

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

55 WRIT PETITION NO.3280 OF 2012

1. Vilas s/o Rambhau Kaware,
Age: 60 years, Occu. Service & Agri.
R/o. Tuljapur at present
R/o. Sadashiv Peth, Pune-30

2. Vaibhav s/o Vilas Kaware,
Age: 29 years, Occu. Education,
R/o. As above.

...Petitioners
(Orig.Plaintiffs)

Versus

1. Chandrakant s/o Mahadeo Todkari,
Age: 37 years, Occu. Agri.
R/o. Apsinga, Tq. Tuljapur,
Dist. Osmanabad.

2. Sanjay s/o Murlidhar Rohinkar,
Age : 40 years, Occu. Agri.
R/o. As above.

3. Trimbak s/o Vithoba Gore,
Age: 63 years, occu. Agri.
R/o. As above.

...Respondents
(Orig. Defendants)

Mr Prashant K. Deshmukh, Advocate for Petitioners
Mr Amol T. Jagtap, Advocate for Respondent
Nos. 1(A),1(C),1(E), 1(D) and 1(B)

CORAM : SANDEEP V. MARNE, J.
DATE : 28th NOVEMBER, 2022

ORAL JUDGMENT :

1. Rule. Rule made returnable forthwith. With the consent of both the sides, matter is taken up for final hearing.

2. By this petition, petitioners challenge order dated 18.10.2011 passed by the 2nd Jt. Civil Judge Junior Division, Tuljapur thereby rejecting their application at Exh. 34 for amendment of the plaint.

3. The suit, as originally filed contains relief for measurement and demarcation of the suit property. The suit is premised on specific averments that the defendant is claiming possession in respect of land admeasuring 11R, which is purchased by petitioners. On that allegation, the prayer for measurement and demarcation of the suit property was sought.

4. Before the commencement of evidence, petitioner/plaintiff moved an application for amendment of the plaint alleging that by that time, the defendant No.1 was claiming possession in respect of land admeasuring 24R. Plaintiffs/petitioners therefore sought to incorporate averments relating to encroachment on land admeasuring 24R as well as the prayer for recovery of possession of land admeasuring 24R. The application is rejected by the impugned order dated 18.10.2011 by making various observations on the fact as to whether there is any exact encroachment.

5. Learned counsel appearing for petitioner submits the amendment is necessary for the purpose of determining the real question of controversy between the parties. He submits that the amendment is necessary to claim whole relief in one suit as the extent of encroachment over suit property by defendant No.1 is increased by the passage of time which necessitated filing of amendment application. He would further

submit that since the trial of the suit was yet to commence, plaintiffs/petitioners were justified in seeking amendment of the plaint.

6. Per contra, learned counsel for the respondent would oppose the petition contending that the proposed amendment would alter the nature of the suit. He submits that the suit initially was only for measurement and demarcation of suit property and now, the plaintiff wants to amend the same by seeking altogether different relief of recovery of possession. He would further submit that there is no encroachment by respondent No.1 on any portion of the plaintiff's property. He relies upon the decision of the Supreme Court in ***S.N. Hotel Vs. Alok Ladda Civil Application No. 3707 of 2022 decided on 12th July, 2022.***

7. After having heard the learned counsel for the parties, I find that the plaint contains averments about unauthorized possession of land admeasuring 11R land by defendant No.1. As a matter of fact, on the basis of those averments, the plaintiff ought to have sought relief for recovery of possession of 11R from defendant No.1, which he omitted to do so. He sought prayer only for measurement and demarcation of the land. The plaintiff alleges that the extent of encroachment has increased to 24R, and therefore, sought to amend the plaint. He sought to incorporate prayer for recovery of possession of the land admeasuring 24R. In my view, therefore the proposed amendment would not change the nature of suit. The original suit is premised on the alleged act of defendant No.1 for encroaching over the land in which the plaintiff claims ownership. Only the extent of such encroachment is now sought to be

changed from 11R to 24R. The amended prayer, in my view, would be necessary as the same would enable the plaintiff to claim whole relief in one suit.

8. Perusal of the order passed by the trial court would indicate that it has unnecessarily gone into the merits of the proposed amendment, which it was not supposed to do so. It has recorded a finding as to whether the defendant No.1 has indeed committed encroachment or not. While deciding an application for amendment, in my view, the trial court was not required to undertake an inquiry as to whether the contents of the proposed amendment are factually correct or not. The finding recorded by the trial court to the effect that it cannot be believed that the defendants have made encroachment as pleaded in the application is totally unwarranted. This is something which is to be decided at the time of decision of the suit. The order passed by the trial court is thus unsustainable.

9. The reliance of the learned counsel for the respondents on the Judgment of the Supreme Court in **S.N.Hotel** (supra) would be of little assistance in the present case. The facts of the present case are peculiar where the alternate relief in suit itself is premised on allegations of encroachment by defendant No.1. By the proposed amendment, the nature of the suit is kept intact and only the area of encroachment is sought to be modified and complete relief is sought to be incorporated for recovery of possession of the encroached land.

10. The trial court has also lost sight of the fact that the trial in the suit is yet to commence, and therefore, the plaintiff was otherwise entitled to seek amendment in the plaint to the extent that it did not change the nature of the suit. The amendment, in my view, is necessary for the purpose of determining the real question of controversy between the parties.

11. Consequently, I proceed to pass the following order :-

ORDER

- (i) The order dated 18.10.2011 passed by the 2nd Jt. Civil Judge Junior Division, Tuljapur on application below Exh. 34 is set aside.
- (ii) The plaintiff/petitioner's application for amendment at Exh. 34 stands allowed in terms of prayers made therein.
- (iii) The defendant shall have an opportunity to file an additional written statement to the amended plaint.
- (iv) With the above observations, the writ petition is allowed.
- (v) Rule is made absolute in above terms.

[SANDEEP V. MARNE, J.]

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