

Shailaja

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE SIDE JURISDICTION

WRIT PETITION NO.8194 OF 2019

Bhaskar Kamlaji Patil	]	Petitioner
Vs.		
Surekha Santosh Gaavand	]	
and another.	]	Respondents

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Mr. Kedar J. Patil, Advocate for the Petitioner.

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CORAM : R.G. KETKAR, J.

DATE : 31st JULY, 2019.

P.C:

Heard Mr. Patil, leaned Counsel for the petitioner, at length.

2. This Petition takes exception to the order dated 8th April, 2019 passed by the learned trial Judge below Exhibit 65 in R.C.S No.117 of 2016. By that order, the learned trial Judge rejected the application made by the petitioner, hereinafter referred to as 'plaintiff' under Order-VI, Rule-17 of the Code of Civil Procedure, 1908 (for short 'C.P.C') for amending the plaint.

3. The plaintiff has instituted suit, inter alia, praying for declaration that;

[1] agreement dated 21st March, 2006 executed between the plaintiff and defendant No.1 is not binding on him;

[2] that the plaintiff is owner of road having dimension of 16x33 out of Survey No.138, Hissa No.3;

The plaintiff has further prayed for removal of encroachment by the defendant at his cost and for perpetual injunction restraining the defendant from causing obstruction to the plaintiff use of road having dimension of 16x33.

4. During pendency of the suit, the plaintiff took out application Exhibit 65 for amending the plaint on the ground that during pendency of the suit, the plaintiff has perfected title by way of adverse possession. The period of 12 years was not over at the time of filing of the suit. The plaintiff, therefore, filed application for incorporating the prayers for declaration of ownership by way of adverse possession. By the impugned order, the learned trial Judge has rejected the application.

5. In support of this Petition, Mr. Patil submitted that the learned trial Judge committed serious error in rejecting the application. He submitted that the proposed amendment is necessary for resolving controversy between the parties. The learned trial Judge should have, therefore, allowed the application.

6. A perusal of the impugned order shows that in paragraph 7, the learned trial Judge noted that the plaintiff has closed his evidence by filing pursis at Exhibit 64. In other words,

the trial had commenced. The plaintiff came with the case that during pendency of the suit, period of 12 years was over and, therefore, it be declared that he became owner by way of adverse possession. In paragraph 9, the learned trial Judge dealt with case made out by the plaintiff and recorded a finding that the proposed amendment changes nature of the suit. That apart, it is settled principal of law that plea of adverse possession is a shield and not a sword. The plaintiff cannot claim ownership on the basis of adverse possession. In the case of **Gurdwara Sahib Vs. Gram Panchayat Village Sirthala, (2014) 1 Supreme Court Cases 669**, the Apex Court has held that declaration of ownership of land on the basis of adverse possession cannot be sought by the plaintiff. Claim of ownership on the basis of adverse possession can be made by way of defence when arrayed as defendant in a proceeding against him.

7. In view thereof, no case is made out for interfering with the impugned order. Hence, Petition fails and the same is dismissed.

8. It is, however, expressly made clear that where a decree is appealed from by the petitioner, any error, defect or irregularity in the impugned order, affecting the decision of the case, may be set forth as a ground of objection in memorandum of Appeal as contemplated by Section 105(1) of C.P.C.

[R.G. KETKAR, J.]