

Nikita

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO.9877 OF 2019

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Dhareppa Ningappa Kesgond

... Petitioner

V/s.

Kasappa Nilappa Kesgond

... Respondent

Mr. Kuldeep U. Nikam, for the Petitioner.

Mr. Umesh R.Mankapure, for Respondent No.1.

CORAM : AMIT BORKAR, J.

DATED : OCTOBER 3, 2023

P.C.:

1. This petition under Article 227 of the Constitution of India, challenging the order dated 17th August 2019, passed by Civil Judge Junior Division Jath, rejecting the application for amendment of plaint to incorporate pleadings and prayers as regards encroachment over the suit property.

2. The petitioner is original plaintiff, who has filed Regular Civil Suit No.197 of 2015, seeking permanent injunction against the defendant restraining him from disturbing plaintiff's possession over the Gat No.331/1B as described in paragraph No.1 of the plaint.

3. The respondent/defendant filed written submissions and contested the suit.

4. During the pendency of the suit and before commencement

of the Trial, the plaintiff filed an application to incorporate pleadings of encroachment and relief of possession of encroached portion based on measurement done by the Taluka Inspector of Land Records on 14th August 2018. The petitioner filed application for amendment on 28th June 2019.

5. The Trial Court rejected the application on the ground that the amendment will change the nature of the suit and the possession of defendant was within knowledge of the plaintiff and, therefore, the proposed amendment could be barred by limitation.

6. On perusal of the impugned order and pleadings, it appears that the initial suit is for injunction restraining defendant from disturbing plaintiff's possession over the suit property. According to the plaintiff, fact of encroachment was noticed only after Taluka Inspector of Land Records carried out measurement. The Trial Court proceeded on the basis that the defendant's possession over the suit property was the fact within knowledge of the plaintiff and, therefore, the suit is barred by limitation. In such a suit, where based on material on record, at the stage of consideration of amendment, if conclusive finding of limitation cannot be recorded that the suit is barred by limitation, the option available with the Court is to allow the amendment subject to keeping the question of law of limitation open. The Apex Court in **L.J. Leach & Co. Ltd. & Anr. v. Jardine Skinner & Co.**, AIR 1957 SC 357 as held that in such a case, it will be open for the Court to make issue of limitation subject to decision of the suit.

7. Insofar as the next reason of rejection namely, that it will

change the nature of the suit is concerned, in my opinion, in a suit seeking relief of injunction, cause of action for relief of removal of encroachment are interconnected. To avoid multiplicity of proceedings, it is always open for the Court to allow the relief of encroachment to be incorporated in a suit for injunction.

8. Therefore, in my opinion, the Trial Court ought to have been allow the application for amendment subject to keeping the question of limitation open. Hence following order.

a) The order dated 17th August 2019, passed by Civil Judge Junior Division, Jath, in Regular Civil Suit No.197 of 2015 below Exhibit-85 is quashed and set aside.

b) The application below Exhibit-85 in Regular Civil Suit No.197 of 2015, is allowed. Keeping the question of limitation open and to be decided at the time of final hearing of the suit.

c) If, infact there is encroachment from neighbour, it is for the Trial Court to decide at appropriate stage.

d) Considering order dated 30th April 2019, the Trial Court is directed to decide the suit as expeditiously as possible, and in any case, within six months from today.

9. The writ petition stands disposed of.

(AMIT BORKAR, J.)