

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR.

WRIT PETITION NO.7365 OF 2017

Vidya w/o Suresh Jaiswal
and anr.

... Appellants

-vs-

Kishor s/o Vasantrao Admane
and ors.

... Respondents.

Shri Rohit Joshi, Advocate for appellants.
Shri V. R. Baseshankar, Advocate for respondent No.1.

CORAM : A.S.CHANDURKAR, J.
DATE : March 27, 2019

P.C.

Rule heard finally with consent of learned counsel for the parties.

An order passed by the trial Court rejecting the application as filed under provisions of Order VI Rule 17 of the Code of Civil Procedure, 1908 is under challenge.

2. The petitioners are the original plaintiffs who have filed suit for specific performance of an agreement entered into with the defendant. According to the plaintiffs they are in possession of the suit property and a further declaration as to their lawful title has been sought in the suit. During the course of deposition of plaintiff No.2 it was admitted by him in his cross-examination that the defendant was in possession of the suit property and hence a prayer for recovery of possession was made. Thereafter the application for amendment seeking to add the prayer for possession came to be moved. The trial Court has rejected that application.

3. Shri R. Joshi, learned counsel for the petitioners submitted that the suit in question is for the relief of specific performance coupled with other reliefs. Though it has been averred in the plaint that the plaintiffs were in possession, there is an admission in the cross-examination that the defendant was in possession. It is on that basis that the prayer for possession was sought to be added. He submitted that even under provisions of Section 22 of the Specific Relief Act, 1963 the Court was empowered to grant such prayer even if it was claimed at a later stage. According to him the plaintiff No.2 would not lead any further evidence on the amended pleadings if the amendment is allowed.

4. Shri V. R. Baseshankar, learned counsel for respondent No.1 opposed aforesaid submissions. It is submitted that there is absence of due diligence on the part of the plaintiffs and the application was rightly rejected. He referred to the pleadings in the plaint as well as cross-examination to indicate the admission of plaintiff No.2. He therefore submitted that the trial Court rightly refused to grant the amendment.

5. After hearing the learned counsel for the parties it is seen that the suit as filed is for specific performance of the agreement with a prayer to direct the defendant to execute the title-deed in favour of the plaintiffs. Though it is averred in the plaint that the plaintiffs were in possession, the plaintiff No.2 has admitted in his cross-examination that the defendant was in possession. In the light of the fact that if the relief of specific performance is ultimately granted to the plaintiffs, the provisions of Section 22 of the Act of 1963 could be resorted to, the trial Court ought to have allowed said amendment. The same was based on the admission given in the cross-examination. The entitlement to the prayer for possession is dependent upon the final adjudication of the suit. Moreover, the plaintiff No.2 does

not intend to lead further evidence in respect of the amended pleadings. In that view of the matter the impugned order is liable to be set aside.

6. Accordingly the order below Exhibit-53 dated 17/07/2017 is set aside. The application stands allowed. The defendants are at liberty to consequently amend their pleadings. The statement made on behalf of plaintiff No.2 that he does not intend to lead any further evidence on the amended pleadings is accepted. The suit be decided on its own merits in accordance with law. The writ petition is allowed in aforesaid terms. No costs.

JUDGE