

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR

WRIT PETITION NO. 2410 OF 2021

Digambar Madhavrao Deshmane and ors __ Vs. __ Govindrao Abuji Shete thr L.Rs
AND

WRIT PETITION NO. 1253 OF 2021

Govindrao Abuji Shete __ Vs. __ Digambar Madhavrao Deshmane and ors

Office Notes, Office Memoranda of Coram,
appearances, Court's orders of directions
and Registrar's orders

Court's or Judge's orders

Mr. R.G.Kavimandan, Advocate petitioner in WP NO. 2410/2021 and for respondent in W.P.NO. 1253 of 2021

Mr. S.N.Bhattad, Advocate for Respondent WP NO. 2410/2021 and for petitioner in W.P.NO. 1253 of 2021.

CORAM : AVINASH G. GHAROTE, J.

DATE : 10/01/2023

1] Heard Mr. Kavimandan, learned counsel for the petitioner and Mr. Bhattad, learned counsel for the respondent in W.P. No. 2410/2021.

2] Both the petitions challenge the order dated 7.9.2020 whereby the application at Exh. 92 an application under Order 6 Rule 17 read with Order 1 Rule 10 of CPC has been partly allowed by the learned Trial Court by permitting the amendment to be carried out, but rejecting the addition of parties.

3] Mr. Kavimandan, learned counsel for the petitioner submits that the learned Court below had erred in rejecting the plea under Order 1 Rule 10 of CPC, as it merely sought to implead all the trustees of

Shikhasn Prassarak Mandal, Chikhali in the suit, which was for removing the encroachment over 0.22 R of land towards southern portion of Gat no. 122 owned by the petitioner/plaintiff. He submits that though in the original suit, one of the trustees viz. Respondent No.1 herein was made a party, however on account of his demise, the other trustees were necessary to be added. He also defended the order granting amendment, contending that the amendment does not change the nature of the suit, as the relief sought to be claimed of the amendment of demolition of the construction on the aforesaid land is inbuilt in the original prayer clause (1) in the plaint (page 23).

4] Mr. Bhattad, learned counsel for the respondent opposes the contention and submits that since the petitioner throughout was aware of the construction made since 2003, which is reflected from para 4 of the plaint in RCS No. 97/2008, the Trial Court could not have allowed the application permitting amendment seeking the relief of demolition of the structure made on the aforesaid land. He also supports the impugned order rejecting the application under Order 1 Rule 10 of CPC.

5] A perusal of prayer clause (1) in the plaint indicates that it seeks vacant possession of the land admeasuring 0.24 R of Gat No. 122, considering which

language, in case the decree is passed in terms thereof, it would equally result in an inbuilt direction for demolition of the construction made therein, considering which since the relief is already inbuilt in prayer clause (1), though the grant of the same as a matter of elaboration cannot be faulted with. It is equally true that since it is claimed that the land is encroached by the trust, the trust was a necessary party, however, the suit was filed against one of the trustees, the application for addition of the other trustees and the trust, would be necessarily required to be allowed, considering the nature of averments made against the trust itself.

6] Though Mr. Bhattad, learned counsel for the respondent relies upon **Ajendraprasadji N. Pandey vrs. Swami Keshavprakeshdasji N, (2006) 12 SCC 1** (para 65) which speaks about amendment not being permissible on account of lack of due diligence, as the application in the instant case is after the framing of issues, but before the affidavit in lieu of evidence was filed, and considering that the relief claimed is already inbuilt in prayer clause (1) of the original plaint, the grant of the same cannot be faulted with, considering which the petition is allowed. The impugned order dated 7.9.2020 in so far as it rejects the application under Order 1 Rule 10 of CPC is hereby quashed and set aside and the application to that extent is allowed.

(4)

56wp2410.21

7] Writ Petition No. 2410/2021 is allowed in above terms. No costs.

8] W.P No.1253/2021 questioning the same order, for the above reasons is hereby dismissed. No costs.

JUDGE

Rvjalit