

Santosh

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 15206 OF 2024

Shankar Manohar Khairavkar

...Petitioner

Versus

Gorakh Rau Bhagat and ors.

...Respondents

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KULKARNI

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Mr. Sumedh Modak, i/b Vijay Killedar, for the Petitioner.

Ms. Manisha Devkar, for Respondent No.1.

CORAM: N. J. JAMADAR, J.

DATED: 3rd APRIL, 2025

ORDER:-

1. Heard the learned Counsel for the petitioner.
2. The challenge in this petition is to an order dated 23rd February, 2024, whereby an application preferred by the respondent – plaintiff for amendment in the plaint under Order VI Rule 17 of the Civil Procedure Code, 1908, came to be allowed.
3. The respondent had initially instituted a suit for perpetual injunction asserting, *inter alia*, that the defendants were threatening to commit encroachment over the suit property. Preparations were made to carry out construction by encroaching over the plaintiff's property. The plaintiff thereafter filed an application for amendment in the plaint

(Exhibit-82) and sought relief of declaration and also to implead defendant Nos.3 to 17 as the party defendants to the suit. By an order dated 15th February, 2018 the said application came to be allowed.

4. Trial commenced. Thereafter, the plaintiff again filed application seeking amendment in the plaint to incorporate the averments to the effect that, taking undue advantage of the fact that there was no restraint order passed by the Court, the defendant committed encroachment over an area admeasuring 10 R and erected temporary tin shed over the suit property. The plaintiff thus proposed to add the relief of removal of encroachment and delivery of possession of the alleged encroached portion of the suit property.

5. The application was resisted by the defendant.

6. The learned Civil Judge was of the view that, the matters referred to in the application for amendment, pertained to the events which happened subsequent to the institution of the suit. It was, therefore, necessary to allow the amendment to decide the real question in controversy between the parties.

7. Mr. Modak, the learned Counsel for the petitioner, submitted that since the amendment was sought to be

carried out after the commencement of the trial, the proviso to Rule 17 of Order VI came into play and it was incumbent upon the plaintiff to satisfy the element of due diligence. Taking the Court through the averments in the application, Mr. Modak would urge that the application is singularly silent about due diligence. It has not been specifically stated as to when the defendants allegedly committed encroachment over the suit property; either before or after the commencement of the trial. Therefore, the learned Civil Judge committed an error in allowing the application for amendment. Reliance was placed on the decision of the Supreme Court in the case of *Vidyabai and others vs. Padmalatha and another*¹.

8. I have perused the averments in the plaint and the application for amendment. The plaint proceeded on the premise that the defendant Nos.1 and 2 threatened to cause obstruction to the possession and enjoyment of the plaintiff over the suit property and also to commit encroachment over a portion of the suit property. Initially relief of temporary injunction was sought as the defendant threatened to commit encroachment by making preparation for erecting construction.

¹ (2009) 2 Supreme Court Cases 409.

9. The application for amendment proceeded on the premise that during the pendency of the suit, the defendants, by taking undue advantage of the absence of restraint order, committed encroachment over an area admeasuring 10 R and also erected a temporary tin shed. It appears that there is an element of continuity in the causes of action asserted by the plaintiff. The essential dispute between the parties revolves around the demarcation of the suit land and that of the defendants.

10. In these circumstances, the real question in controversy between the parties is the actual dimensions of the respective lands and the factum of encroachment, if any. To put it in other words; whether the defendants have committed encroachment over the suit land, and thereby committed breach of their obligations as adjacent land holders. The plaintiff alleges sch encroachment took place during the pendency of the suit. From this standpoint, the proposed amendment appears to be necessary to determine the real question in controversy between the parties. By the proposed amendment, no prejudice is likely to be caused to the defendants as the nature and character of the suit is not at all altered.

11. So far as the bar created by the proviso to Rule 17 of Order VI, there are averments in the application that the defendants, by taking undue advantage of absence of restraint order, committed encroachment over the suit property. It is true a specific date of encroachment has not been pleaded in the application. However, in a case of this nature, where the proposed amendment advances the cause of determination of all the disputes between the parties once and for all, the Court is not expected to take a hyper-technical view of the matter.

12. Therefore, this Court does not find such infirmity in the impugned order as to warrant interference in exercise of supervisory jurisdiction.

13. The petition thus stands dismissed.

[N. J. JAMADAR, J.]