

Urmila Ingale

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 6769 OF 2017

Power Arm India	.. Petitioner
Vs.	
Mangesh Ganpat Kamthe	.. Respondent

Mr.Pradeep J. Thorat, for the Petitioner.
Mr.S.K.Deshmukh i/b Mr.Pravin Desai, for the Respondent.

CORAM : M.S.KARNIK, J.

DATE : 26th SEPTEMBER 2019

P.C. :

. Heard learned Counsel for the petitioner.

2. The petitioner is the original plaintiff. By this Petition, the plaintiff is challenging the order passed below Exhibit 46 rejecting the application for amendment of plaint under Order VI Rule 17 of Code of Civil Procedure Code, 1908.

3. The plaintiff had filed the Suit for removal of

encroachment. The plaintiff claims to be the owner of land Gat No. 4B admeasuring 0-52-6 Hactares. On the basis of a map prepared by D.I.L.R., the plaintiff filed the Suit contending that defendant has encroached on his suit property and constructed a cattle shed admeasuring 20x20 ft. i.e. 400 sq.ft. The Suit is for removal of this encroachment of 400 sq.ft.

4. The plaintiff thereafter filed an application for appointment of Court Commissioner which was allowed. On 03/06/2016, Deputy Superintendent of Land Records submitted a report. In the said report, according to the plaintiff, it is revealed that there are some additional encroachments within the suit property owned by the plaintiff. The plaintiff therefore filed application below Exhibit 46 for amendment of the plaint for seeking removal of these encroachments which were noticed by plaintiff when the Court Commissioner submitted his report in the year 2016. Some of the encroachments which the plaintiff alleges are construction of toilet block, car shed and extension of defendant's house. The trial Court rejected the

application on the ground that the Suit as filed by the plaintiff was alleging encroachment which was in the nature of cattle shed admeasuring 400 sq.ft and scope of the Suit cannot be enlarged now on the basis of the report submitted by the Court Commissioner.

5. Learned Counsel for the petitioner would submit that these encroachments which are reflected in the Court Commissioner's report submitted in 2016 are very much part and parcel of the suit property owned by the plaintiff. He would submit that this being a pretrial amendment, the plaintiff is seeking removal of these encroachments also. He would submit that by amendment nature of the Suit will not change.

6. Learned Counsel for the respondent supported the impugned order. According to him, the encroachments now sought to be alleged after the Court Commissioner submitted the report are not at all within the plaintiffs property. He would moreover submit that the application is ex-facie barred by Law

of Limitation in as much as it is only on the basis of the Court Commissioner's report in the year 2016, that an application is made for the first time in 2016 for the removal of these encroachments. Learned Counsel for the respondent would further submit that the scope of the Suit initially filed in the year 2012 for removal of the cattle shed admeasuring 400 sq. ft cannot be enlarged by permitting the plaintiff to amend the plaint bringing on record the encroachments which the plaintiff claims to have noticed after the Court Commissioner's report filed in the year 2016.

7. It is further the case of the respondent that an altogether new case is made out. It is the submission of the learned Counsel for respondent that it is the plaintiff's own case that fencing has been put around the plaintiffs property and therefore the case of additional encroachments deserves an outright rejection.

8. Heard learned Counsel. In my opinion, this would

not be a new case as the Suit is for removal of encroachment as even by proposed amendment, the plaintiff is still seeking the removal of additional encroachments.

9. The Suit is filed in the year 2012 for removal of the encroachment. The Suit is filed for removing the encroachment which is in the nature of cattle shed admeasuring 400 sq.ft. When the Court Commissioner filed his report in 2016, the plaintiff realised that there are further additional encroachments in the form of extension of house, toilet block and car shed which form part and parcel of his property. This is vehemently denied by learned Counsel for the respondent. Learned Counsel for the respondent also invited my attention to the map submitted in 2016 to show that the said encroachments do not form the part and parcel of the suit property admeasuring gat No. 4B.

10. Be that as it may, whether the encroachment alleged is part of the plaintiff's property or not is something that can be

decided on the basis of the evidence and it is not possible to decide the same on the basis of the map produced by Deputy Superintendent of Land Records. Further whether the amendment is time barred or not is an issue which will have to be decided by the trial Court. However, as the Suit is initially filed for removal of encroachment which was in the nature of the cattle shed and later on, on the basis of the Court Commissioner's report, the petitioner also seeks to remove some of the additional encroachments which he noticed, there is no difficulty in permitting the plaintiff to amend the Suit as the application for amendment is made before the trial has commenced. This would avoid multiplicity of proceedings. Whether the encroachments form part and parcel of the suit property owned by the plaintiff is an aspect which will have to be decided by the trial Court on evidence. In the present facts, issue of limitation is kept open. According to learned Counsel for respondent the plaintiff is now trying to make out a case of obstruction. It is made clear that as the Suit is for removal of encroachment, obviously, the plea of the plaintiff only as regards

the removal of encroachment shall be considered by the trial Court.

11. In this view of the matter, the impugned order is set aside. The Petition is allowed. Application Exhibit 46 is allowed. Amendment to be carried out within 14 days from the date when the order is uploaded. Needless to mention that the defendant is at liberty to file written statement to the plaint as well as amended plaint.

(M.S.KARNIK, J.)

Urmila P. Ingle

Digitally signed
by Urmila P.
Ingle
Date:
2019.10.04
12:21:04 +0530