

R.C.S. No.138/2013
Shivaji Karbhari Aher, etc.
Vs.
Tanubai Tukaram Aher, etc.

Order Below Exh. 57

The present application is filed by the plaintiffs seeking amendment of the plaint under order VI Rule 17 of the Code of Civil Procedure.

2. The plaintiffs contend that the present suit is filed by them against the defendants for declaration and perpetual injunction. The plaintiffs are the owners and in possession of Gat No. 433 admeasuring about 1H 32 R+ 0H 72 R situated at village Rameshwar, Tal. Deola, Dist. Nashik. The defendants are the owners of Gat No. 434 admeasuring about 0H 77R + 1H 27 R situated at village Rameshwar, Tal. Deola, Dist. Nashik. The defendants have made an encroachment upon 70 R area of their Gat No. 433. Hence, the plaintiffs have filed the present suit for declaration and perpetual injunction. By way of the present application the plaintiffs propose to insert pleadings regarding measurement taken place in respect of his Gat number as per Measurement Number 317/2005 and encroachment of 0.70 R. area which was found as per the measurement. The plaintiffs also seek to insert area and fore-boundaries of the encroached land. The plaintiffs seek to amend paragraph regarding computation of court fees stamp. The plaintiffs further seek to amend prayer clause of the plaint by inserting prayer regarding recovery of possession of encroached portion of land. Thus, the plaintiffs contend that if the present application is allowed it will not change the nature of the suit. If the present application is allowed, no prejudice will be caused to the defendants. However, if the present application is rejected the plaintiffs will suffer irreparable loss. Hence, the plaintiffs prayed that the present application be allowed.

3. The defendants resisted the present application by filing their say at Exh. 62. They contend that the present suit was filed in the year 2013. However,

the measurement which the plaintiffs contends to have taken place was made on 23/12/2005. The plaintiffs were aware of the said measurement while filing the present suit. However, they failed to incorporate the said pleadings at the time of filing the suit. Further, although Additional Commissier Nashik, has cancelled order of S.D.O. and Additional Collector Malegaon, he has not given direction to hand over encroached land to the plaintiffs. The said matter is already pending before the Revenue Court. Hence, the plaintiffs cannot seek relief of recovery of possession of encroached land. Further the present suit was originally filed for declaration and perpetual injunction however, hence if the plaintiffs are allowed to insert additional prayer of recovery of possession of encroached land, it will change the nature of the suit. Thus considering all the above grounds the defendants prayed that the present application be rejected.

4. Ld. adv. for the plaintiffs Shri. A. V. Junnare argued that measurement map in MR. No.317/2005 has already been filed by the plaintiffs along with list of documents at Exh. 3. By way of present application the plaintiffs merely want to amend pleadings regarding the same. In case of suit for encroachment if, prayer of possession is inserted by way of amendment it does not change nature of the suit in any way. Even if, the present application is allowed the plaintiffs will have to prove their case. The defendants will have opportunity to cross-examine the plaintiff witnesses. Moreover, trial has not been commenced in the present matter, Hence, if the present application is allowed no prejudice will be caused to the defendants. However, if, the present application is rejected the plaintiffs will suffer irreparable loss. The plaintiffs are ready to pay costs imposed by the court if the present application is allowed. Thus he prayed that the present application be allowed.

5. Per contra Ld. Adv. for the defendants Shri. D. N. Sonawane, argued that in the present case, measurement was carried out in the year 2005 and the present suit is filed in the year 2013. Hence, the present suit is not filed within limitation as per the provisions of Article 64 of Limitation Act. Additional

Commissioner in his Judgment dated 4/6/2011 had merely remanded the present matter and it was not allowed in favour of the plaintiffs. Hence, the plaintiffs cannot seek recovery of possession of encroached land. Further, the present application does not mention reason for the proposed amendment. Moreover, if the proposed amendment is allowed, it will change nature of the suit. Hence, he prayed that the present application be rejected

6. Perused the application, say and documents filed on record. Heard ld. Adv. Shri. A.V. Junnare for the plaintiff and ld. Adv. Shri. N. K. Sonawane for the defendants. At this juncture it is necessary to discuss the provisions of order VI Rule 17 of Code of Civil Procedure.

Order VI Rule 17 of C.P.C. reads as follows.

Amendment of pleadings-The Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties.

Provided that no application for amendment shall be allowed after the trial has commenced, unless the court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial.”

7. As per the above provision, amendment may be allowed at any stage of the proceedings if it is necessary for the purpose of determining real question in controversy between the parties. The amendment which the plaintiffs have sought is in respect of carrying out measurement of the suit lands. Hence, pleadings regarding the same are necessary for determining real question in controversy between the parties. The present suit is in respect of alleged encroachment. Hence, if the plaintiffs seek relief of recovery of possession of encroached land, the said relief cannot be said to change nature of the present suit. The defendant has raised an objection to the present application on the

ground that the suit is hit by Law of Limitation. However, the said is a question of merit and it can be determined during trial of the suit. The defendants are at liberty to file amended say. The plaintiffs will have to prove their case and the suit will ultimately be decided on merit. However, at this juncture the plaintiffs cannot be denied opportunity to put their entire case before the court. If the present application is rejected, the plaintiff will be denied the opportunity of putting up their case before the court. On the other hand, if the present application is allowed no prejudice will be caused to the defendants. Also in the present case trial has not yet commenced and the defendants have opportunity to file amended say and to cross-examine plaintiff witnesses. However, the plaintiffs could have incorporated the pleadings regarding measurement carried out in the year 2005 at the earlier stage and could have avoided the delay. However, the delay can be compensated in terms of money.

In the light of the above discussion, I pass the following order-

ORDER

1. Application (Exh. 57) is allowed with costs Rs. 500/- (in words Rupees Five Hundred only)
2. The plaintiff to pay costs to the defendants.
3. The plaintiff is directed to carry out the amendment and file the amended plaint on or before the next date.

(Dictated and pronounced in open court)

Place : Kalwan
Date : 09.02.2021

(A. C. Joshi)
Jt. Civil Judge, J.D., Kalwan