

Order passed below application (Ex.78) in Regular Civil Suit No.377/2004

Read the application (Ex.78) and say filed by the defendants. Heard arguments of both the learned counsel. Perused record and annexed with documents.

2) The plaintiff has filed present application under Order 6, Rule 17 of the Code of Civil Procedure, 1908 for amendment in pleading and addition of proposed defendant no.7 to 12. The plaintiff submitted that this Court has framed additional issue regarding non-joinder of necessary parties, therefore, it is necessary for the plaintiff to make amendment and to lead additional evidence. The plaintiff is seeking addition of pleading in para no.2 of plaint (Ex.1) in respect of Regular Civil Suit No.280/1989 and rejection of application (Ex.5) in it. The plaintiff also wants to add pleading about easementary way of disputed road and right to use it since 35 years and its acquisition by prescription by virtue of section 15 of the Easement Act. The plaintiff has filed copies of RCS NO.280/1989, 7/12 extracts of block no.84, 87 and 88. The plaintiff prayed to allow present application.

3) The defendants strongly objected present application on various grounds. It is submitted that the plaintiff has filed present suit for injunction only but now after completion of entire evidence of both the parties the plaintiff wants to raise plea of easementary right by prescription, which will lead to change nature of suit totally. Therefore, application is not maintainable at very fag end of trial. The plaintiff has not assigned any reason for delay even though was very well knowing as to who are necessary parties to the suit and even though the defendants raised this objection in their written statement at initial stage. The plaintiff wants to fill lacuna in the suit

and by this amendment he wants to change nature of suit completely. The defendants prayed to reject this application.

4) Following point arise for my consideration, with my findings and reasoning thereon is as under

Sr.No.	Point	Finding
1.	Is application liable to be allowed?	No.
2.	What order?	Application is rejected

REASONING

As to point no.1 :-

5) Learned counsel for the plaintiff submitted that as this Court has framed additional issue regarding non-joinder of necessary parties, the plaintiff is required to make amendment in the pleading and wants to add those necessary parties. If application is not allowed the plaintiff will not get fair opportunity. Learned counsel for the plaintiff has filed copies of 7/12 extract of block no.84, 87, 88 with list (Ex.81/1 to 81/3), copy of plaint (Ex.1) of RCS No.280/1989 and order on Ex.5 in it with list (Ex.81/4 and 81/5). Learned counsel for the plaintiff relied on following rulings in support of contention that while deciding amendment application, court should not go into correctness or falsity of case in the amendment and court should take liberal view while allowing such application, are as-

- A. Rajesh Kumar Aggarwal & Ors. Vs. K.K.Modi & Ors., AIR 2006 SC 1647
- B. Parmeshwar s/o Dhondiba Umbre Vs. Mahadeo s/o Waman Raut, 2012 Mh.L.J. 856

C. Shri Prabhakar Xembu Bhandari & Ors. Vs.
The State of Goa & Ors., 2013(5) ALL MR 594.

These rulings are of general application. The defendants have objected present application on various grounds and prayed to reject the same as it is not maintainable at this stage.

6) Learned counsel for the defendants submitted that suit has reached stage of judgment as both the parties have concluded their evidence and advanced final argument on 30/10/2014 and 12/11/2014. In view of provisions of proviso of Order 6, Rule 17 of The Code of Civil Procedure, 1908, amendment at this stage cannot be allowed as the plaintiff has not pointed out his due diligence to make amendment before commencing trial but making attempt after trial ended and was to change nature of suit completely. Learned counsel pointed out observations of Hon'ble High Court, Bombay in para no.13 that prohibition or making amendment is to alter cause of action in the suit or to introduce and entirely new or inconsistent cause of action which would virtually amount to substitution of new claim or new cause of action in the place of the original plaint. Hon'ble High Court, Bombay allowed amendment observing that said case was not reached to commencement of trial and issues were not framed in it. In the present case, present suit was not only reached to the stage of commencement of trial but same is fixed and pending for judgment and thus trial has been completed as regards hearing is concerned.

7) In such situation, it is required to see whether proposed amendment will change nature of suit or cause of action. Undisputedly, an additional issue is framed as per order below Ex.1 on 25/11/2014, when it

was pointed out that issue regarding non joinder of necessary party was not framed inspite of objection in written statement Ex.12 filed on 8/2/2005, and inspite of specific contention that owner of block no.84 was not impleaded though suit is for injunction in respect of way passing through block no.84. Accordingly, order dated 25/11/2014 is passed below plaint (Ex.1) with direction to both the parties to lead evidence within 8 days on this issue as suit is pending since last 10 years. The plaintiff without leading evidence and complying order dated 25/11/2014 filed present application for addition of parties as well as he is trying to make amendment, which will lead to change entire nature of suit. It shows only and only intention of plaintiff to fill up the lacuna. Furthermore it is required to see whether the plaintiff was not aware about knowledge and effect of non impleadment of proposed defendants. The plaintiff has filed certified copy of RCS no.280/1989 and on its basis wants to implead proposed defendants to fill up the lacuna after about 10 years. This certified copy shows that the plaintiff applied for it on 30/10/2004 and received the same on 17/11/2004. The plaintiff has filed present suit on 5/11/2004 which clearly shows that the plaintiff was very well aware and was having knowledge before filing present suit that proposed defendants are necessary party to present suit. Even after objection of the defendants in written statement (Ex.12), the plaintiff took no effort and make attempt to add them as defendants. Even though, proposed defendants are necessary parties, the plaintiff wants to take disadvantage of provisions of O.6 R.17 of CPC to fill up material lacuna after lapse of 10 years and that too when the suit is posted for judgment.

8) Apart from addition of proposed defendants, the plaintiff wants to amend pleading in para no.2 of plaint and to add pleading about accusation of easementary right by prescription over disputed way. On perusal of plaint in

RCS no.280/1989 wherein plaintiff no.1 and 2 were defendant no.1 and 2 and the suit was in respect of obstruction of said way by these plaintiffs and other 6 persons. It shows that the plaintiff is aware about status and nature of their right over disputed way since 1989. Proposed amendment regarding RCS no.280/1989 is definitely a part of evidence. So, it need not be pleaded when documentary evidence is filed by the plaintiff and same can be scrutinized, those being certified copies of court record.

9) The plaintiff wants to add pleading about easementary right over disputed way in later part of proposed amendment, which is at all different than nature of original suit. Learned counsel for the defendants submitted that the plaintiff wants to plead theory of easementary right which will definitely change nature of suit. Conditions of easement are totally different and original suit is not for such easementary right and therefore present application can not be allowed. In support of this contention, he relied upon ruling reported in Alimoddin Faizuddin and others Vs. Siddi Mumtaz Ahmad Siddi Ahmad Kadar and others, AIR 2010 Bom.59 (Aurangabad Bench). This ruling is helpful to the defendants considering nature of proposed amendment which will adversely affect on the defendants and their dispute and considering final stage of suit, the plaintiff can not be allowed to amend pleading, so as to completely change entire suit by allowing such application. When both the parties were directed to lead additional evidence on the additional issue though since beginning both the parties were knowing this fact, the plaintiff choosed to file present application only with intention to fill up the lacuna. It seems that the plaintiff has not acted diligently while filing present suit. So, considering all these aspects and final stage of suit, application is liable to be rejected. Accordingly, I answer point no.1 in the negative.

As to point no.2:-

10) Considering reasoning on point no.1, present application is liable to be rejected in view of proviso of Order 6, Rule 17 and as the plaintiff did not point out his due diligence to make amendment before commencing trial. The suit is pending since 13 years and suit is fixed for judgment, it will be proper to reject present application by imposing cost of Rs.1,000/- upon the plaintiff. Hence, I pass following order.

Order

Application (Ex.78) is rejected with cost of Rs.1,000/- upon the plaintiff.

Date - 17/01/2015.

(Mrs. J.S.Jagdale)
Joint Civil Judge Junior Division, Parner.