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14-wp-14687-24

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

14 WRIT PETITION NO. 13687 OF 2024

PRABHAVATIBAI ASHOK RANDHE

VERSUS

**KANHAIYYALAL GOTIRAM MUTHA DIED THROUGH LRS SANDESH
KANHAIYYALAL MUTHA AND ANOTHER**

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Advocate for the Petitioner : Mr. P. D. Bachate
h/f. Mr. Abhinay D. Khot

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CORAM : R.M. JOSHI, J.

DATE : 16.12.2024

PER COURT :

1. This petition exception to the order dated 25.09.2024 passed below Exhibit 45 in RCS No. 68/2009 whereby application filed by petitioner/plaintiff praying under Order VI Rule 17 for leave to amend the plaint, is rejected.

2. Facts as they appear from record reveals that the petitioner purchased the suit property from defendant. It is his case that though defendant had sold Survey No. 301/1 total area admeasuring 9 acre 4 G., he was not put into the possession of 17 R. land. He, therefore, filed suit seeking recovery of possession on the said part of land on the basis of the title.

3. The suit was contested by the defendant. During the course of hearing, Court Commissioner came be appointed for measurement of the property. It is revealed to the petitioner/plaintiff that the portion of 17 R. land is not into the possession of defendant but it is in the possession of third party. He, therefore, filed an application under Order 6 Rule 17 of the C.P C. for amendment to the plaint to include his prayer for recovery of possession from third party. This application came to be rejected.

4. Learned counsel for the petitioner submits that in order to avoid multiplicity of the proceeding and since no prejudice would cause to the defendant by allowing the amendment, the petition deserves to be entertained and impugned order deserves to be set aside. To support his contentions, he placed reliance on the judgment of ***Sampat Kumar Vs. Ayyakannu and another, (2002)7 SCC 599.*** He also placed the reliance on the judgment of ***Trimbak Rama More and others Vs. Laxman Kaduba More*** and others of Co-ordinate Bench of this Court in Writ Petition No. 37 /2019.

5. There cannot be any quarrel with regard to the proposition sought to be canvassed by the learned counsel for the petitioner relying

upon the judgment of the Hon'ble Supreme Court in case of ***Santoshkumar*** (*supra*), that to avoid the multiplicity of the proceeding and subsequent relevant events can be allowed to be incorporated by way of amendment to the pleadings. It is however, pertinent to note that in the said proceeding before Hon'ble Supreme Court, there was no change in the cause of action. In the said case, the relief of injunction was sought and when it was found that the property was in possession of the defendant therein, relief of possession came to be asked. It is in such set of facts and circumstances, the Hon'ble Supreme Court has held that the amendment to the plaint ought to have been allowed.

6. Similarly, in the case of ***Trimbak Rama More*** (*supra*), it was found on the basis of the report of the Court Commissioner that the defendant to the suit along with the other persons committed encroachment. Thus, it is clear that facts of the present case totally different from the judgment cited *supra*. Hence, the said judgments have no application to the present case.

7. From perusal of the pleadings in the plaint, it is revealed that suit is filed by the petitioner/plaintiff with specific averment that though the defendant/vendor has instituted registered sale-deed in respect of the

land bearing Survey No. 301/1 to the extent of 1 acre 25 R. land and has claimed the 17 Guntha. land was not even in his possession. Thus, the cause of action for filing suit is altogether different. Considering fact that the vendor of plaintiff is not in possession of the said property but the same is encroached by the third party, it would be different cause of action to seek possession of the said land from the third party. Material difference in the cause of action would be that there was no encroachment of the land by the vendor, but he had failed to hand over the possession of the land which was sold to the petitioner/plaintiff. As against this, the third party who has caused encroachment upon the said land had no title in respect of the same. Thus, those causes of action cannot allowed to be combined in this suit. In appropriate case party is required to file separate suit only.

8. In any case, it is open for the petitioner/plaintiff to file appropriate proceeding for seeking possession of the subject land, if he is in a position to prove that third party encroachment caused therein. Hence, no prejudice will cause to the petitioner/plaintiff, if the petition is not entertained and impugned order is not interfered with.

9. In any event for want of any perversity in the impugned order,

this Court is not inclined to cause interference therein in the exercise of writ jurisdiction.

10. In view of above, Petition stands dismissed.

(R.M. JOSHI, J.)

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