

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 8839 OF 2018**

Ananda Ramchandra Shirsat & Anr.	...Petitioners
Versus	
Krishna Dattu Chougule & Ors.	...Respondents

Mr. Tejpal S. Ingale for the Petitioners

Mr. B. G. Ligade for the Respondent No.6

CORAM : REVATI MOHITE DERE, J.
THURSDAY, 12th DECEMBER 2019

P.C. :

1 Heard learned counsel for the parties.

2 By this petition, the petitioners have impugned the order dated 20th March 2018 passed by the learned Civil Judge, Junior Division, Kale (Kheriwade), below Exhibit 34 in Regular Civil Suit No. 341/2017, by which the petitioners' application for amendment of the plaint under Order VI Rule 17 of the Civil Procedure Code ('CPC') was rejected as well as the subsequent order dated 13th July 2018 passed by the learned Judge below Exhibit 40.

3 Learned counsel for the petitioners (original plaintiffs) submits that the petitioners had filed a suit for possession of encroached land on the

basis of a rough sketch map annexed to the plaint. Learned counsel for the petitioners submits that the petitioners realized that they had wrongly described the encroached land/property, only after the written statement was filed by the respondent No.6. Learned counsel relied on the judgment of the Apex Court in the case of ***Sajjan Kumar vs. Ram Kishan***¹.

4 Learned counsel for the respondent No.6 opposes the petition. He submits that no interference is warranted in the impugned orders passed by the trial Court. He submits that the amendment would entail a new cause of action in the suit for removing encroachment.

5 Perused the papers. On 8th August 2018, notice was issued to all the respondents, returnable on 17th October 2018. The office noting shows that the respondent Nos. 1 to 15 were duly served and that only notice issued to respondent No.16 was returned unserved with remark "Not residing at the given address". Learned counsel for the petitioners state that he has filed an affidavit of service stating therein that respondent No.16 has also been served. It appears that thereafter, again on 30th August 2019, this Court (Coram : M. S. Karnik, J.) directed the petitioners to serve advocates notice on respondent Nos. 5(a) to 5(c) informing them that an endeavour

1 (2005) 13 SCC 89

shall be made to dispose of the matter finally on 27th September 2019, even if the said respondents fail to appear. It is noted in the said order that all other respondents have been served. Pursuant thereto, the petitioners have filed an affidavit of service stating therein that the said respondents, as directed vide order dated 30th August 2019 have been served.

6 Learned counsel for the respondent No.6 appears in the aforesaid petition and opposes the petition. The petitioners (original plaintiffs) have filed suit bearing Regular Civil Suit No. 341/2017 (old RCS No. 147/2016) against respondents herein, praying therein for possession of encroached land and for permanent injunction restraining the respondents from interfering with the peaceful possession and enjoyment of the property. The said suit was filed on the basis of a rough sketch map which is annexed to the plaint. It appears that the respondents appeared before the trial Judge and filed their written statements. After the written statements were filed, the petitioners realized that the description of the property was wrongly mentioned in the plaint and as such, filed an application being Exhibit 34 for amendment in the plaint under Order VI Rule 17 CPC. It was mentioned in the said application that by way of the proposed amendment, the petitioners wanted to correct southern side boundary. The said application was rejected by the trial Judge vide order dated 20th March

2018. Thereafter, within three weeks, the petitioners filed another application being Exhibit 40, again praying for amendment of the plaint for correcting the eastern, western and southern side of the boundaries, in short, the description of the property. It was stated that the amendment was necessary to correct the typographical errors/mistakes that had occurred in the description of the property while filing the said claim. The learned trial Judge vide order dated 13th July 2018 rejected the said application, after observing that it would change the nature of the suit as well as would affect the defence of the respondents. It is pertinent to note that the Apex Court in the case of **Sajjan Kumar (supra)**, while considering a similar situation, allowed the amendment after observing in para 5 as under :

“5. Having heard the learned counsel for the parties, we are satisfied that the appeal deserves to be allowed as the trial court, while rejecting the prayer for amendment has failed to exercise the jurisdiction vested in it by law and by the failure to so exercise it, has occasioned a possible failure of justice. Such an error committed by the trial court was liable to be corrected by the High Court in exercise of its supervisory jurisdiction, even if Section 115 CPC would not have been strictly applicable. It is true that the plaintiff-appellant ought to have been diligent in promptly seeking the amendment in the plaint at an early stage of the suit, more so when the error on the part of the plaintiff was pointed out by the defendant in the written statement itself. Still, we are of the opinion that the proposed amendment was necessary for the purpose of bringing to the fore the real question in controversy between the parties and the refusal to permit the amendment would create needless complications at the stage of execution in the event of the plaintiff-appellant succeeding in the suit.”

7 In the present case, the proposed amendment seeks correction of the description of the suit property in the plaint. No doubt, the petitioners (original plaintiffs) ought to have been diligent whilst giving description of the suit in the plaint, however, this Court is of the opinion that the proposed amendment would be necessary for the purpose of bringing to the fore the real question of controversy between the parties. If the amendment is not allowed, the same would lead to several complications later, in the event, the petitioners succeed in the suit.

8 Considering the aforesaid, the petition is allowed and the impugned orders dated 20th March 2018 passed below Exhibit 34 and order dated 13th July 2018 passed below Exhibit 40 by the learned trial Judge are quashed and set aside. The petitioners/respondents are permitted to amend the plaint in terms of the prayer made in Exhibit 40. After amendment is carried out, the defendants are permitted to file additional written statement.

9 The petitioners to pay cost of Rs.5000/- to the respondent No.6 within two weeks from today.

10 Petition is disposed of accordingly.

11 All concerned to act on the authenticated copy of this order.

REVATI MOHITE DERE, J.