

IN THE COURT OF JOINT CIVIL JUDGE, JR. DIV. (Morning Court)
MALVAN.
AT : MALVAN.

Shri. Ganesh Nareshwar Vengurlekar --- Plaintiff.
Vs.

1. Shri. Anand Bala Bambardekar and others ---Defendants

ORDER BELOW EXH. 65 IN REG. CIVIL SUIT NOS. 14/2013,
(Order dated 02/02/2015)

The present suit is filed for declaration of easementary right and for permanent injunction. Defendants have contested the suit. In this suit plaintiff has filed application for temporary injunction below Exh. 5. During the Course of argument of Exh. 5 it is brought to my notice that after filing of suit, defendant nos. 1 and 2 have closed the disputed way. Hence the amendment is necessary in the application of temporary injunction in respect of relief of mandatory injunction. Accordingly plaintiff has filed present application under Section 151.

02. This application is strongly opposed by defendant nos. 1 to 3 contending that the Court can not use powers under Section 151 and grand this application. It is further contended that plaintiff has not ask amendment in the plaint. It is further contended that after hearing the argument on Exh. 5 the present application is moved. It is further contended that after filing of this suit after laps of one and eight months plaintiff has taken the matter for argument on temporary injunction application and thereafter this application is moved, it shows that there was no urgency to the plaintiff. It is further contended that the application is filed at belated stage and there is no substance and force in the application and hence it is contended that,

application may be rejected.

03. I have heard Ld. Advocate Shri. S.S.Pai for plaintiff and Ld. Advocate Smt. Kubal for defendant nos. 1 to 3. Ld. Advocate Shri. Pai has submitted that, after filing of this suit defendant nos. 1 to 3 have closed the suit way and that is to why plaintiff has filed the present application which is covered by Sec. 151 as well as 153 of the Code of Civil Procedure, 1908. It is submitted that the objection taken by the defendants is absolutely unfair and deserves to be rejected.

04. *Per contra*, Ld. Advocate Smt.Kubal submitted that, jurisdiction under Section 151 of the Code of Civil Procedure, 1908 cannot be exercised so as to nullify the provisions of the Code. Where the Court expressly deals with a particular matter, the provision should normally be regarded as exhaustive. In support of her submission she relied on the judgment of Hon'ble Apex Court in **National Institute of Mental Health and Neuro Science Vs. C. Parameshwara reported in 2005(2)Mh.L.J. Page 1**. She further submitted that the provisions of Section 151 cannot be exercise routinely, merely for asking. She relied on the judgment of Hon'ble Apex Court in **K.K. Velusamy Vs. N.Palanisamy reported in 2011 (3) ALL M.R. 455 (SC)**. She further submitted that the provisions of Sec. 153 of the Code of Civil Procedure,1908 also cannot be used for purpose of allowing this application. She relied on the judgment of Hon'ble Bombay High Court in **Jotiram Shiva Patil Vs. Dwarkabai Yashwant Mardane reported in 2012 (1) ALL M.R. 644**. She further submitted that the application is filed after laps of one year and eight months which shows that, plaintiff was no urgency. She further submitted that plaintiff has no easementary right from the suit property. She raised all other points mention in the say filed below Exh. 67 and prayed to reject the application.

05. The law is well settled for invoking the powers under Section 151 of the Code of Civil Procedure, 1908. Ld. Advocate Smt. Kubal rightly placed her reliance on the judgment of Hon'ble Apex Court in **National Institute of Mental Health and Neuro Science Vs. C. Parameshwara reported in 2005(2)Mh.L.J. Page 1** and in **K.K. Velusamy Vs. N.Palanisamy reported in 2011 (3) ALL M.R. 455 (SC)**. But we cannot ignore the provision of Section 153 of the Code of Civil Procedure, 1908. The said provision read thus,-

153. **General power to amend.**- The Court may, at any time, and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceeding in a suit; and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on such proceeding.

06. The present suit is for declaration of easementary right and for permanent injunction. The report of Court Commissioner is on record. Photographs of disputed way taken at the time of filing of the suit and after filing of suit as well as at the time of court commission work are on record. According to plaintiff after filing of the suit and service of suit summons defendants have closed the disputed way. Whether the disputed way is in existence, whether the plaintiff has easementary right over the suit way, whether the said way is closed by defendants after filing of the suit etc. are the points to be considered on merit. But considering the allegations level against defendants and contents of application I am of the opinion that the power under Sec. 153 can be used to amend any defect or error in the proceeding of the suit. The proposed amendment is asked for the purpose of determining the real question raised in the proceeding. Hon'ble Bombay High Court in **Jotiram Shiva Patil Vs. Dwarkabai Yashwant Mardane**

(4/4) Order below Exh. 65 in R.C.S. No. 14/2013.

reported in 2012 (1) ALL M.R. 644 , which is relied upon by Ld. Advocate Smt. Kubal, it is held in Para No. 14 that,

It is trite that in so far as, the rules of procedure are concerned, they are the hand maid of justice and have to be utilized for the furtherance of the cause of justice rather than to oppress it. A party cannot be refused relief merely because there was some error or mistake or negligence on its part as ultimately the substance has to be seen and not the form. A useful reference could be made to the Judgment of the Apex Court in **Jai Jai Ram Manohar Lal (supra)**.

In the said judgment Hon'ble High Court has considered the Provisions of Sec. 153 of the Code of Civil Procedure, 1908. In the said judgment it is held that, Court is sufficiently ceased the powers under Sec. 153 of the Code Of Civil Procedure, 1908 to permit the correction of any defect or error in the proceeding so far to facilitate the determination of the real question before the Court. So application deserves to be allowed and allowed accordingly. No order as to costs.

Dictated on dais and pronounced in open Court.

Date: 02/02/2015

(Santosh D. Chavan)
Jt. Civil Judge, Jr. Dn. Malvan.