

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

WRIT PETITION NO. 4728 OF 2018

Vishnu S/o Narayan Kolte,
Aged about 60 years, Occupation :
Cultivator, R/o Advihir, Tah.Motala,
Dist. Buldhana

...Petitioner

// VERSUS //

Kashinath S/o Ninu Badhe (Dead)

- 1(a) Vimal Wd/o Kashinath Badhe,
Aged about 65 years, Occ. Household,
- 1(b) Ramdas S/o Kashinath Badhe,
Aged about 52 years, Occ. Agriculturist
- 1(c) Ujjwal S/o Kashinath Badhe,
Aged about 46 years, Occ. Service
- 1(d) Prafulla S/o Kashinath Badhe,
Aged about 42 years, Occ. Agriculturist
All are R/o Advihir, Tah. Motala, Dist.
Buldhana

... Respondents

Shri N.B.Kalwaghe, Advocate for the petitioner.

Shri A.J.Thakkar, Advocate for the respondent nos. 1 (a) to 1 (d).

CORAM : ANIL S. KILOR, J.

DATED : 2nd AUGUST, 2023.

ORAL JUDGMENT :

Heard. Rule. Rule made returnable forthwith. Heard finally
by consent of the parties.

2. In a suit for declaration of removal of encroachment filed by the petitioner, an application for amendment was moved under Order VI Rule 17 of the Code of Civil Procedure (in short referred as “CPC”) and

on rejection of the same vide impugned order dated 14th March, 2018 passed by the Civil Judge, Junior Division, Motala, Dist. Buldhana in Regular Civil Suit No. 107 of 2009, the petitioner has approached this Court by way of present writ petition.

3. The petitioner on finding that in the suit he himself to make certain necessary pleadings were missed to take and also on findings that the map is not prepared as per scale, permission was sought to withdraw the suit under Order XXIII Rule 1 and 3 of CPC with liberty to file a suit afresh.

4. The said prayer was granted by the learned trial Court. However, on questioning its invalidity in Civil Revision Application No. 44 of 2015, this Court set aside the said order and permitted the petitioner to seek amendment in the plaint. This Court further observed that if such application is made the trial shall consider the same within the parameters of Order VI Rule 17 of the CPC uninfluenced by any observations made in this order.

5. Thereupon, the petitioner filed application Exhibit 59 for amendment.

6. In the suit, the pleadings as regards the easementary right by way of restriction and necessity are made. However, the prayer for declaration that the petitioner is having easementary right by way of grant was not made and therefore along with the said prayer certain amendment was proposed by the petitioner.

7. Admittedly, the application was filed after commencement of the trial and as such the learned trial Court rejected the application on the ground of due diligence and on the ground that it would change the nature of suit.

8. In the application for amendment, the petitioner has explained the delay for moving the application for amendment and also pleaded due diligence.

9. It is stated that as a layman he does not know nuances of law and therefore, though the pleadings are made in respect of encroachment over his land certain facts were not stated and prayer as regards right of easementary by way of grant that was not made. Thus, sufficient reason has been shown by the petitioner and also pleaded with due diligence for moving the application after commencement of the trial.

10 Shri Thakkar, learned counsel for the respondent opposed the present petition on the ground that the prayer as regards the declaration that the petitioner is having easementary right by way of grant is barred by limitation and the same cannot be granted.

11. He has further argued that the withdrawal of the suit was also sought on the ground that the map was not filed as per the scale and not on the ground to seek easementary right by way of grant. It is submitted in the proposed amendment new ground are raised is taken.

12. In my considered view, the points raised by the respondent as regards the limitation needs to be considered first. It is a settled law that one of the cardinal principles of law in allowing or rejecting an application for amendment of the pleading is that the courts generally, as a rule, decline to allow amendments, if a fresh suit on the amended claim would be barred by limitation on the date of filing of the application. But that would be a factor to be taken into account in the exercise of the discretion as to whether the amendment should be ordered, and does not affect the power of the court to order it, if that is required in the interest of justice.

13. The Hon'ble Supreme Court in the case of Life Insurance Corporation of India Vs. Sanjeev Builders Private Limited and another¹ has observed thus:

19. It is well settled that the court must be extremely liberal in granting the prayer for amendment, if the court is of the view that if such amendment is not allowed, a party, who has prayed for such an amendment, shall suffer irreparable loss and injury. It is also equally well settled that there is no absolute rule that in every case where a relief is barred because of limitation, amendment should not be allowed. It is always open to the court to allow an amendment if it is of the view that allowing of an amendment shall really sub-serve the ultimate cause of justice and avoid further litigation. In *L.J. Leach & Co. Ltd. & Anr. v. Jardine Skinner & Co.*, AIR 1957 SC 357, this Court at paragraph 16 of the said decision observed as follows:

"16. It is no doubt true that courts would, as a rule, decline to allow amendments, if a fresh suit on the amended claim would be barred by limitation on the date of the application. But that is a factor to be

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taken into account in exercise of the discretion as to whether amendment should be ordered, and does not affect the power of the court to order it, if that is required in the interest of justice....."

31. In *Ragu Thilak D. John v. S. Rayappan & Ors.*, (2001) 2 SCC 472, this Court also observed that where the amendment was barred by time or not, was a disputed question of fact and, therefore, that prayer for amendment could not be rejected and in that circumstances the issue of limitation can be made an issue in the suit itself like the one made by the High Court in the case on hand.

32. In a decision in *Vishwambhar & Ors. v. Laxminarayan (Dead) through Lrs. & Anr.*, (2001) 6 SCC 163, this Court held that the amendment though properly made cannot relate back to the date of filing of the suit, but to the date of filing of the application.

33. Again, in *Vineet Kumar v. Mangal Sain Wadhera*, (1984) 3 SCC 352 : AIR 1985 SC 817, this Court held that if a prayer for amendment merely adds to the facts already on record, the amendment would be allowed even after the statutory period of limitation.

14. In the present matter, after going through the plaint it is evident that sufficient pleadings are made as regards the alleged encroachment made by the respondent and as regards the right of easmentary by prescription and necessity.

15. Thus, the point relating to limitation for seeking declaration relating to right of easement by way of grant, it can be decided by the trial court after recording the evidence as the point of limitation is mixed question of facts and law.

16. As far as other amendment is concerned, already necessary pleadings are there and in addition to the same if the proposed amendment is allowed, no prejudice would be caused to the respondent and it will not change the nature of the dispute. However, by allowing the amendment, the multiplicity of proceedings could be avoided. Accordingly, I pass the following order.

- i. Writ petition is allowed;
- ii. The order dated 14th March, 2018 passed by the Civil Judge, Junior Division, Motala, Dist. Buldhana in Regular Civil Suit No. 107 of 2009 is hereby quashed and set aside and thereby Exhibit 59 for amendment preferred by the petitioner is allowed;
- iii. The point of limitation as regards declaration sought by the petitioner to the effect that he has right of easement by way of grant is concerned, is kept open to be decided by the trial Court after recording the evidence.

[ANIL S. KILOR, J.]

SACHIDANAND
KUTTAN NAIR

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by
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