

ORDER BELOW EXH. 68 IN RCS No. 19 / 2014
Mithya Himda Bhil & oth. Vs. Bhimsing Relya Vasave

1- This is an application under Order VI Rule 17 of C.P.C. for amendment in the plaint.

2- Contentions of plaintiffs, in short, are as under.

The suit is for perpetual injunction and declaration of ownership. While filing the same, name of defendant was wrongly mentioned as "Bhimsing @ Thankya" in paragraph No. 3, which is required to be replaced by "Bhimsing @ Dhankya". In paragraph No. 6, an addition is to be made about date of mutation entry as well as illegal activity of mother of defendant. Although perpetual injunction is one of the relief sought by plaintiffs and court fees is also paid for the same, there is no specific mention about said relief in title as well as body of plaint. It is also further submitted that plaintiff No. 1 Mithya is father of plaintiff Nos. 2 and 3, and now plaintiff No. 1 Mithya has expired and whereabouts of plaintiff No. 3 Dharma are not known since long, and therefore the application is made by plaintiff No. 2 Khetya only. Accordingly, this is the application by plaintiff No. 2 Khetya for himself as well as on behalf of plaintiff No. 3. Affidavit of plaintiff No. 2 Khetya in support of said contentions is also on record at Exh. 69.

3- Defendant filed say overleaf the application. According to him, the suit is old one and the application is moved in order to protract the trial. It is also contended that entire nature of suit will be changed if the amendment is permitted. He accordingly requested to reject the application.

4- Heard learned Advocate Shri R.R.Marathe for plaintiffs and learned Advocate Shri R.T.Vasave for defendant. Also gone through entire material on record.

5- At the outset it is necessary to mention that issues are

framed in the year 2015, affidavit of P.W.No. 1 is on record, and the suit is posted for his cross-examination. As such, it is clear that the trial has commenced and therefore there is strict rigour of provisions of Order VI Rule 17 applicable at this juncture. Accordingly two important aspects are required to be seen. Firstly as to whether the proposed amendment is necessary to determine real controversy between the parties or not ; and secondly whether said amendment will cause prejudice to any party or not.

6- Plaintiffs are intending to make three prominent changes in their pleading. First is in respect of name of defendant ; second is in respect of mutation entry and details thereof ; and third is in respect of relief of perpetual injunction. Also it will be necessary to see as to whether said amendment, if allowed, will change nature of suit or not. Let us discuss each one on different footings.

7- Regarding the first aspect, on perusal of record and proceeding, it is clear that name of defendant in title clause is mentioned as "Bhimsing @ Dhankya", whereas in paragraph No. 3 it is mentioned as "Bhimsing @ Thankya". As such, it is quite clear that in paragraph No. 3 of plaint, there is typographical error, which is minor in nature and not going to affect the proceeding in any way.

8- Regarding second aspect, it is also seen that in paragraph No. 6 of the plaint, there is only mention of mutation entry No. 92, but its date is not mentioned. Plaintiffs are now intending to bring on record said date of mutation entry. Plaintiffs are also intending to elaborate as to how fraud was played by mother of plaintiff with the hands in glove with revenue authorities for getting sanctioned said mutation. Definitely it is part of evidence. However, without there being any pleading, plaintiffs may be deprived to adduce any evidence. On the contrary, if said pleading is allowed, defendant is not going to be harmed in any

way, particularly considering his stand that valuable rights are created in his favour vide said mutation entry. Facts about and behind said mutation entry are necessary, particularly when the plaintiffs are agitating to be the owners of the suit property and seeking the relief of declaration. Therefore, I am of the view that said amendment is necessary to decide the controversy between the parties as well as it will not cause any prejudice to defendant.

9- Regarding the last and important aspect about amendment in relief, record and proceeding goes to show that plaintiffs had preferred an application under Order XXXIX Rule 1 and 2 of C.P.C. for temporary injunction and it was rejected by the court. Plaint also goes to show that the valuation of the suit was done showing the reliefs of declaration of ownership as well as perpetual injunction. Therefore, although there is no pleading about perpetual injunction, record clearly goes to show that plaintiffs have paid the court fees for the same as well as contested early stage of said claim. As a result, I am of the opinion that said omission shall not come in the way of plaintiffs, to pursue their cause in the litigation.

10- An important aspect is now required to be considered is as to whether plaintiff No. 2 can be allowed to plead for plaintiff No. 3. It is clear that initially all the three plaintiffs were claiming to be owners of the suit property and therefore sought the relief of declaration of ownership. Now, although plaintiff No. 2 is allowed to continue the cause, it is quite clear that the declaration he will seek is for him as well as said plaintiff No. 2. It cannot be overlooked that defendant has challenged (vide his written statement) the rights of all the three plaintiffs in the suit. Therefore, even though application is preferred by plaintiff No. 2, it is definitely for the larger interests of plaintiff Nos. 2 and 3. As a result, I am of the view that owing to temporary absence of

plaintiff No. 3 for the reasons set in the application, plaintiff No. 2 shall not be deprived from continuing the cause.

11- Thus, in view of all the abovesaid, I am of the opinion that although the suit is fixed for trial, the proposed second and third amendments are necessary to decide the real controversy between the parties as well as it will not cause any prejudice to defendant.

12- However, it cannot be overlooked that the suit is of the year 2014 and owing to said amendment, the suit will relegate to the stage of written statement of defendant. No doubt, it will increase the duration of the proceeding and for which plaintiffs are to be blamed. Therefore, I am also of the opinion that for the said cause of negligence on the part of plaintiffs, they shall be saddled with the costs for the cause.

13- For abovesaid reasons, I am of the opinion that the application deserves to be partly allowed. Accordingly, following order.

ORDER

- 1] Application is allowed, subject to cost of Rs.1,500/- (Rs. One Thousand Five Hundred only) to defendant for the cause, as condition precedent.
- 2] Plaintiffs to carry suitable amendment in plaint and also to file amended plaint on or before next date.

Dt. 15.12.2018
Akkalkuwa

(**Anand D. Karbhajan**)
Civil Judge (Junior Division),
Akkalkuwa