

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.8208 OF 2019**

Kamlakar Appaso Babar .. Petitioner

Vs.

The Collector, Satara & Ors. .. Respondents

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Mr. Vaibhav R. Gaikwad for the petitioner.

Ms. Vaishali Nimbalkar, A.G.P. for respondent Nos.1 and 2.

Mr. Nikhil Wadikar i/b Mr. Nandu Pawar for respondent Nos.5, 8, 9 and 10.

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CORAM : SMT. BHARATI DANGRE, J.

DATED : 05TH OCTOBER, 2021.

P.C:-

1. The petitioner is aggrieved by the order dated 07/12/2018 passed below Ex-96 in Regular Civil Suit No.61 of 2014 by which the application filed by the plaintiff seeking amendment of his plaint by invoking Order 6 Rule 17 of the Civil Procedure Code (“CPC”), is rejected.

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2. The suit is filed by the plaintiff seeking perpetual injunction restraining the respondents from carrying out the construction, which according to the plaintiff, is illegal. The suit proceeds on a footing that Grampanchayat property No.36 is an ancestral property of the plaintiff and defendant Nos.5 to 12. It is alleged that it is not partitioned till today and the shares of its co-owners are not yet distinctly marked. In utter violation, the defendant No.5 is carrying out construction by encroaching upon the said property by demolishing his old house in Grampanchayat property No.38. It is in these circumstances, an application was filed vide Ex-5, which is decided on 11/04/2014. Pertinent to note that before Ex-5 was decided, the court appointed a Commissioner to submit a report by ascertaining the factual scenario of the construction and the report of the Commissioner exhibited at Ex-40 forms the basis of granting injunction vide Ex-5. The report of the Commissioner records about the existing construction in the form of erection of a RCC column coupled with first slab and it also records about some construction material found on the spot. As far as southern portion is concerned, it is on the plinth level. The map which is enclosed along with the report clearly gives the position of the construction on the said plot.

3. While considering the application vide Ex-5, the court has taken into consideration the very same finding and on recording

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that a *prima facie* case existed in favour of the plaintiff along with balance of convenience and on being convinced that the ingredients for grant of temporary injunction are in favour of the plaintiff, Ex-5 is allowed. Paragraph No.22 of the said order, which is the soul of the order dated 11/04/2014 records that the construction which has reached upto a particular level, if it stopped, no loss would be caused to defendant No.5, whereas, if it is continued further, the plaintiff would be put to irreparable loss. A balance has, therefore, been struck by recording the same and granting injunction.

4. The application for amendment has been moved by the plaintiff vide Ex-96, wherein he sought amendment of his plaint for demolition of the existing construction, which is standing on the suit property in terms of the report of the Commissioner. The amendment is sought in terms of paragraph 8A and a relief is also sought for amendment by inserting paragraph 11A. When the application came up for consideration, it was objected to, by the defendants in the backdrop of the report of the Commissioner dated 22/2/2014. Learned Judge has recorded that by way of proposed amendment, the plaintiff is claiming insertion of a prayer for grant of mandatory injunction against Defendant No.5 that the structure, which is standing on the said property shall be demolished. Making a reference to the report of the Commissioner, the Court has recorded that the very same report forms the basis of grant of temporary injunction. However, the

insertion of prayer for mandatory injunction after a period of three years on receipt of the Commissioner's report, has been frowned by the learned Judge and it is also recorded that the plaintiff has not established that after grant of Ex-5, the defendant has continued with the construction on the said property and, therefore, the relief of mandatory injunction of demolition of construction cannot be granted. On the last date of hearing, I had asked whether after 11/04/2014, when Ex-5 was decided, whether any further construction was taken place and learned counsel for the plaintiff himself has placed on record two photographs, which are taken on record and marked 'X-1' and 'X-2' for identification, which establish that the construction is still at the first slab level and not progressed further after the report is submitted.

5. In such circumstances, the prayer for amendment seeking a mandatory injunction in the nature of demolition of the structure cannot be granted, at this stage. The impugned order, which is passed on the basis of the very said logic that the relief, which was not initially prayed in the plaint, cannot be now inserted in the manner sought by way of amendment on the two grounds; firstly, it is beyond the prescribed period of limitation and, secondly, there is no cause of action for seeking the said relief. The impugned order is, therefore, upheld and the writ petition is dismissed.

6. Needless to state that the plaintiff can always seek cost from the defendants in case the suit is decreed in his favour and the cost incurred for demolition of the structure can always be recovered from the defendant, if the court deems fit.

[SMT. BHARATI DANGRE, J.]