

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.5373 OF 2007

Bapusaheb s/o Mohanrao Patil
Age 58 years, Occ. Retired
R/o. Behind Marathwada Gramin Bank
Laxmi Colony, Latur
District Latur

...Petitioner
(Ori. defendant)

versus

Mohan s/o Madhavrao jadhav
Age 65 years, Occ. Agriculture
R/o. Shvani (Kh.),
Tq. and District Latur

...Respondent
(Ori. Plaintiff)

.....
Advocate for Petitioner : Mr. R. P. Adgaonkar h/f Mr. Amit Deshpande
Advocate for Respondents : Mr. Dhananjay Deshpande
.....

CORAM : V. K. JADHAV, J.
DATED : 18th FEBRUARY, 2020

ORAL JUDGMENT:-

1. Heard both sides.
2. The petitioner is original defendant in Regular Civil Suit No. 786 of 1988. The respondent-plaintiff has instituted the suit for removal of encroachment. The petitioner-defendant has strongly resisted the suit by filing written statement. The trial court had dismissed the suit. Being aggrieved by the same, the respondent-plaintiff has preferred Regular Civil Appeal No. 144 of 2005. During pendency of Regular Civil Appeal No. 144 of 2005, on 20.1.2007, the respondent-plaintiff had filed an application Exh.30 under Order VI

Rule 17 r.w. Section 151 of C.P.C. for amendment in the plaint. The petitioner-defendant has strongly resisted the said application by filing say at Exh.32. The learned Principal District Judge, Latur by impugned order dated 7.9.2007 passed below Exh.30, allowed the said application and permitted the respondent-original plaintiff (appellant) to carry out the necessary amendment in the plaint and further granted liberty to the petitioner (original defendant) to file his written statement to the amended plaint. Hence, this writ petition.

3. Learned counsel for the petitioner-original defendant submits that the application Exh.30 has been submitted after thought. Learned counsel submits that the trial court has decided the suit on merits. The respondent-plaintiff has failed to prove encroachment over the portion of his plot by the petitioner-defendant and as a consequence thereof, the trial court has dismissed his suit. Learned counsel submits that even assuming that the respondent-plaintiff during pendency of the appeal has filed the application alongwith measurement map etc. however, as observed by the court, the said measurement had been carried out in the year 1998 itself i.e. during pendency of the suit. The respondent-plaintiff has not stated anything in the application Exh.30 as to what prevented him from filing the application seeking amendment during pendency of the suit on the basis of the said measurement. Learned counsel submits that belatedly the respondent-plaintiff has sought the amendment and the said amendment would change the nature of the suit. The first

appellate court has not considered the same and allowed the application erroneously. Learned counsel for the petitioner, in the alternate, submits that the respondent-plaintiff may be saddled with heavy costs for his inaction and negligence in filing the application seeking amendment in the plaint at belated stage i.e. during pendency of the appeal.

4. Learned counsel for the respondent-plaintiff submits that the plaintiff is owner of city survey No. 4033 and to the western side of the suit plot, the defendant's plot bearing city survey No. 4034 is situated. The suit has been instituted for removal of encroachment. By way of proposed amendment, the respondent-plaintiff has specifically stated about the area under encroachment of the disputed plot. Learned counsel submits that the same would not change the nature of the suit in any manner. Though the amendment is sought belatedly, however, the dispute pertains to the suit plot measuring 66x66 ft. and in view of the same, the encroachment, if any on the plot, would affect the suit property of the respondent-plaintiff substantially. Learned counsel submits that the first appellate court has therefore rightly allowed the application Exh.30 and further granted liberty to the petitioner-defendant to file written statement and after considering his pleading, the appeal would be decided on its own merits. There is no substance in this writ petition and the writ petition is liable to be dismissed.

5. On going through the contents of application Exh.30 and the order passed thereon by the learned Principal District Judge, Latur, it appears that by filing an application seeking proposed amendment, the respondent-plaintiff with the help of map has demarcated the exact encroached area. Learned Principal District Judge has rightly observed that the material question for consideration would be about the encroachment and as such, the proposed amendment therefore, would not change the nature of the suit. Though the respondent plaintiff has examined the cadastral surveyor, who has measured the suit plot and shown encroachment in the year 1998 and the same is the basis for the present amendment, filing of application Exh.30 during pendency of appeal is certainly due to inaction and negligence on the part of respondent-plaintiff. The respondent-plaintiff would have been saddled with costs by the learned Principal District Judge for allowing such application seeking amendment in the plaint belatedly. However, except imposition of the costs, I do not find any fault in the order passed by the learned Principal District Judge, Latur. Learned first appellate court also granted liberty to the petitioner-defendant to file written statement to the amended plaint. Furthermore, while granting Rule on 15.1.2008, this Court has confirmed the interim relief granted vide order dated 21.9.2007 and hearing of Regular Civil Appeal No. 144 of 2005 is pending since then. Thus, considering the entire aspects of the case, I am not inclined to interfere in the well reasoned order passed by the learned Principal District Judge, Latur. However, I am inclined to saddle the

respondent-plaintiff with heavy costs and order impugned is required to be modified to that extent. Hence, the following order:-

O R D E R

- I. The writ petition is hereby partly allowed.
- II. The impugned order dated 7.9.2007 passed below Exh.30 in Regular Civil Appeal No. 144 of 2005 has been confirmed with modification that the respondent-plaintiff to pay costs of Rs.5000/- (Rupees Five thousand only) to the petitioner-defendant and only on payment of such costs, the appeal shall be taken up for hearing and if the costs is not paid within four weeks from the date of service of notice on appellant-original plaintiff, the appeal shall be dismissed.
- III. The first appellate court shall issue notices to both the parties.
- IV. The first appellate court shall dispose of the pending appeal, as expeditiously as possible, preferably within a period of six months from the date of service of notice on the parties.
- V. The writ petition is accordingly disposed of. Rule is made absolute in the above terms.

(V. K. JADHAV, J.)

rlj/