

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.12284 OF 2015**

1. Shri Madhukar Shankar Pattekar,

Deceased by heirs:-

1A. Smt. Shivkanta Madhukar Pattekar

& Anr.

...Petitioners/ (Orig.
Appellants/ Orig. Plaintiffs)

V/s.

Smt. Laxmibai Baburao Kasture & Anr.

...Respondents
(Orig. Defendants)

.....

Mr. N. J. Patil i/b. Mr. A. N. Patil for the petitioners.

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CORAM : R. G. KETKAR J.

DATE : 11th DECEMBER, 2015.

P.C.:

1. Heard Mr. N. J. Patil, learned counsel for the petitioners at length.

2. By this petition under Article 227 of the Constitution of India, original plaintiffs have challenged the judgment and order dated 23/10/2015 passed by the learned District Judge, Solapur below Exh.33 in Regular Civil Appeal No.62 of 2014. By that order, the learned trial Judge rejected the application taken out by the petitioners for amending the plaint for incorporating paragraphs 6-C and 10-U and also some portion after paragraphs 7 and 8.

3. The plaintiffs have instituted a suit for declaration and

perpetual injunction inter alia contending that the defendants have no right and share in the agricultural land and in the alternative if it is held that the defendant No.1 has any share in the agricultural land, it be declared that the defendant No.1 is the owner of 50 Are's only; for declaration that mutation entry no.318 on the basis of decision of Civil Judge, Senior Division, Solapur in RCS No.998/2012 dated 31/1/2014 is illegal; the sale deed executed by defendant No.1 to defendant No.2 dated 20/12/2004 is illegal and not binding on the plaintiffs. The plaintiffs also sought perpetual injunction during pendency of the suit.

4. Defendant no.1 filed written statement resisting the suit. In paragraph 13-C, it was specifically contended that she executed agreement of sale on 6/12/2014 in favour of defendant No.2. In pursuance of agreement of sale, sale deed was executed by her infavour of defendant No.2 on 20/12/2004. Defendant No.1 therefore contended that even before institution of the suit, she had sold the property to defendant No.2 and since then he is in possession thereof. After considering the evidence on record, the learned trial Judge dismissed the suit on 31/1/2014.

5. Aggrieved by this decision the plaintiffs preferred Regular Civil Appeal No.62/2014. During pendency of the appeal, plaintiffs took out Application at Exh.33 on 13/8/2015 for amending the plaint. By impugned judgment and order the learned District Judge rejected the application.

6. Mr. Patil, submitted that the proposed amendment does not change the nature of the suit. That apart allowing the application for

amendment does not mean that the Court is allowing the claim made by the plaintiff. The Court will have to go into the merits of the claim made and therefore no prejudice would be caused to the defendants if application for amendment is allowed. He further submitted that the present amendment is necessary for deciding the controversies raised by the parties. The learned Judge was not justified in rejecting the application.

7. I have perused the record. It is not in dispute that the suit is instituted in 2012 that is post 2002 CPC amendment. Order VI Rule 17 of CPC reads thus:

“the Court may at any stage at the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties:

Provided that no application for amendment shall be allowed after the trial has commenced, unless the court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial.”

8. Perusal of Order VI Rule 17 of CPC shows that no application for amendment can be allowed after the trial is commenced unless the Court comes to the conclusion that despite due diligence party could not have raised the matter before commencement of trial. The learned District Judge while rejecting the application have recorded a finding that plaintiffs did not satisfy the condition stipulated under Order VI Rule 17 of CPC. Perusal of the prayer clause in the plaint shows that the plaintiffs challenged the sale deed executed by defendant No.1 in favour of defendant No.2 on 20/12/2014. The plaintiffs did not plead and assert right of pre-emption. Suit was dismissed and during the

pendency of Appeal, the Application for amendment is taken out. In the case of *Vidyabai & Ors vs. Parmalatha & Anr., (2009) 2 Supreme Court Cases 409*, the Apex Court has held that Order 6 Rule 17 is couched in a mandatory form. Unless the jurisdictional fact, as envisaged in the proviso to Order 6 Rule 17 CPC is found to be existing, the court will have no jurisdiction at all to allow the amendment of the plaint. The court's jurisdiction to allow such amendment is taken away unless the conditions precedent are satisfied i.e. it must come to a conclusion that in spite of due diligence the parties could not have raised the matter before the commencement of the trial.

9. In the present case the defendant No.1 specifically asserted that she has executed sale deed on 20/12/2004 in favour of defendant No.2. In fact plaintiffs specifically challenged the sale deed. However, plaintiffs did not assert the right of pre-emption. In view thereof, I do not find any error in rejecting the application on the ground that the applicant does not satisfy the condition stipulated in provision Order VI Rule 17 of CPC. Hence, no case is made out for invocation of powers under Article 227 of the Constitution of India. The petition fails and the same is rejected. It is however, expressly made clear that where a decree is challenged by the petitioners, any error, defect or irregularity in the impugned order affecting the decision of the case, may be set forth as a ground of objection in memorandum of proceedings as contemplated by section 105(1) of the Civil Procedure Code. Order accordingly.

(R. G. KETKAR, J.)