

CNRNo-MHNS130011232016

R.C.S. No. 122/2016
Lalit Shinde Vs Bhikaji Thete**ORDER BELOW EXH.54**

The present application is filed by the plaintiffs for review U/O XLVII Rule 1 of Code of Civil Procedure, 1908. Called for say. No say filed. Hence, my Ld. Predecessor passed no say order below Exh.54.

2. Perused the application, record. Heard learned advocates for both the parties. Ld. Adv. Shri. V.B. Deshmane appearing for the applicants/plaintiffs submitted that plaintiffs have instituted this suit for perpetual injunction. Exh.5 was allowed partly. Defendants preferred the appeal against the said order. Appeal was allowed, thereby order below Exh.5 was set aside. Due to which these plaintiffs moved application U/O VI Rule 17 Rule 16. If court comes to the conclusion that plaintiffs have no possession over the suit property, then in such situation plaintiffs felt alternate prayer in respect of possession is required. Therefore, plaintiffs moved application for amendment for alternate prayer of possession. Defendants objected application and court rejected the amendment application below Exh.49.

3. He further submitted that plaintiffs have clearly stated amendment sought is alternative in nature. They have not abandoned demand made in original claim. Also, plaintiffs did not ask for amendment in pleading, in such a situation plaintiffs feel that court drawn such conclusion because the court did not notice the word "Alternative" in the application. He submitted that amendment

sought does not change the content or demand of original claim. On the other side, it would end the dispute between the parties if the proposed amendment is allowed. Hence, by this application he prayed to review the order below Exh.49.

4) Considered the submissions of both the parties. Points for determination along with my findings thereon, for the reasons are as under:

Sr. No.	<u>Points for determination</u>	Findings
1.	Whether the order below Exh.49 needs to be reviewed under order XLVII Rule1?	No.
2.	What order?	As per final order.

:: REASONS ::

AS TO POINT NOS. 1 AND 2:

5) As these points are interconnected, I have taken them together for discussion in order to avoid repetitions of facts. Learned Adv. Shri. V.B. Deshmane appearing for the applicants/plaintiffs submitted that the plaintiffs have filed this suit for perpetual injunction that defendant no.1 to 9 shall not obstruct the plaintiffs from building wire fence by digging holes in the land. It is also prayed that defendants shall not obstruct plaintiffs from enjoyment or shall not do such act which causes obstruction to the ownership and possession of the plaintiffs over the suit land mentioned in para 1 of the plaint. He argued that Court failed to consider the legal position. By way of amendment plaintiffs in alternative were asking for possession, which does not change the nature of the suit. Alternative relief

would not change the nature of the suit and hence, finding of the court that proposed amendment would change the nature of the suit is not correct. Such finding is something mistake or error apparent on the face of the records. To support his contentions, he has relied on the rulings of Hon'ble apex court in the matter *Shakuntala Balsaraf v/s Ramdas Balsaraf 2013(2) Mh.L.J* and *Ashok v/s state of Goa 2015(1) Mh.L.J.*

6) On the other hand, Ld. Advocate Shri.R.T Chavan for the defendants submitted that, present application is not tenable. Plaintiffs have pleaded in the plaint that they are owner and possessor of the suit property. On that basis they have instituted suit for perpetual injunction. Thereafter, at the stage of hearing and commencement if trail moved application for amendment with prayer of partition and separate possession. The proposed amendment changes the whole nature of the suit. Issues are already framed and evidence affidavit is also filed, therefore prayer in proposed amendment is barred by limitation. Hence, he prayed to reject the application.

7) On perusal of record, prima facie it appears that this suit is instituted in the year 2016, wherein Plaintiffs have pleaded ownership and possession over the suit property and prayed for perpetual injunction against the defendants. Defendants have appeared and filed their W.S. at Exh.27. On 02.05.2017 my Ld. Predecessor allowed Exh.5 of the plaintiff partly. On 21/11/2017 issues are framed at Exh.39 and on

08/08/2018 plaintiffs filed evidence affidavit of P.W.1 Lalit Shinde at Exh.40. Since then, matter was pending for cross examination of P.W.1 till 09/11/2021. Meanwhile LR's of deceased was taken on record. On 18/10/2022 application for amendment is moved below Exh.49. My ld. Predecessor rejected the same vide order below Exh.39.

8) Record shows that, the amendment application is moved after commencement of the trial. Suit is for simpliciter injunction instituted on the basis of ownership and possession. Ld. Advocate for the plaintiffs argued that appeal preferred against order below Exh.5 got rejected, and thus cause for proposed amendment occurred. Appeal against Exh.5 is allowed in favour of the defendants and since then they are disputing the possession of the plaintiff. If after evidence it is disclosed that plaintiffs are not in possession but land is in common possession, then plaintiff would be entitled for separate possession. Therefore, he is entitled for partition and separate possession.

9) I have carefully gone through the record and proposed amendment. The nature of the suit instituted and demands made in the suit are different from the proposed amendment and prayers, which clearly changes the nature of the suit. I have also carefully gone through the rulings cited by ld. Advocate for the plaintiffs. In the matter **Shakuntala Balsaraf v/s Ramdas Balsaraf 2013(2) Mh.L.J** sale deed was executed by the defendants; there was specific pleadings and

main prayer of declaring that sale deed null and void. Proposed amendment was for restoration of possession of suit land as respondents have taken possession with police aid and therefore it was necessary to seek amendment of the plaint and prayer of additional relief of restoration of possession. Further, facts and circumstances in the matter *Ashok v/s state of Goa 2015(1) Mh.L.J.* are different than the present suit and hence, not applicable.

10) In present suit there is no such pleading in the plaint to the effect that defendants were/are denying the possession of the plaintiffs and hence, plaintiffs are entitled for such declaration and for recovery of possession. On the other hand, ld. Advocate while argument stated if after evidence it is disclosed that plaintiffs are not in possession but land is in common possession, then plaintiff would be entitled for partition and for separate possession. Suit for simpliciter injunction based on ownership and possession is different from the suit for partition and separate possession. I am of the considered view that proposed amendment and demand of possession though alternative in nature, without any pleading in the plaint to that regard, without any subsequent event during pendency of suit due to which relief could not have been made earlier with all diligence at command of the plaintiff etc. clearly changes the nature of the suit. On perusal of order passed below Exh. 49 I found findings given by my Ld. Predecessor are well reasoned.

11) Further, it is well settled position of law that application for amendment can be moved at any stage, however it should not change the nature of the suit. In present case situation is different and proposed amendment changes the nature of the suit. Moreover, as decided in many rulings of the Hon'ble apex court review is for correcting the mistakes and not to substitute a view. I do not find any mistake or error apparent on the face of the record as contended by the plaintiffs. Under such circumstances, I answer to the **point no.1** in **Negative** and as an answer to **point no.2**, I pass following order:

ORDER

1. The application filed U/O XLVII Rule 1 at Exh.38 stands rejected.

Sd/-xxx

Date :- 15/07/2025
Place :- Pimpalgaon (B).

(V. W. Khendad)
2nd Jt.Civil Judicial Junior Division
Pimpalgaon