

**IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD**

31 WRIT PETITION NO.5580 OF 2016

Ganesh S/o Asaram Sawant,
Age: 40 years, occu: agriculturist
R/o Pimpalner, Tq. And Dist. Beed

Petitioner
(original defendant)

versus

1) Smt. Bebitai W/o Sakharam Pardeshi
Age: 65 years, Occu: household
R/o Pimpalner, Tq. And Dist. Beed

2) Madansing S/o Dharamsing Pardeshi
Age: 65 years, Occu: Agriculturist
R/o Pimpalner, Tq. And Dist. Beed

Respondents

...

Mr. Tungar Hrishikesh V. Advocate for Petitioner
Mr.G.K. Thigale – Naik, Advocate for Respondents

...

CORAM: ROHIT BABAN DEO, J.

Date: JANUARY 14th, 2020

...

ORAL JUDGMENT

1 Rule. Rule made returnable forthwith. Heard finally with the consent of the parties.

2 The petitioner is the defendant in RCS No.222/2010 brought by the respondents – plaintiffs for perpetual injunction.

3 The petitioner – defendant is aggrieved by the order dated 25.2.2016 whereby the plaintiff is permitted to amend the plaint subject to costs of Rs.2000/-.

4 The submission of the learned counsel for the petitioner is that the amendment changes the nature of the suit. Reliance is placed on the decision of this Court in the matter of **Harish Narayan Chougule versus Namdeo Krushnaji Bedekar** (LEX(BOM)2001 7 172) in support of the said submission.

5 Few facts may be noted:-

Concedely, the description of the suit property in the plaint was horrendously incorrect in as much as the property owned by the defendant was referred to as the property of the plaintiff. The map of the disputed portion was neither placed on record, nor was the description of the disputed portion incorporated in the plaint.

6 The respondents – plaintiffs preferred an application under order 23 rule 3(a)(b) on the premise that the defects in the plaint are of formal nature and sought permission to withdraw the suit with liberty to institute fresh suit on the same of cause action.

7 The petitioner – defendant resisted the application for withdrawal of the suit with liberty.

8 The trial Court rejected the application, seeking permission to withdraw the suit with liberty to institute fresh suit on the same cause of action vide order dated 19.4.2012.

9 The respondents – plaintiffs preferred Civil Revision Application No.139/2013 which came to be disposed of by this Court vide Judgment dated 31.7.2013. This Court noted the nature of defects in the complaint and held that the defects were not of formal nature. However, this Court permitted the plaintiffs to prefer an application for permission to amend the plaint and directed the trial Court that such application, if preferred, shall be decided on its merits. It is categorically observed by this Court that in the facts of the case, it was possible for the plaintiffs to cure defects, if any, by moving appropriate application for amendment. The relevant observations of this Court read thus:-

“15. In the facts of the present case, it was possible for the plaintiffs to cure defects, if any, by moving appropriate application for amendment. In the present case, already written statement is filed by the respondent/defendant and issues are also framed by the trial Court. As observed by the Supreme Court in the case of **K.S. Bhoopathy** (supra) while exercising discretion under Order Rule 1(3), discretion of the Court is to be exercised with caution and circumspection. It is required to be keep in mind that, all aspects of the matter are to be examined, including the desirability or otherwise of permitting a fresh round of litigation on a cause of action which has already been agitated. The Supreme Court in paragraph-13 of the judgment held that, grant of permission for withdrawal of a suit with leave to file a fresh suit may also result in annulment of a right vested in the defendant or even a third party and withdrawal of a suit at the appellate/second appellate stage results in wastage of public time of Courts which is of considerable importance in the present time in view of large accumulation of cases in lower Courts and inordinate delay in disposal of cases.

16. Therefore, taking overall view of the matter, in my opinion, the impugned order does not suffer from any jurisdictional error or is not a case of exceeding jurisdiction or the reasons assigned by the Court below are not perverse. Therefore, Civil Revision Application sans merit, hence same stands rejected. Rule discharged. However, the applicants will be at liberty to file application for amendment of the plaint and if such application is filed, respondent/defendant will have an opportunity to contest the said application and the concerned Court to decide the same in accordance with law.

10 In view of the liberty reserved by this Court while rejecting the Civil Revision Application, the respondent plaintiff, preferred an application for amending the plaint which is allowed by the trial Court, as stated supra.

11 The Trial is yet to commence.

12 In this view of the matter, I do not envisage any serious prejudice if the defects in the plaint are cured by correcting the description of the property and by incorporating the details of the encroached portion. The plaintiffs are further permitted to incorporate an additional relief of recovery of possession. Be it noted that in paragraph No.13(A) which is introduced, the averment is that the possession is wrongfully taken by the defendants taking undue advantage of the rejection of the prayer for temporary injunction.

13 The learned counsel for the petitioner – defendant would strenuously urge that the nature of the suit is changed. It is

difficult to agree with the said submission. The correction of the description of the suit property or incorporating the details of the encroached portion or the additional relief of possession lead to no inference that the nature of the suit is changed. The dispossession, according to the plaintiff, occurred during the pendency of the suit and the relief of possession, is, therefore, additionally sought.

14 The reliance placed by the learned counsel for the petitioner defendant, on the decision of **Harish Chougule** is clearly misplaced. It would be necessary to appreciate the factual matrix which is the bed rock of the said decision. The plaintiff claimed to be the tenant and in possession of the suit premises and sought perpetual injunction which prayer was rejected. The plaintiff then sought to amend the plaint extensively. This Court found that the case made out by the plaintiff in the proposed amendment was entirely different from the one mentioned in the plaint. While the plaint asserted that the plaintiff was in possession as a tenant, by amending the plaint, a new story was introduced which was that the plaintiff – tenant vacated the suit premises. The plaintiff then sought to contend that after he vacated the suit premises, the suit premise was demolished and then the defendant – owner constructed a new building on the suit plot. In the context of the plea taken by the defendant that the plaintiff – tenant had surrendered the

tenancy and did not have any concern with the new building, this Court found that the case sought to be introduced by amending the plaint was totally new and changed nature of the cause of action.

15 I am satisfied that the order impugned does not suffer from such error as would warrant this Court's interference in the writ jurisdiction.

16 The trial Court is requested to expedite hearing of the suit and to finally dispose of the suit within 12 months.

17 At this stage, the learned counsel for the petitioner states that he be permitted to file written statement to the amended plaint. In all fairness, the learned counsel for the respondents – plaintiffs has no objection.

18 The Trial Court shall permit the defendant to file his amended written statement within one month.

19 Rule is discharged.

(ROHIT BABAN DEO, J)