

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO.9161 OF 2014

Khandu Shankar Moholkar : Petitioner
versus
Ramchandra Shankar Moholkar
since deceased through LRs
Sharad Ramchandra Moholkar and ors. : Respondents.

Mr. Surel S Shah for the Petitioner.
Mr. Rahul S Kadam for the Respondent Nos.1A, 6 to 8 and 13 to 21.

CORAM : R. M. SAVANT, J.
DATE : 03rd September 2015

P.C.

1 The writ jurisdiction of this Court is invoked against the order dated 16/06/2014 passed by the learned Civil Judge, Junior Division, Karmala by which order the application for amendment of the Written Statement filed on behalf of the Defendant Nos.1 and 2 came to be rejected.

2 The suit in question has been filed for partition of the ancestral properties. In the said suit the Defendant Nos. 1 and 2 have filed their Written Statement and have averred as to how the partition has taken place in 1979. The suit is at the stage where the cross examination of the Plaintiffs' witness is already over, and it is at the said stage that the Application (Exhibit 109) came to be filed by the Defendant Nos. 1 and 2 for amendment of the Written Statement so as to incorporate paragraph 6A after paragraph 6. By the said

amendment the facts relating to how the Defendant No.1 had redeemed the mortgage in respect of two lands and pursuant to which an oral agreement for partition took place, and thereafter how the lands were partitioned between the family members has been mentioned. The said application was replied to on behalf of the Plaintiffs and the said application was objected on the ground that since the same has been filed long after the trial has commenced, the same could not be allowed having regard to the pronouncements of the Apex Court.

3 The Trial Court considered the said application and has by the impugned order dated 16/06/2014 rejected the same. The rejection is inter alia on the ground that the Defendant Nos.1 and 2 have not satisfied the due diligence test which is sine-qua-non for permitting the amendment post the commencement of the trial. The Trial Court has also observed that the case of the Defendant Nos.1 and 2 that since the Defendant No.1 is old could not be accepted as the other Defendants are between the ages 40 to 50.

4 It is the submission of the learned counsel for the Petitioner that the amendment sought is only clarificatory in nature and it only amplifies the case of the Defendants as averred in the Written Statement as originally filed. With the assistance of the learned counsel for the parties I have gone through Paragraph 6A which is now sought to be incorporated. In my view, the said paragraph 6A cannot be said to be clarificatory in nature and seeks to

introduce a case for the first time which would obviously prejudice the Plaintiffs when their evidence is already complete. The Trial Court was therefore right in rejecting the application though for a different reason. In that view of the matter, no case for interference in the writ jurisdiction of this Court is made out. The above Writ Petition is accordingly dismissed. At this stage the learned counsel appearing for the Petitioner Shri Surel Shah prays for continuation of the ad-interim order. In the facts and circumstances of the instant case, the said prayer is rejected.

[R.M.SAVANT, J]