

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

**WRIT PETITION NO.7757/2014**

Gandhi Seva Trust Hingoli and another  
V/s  
Avinash S/o Ramchandra Bangar & ors.

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Shri P.S.Agrawal,Adv. For petitioners  
Shri S.M.Godsay,Adv. For R.1.

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**CORAM : N.W.SAMBRE,J.  
DATED : 27TH NOVEMBER,2015**

**PER COURT :-**

Special Civil Suit No.2 of 2013 was filed by petitioners-original defendants praying therein a decree for possession of the suit property, setting aside the Sale Deed and for mesne profit.

2] It is not in dispute that present petitioners initiated Regular Civil Suit No.271/1993 against present respondent no.1 through his mother for declaration and injunction which was decreed against respondent by judgment and decree dated 24/2/1997. Subsequent thereto, the present Suit is filed for setting aside of Sale Deed and possession.

3] After the trial in the Suit has commenced that is the plaintiff's evidence was recorded, the present respondent-plaintiff moved an

application Exh.126 seeking amendment with an intention to incorporate the pleadings as regards the decree for declaration that the decree passed in the earlier Suit bearing No.271/93 on 24/2/1997 as not binding on him and also sought to incorporate his mother as defendant to the Suit. The said application came to be allowed by order dated 16/7/2014 by Civil Judge, Senior Division, Hingoli. While objecting the said order, learned counsel for the petitioner-defendant would urge that the facts about passing of a decree in earlier Civil Suit No.271/93 was well within the knowledge of the present respondent-plaintiff as he has volunteered pleadings to that effect in his plaint. According to him, once said fact was within the knowledge of the respondent plaintiff, it was open for him to plead same at the time of filing of the Suit. By grant of amendment, he would urge the nature of pleading that are sought to be incorporated change the entire nature of claim in the Suit. According to him earlier, the Suit was for declaration and possession in which setting aside of a decree is sought by impleading his mother as a party-defendant. He would then urge that the amendment which is moved at advance stage of the Suit will change the entire nature of claim in the Suit hence ought not to have been granted and sought setting aside of the order dated 16/7/2014.

4] The learned counsel for the respondent-plaintiff would urge that when the earlier Suit was filed bearing No.271/93 he was minor and the said Suit was initiated by him through his mother. He would thus urge that what is sought to be added by way of amendment is setting aside of the decree for which pleadings were already incorporated and according to him, petitioner defendants will not be taken by surprise if the amendment is allowed. He would urge that once the Court below having exercised its discretion in grant of amendment, this Court should be slow in interfering therewith.

5] Having considered rival submissions, it is required to be noted herein that the fact about the filing of earlier Civil Suit No.271/93 was well within the knowledge of the present respondent-plaintiff, when he filed present Suit as is apparent from the pleadings in para 1 of the plaint. The pleadings which are sought to be incorporated by virtue of amendment, with an intention to seek declaration that the decree passed in the earlier Civil Suit for declaration and injunction is not binding on him as such were within knowledge of the respondent-plaintiff at time of filing of the Suit. Having noted that the said fact of decree in earlier Suit was well within knowledge of the respondent, when he filed instant Suit, the learned trial Court while granting amendment has formed opinion that even though Suit is at advance stage, for deciding real controversy between the parties, the amendment is necessary without dealing with the said aspect of the matter i.e. fact within the knowledge of the plaintiff.

6] In my opinion, the learned trial Court committed an error by overlooking the above referred fact particularly knowledge of decree passed in earlier Civil Suit No.271/1993 and already existing pleading to that effect. There is no explanation whatsoever on behalf of the plaintiff-respondent as to why the said challenge to the earlier decree not incorporated when the Suit came to be filed. One more aspect of which this Court must take note is that trial in the Suit has already commenced as the plaintiff's evidence is already recorded.

7] Having regard to the nature of claim that is sought to be incorporated by virtue of amendment particularly incorporating the prayer seeking declaration, in my opinion changes the nature of claim.

8] In view of above, order passed by the learned Civil Judge, Senior Division, Hingoli on 16/7/2014 passed below Exh.126 in Civil Suit No.2/13 is not sustainable and as such is quashed and set aside. The application Exh.126 as such stands rejected.

**(N.W.SAMBRE,J.)**

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