

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

APPEAL FROM ORDER NO.266 OF 2019

Muktai Sheshrao Munde

And Others

... Appellants

Versus

Nagrabai Shivaji Musle

... Respondent

.....

Mr. K.H. Holambe Patil i/b Mr. Krishna K. Holambe Patil for the Appellants.

Mr. Vinayak V. Katti for the Respondent.

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COR0AM : S.C. GUPTE, J.

DATE : 30 SEPTEMBER 2019

P. C. :

. Heard learned Counsel for the parties.

2 Rule.

3 Rule taken up for hearing forthwith by consent of the parties.

4 This Appeal from Order challenges an order passed by the City Civil Court at Dindoshi, Mumbai on a Chamber Summons taken out by the Appellants (original plaintiffs) seeking amendment of the plaint. The chamber summons was originally allowed. Subsequently, on a review application by the Respondent herein (original defendant), the court reversed its earlier order and rejected the chamber summons.

5 The plaintiffs' suit is based on their settled possession; it seeks perpetual injunction restraining the defendant from interfering with or disturbing their possession. A notice of motion taken out in the suit was rejected by the trial court on 22 June 2015. This order was challenged by the plaintiffs before this court in an Appeal from Order. In the meantime, however, it appears that before this court could consider grant of any interim relief to the plaintiffs, the defendant took over forcible possession of the suit premises. This fact, though, has been disputed by the defendant. It is the defendant's case that the plaintiffs were never in possession of the suit premises. Be that as it may, on the basis of their case that they have lost their possession during the pendency of the suit and after rejection of their interim injunction, the plaintiffs applied for an amendment of their suit by seeking to add a prayer for recovery of possession on the basis that the possession was lost during the pendency of the suit by a forcible act on the part of the defendant. The chamber summons was allowed. However, before the amendment could be carried out, the defendant applied for review of this order. The defendant prayed for setting aside the order allowing the amendment. The trial court, by its impugned order, reviewed its original order and dismissed the chamber summons. That order, as noted above, has been challenged in the present Appeal from Order.

6 The chamber summons was rejected by the trial court

purportedly on the footing that the plaintiffs had contended that they were in possession of the suit premises and that this contention was negatived by the predecessor of the trial court by rejecting their notice of motion. The court was of the view that in these facts and considering that the matter thereafter had already proceeded for evidence, amendment could not be permitted as it would change the nature of the suit.

7 It is difficult to see how in a suit for protection of the plaintiff's possession, the plaintiff's case being that during the pendency of his suit, he had lost possession due to a unilateral act on the part of the defendant, incorporating a prayer for recovery of possession should change the nature of the suit. A suit seeking to protect possession on the basis of settled possession is no different from a suit seeking to recover possession on the basis of settled possession. It is the plaintiffs' case here that their settled possession was lost during the pendency of the suit, as a result of their interim application being rejected. That was so before their challenge to the rejection of their interim application could be considered by the appeal court. This case is yet to be tested. In these facts, it was imperative for the trial court to have permitted the plaintiffs to amend their suit by incorporating an appropriate prayer for recovery of possession. Such amendment was absolutely necessary to determine real controversy between the parties and to grant effective reliefs in the facts of the case to the plaintiffs.

8 The impugned order of the trial court, accordingly, cannot be

sustained. Rule is, accordingly, made absolute and the Appeal from Order is allowed by quashing and setting aside the impugned order dated 23 March 2018 and allowing Chamber Summons No.781 of 2017. It is made clear that all rights and contentions of the parties on merits of the amendment are kept open, to be agitated before the trial court. The plaintiffs shall carry out the amendment within a period of three weeks from today. Amended copy of the plaint be served on the defendant. Defendant may file her additional written statement within a period of three weeks of service of the amended plaint.

9 The Appeal from Order is disposed of accordingly.

(S.C. GUPTE, J.)