

Order below Exh.162 in RCS 36/2009
Radhabai Karade and Ors Vs Vikaram Dafale and Ors
(CNR-MHSN08-000156-2009)

The application is for amendment, by the original defendants 1 to 5 in the counter claim.

2 Perused the application, say (Exh.164), and the record.

3 Heard, both the sides.

4 Brief facts in the proceedings:- The suit is of 2009. Initially, the suit was for fixation of boundaries. By way of amendment, below Exh.104, prayer for the original plaintiff being the owners by adverse possession has been incorporated. This is after the Court Commission has submitted its report Dt.21/04/2016. The original defendants filed their detailed ws below Exh.22, along with the counter claim, seeking mandatory injunction of removal of the construction in the S.No.490/1A of defendant 1 towards eastern side Anandpur road. Further, by way of amendment below Exh.35. The digging of the well, and the electricity connection is sought to be declared as illegal.

5 By way of proposed amendment, the original defendants, contended, that the original plaintiff has incorporated 2 H 90 R land more particularly mentioned in instant application para 10 A A, the possession of the encroached portion has been sought. Vide proposed para 11 B 1, the prayer for Mesne Profit, has been claimed under para 11 B 2. Therefore, it would be prayed that the application may kindly be allowed.

6 The application has been vehemently opposed on the ground that the proposed amendment has been sought for, after 8 years 2 months and 7 days. The trial has commenced. The suit property is owned and possessed by the original plaintiffs since 17/05/1958. The counter claim for a decree of perpetual injunction has been sought to be changed to a claim for possession. Earlier in the suit RCS 38/2007 by the original defendants against the original plaintiff has been dismissed. The original defendants' suit for partition bearing RCS 13/2007 has been dismissed of 02/07/2008. The prayer has been sought after 66

years. Therefore, it would be prayed that the application being misconceived, be rejected.

7 The following points arose for my determination to which I record my findings together with the reasons thereof.

Sr.No	Points of determination	Findings
1	Does the plaintiff prove that the proposed amendment, is necessary for deciding the real controversy between the parties under Order 6 Rule 17 of the C.P.C?	Yes
2	Whether the facts are covered under the proviso to Order 6 Rule 17 of the C.P.C?	Yes
3	What order?	As per the final order

Reasons

Points 1 and 2

8 For deciding the instant application, the application has to be tested on the touchstone of Order 6 Rule 17 of the Code of Civil Procedure, 1908 (the C.P.C). The test is that whether the proposed amendment is necessary for deciding the real controversy between the parties?. The same is circumscribed by the proviso, which restricts the post trial amendment, and allows the exception only in case, that despite due diligence, the amendment could not be sought for.

9 The original suit is for removal of encroachment, the original plaintiffs being owners by adverse possession, and the decree of perpetual injunction. The counter claim was initially for removal of construction/mandatory injunction and finally now challenging the digging of the well and the obtaining a electricity connection.

10 If the facts are considered, when the original plaintiffs claims to be owner by adverse possession, the fact remains the original plaintiffs

admits the ownership of the original defendants. By way of proposed amendment, possession of encroached portion has been sought as well as Mesne Profit. If, the original plaintiffs claim adverse possession, the possession of the property or the area, allegedly possessed by the original plaintiff vis-à-vis the fixation of boundary has been sought to be incorporated. The fact remains the controversy may be decided, if the instant application is allowed.

11 It is settled law, that the amendment of plaint and written statement stands on different footings. Further, it is settled law that, amendment to written statement has to be liberally, allowed than the plaint.

12 The original defendants, contested that inadvertently they failed to seek the relief. The application is on affidavit. The inadvertence may be one of the grounds for not seeking, the amendment at the earliest, the fact remains to avoid multiplicity of the proceedings, the age of the instant proceedings which is about 16 years, and the particularly the fact remains, the disputed question of fact and law as to the amendment being time barred can be gone into, at the stage of trial. In short, the merits of the amendment may not be gone into at this stage.

13 If the facts are considered from another angle, that if a separate suit for possession, is filed, the parties are required to contest the same.

14 For the above reasons the application has to be allowed. The inconvenience caused to the other side has to be remedied. The proposed amendment is necessary for deciding the rights of the parties. The application qualifies the test of due diligence i.e., for post trial amendment. The other side may counter the amendment, if required. Accordingly, the points for determination are answered. Costs follows the events. Hence, the following

Order

The application is allowed.

2 The original defendants to carry out the proposed amendment forthwith, and file on record duly amended copy within 3 days from today.

3 The cost at Rs.1000/- payable forthwith.

Jath
Date:02/04/2025

(Sanjay P.Bunde)
Jt.C.J.J.D, Jath