

drp

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.10185 OF 2014

1. Smt. Vijaya w/o Vyankatesh Katneshwarkar PETITIONERS
Age - 60 years, Occ - Household
R/o Nandanwan Colony,
Parbhani, District - Parbhani
2. Vishal s/o Vyankatesh Katneshwarkar
Age - 36 years, Occ - Business,
R/o Nandanwan Colony,
Parbhani, District - Parbhani
3. Dattatraya @ Vishwas s/o Vyankatesh Katneshwarkar,
Age - 33 years, Occ - Legal Practitioner
R/o Nandanwan Colony,
Parbhani, District - Parbhani
At present R/o Aurangabad
Taluka and District - Aurangabad

VERSUS

Vikrant s/o Vyankatesh Katneshwarkar
Age - 39 years, Occ - Business,
R/o Parbhani, Taluka and District - Parbhani
Now at present
R/o C/o Dinesh Morgaonkar,
House No. C-47/4, 11th Scheme,
Near Wani Mangal Karyalaya,
Shivajinagar, Garkheda Area,
Aurangabad
Taluka and District - Aurangabad

RESPONDENT

.....

Mr. Pravin N. Kalani, Advocate for the petitioners
Mr. A. S. Barlota, Advocate for the respondent

.....

[CORAM : SUNIL P. DESHMUKH, J.]

DATE : 30th JUNE, 2015

ORAL JUDGMENT :

1. Rule. Rule made returnable forthwith and heard finally with consent of learned advocates for the parties.
2. The petition has been moved against order dated 7th October, 2014 passed by Joint Civil Judge, Senior Division, Parbhani rejecting request of defendants - present petitioners under Exhibit-34 for amendment to written statement in Special Civil Suit No. 42 of 2012.
3. Succinctly, the facts, as they emerge, are - Special Civil Suit No. 42 of 2012 is instituted by present respondent against his mother and two brothers, for recovery of possession, by way of partition claiming one fourth share in the property referred to in clause "A" of claim clause of the plaint, contending the same to be joint family property.
4. The petitioners - defendants appeared in the suit and filed their written statement denying the claim of property being joint, contending that the property was purchased by petitioner No.1 in the name of her husband, by selling her gold ornaments and the plaintiff, at the time of purchase, was minor.
5. The suit proceeded with, issues were framed and

examination in chief on affidavit had been tendered by the plaintiff. The petitioners - defendants, on 12th September, 2014, filed application Exhibit-34 seeking amendment to the written statement, in terms of proposed paragraph No.4-A, stating that the proposed amendments are necessary for adjudication of the matter and that recently it occurred to defendant No.1 that her husband had obtained loan for construction over suit property and that the husband had repaid the loan and this particular aspect had been missed out while written statement was filed and this is a fact which would have bearing on the outcome of the suit. The omission was realized when the petitioners were preparing for the cross examination of plaintiff.

6. Application Exhibit-34 was resisted by the plaintiff pointing out that no due diligence is shown in order to avail of the concession as may be appearing under Order VI, Rule 17 of the Code of Civil Procedure and that with filing of affidavit of examination in chief by the plaintiff, the trial shall be deemed to have commenced and as such, the application cannot be considered.

7. The trial court rejected the application Exhibit-34 overwhelmed by consideration that the application appear to be

a dilatory tactic, as the matter was ripe for hearing and as such, the application came to be rejected.

8. Mr. Kalani, learned advocate appearing for the petitioners submits that the considerations which weighed for rejection of the application may not be factually correct, for in one breath the court has observed that the suit was at the arguments stage, whereas in the next the court finds that the matter was at cross-examination stage of the the plaintiff. As such, the order is vulnerable on facts as far as stage is concerned. Learned advocate submits that petitioner No.1 is a home maker and hardly has any acquaintance with the procedural requirements and the other petitioners were not aware of any such transaction, being minors then. He, therefore, submits that the matter has to be viewed accordingly and is to be dealt with leniently. He relies on a judgment of the Supreme Court reported in 2006 (5) Mh .L.J. 634 "*Baldev Singh & Others V. Manohar Singh and Another*", wherein the Supreme Court has considered the principles that would govern application for amendment of pleadings, observing that the court should be extremely liberal in granting prayer for amendment of pleadings unless serious injustice or irreparable loss is caused to the other side. The Supreme Court has referred to a decision of Privy Council

reported in *AIR 1922 P.C. 249 " Ma Shew Mya V. Maung Mo Hnaung"*, wherein it has been observed that rules of courts are nothing but provisions intended to secure the proper administration of justice and it is, therefore, essential that they should be made to serve and be subordinate to that purpose, so that full powers of amendment must be enjoyed and should always be liberally exercised. The Supreme court then went on to consider the provisions relating to amendment under Order VI, Rule 17 of the Civil Procedure Code. The court has observed that it cannot be doubted that wide power and unfettered discretion has been conferred on the court to allow amendment of the pleadings to a party in such a manner and on such terms as it appears to the court to be just and proper, albeit, keeping in mind that suit can be disposed of expeditiously. The court has further observed that court may allow the amendment, if it is satisfied that in spite of due diligence, the party could not have raised the matter before commencement of trial.

9. Mr. Barlota, learned advocate for the respondent, however submits that the application does not refer to any particular reason as to why such an amendment was not sought before commencement of the trial and as such, it cannot be said that there is due diligence in availing concession under Order VI, Rule

17 of the Code of Civil Procedure. He, therefore, submits that no fault can be found with the order impugned.

10. Learned advocate for the petitioners submits that while the petitioners were preparing for cross examination, it was realized by them that husband of petitioner No.1 had obtained loan for construction over suit property and as such, the application had been moved. Though averments in this respect may not be specific, yet looking at that the pleadings are from *muffossil* area, liberal construction will have to be placed on such averments.

11. Petitioner No.1 is a lady and learned advocate for the petitioners has submitted that she is a home maker and her literacy level may not be high. In such a case, the matter may be viewed with lenient consideration and inconvenience if any, caused to other side can be taken care of by awarding costs. He has also submitted that considerations for doing justice shall outweigh the procedural constraints.

11. Looking at aforesaid and the observations of the Supreme Court appearing in the reported judgment referred to hereinabove, I deem it appropriate that pedantic approach needs to be eschewed in the present matter and inconvenience caused

to the other side can be suitably mended by awarding costs of Rs.5000/-.

12. Eventually, the impugned order dated 7th October, 2014 passed by Joint Civil Judge, Senior Division, Parbhani rejecting request of present petitioners - defendants under Exhibit-34 for amendment of written statement in Special Civil Suit No. 42 of 2012 stands set aside. The writ petition is allowed. Rule is made absolute in terms of prayer clause "B", on the condition that costs of Rs.5000/- be deposited by the petitioners in the trial court within a period of four weeks from the date of receipt of writ of this order, to be paid to the plaintiff. Suit be expedited.

[SUNIL P. DESHMUKH, J.]

drp/wp10185-14