

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

WRIT PETITION NO. 3494 OF 2014

Sitaram Asaram Pawar,
Age: 77 years, Occu: Nil,
R/o : Binake Mangalwari, Nagpur,
at present Sukhwani Imperial Phase I,
C-1/04, Morwadi, Pimpri, Pune. ...Petitioner

versus

1. Smt. Taibai w/o Rangnath Sanstanshe,
Age: 61 years, Occu: Business,
R/o : Mukundwadi, Aurangabad,
Dist. Aurangabad.
2. Rajendra s/o Rangnath Sanstanshe,
Age: 34 years, Occu: Business,
R/o : Mukundwadi, Aurangabad,
Dist. Aurangabad.
3. Abhinav Grihanirman Sahakari Sanstha Ltd.,
Through its Secretary,
Mayanagar, N-2, CIDCO, Aurangabad.
4. The Administrator, CIDCO office,
Aurangabad. ...Respondents

**WITH
WRIT PETITION NO. 6488 OF 2013**

Rajendra s/o Rangnath Santhanse,
Age: 37 years, Occu: Trade,
Residing at Mukundwadi, Aurangabad, ...Petitioner

versus

1. Sitaram S/o Asaram Pawar,
Age: 76 years, Occu: Nil,
Residing at Binake Mangalwari, Nagpur,
Through G.P.A.
Govind S/o Keshavrao Jadhav,
Age: 87 years, Occupation: Agriculture,
Residing at Kolgaon, Tq. : Shrigonda,
District : Ahmednagar.

2. Smt. Taibai w/o Rangnath Santanshe,
Age: 61 years, Occu: Business,
Residing at Mukundwadi, Aurangabad,
Dist. Aurangabad.
3. Abhinav Grihanirman Sahakari Sanstha Ltd.,
Through its Secretary,
Mayanagar, N-2, CIDCO,
Aurangabad.
4. The Administrator, CIDCO office,
Aurangabad. ...Respondents

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Mr. S. R. Deshpande, Advocate for petitioner in W.P. No. 3494/14 and for respondent No. 1 in W.P. No. 6488/13.

Mr. Hemant Surve, Advocate for respondent No. 1 & 2 in W.P. No. 3494/14 and for petitioner in W.P. No. 6488/13.

Mr. P. B. Paithankar, Advocate for respondent No. 3 in W.P. No. 3494/14.

Mr. A. S. Bajaj, Advocate for respondent No. 4 in W.P. No. 3494/14.

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CORAM : N.W. SAMBRE, J.

Reserved on : 15th April, 2015

Pronounced on : 23rd April, 2015

ORDER :

Both these petitions since are arising out of the orders passed in Special Civil Suit No. 31 of 2012 for partition and separate possession pending on the file of Civil Judge Senior Division, Aurangabad are taken up for final disposal together with consent of the parties.

2. In W.P. No. 6488 of 2013, defendant questioned the

legality and validity of the order passed below Exhibit-65 in Special Civil Suit No. 31 of 2012, wherein the trial Court has ordered the grant of application for the amendment under Order 6 Rule 17 of the Code of Civil Procedure, whereas, W. P. No. 3494 of 2014 is by the plaintiff questioning the legality and validity of the order passed by the trial Court granting application for recalling of witness of the plaintiff for cross-examination upon grant of amendment cited supra.

3. In W.P. No. 6488 of 2013, Mr. Surve, learned Counsel for the petitioner-defendant while questioning the legality and validity of the order of grant of amendment would urge that, the said application is granted after commencement of the trial in the suit. In addition to above, he would urge that the effect of grant of amendment changes the entire nature of the claim made in the suit for partition and separate possession. According to him, the amendment is by way of afterthought i.e. after cross-examination of the witness of the plaintiff and with an intention to cover up the short-falls and illegality committed in the suit.

4. He would pray for allowing writ petition by quashing the order impugned dated 08/07/2013.

5. Mr. Deshpande, learned Counsel for the plaintiff would

urge that, the amendment which is granted by the Court below is in exercise of the procedural powers and there are no substantive powers to take away grant of such amendment. According to him, once the trial Court has exercised the jurisdiction, this Court should not interfere in absence of any serious perversity or material illegality. He would urge that, sufficient cause was established in the suit in which trial is at its initial stage. In support of his contention, he has relied upon the judgment of this Court in the matter of **Bharat Petroleum Corporation Ltd. Vs. Precious finance Investment Pvt. Ltd.** reported in **2007(1) Mh.L.J. 331.**

6. Upon considering the rival contention of the parties, no doubt, Mr. Surve, learned Counsel for the defendant was right in contending that the trial in the suit has commenced as cross-examination of the plaintiff's witness is over, however, it is required to be examined whether the plaintiff has brought sufficient cause for carrying out amendment and whether by grant of amendment, what prejudice is caused to the petitioner-defendant. Perusal of the nature of amendment that is sought, only appears to be corrective in nature and in my opinion, no prejudiced will be caused to the present defendant by grant of the said amendment. Even otherwise, the amendment would change the nature of the suit as the petitioner will be getting appropriate opportunity to meet the claim in the suit for partition and separate possession. Learned trial Court has rightly

recorded the reasons in support of grant of amendment based on the above referred judgment of this Court in the matter of Bharat Petroleum Corporation Ltd.

7. As such, in my opinion, no case for interference in the writ petition No. 6488 of 2013 is made out. The writ petition fails, stands dismissed.

8. As consequences of above referred amendment what is sought by the defendant is recalling of the witness of the plaintiff, whose cross-examination is over, as according to the defendant, the case put forth by the plaintiff by way of amendment needs to be contested. Learned trial Court, while grant of such permission was alive to the fact about grant of amendment at the behest of the plaintiff. Once the amendment is granted, which is subsequent to recording of cross-examination of the witness of the plaintiff, in my opinion, learned trial Court was right in granting the application for recalling of the witness. Even though, learned Counsel for the petitioner has relied upon the judgment of the Apex Court in the matter of **K. K. Velusamy vs. N. Palanisamy** [(Civil Appeal Nos. 2795-2796 of 2011 (arising out of SLP © Nos. 182111 of 2010)] dated 30/03/2011 so as to canvass that, the provisions of Order 18 Rule 17 of Code of Civil Procedure are not intended to be used routinely or merely for asking. However, the Apex Court has carved out the

exception as regard grant of such application if same was noticed to be bonafide and where it is necessary that the additional evidence, oral or documentary will assist the Court to clarify the evidence. If the parameters which are laid down by the Apex Court in the said judgment are to be considered in the light of facts of the present case, it is required to be noted that the conduct of petitioner in moving the application for amendment of claim after concluding of cross-examination of his own witness. This Court has already upheld the validity of the order granting amendment in favour of the petitioner. It is required to be noted that, in the present case the application for recalling of the witness of the plaintiff for cross-examination after his amendment was granted at the behest of defendant, is neither mischievous, frivolous or to cover up the negligence or lacuna but is based on subsequent development.

9. In that view of the matter, no case for interference is made out at the behest of the petitioner in the Writ Petition No. 3494 of 2014, the writ petition stands dismissed.

[N.W. SAMBRE, J.]

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