

IN THE HIGH COURT OF JUDICATURE OF BOMBAY,
BENCH AT AURANGABAD

WRIT PETITION NO. 1072 OF 2015

Mulshankar S/o Ramchandra Kapse ... Petitioner

Versus

Somdev S/o Gyanoba Kapse
& others ... Respondents

.....
Mrs. S.B. Warma, Advocate for petitioner

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CORAM : RAVINDRA V. GHUGE, J.

DATED : 10th FEBRUARY , 2015

PER COURT :

1. Grievance of the petitioner is that in R.C.A. No. 40 of 2008 an application Exhibit 35 was moved by the petitioner/ appellant who is the original plaintiff. Proposed amendment is set out below paragraph 5 in paragraph Nos. A to D. The said proposed amendment was on the basis of certain old records which the petitioner received / collected and as such the amendment became necessary. Application Exhibit 35, however, was rejected by the Appellate Court by the impugned order dated 01-01-2015.

2. Grievance of the petitioner is that certain ancestral properties have been narrated and it was on the basis of old records that the proposed amendment was sought to be

introduced so as to high light the case of the petitioner. By the rejection of the said application, those aspects which are sought to be placed on record before the Appellate Court, have been dis-allowed and as such the Appellate Court may not be in a position to decide the real controversy. An appeal is an extension of the suit and as such the jurisdiction exercised by the Appellate Court is akin to the jurisdiction being exercised by the Trial Court.

3. Having considered the submissions of the learned Advocate for the petitioner and having gone through the petition paper book, it appears that the proposed amendment is based on a bald statement made in paragraph 5 that “ *finally at the end of 2012 plaintiff got some old record and considering those documents its required of time to amend the main plaint*”.

4. The appeal is pending since 2008. No explanation has been set out in the application Exhibit 35 to indicate as to which documents constitute 'old record'. There is no description of the documents based on which it could be said that the petitioner has stumbled across such information and evidence which would support the proposed amendment. In the absence of any pleading and in the light of the statement made that some old record was found, the appellate Court was not convinced.

5. Nevertheless, I find from the impugned order that the Appeal Court has noted that neither the suit before the Trial Court was for partition, nor have the defendants prayed for partition. Despite this fact situation, the Trial Court has passed a decree of partition which is the subject matter of challenge in the appeal proceedings before the appeal Court. As such, the appeal Court has concluded that these contentions of the petitioner / appellant can be discussed and can be agitated in the appeal and for that purpose it is not necessary to amend the suit.

6. In my view, the above observations of the appeal Court in paragraph 13 of the impugned order sufficiently secure the interest of the petitioner. The Appeal Court would, therefore, be considering the contentions of the petitioner as regards the Trial Court having exceeded its jurisdiction in passing the decree of partition without any such claim made in the suit.

7. In the light of the above, I do not find that the impugned order could be termed as perverse or erroneous. Merely because a second view is possible, would not mean that the impugned order is unsustainable. As such, the petition is dismissed.

(**RAVINDRA V. GHUGE, J.**)