

R.C.S. No. 103/2012

Khan Wahid Vs. Shaikh Chandubhai & ors.

ORDER BELOW EXH.150

CNR No. MHAH140002272012

The plaintiff filed this application under Order VI Rule 17 of the Code of Civil Procedure.

2. It is contended by the plaintiff that he has filed this suit for perpetual injunction. During pendency of the suit one Raju Mohammad has encroached upon the suit property and raised construction. It is further contended that as per application of the plaintiff T.I.L.R. was appointed as court commissioner. The court commissioner has filed his report and map wherein it is shown that the defendants have made encroachment upon the suit property. Therefore the plaintiff wants to implead Raju Ahemad Shaikh as defendant No. 6. Further he wants to carry out amendment in respect of alleged encroachment made by the defendants. The plaintiff is also claiming possession of the encroached area. Therefore the plaintiff prayed for allowing the application.

3. Defendant No. 2 opposed the application by filing his say (Exh. 152). He contended that initially the suit was filed for perpetual injunction and now the plaintiff is claiming mandatory injunction and possession. Hence the nature of suit will change. It is further contended that the plaintiff has denied the report of court commissioner. Hence he cannot ask for the amendment as per the said report. It is contended that the defendants are in possession of the suit property since 40 to 50 years. The plaintiff was never in possession of the suit property. The

plaintiff by way of proposed amendment is filling up the lacuna. Therefore, the nature of the suit will change. On these grounds this defendant prayed for rejecting the application with cost of Rs. 5000/-

4. Heard the learned counsel for the plaintiff and defendant No.2.

5. The plaintiff has filed this suit for perpetual injunction. The issues (Exh. 144) have been framed on 22.01.2018. The plaintiff has not yet filed his affidavit of evidence. It shows that the trial has not yet commenced. The learned counsel for the plaintiff argued that, the proposed amendment is necessary to determine the real controversy between the parties. On the basis of report of the court commissioner the alleged encroachment is revealed. Hence he prayed to allow the application.

6. The learned counsel for the plaintiff in support of his argument placed his reliance in the case of **Bhimrao Laxman Kamble (since deceased) through his L.Rs. Sharada Bhimrao Kambale and others Vs. Annaso Dhondiram Manole and another, reported in 2018(2) Mh.L.J. 276**, wherein the Hon'ble Supreme Court pleased to hold that -

“(a) Civil Procedure Code, O. 6, R. 17- Amendment in pleading permissibility - Suit filed in year 2000 and application for amendment filed in year 2017 - Amendment

necessary for determining real question of controversy and not changing basic nature of suit - Even if sought at belated stage, it can be allowed keeping open point of limitation, to be decided at time of final hearing.”

7. The learned counsel for the defendant argued that the proposed amendment is changing nature of the suit. Further there is delay in carrying out the amendment. It is further argued that there is no due diligence on the part of the plaintiff. Hence he prayed to reject the application. The learned counsel in support of his argument has placed his reliance in the case of **Vidyabai and others Vs. Padmalatha and another, reported in 2009 STPL 2228 SC**, wherein the Hon'ble Supreme Court pleased to hold that -

“Civil Procedure Code, 1908, Order 6 Rule 17 – Civil Procedure – Amendment of written statement – Barred – 'Commencement of proceedings' – Date on which issues are framed is the date of first hearing – Filing of affidavit in lieu of examination of chief of witness, would amount of 'commencement of proceedings' – High Court allowed amendment and did not apply its mind on the jurisdiction issue – Order of High Court does not satisfy the test of judicial review – Order set aside.”

8. The learned counsel further relied upon in the case of **Archana Ashok Amburle Vs. Smt. Arpana Shankar Dudham & Ors. reported in 2019 (3) ALL MR 768**, wherein the Hon'ble Bombay High Court pleased to hold that -

“(A) Civil P.C. (1908), O.6 R.17- Amendment of plaint –

Application made for adding prayer for relief of possession – In suit seeking mandatory injunction for removal of suit structure - Application has made at stage of final argument - No case that inspite of due diligence, applicant could not pray for possession of suit property before commencement of trial- If amendment is allowed, it would change cause of action – In absence of any plea of due diligence of proof thereof, rejection of application, held proper.”

9. The learned counsel further relied upon in the case of **The Liquidator, The Maratha Market People's Co-op Bank Ltd. Vs. M/s. Jeejaee Estate & ors., reported in 2019(1) ALL MR 884**, wherein the Hon'ble Bombay High Court pleased to hold that -

“Civil P.C. (1908), O.6 R.17 – Amendment of pleadings – Application for – Objection that application was filed after commencement of trial as plaintiff has already filed affidavit in lieu of examination in chief – Plea of plaintiff that trial does not commence merely by filing of affidavit of evidence, it commences only after witness enters witness box and Court accepts affidavit of evidence – Not tenable – As trial commences when first affidavit of evidence is filed – Moreover, facts and documents sought to be brought on record by plaintiff are within knowledge of plaintiff prior to institution of suit – No due diligence on part of plaintiff – Amendment application cannot be allowed.”

10. The learned counsel further relied upon in the case of **Amartya s/o. Surendra Deshmukh & Anr. Vs. Sau. Sheela w/o. Ramesh Rao Deshmukh & Ors., reported in 2018(5) ALL MR 878**, wherein the Hon'ble Bombay High Court, Bench at Nagpur pleased to hold that -

“Civil P.C. (1908), O.6 R.17- Amendment of plaint- Application for, made in appeal against order rejecting suit for declaration as to ownership and permanent injunction - Applicant by way of amendment sought to bring on record certified copies of mutation entries - It also wants to bring on record revenue records showing origin of ownership of suit property - However, no attempt made in application to demonstrate that inspite of due diligence documents were not located or knowledge of origin of ownership could not be gathered before commencement of trial - Application liable to be rejected.”

11. The plaintiff by way of proposed amendment is claiming possession of the encroached area. As discussed earlier the trial has not yet commenced. Therefore, the defendants cannot take help of the above rulings. In view of the ruling in the case of Bhimrao (supra) approach of the court has to be liberal while considering the application for amendment. The plaintiff wants to carry out the amendment as per report of the court commissioner. Hence to avoid the multiplicity of proceeding and to determine the real controversy between the parties the proposed amendment is necessary. Further, the proposed amendment does not cause such prejudice to the defendants which cannot be compensated adequately in terms of money. Therefore, in the interest of justice the application is liable to be allowed. Hence, I pass the following order -

:- ORDER :-

1. The application is allowed subject to cost of Rs. 1,000/- be paid to the defendants.

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(Exh. 150)

2. The plaintiff shall carry out the proposed amendment on or before 10.10.2019 and shall submit amended copy of the plaint.
3. The plaintiff is directed to pay additional court fee for the claim of possession.

(Smt. S. D. Soni)
Jt. Civil Judge, S.D.
Newasa

Date : 18.09.2019