submits that Trial Court erred in coming to the conclusion that amendment cannot be permitted after the commencement of the trial. He submits that Apex Court in the matter of ***Abdul Rehman and Another vs. Mohd. Ruldu and others***¹ held that even if the trial commences, if matter is required to be decided on its own merits, amendment can be allowed. Paragraph 13 of the said Authority reads thus:

“13. Next, we have to see whether the proposed amendments would alter the claim/cause of action of the Plaintiffs. In view of the same, we verified the averments in the un-amended plaint. As rightly pointed out by Ms. Manmeet Arora, Learned Counsel for the Appellants that the entire factual matrix for the relief sought for under the proposed amendment had already been set out in the un-amended plaint. We are satisfied that the challenge to the voidness of those sale deeds was implicit in the factual matrix set out in the un-amended plaint and, therefore, the relief of cancellation of sale deeds as sought by amendment does not change the nature of the suit as alleged. It is settled law that if necessary factual basis for amendment is already contained in the plaint, the relief sought on the said basis would not change the nature of the suit. In view of the same, the contrary view expressed by the trial Court and High Court cannot be sustained. It is not in dispute that the relief sought by way of amendment by the Appellants could also be claimed by them by way of a separate suit on the date of filing of the application. Considering the date of the sale deeds and the date on which the application was filed for amendment of the plaint, we are satisfied that the reliefs claimed are not barred in law and no prejudice should have been caused to

1 (2012) 11 SCC 341

Respondent Nos. 1-3 (Defendant Nos. 1-3 therein) if the amendments were allowed and would in fact avoid multiplicity of litigation.”

10 The learned counsel for the petitioner submits that Trial Court rejected their Application also on the ground of delay. He submits that the Apex Court in the matter of ***Sampath Kumar vs. Ayyakannu and another***² held that even after amendment, if claim comes within limitation then there is no question of rejection of the same on the ground of limitation. Paragraph 5 and 11 reads thus:

“5. The short question arising for decision is whether it is permissible to convert through amendment a suit merely for permanent prohibitory injunction into a suit for declaration of title and recovery of possession.”

“11. In the present case the amendment is being sought for almost 11 years after the date of the institution of the suit. The plaintiff is not debarred from instituting a new suit seeking relief of declaration of title and recovery of possession on the same basic facts as are pleaded in the plaint seeking relief of issuance of permanent prohibitory injunction and which is pending. In order to avoid multiplicity of suits it would be a sound exercise of discretion to permit the relief of declaration of title and recovery of possession being sought for in the pending suit. The plaintiff has alleged the cause of action for the reliefs now sought to be added as having arisen to him during the pendency of the suit. The merits of the averments sought to be incorporated by way of amendment are not to be judged at the stage of allowing prayer for amendment. However, the

2 (2002) 1 SCC 559

defendant is right in submitting that if he has already perfected his title by way of adverse possession then the right so accrued should not be allowed to be defeated by permitting an amendment and seeking a new relief which would relate back to the date of the suit and thereby depriving the defendant of the advantage accrued to him by lapse of time, by excluding a period of about 11 years in calculating the period of prescriptive title claimed to have been earned by the defendant. The interest of the defendant can be protected by directing that so far as the reliefs of declaration of title and recovery of possession, now sought for, are concerned the prayer in that regard shall be deemed to have been made on the date on which the application for amendment has been filed."

11 On the basis of these submissions and the authorities of the Apex Court, the learned counsel for the Petitioner submits that impugned order is required to be set aside allowing the Petitioner's Application below Exhibit-44 for carrying out amendment in the plaint. He submits that if Writ Petition is not allowed, irreparable loss will be caused to the Petitioner.

12 On the other hand, the learned counsel for the Respondent original defendant vehemently opposed the present Writ Petition. He submits that after considering the facts of the present matter, Trial Court rightly held that the Petitioner failed to make out any case for carrying out amendment, that also after the trial commences. He submits that there was delay on the part of Petitioner to make appropriate Application for carrying out amendment in the plaint. He submits that Trial Court rejected the Petitioner's Application below Exhibit-5 on 24.07.2008 and

thereafter, near about after 3 years Petitioner filed Application for amendment on 24.07.2008. There was no explanation in their Application about the delay. Hence, the Trial Court rightly rejected their Application on the ground of delay. Hence, there is no substance in the present Writ Petition and same is required to be dismissed with costs.

13 Heard.

14 Admittedly, in the present Writ Petition, Petitioner original plaintiff filed Suit for simplicitor injunction restraining Respondents defendants from obstructing their right of way. After dismissal of their Application below Exhibit-5 for injunction, Petitioner filed Application for carrying out amendment for adding prayer for mandatory injunction.

15 It is to be noted that on the basis of observation made by the Trial Court in its order dated 24.07.2008 below Exhibit-5, Petitioner filed Application for amendment. There is no question of delay because trial was not begun. Neither plaintiff nor defendant filed any affidavit of evidence. In any case, bare reading of the proposed amendment shows that same is not going to change the entire nature of the Suit.

16 Considering these facts and the law declared by the Apex Court, I am of the opinion that Petitioner has made out a case for allowing this Writ Petition. Hence, the following order is passed:

- a. Order dated 06.08.2011 passed by II, Joint Civil Judge, Senior Division, Sangola, Solapur below Exhibit-44 is set aside.
- b. Application filed by the Petitioner below Exhibit-44 dated 18.06.2011 for carrying out amendment in the plaint is allowed.
- c. Petitioner is directed to carry out amendment on or before 30.03.2019 and serve amended copy of plaint on the other side.
- d. Liberty granted to the Respondents original defendants, if they so desire, to file their additional written statement on or before 30.04.2019 with copy to other side.
- e. Hearing of Regular Civil Suit No. 110 of 2008 is expedited.
- f. This court expects Trial Court to decide Regular Civil Suit No. 110 of 2008 as early as possible, but in any case on or before 31.08.2019.
- g. No order as to costs.

(K. K. TATED, J.)