

(2017) 02 BOM CK 0153
In the Bombay High Court
Case No : 689 of 2016

Smt. Asha Harishchandra Parsekar alias Smt. Alka Toraskar	APPELLANT
Vs	
Shri Ashok Anant Toraskar	RESPONDENT

Date of Decision : 09-02-2017

Acts Referred:

[Code of Civil Procedure, 1908](#), [Order 6 Rule 17](#)

Citation : (2017) 02 BOM CK 0153

Hon'ble Judges : C. V. Bhadang

Bench : SINGLE BENCH

Advocate : Asha Desai, Balkrishna Sardessai

Final Decision : Allowed

Judgement

1. Rule made returnable forthwith. The learned Counsel for the respondent, waives service. Heard finally by consent of parties.
2. The petitioner had filed a suit against the respondent for declaration, permanent injunction and consequential reliefs in respect of a property better known as "Auchit Wada", surveyed under no. 277/8, admeasuring 2225 square metres. The said property was originally owned by Mr. Victor Sequeira and is presently, surveyed under nos. 277/8 and 277/8-A.
3. According to the case made out in the plaint, there is a house bearing no. 166 (old), 343 (new), standing in the subject property. Admittedly, there is a sale deed dated 15.05.1989, by which an area admeasuring 912 square metres is shown to be purchased by the respondent from the original owner and this portion, which is purchased, is on the western side of the property. The portion is numbered as survey no.277/8-A.
4. The petitioner has made out a case that she is having a prescriptive right over the land survey no. 277/8-A and coownership right with the respondent (who happens to be the exhusband of the petitioner) in respect of the land survey no.

277/8.

5. The learned Trial Court by a judgment and order dated 30.11.2011, dismissed the suit, which is subject matter of challenge, at the instance of the petitioner, in Regular Civil Suit No. 185/2011, before the learned District Judge at Panaji.

6. On 06.11.2012, the petitioner filed an application for amendment of the plaint before the learned Appellate Court, on the ground that there was an error in mentioning the survey numbers. In short, the amendment sought is by interchanging the survey nos. 277/8-A and 277/8. In other words, the petitioner now wants to claim that she is the co-owner of survey no. 277/8-A and claiming prescriptive right in the land survey no. 277/8.

7. The application was opposed on behalf of the respondent.

8. The learned District Judge by the impugned order dated 29.06.2016 has dismissed the application, mainly on the ground that the petitioner has not shown due diligence as per the requirement of proviso to Order VI, Rule 17 of CPC. It has also been found that once, the suit has been decided, no amendment to the plaint can be allowed.

9. I have heard the learned Counsel for the petitioner and the learned Counsel for the respondent. With the assistance of the learned Counsel for the parties, I have perused the impugned order and the relevant record.

10. It is submitted by the learned Counsel for the petitioner that no oral hearing was granted to the petitioner and the application was decided on the basis of the written notes filed before the predecessor of the Presiding Officer, who has decided the application. Secondly, it is contended that the application should have been taken up for consideration at the time of final hearing of the matter. Insofar as the merits of the application are concerned, it is submitted that the petitioner is only praying to correct an error, which arose out of accidental slip or omission. It is submitted that the case of the petitioner is not changed and as such, no prejudice would be caused.

11. On the contrary, the learned Counsel for the respondent has contended that the suit was filed in the year 2007 and the amendment is sought in the year 2012, at the appellate stage, without showing due diligence and as such, the application has rightly been rejected. It is submitted that the petitioner has not been diligent in ascertaining the survey numbers and has also not put forth proper case before the Trial Court and now cannot seek amendment at the appellate stage.

12. I have considered the rival circumstances and the submissions made. At the outset, it is necessary to mention that the amendment at the appellate stage (of the pleadings before the Trial Court), cannot be said to be impermissible. In other words, it cannot be said that amendment of the pleadings before the Trial Court, cannot be sought at the appellate stage. The question depends upon facts and circumstances of each case. In the present case, all that the petitioner wants

is, interchanging of the survey nos. 277/8-A and 277/8. While in the original pleadings, the petitioner claimed co-ownership in respect of the land, which was described as survey no. 277/8, now, the co-ownership is claimed in respect of land survey no. 277/8-A. This is not on the ground of any dispute as to identity of the property. The perusal of the judgment and order of the Trial Court shows that Forms I & XIV of both these survey numbers are placed on record before the Trial Court. It was not disputed during the course of the arguments at bar that the portion admeasuring 912 square metres, which is subject matter of the sale deed dated 15.05.1989 is numbered as survey no. 277/8-A. Thus, this is a case of mere correction of a clerical error arising out of accidental slip or omission.

13. The learned Counsel for the petitioner states that the petitioner does not intend to lead any further oral or documentary evidence and shall not claim remand, if the amendment is allowed, as the matter can be decided on the basis of the evidence already led.

14. In the result, the following order is passed: O R D E R

- (a) The petition is allowed.
- (b) The impugned order is hereby set aside.
- (c) The application for amendment is allowed.
- (d) The learned District Judge shall decide the appeal on the basis of the evidence already led, on its own merits and in accordance with law.
- (e) Rule is made absolute in the aforesaid terms, with no order as to costs.