



**IN THE JUDICATURE OF HIGH COURT AT BOMBAY
BENCH AT AURANGABAD**

913 WRIT PETITION NO. 2334 OF 2023

Vitthal Govind Kaspate And Another
VERSUS
Shobhabai Jankiram Bukre And Others

...
Advocate for the Petitioner : Mr. Gujrathi Pushpak U.
Advocate for Respondent No.1 : Mr. Moinpasha Shaikh Farid
...

CORAM : R. M. JOSHI, J.

Dated : July 23, 2024

PER COURT :-

1. By consent of both sides heard finally at admission stage.
2. Petitioners/ plaintiffs in Regular Civil Suit No.32/2014 is aggrieved by rejection of application Exhibit 71 filed under Order 6 Rule 17 of the Code of Civil Procedure for amendment to the plaint. It is the contention of the plaintiffs in the plaint that defendant No.1 has encroached upon 62 R land from the Northern side whereas defendants No.2 to 4 caused encroachment of 15 R land from Southern side. Said suit was decreed by order dated 17/12/2018 against defendant No.1. In Regular Civil Appeal No.50/2019 order came to be passed on 04/08/2020 whereby Regular Civil Suit No.32/2014 was remitted back to the Trial Court for de novo trial. Even after the commencement of the de novo trial except for defendant No.1 no other defendant appeared and suit proceeded ex-parte against them. Defendant No.1 filed written statement. After framing of issues, suit is for recording of evidence. At this stage application Exhibit 71 is filed for amendment in the plaint incorporating the fact that out of the suit property, 59 R land to be encroached upon by defendant No.1 from

Northern side of the plaintiff No.1 and 15 R land is encroached by defendant Nos.2 to 4 from Southern side of land of plaintiff No.2.

3. Learned Counsel for petitioners submits that since the suit land is jointly cultivated by the petitioners/ plaintiffs, it was necessary to explain that the encroachment caused by defendant No.1 is from the Northern side of plaintiff No.1 and other defendants caused encroachment from Southern side land of plaintiff No.2. This contention is opposed by the defendant No.1 on the ground that the application is filed at belated stage, so also it is barred by limitation as the amendment not being sought after the entry has sought after joint measurement being carried on 23/11/2017. Learned Trial Court has rejected the application by accepting the said submissions.

4. Learned Counsel for the petitioner has placed reliance on the Judgment of the Hon'ble Supreme Court in case of ***Life Insurance Corporation of India vs. Sanjeev Builders Private Limited, reported in AIR 2022 Supreme Court 4256***, wherein the parameters are settled for the allowing / rejecting amendment to the pleadings. Learned Counsel for the respondent submits that the amendment ought to be carried out within three years of the measurement of the suit property and in view of Section 137 of the Limitation Act such application being not filed within three years is

barred by limitation. It is his further submission that due diligence has not been shown by the plaintiffs for amendment in the pleadings and that the amendment will change the nature of the suit. He further submits that though amendment is sought to the pleadings, no prayer is made against defendant No.1.

5. The Hon'ble Supreme Court in case of **Life Insurance Corporation of India** (Supra) has laid down in paragraph No.70 the criteria for the purpose of allowing / rejecting the applications for amendment. It is as under : -

"70. Our final conclusions may be summed up thus:

(i) Order II Rule 2 CPC operates as a bar against a subsequent suit if the requisite conditions for application thereof are satisfied and the field of amendment of pleadings falls far beyond its purview. The plea of amendment being barred under Order II Rule 2 CPC is, thus, misconceived and hence negatived.

(ii) All amendments are to be allowed which are necessary for determining the real question in controversy provided it does not cause injustice or prejudice to the other side. This is mandatory, as is apparent from the use of the word "shall", in the latter part of Order VI Rule 17 of the CPC.

(iii) The prayer for amendment is to be allowed.

(i) if the amendment is required for effective

and proper adjudication of the controversy between the parties, and

(ii) to avoid multiplicity of proceedings, provided

(a) the amendment does not result in injustice to the other side,

(b) by the amendment, the parties seeking amendment does not seek to withdraw any clear admission made by the party which confers a right on the other side and

(c) the amendment does not raise a time barred claim, resulting in divesting of the other side of a valuable accrued right (in certain situations).

(iv) A prayer for amendment is generally required to be allowed unless

(i) by the amendment, a time barred claim is sought to be introduced, in which case the fact that the claim would be time barred becomes a relevant factor for consideration,

(ii) the amendment changes the nature of the suit,

(iii) the prayer for amendment is malafide, or

(iv) by the amendment, the other side loses a valid defence.

v) In dealing with a prayer for amendment of pleadings, the court should avoid a hypertechnical approach, and is ordinarily required to be liberal especially where the opposite party can be compensated by costs.

(vi) Where the amendment would enable the court to pin-pointedly consider the dispute and would aid in

rendering a more satisfactory decision, the prayer for amendment should be allowed.

(vii) Where the amendment merely sought to introduce an additional or a new approach without introducing a time barred cause of action, the amendment is liable to be allowed even after expiry of limitation.

(viii) Amendment may be justifiably allowed where it is intended to rectify the absence of material particulars in the plaint.

(ix) Delay in applying for amendment alone is not a ground to disallow the prayer. Where the aspect of delay is arguable, the prayer for amendment could be allowed and the issue of limitation framed separately for decision.

(x) Where the amendment changes the nature of the suit or the cause of action, so as to set up an entirely new case, foreign to the case set up in the plaint, the amendment must be disallowed. Where, however, the amendment sought is only with respect to the relief in the plaint, and is predicated on facts which are already pleaded in the plaint, ordinarily the amendment is required to be allowed.

(xi) Where the amendment is sought before commencement of trial, the court is required to be liberal in its approach. The court is required to bear in mind the fact that the opposite party would have a chance to meet the case set up in amendment. As such, where the amendment does not result in irreparable prejudice to the opposite party, or divest

the opposite party of an advantage which it had secured as a result of an admission by the party seeking amendment, the amendment is required to be allowed. Equally, where the amendment is necessary for the court to effectively adjudicate on the main issues in controversy between the parties, the amendment should be allowed.”

6. In the instant case perusal of the record shows that Regular Civil Suit No.32/2014 was decreed on 17/12/2018. Practically the said decree is passed as the defendants did not contest the suit. Thus, at that time no need arose for the plaintiff to carry out any amendment to the plaint. This material fact has been ignored by the learned Trial Court while holding that the application has been filed beyond limitation. The Court has erred in not considering the fact that by virtue of order passed by the First Appellate Court the suit was relegated back for decision afresh for de novo trial. In such circumstances, it was not open for the learned Trial Court to reject the application on this ground.

7. Apart from this, amendment sought is only clarificatory in nature . Since there are two plaintiffs, it was essential to narrate as to the side of which plaintiffs' the encroachment has been done by which defendant. The nature of suit does not change by this amendment. No prejudice much less any irreparable loss will be caused to the defendants if the

amendment is so allowed. It would be open for defendants to resist this contention of plaintiff.

8. As far as due diligence is concerned, since suit is directed to be tried de novo, and immediately after filing of written statement, the application for amendment is moved. In so far as the contention of defendant No.1 about there being no prayer made pursuant to the amendment caused by the plaintiff is concerned, the consequence of lack of prayer would be determined by the Trial Court in accordance with law. This however cannot be a ground for rejecting application for amendment. Thus, by imposing appropriate cost such application can be allowed. In the facts of the case, cost is determined Rs.1000/- (Rupees one thousand only) payable by plaintiffs to the defendant No.1.

9. In view of the above, the impugned order is set aside. Application Exhibit 71 is allowed subject to plaintiff paying cost of Rs.1000/- to defendant No.1.

10. Petition stands allowed in above terms.

(R. M. JOSHI, J.)

vj gawade/-.