

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

**WRIT PETITION NO. 10013 OF 2013**

Chandrakant s/o Ramdas Jape,  
Age: 55 years, Occ: Agri.,  
R/o. Kokamthan, Ta. Kopargaon,  
District Ahmednagar.

...Petitioner

versus

1. Ashok s/o Ramdas Jape,  
Age: 50 years, Occ: Agri.,  
R/o. Kokamthan,  
Tal. Kopargaon, Dist. Ahmednagar.
2. Dr. Ravindra s/o Ramdas Jape,  
Age: 45 years, Occ: Medical Profession  
& Agri., R/o. Kalashanti Apartment,  
Peer Bazar Road, Aurangabad.  
Dist. Aurangabad.
3. Sanjay s/o Ramdas Jape,  
Age: 40 years, Occ: Agri.,  
R/o. Kokamthan,  
Tal. Kopargaon, Dist. Ahmednagar.
4. Sau. Heerabai Subhash Khadke,  
Age: Major, Occ: Household,  
R/o. Kokamthan,  
Tal. Kopargaon, Dist. Ahmednagar.
5. Parighabai w/o Ramdas Jape,  
Age: 60 years, Occ: Agri.,  
R/o. Savali Vihir (Bk), Ta. Kopargaon,  
District Ahmednagar.

...Respondents

.....  
Mr. Sandeep Gorde Patil, Advocate for petitioner.  
Mr. P.B. Shirsath, Advocate for respondent Nos.1 to 5.  
.....

**CORAM : N.W. SAMBRE, J.**

**DATED : 19TH JANUARY, 2015**

**PER COURT :**

. Transposed plaintiff No.2-legal heir of original plaintiff No. 2 has moved an application Exhibit-76 under Order 6 Rule 17 of Code of Civil Procedure in Regular Civil Suit No. 67 of 1998 for partition and separate possession, which came to be rejected by learned 2<sup>nd</sup> Joint Civil Judge, Junior Division, Kopagaon, by an order dated 05/12/2013. As such, present writ petition.

2. Learned Counsel for petitioner-plaintiff No.2 submits that the order impugned rejecting the application is liable to be upset on two grounds; (a) that after transposition as plaintiff from defendant in the suit for partition, he has every right not to claim amendment to the plaint and (b) amendment is necessary for the purpose of adjudicating rights of the parties to the suit, more particularly in partition suit. According to him, the trial in the suit is yet to begun though issues are framed, as such application should have been granted. In addition to above, he submits that cause cited for rejection is about merits of the amendment application and merits of the suit.

3. Mr. Shirsath, learned Counsel for respondents-defendants while strongly opposing the said application has invited my attention to the fact that the plaintiff No. 2 has sought to incorporate the entire written statement in the plaint. According to

him, if same is granted, it will change the entire nature of the claim in the suit for partition. He has further invited my attention to the nature of pleadings made in the amendment application and submits that those are beyond the scope of Regular Civil Suit No. 67 of 1998 i.e., suit for partition. According to him, the application is rightly rejected by learned trial Court, and as such, prayed for dismissal of the writ petition.

4. After considering the contentions raised by rival parties, it is noticed that the reason cited for rejection of the application for amendment of plaint by learned trial Court is contradictory pleas taken out by present plaintiff in the written statement. Even if presuming that there are contradictory plea set up by plaintiff by virtue of amendment to be carried out in the plaint, in my opinion, same is permissible in view of the settled position of law as it is for learned Court below to decide such contention on its own merits having regard to the evidence and legal position on merit. Just because in the application for amendment, certain alternate pleas are raised, that cannot be ground, in my opinion, for rejection of the application for amendment as contention thereof can be gone into at the time of deciding the suit on merit.

5. One more aspect of which this Court must take note that the nature of claim before the Court is for partition and status of the

parties is that of real brothers. There are other matters which are pending before Court, in relation to the suit properties bearing Regular Civil Suit Nos.248 of 1998 and 84 of 1997. Though further proceedings in these suits are stayed under section 10 of Code of Civil Procedure, however cannot lost sight of the fact that the counter claim preferred in Regular Civil Suit No. 247 of 2011 was granted by the Court on 04/04/2013, which has some colour of amendment sought in present suit.

6. In that view of the matter, in my opinion, learned Court below by rejecting the application for amendment has prejudiced the rights of the petitioner-plaintiff. The law on the issue as regards grant of amendment is well settled.

7. In view of above, the impugned order dated 05/12/2013 is not sustainable and as such, same is set aside. Amendment sought by present petitioner vide Exhibit-76 stands allowed subject to payment of costs of Rs.5,000/- (Rs. Five thousand only) to be paid within period of four weeks from today before trial Court. Payment of cost is condition precedent.

8. The writ petition stands disposed of, in above terms.

**[ N.W. SAMBRE, J. ]**