

//1//

R.C.S. No. 19/2014

Balwant & Others Vs. Vijay & Others

**ORDER BELOW EXH.62**

(Passed on 03/02/2020)

(CNR No.MHWS07-000397-2014)

1. This is an application filed by the plaintiffs under Order 6 Rule 17 of the Civil Procedure Code (for short 'the C.P.C.') for the amendment in the plaint.
2. By way of proposed amendment, the plaintiffs wants to insert Para No. 4 (A). They further want to add prayer clause-2 in the plaint. It is submitted by the plaintiffs that they have filed the present suit for removing encroachment and for mandatory injunction and prayed the relief for removing encroachment of cement poles and iron board done by the defendant No. 1 which is displaying the name of defendant No. 1 and relief of possession. In the present matter no effective hearing took place.
3. The proposed amendment in the plaint is very much necessary for just, proper and fair adjudication of the matter. Hence, the plaintiffs prayed for inserting Para No.4 (A) which is as under.

*Para No. 4 (A) It is submitted that, after the filing of the suit, the defendant has started construction of compound wall and erected the compound wall surrounding to the suit property without any permission or having any authority to do so. The act of defendant is itself arbitrary and irrespective to the process of adjudication of the instant suit as the defendant was well aware and in knowledge that, the lis is pending before the Hon'ble Court in respect of suit property, even though the defendant transgress the law and made illegal construction of compound wall upon the suit property which is liable to be dismantled by way of mandatory injunction.*

4. Further, the plaintiffs want to amend the prayer clause-2 of the plaint by inserting the following proposed contents.

*(2) Encroachment of cement poles and iron board done by the defendant No. 1 which is displaying the name of defendant No. 1 may kindly be removed and the illegal construction of compound wall upon suit property which is under R.C.C. may kindly be removed and dismantled and possession of the suit property may kindly be given to the plaintiffs.*

5. It is further submitted by the plaintiffs that the above said proposed amendment will not change nature of the suit. Moreover, it is necessary for the purpose of determining the real questions between the parties. Further, if the present application is not allowed then it will cause irreparable loss to the plaintiffs. On the contrary, the defendants will not suffer any loss as no effective hearing took place. Hence, the plaintiffs prayed for allowing the present application.

6. Defendant No. 1 filed his say vide Exh. 63 and strongly opposed the present application. It is submitted by him that the plaintiff has already placed their affidavit for evidence on record on 05/03/2016 at Exh. 25 and no new facts or the incident has been brought forward on record by which the plaintiffs can be permitted to amend the plaint. Therefore, the amendment sought after commencement of the trial can not be allowed as barred by the law. Further, the plaintiffs have prolonged the suit by this or that reason after the filing affidavit of evidence. Thereafter, also the plaintiffs moved application for amendment of plaint at Exh. 33 which was allowed by the court. However, the plaintiffs failed to amend the plaint within the time prescribed by the law and then again and again tried to move the applications

for permission to effect the amendment but the court has rejected those applications.

7. It is also submitted by defendant No. 1 that the plaintiffs again sought the adjournments from this court and the same came to be granted subject to costs. Thereafter, again on 26/08/2019 the plaintiffs moved the application for permission to carry out the amendment which came to be rejected by the court. Thereafter, the present application is going to be placed on record which itself speaks everything. Therefore, the application filed by the plaintiffs is liable to be rejected as it is filed after commencement of trial. Hence, defendant No. 1 is entitled for the compensatory costs of Rs. 5,000/-.

8. Heard the learned advocate for the plaintiffs Shri. J.M. Khan and learned advocate for defendant No.1 Shri. R. S. Johrapurkar at sufficient length. Perused the application and say filed by the defendant.

9. It is important to note here that the present suit is filed for the relief of removing encroachment and mandatory injunction. The plaintiffs by way of proposed amendment want to add further pleadings after existing Para No. 4 of the plaint which is relating to alleged construction of compound wall surrounding to the suit property by the defendant No. 1. The plaintiffs further want to add prayer clause in respect of the same.

10. The proposed amendment is strongly opposed by defendant No.1. He submitted that the plaintiffs have not mentioned date of alleged illegal construction. Moreover, already trial has commenced. The present application is not tenable. Previously, also the plaintiffs have filed amendment application at Exh. 33 which was allowed but they failed to carry

out the said amendment. Moreover, now the plaintiffs are prolonging the present suit. Hence, he prayed for rejection of the application.

11. The **Hon'ble Bombay High Court** in **Teodolinda Dias Mandoly Vs. Laurie H. Pereira 2014 (7) Bom. C. R. 222** held that *the court has to take liberal view for allowing application for amendment which are filed prior to the commencement of the trial and which are necessary to decide the matter in controversy*. In the case in hand the plaintiffs have filed affidavit of their evidence vide Exh. 25 and trial has commenced. However, only affidavit is filed and further examination-in-chief is yet not started. Moreover, the proposed amendment seems to be necessary for deciding the real controversy between the parties. Furthermore, the proposed amendment is in respect of illegal encroachment made by the defendant No.1. Hence, the proposed amendment will definitely not change nature of the suit. Defendant No. 1 will also have opportunity to meet out the proposed pleading of plaintiffs and also by way of consequential amendment. So far as delay in filing the present application is concerned the defendant can be compensated in terms of money by way of imposing costs on the plaintiffs.

12. The learned advocate for the defendant No.1 relied on judgment of the **Hon'ble Delhi High Court** in **Evelyn J. Disney Vs. Rajeshwar Nath Gupta AIR 1996 Delhi 86** wherein the Hon'ble High Court in Para No. 12 held that *amendments which are not bona fide and unnecessary for determining real question in dispute then the said amendment needs to be refuse*. I have gone through the said authority. However, with most due respect to the said authority it is important to note here that facts of the cited judgment and facts of the present case are different. In that particular case the

advocates have advanced their arguments and the plaintiffs and defendant No. 7 have filed their written arguments. However, in the present case even further examination-in-chief is yet not completed. Moreover, the proposed amendment seems to be necessary for deciding the real question in dispute as it is relating to illegal encroachment made by defendant No.1. Hence, the said authority will not work for the cause of defendant No.1.

13. The learned advocate for the defendant No.1 further relied on judgment of the **Hon'ble Supreme Court** in **J. Samuel & Others Vs. Gattu Mahesh & Others Civil Appeal No. 561/2012**. I have gone through the above said authority. In the said authority the Hon'ble Apex Court in Para No.10 to 13 have discussed about amendment after commencement of the trial. However, with most due respect to the said authority I would like submit here that in that particular case the matter was posted for judgment. However, the said stage is not with case in hand. Moreover, the Hon'ble Apex Court in Para No.12 itself held that *amendment can be allowed after commencement of trial if it is necessary for the purpose of determining real question between the parties*. In the case in hand admittedly the plaintiffs have not explained about due diligence. Even if it is so, the proposed amendment is necessary for determining real question between the plaintiffs and the defendants. Hence, I am of the view that the defendant No.1 will not get any benefit from the above said authority.

14. The learned advocate for the defendant No.1 also relied on judgment of the **Hon'ble Parent High Court** in **Sasa Detergent Division Vrs. Damodhar S. Mudliyar & Others Writ Petition No. 1216/2011**. I have gone through the said authority. However, with most due respect to the

said authority I would like to submit here that in that particular case the amendment was sought for correction of the description of the suit property etc. Moreover, there was huge delay in filing amendment application. But, in the case in hand there is no such huge delay and there is no correction of description of the suit property. Hence, I am of the view that the said authority is also not helpful to the defendant No.1.

15. The learned advocate for the defendant No. 1 further relied on judgment of the **Hon'ble Apex Court in Vidyabai & Others Vrs. Padmalatha & another Civil Appeal No. 7251/2008**. I have also gone through the said authority. In that judgment the Hon'ble Supreme Court has discussed about Court's jurisdiction to allow amendment application after the commencement of trial. Further, the **Hon'ble Apex Court** by referring judgment of **Salem Bar Association Vs. Union of India** discussed about due diligence. However, with most due respect to the said authority I would like to submit here that the Hon'ble Apex Court in Para No. 14 of the said judgment itself held that proviso appended to Order 6 Rule 17 of the Code restricts the power of court. The court's jurisdiction, in a case of this nature is limited. It means that the courts are having less power to allow the amendment application after commencement of trial. Hence, considering facts of the case I am of the view that the present amendment application needs to be allow for deciding real controversy between the parties. Therefore, I am of the view that the said authority is also not helpful to the defendant No.1.

16. Looking towards the contention of plaint as well as contention in the present amendment application, it can be said that the proposed

amendment does not fundamentally change the nature of the suit. It is further seen that the proposed amendment appears to be outcome of the subsequent event happened during the pendency of the suit. Thus, if such amendment will be allowed to be taken on record then, it would certainly curtail multiplicity of litigation. The amendment sought appears to be necessary for proper adjudication of controversy between the parties. Further, it is settled principle of law that the merit of proposed amendment cannot be gone into while deciding the amendment application. The same can be decided only during the trial. Hence, in view of the above factual and legal aspects, I am of the opinion that the present amendment application needs to be allowed. Therefore, I pass the following order.

**OPERATIVE ORDER**

1. The application (Exh.62) is hereby allowed subject to costs of Rs.500/- payable to defendant No.1.
2. The plaintiffs are directed to carry out the proposed amendment expeditiously.

Date:- 03/02/2021

Civil Judge Junior Division,  
Karanja (Lad), Dist-Washim.

//8//

R.C.S. No. 19/2014

Balwant & Others Vs. Vijay & Others

**CERTIFICATE**

I affirm that the contents of this P.D.F. file Judgment/ Order are same word to word as per the original order.

Name of Steno. :- N.L.Jamnik, Stenographer (Grade-3)

Court Name :- Civil Judge (Jr.Dn.) and J.M.F.C.,  
Karanja. Dist. Washim.

Date :- 03/02/2021

Order signed by the :- 03/02/2021  
presiding officer on

Order uploaded on :- 04/02/2021