

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE SIDE JURISDICTION
WRIT PETITION NO.2964 OF 2009

Manohar Parshuram Waradkar.	..	Petitioner
Suprintendent of Land Records & Ors.	..	Respondents
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Mr.G.S.Godbole with R.K.Yadav for the petitioner
Mr.C.M.Korde Sr.Advocate a/w Mr.Rajiv Singh i/b M/s. Crowford Bayley and
Co for Respondent no.3
Mr.A.I.Patel,AGP for the State

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CORAM :A.S.OKA,J.
DATE : February 26th , 2010

PC.:

1 The parties were put to notice that the petition will be taken up for final disposal at admission stage. I have heard the learned counsel appearing for the petitioner, the learned senior counsel appearing for the third respondent and learned Assistant Government Pleader appearing for the first and fourth to seventh respondents. A notice for final disposal was ordered to be issued on 13th August 2009.

2 The petitioner is the original plaintiff and the respondents are the original defendants. The petitioner filed a suit for declaration that he is in occupation and in possession of suit land bearing CTS No.10/2, Parigha Khari, Kurla Sion Road, Kurla, Mumbai 400070 and that he has become the owner of the land by adverse possession. In the suit, the petitioner has challenged order dated 4th August 1997 passed by the first respondent. A prayer for perpetual injunction has been also made in the suit. The petitioner had taken out a Chamber Summons for amendment of the plaint. By the Chamber Summons,

the petitioner sought permission to amend the description of the suit land. According to the case made out by the petitioner, the suit land more particularly described in paragraph 1 of the plaint has been assigned CTS no. 8 as well as CTS no. 10/2. By the amendment, the petitioner sought permission to rely upon a survey carried out through M/s S.P. Enterprises and a plan dated 22nd January 2009 issued by the said private surveyor. The said Chamber Summons for amendment was opposed by the respondents. By the impugned judgment and order dated 26th February 2009, the Chamber Summons has been dismissed.

3. The learned counsel appearing for the petitioner submitted that the prayer for amendment will be governed by unamended rule 17 of Order VI of The Code of Civil Procedure, 1908 (hereinafter referred to as the said Code). He submitted that though the suit is filed in the year 1998, the learned trial Judge committed an error by applying proviso to rule 17 of Order VI of the said Code. He submitted that without dealing with the merits of the proposed amendment, the Chamber Summons has been rejected by observing that an attempt was being made to delay the trial. He submitted that there is a clear description of the suit property in the plaint with reference to area. He submitted that a plan showing the suit land has been annexed to the plaint. The learned senior counsel appearing for the third respondent submitted that there was a gross delay on the part of the petitioner in making application for amendment. He submitted that after lapse of 11 years from the date of institution of the suit, the description of the suit land was sought to be completely changed. He submitted that the proposed amendment was barred

by limitation and the trial Court was justified in rejecting the same. The learned assistant government pleader supported the impugned Judgment and order and submitted that no interference was called for.

4. I have given careful consideration to the submissions. In the first paragraph of the plaint, the petitioner has stated that his father had entered into an agreement for sale dated 2nd April 1955 for purchasing marshy land admeasuring 7500 square yards equivalent to 6297 square meters from one Budhya Surya Koli. The petitioner claims that the possession of the said land was handed over by the vendor to his father on the date of execution of the said agreement. It is contended that since the said land was forming the part of creek land, there was no survey number assigned to it. In paragraph 3 of the plaint, the petitioner has relied upon a copy of location plan of the suit land. In paragraph 4 of the plaint it is stated that the said land was assigned CTS no. 10/2. In the first prayer in the plaint, a relief has been claimed in respect of land bearing CTS no. 10/2.

5. In the affidavit in support of the Chamber Summons for amendment it is contended that the suit land is covered by two CTS numbers 8 and 10/2. It is stated that due to typographical error, CTS no.8 remained to be incorporated in the plaint. In the affidavit in support, reliance has been placed on record of the survey of the suit land carried out on 22nd January 2009 by a private surveyor. The survey plan has been annexed to the affidavit. The first amendment prayed for is for incorporating CTS no.8 in addition to CTS no.10/2 in the first prayer in the plaint. The second amendment is for

amending the same prayer clause by incorporating area of the suit land as 7500 square yard equivalent to 6297 square meters. It must be stated here that the said area is already set out in the first paragraph of the plaint. The third amendment is for adding a paragraph for placing reliance on a survey carried out by a private surveyor on 22nd January 2009.

6. It must be stated here that area of the suit land is already set out in the first paragraph of the plaint. The location plan showing boundaries of the suit land is relied upon in the plaint which has been annexed to the plaint. By the proposed amendment, the petitioner wants to state that apart from CTS no. 10/2, CTS no.8 has been also assigned to the suit land. The area of the suit land is set out in the plaint. The petitioner wants to incorporate the same area in the first prayer in the plaint. Even if amendment is allowed, the burden will be on the petitioner to prove that CTS no.8 and 10/2 have been assigned to the suit land. Even after amendment, the description of the suit land with reference to the area and boundaries remains the same. Therefore, the said to amendment ought to have been allowed as the same will not change the nature of the suit. The third amendment is for placing reliance on survey of the suit land carried out by a private surveyor on 22nd January 2009. The petitioner Will have to prove the correctness of the survey in evidence. There was no reason to deny that part of the amendment. It is a settled law that the proviso to rule 17 of Order VI incorporated on 1st July 2002 is not applicable to the suits filed prior to the said date. The learned trial Judge has committed an error by applying the said proviso. Moreover, the learned Judge has not considered the amendment on merits. Apart from the

fact that the amendment does not change the nature of the suit, even if the amendment is allowed, all contentions of the respondents including the contention of bar of limitation remain open which can be agitated by filing additional written statement. Hence, the learned trial Judge committed an error by dismissing the Chamber Summons. The same ought to have been allowed.

7. Hence, I pass the following order :

- A) The impugned order dated 26th February 2009 is quashed and set aside;
- B) The Chamber Summons No. (exhibit-8) of 2009 is made absolute;
- C) The Amendment shall be carried out by the Petitioner within a period of two weeks from the date on which the writ of this order is received by the Trial Court;
- D) All contentions of the respondents including the contention of bar of limitation are kept open;
- E) The respondents will be entitled to file additional written statement to the amended plaint within a period of eight weeks from the date on which the amendment is carried out;
- F) The Writ Petition is allowed in above terms with no orders as to costs.

JUDGE