

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

WRIT PETITION NO.10453 OF 2015

Kamalakar Bajirao Rane : Petitioner.
Versus
M/s. Sherali Khan Mohamed Manekia
Through its Constituted Attorney
Mr. Bipin Chimanlal Shah and ors. : Respondents.

Mr.R S Apte, Senior Advocate a/w Mr. Mandar Limaye for the Petitioner.

CORAM : R. M. SAVANT, J.
DATE : 29th October 2015

P.C.

1 The writ jurisdiction of this Court is invoked against the order dated 05/10/2015 passed by the learned 5th Joint Civil Judge, Senior Division Thane, which is the Executing Court, by which order the Application (Exhibit 45) filed for amendment of the Execution Application came to be allowed and the decree holder was permitted to amend the Execution Application in terms of the amendment sought vide the said application (Exhibit 45).

2 The Application for Execution of the decree as originally filed mentions in column 9 that the decree is to be executed against all the Defendants exception the Defendant No.10 who is the Petitioner herein (wrongly referred to as the Defendant No.9 in the impugned order). The First Appeal filed by the said Defendant No.10 it seems came to be dismissed by this Court in the year 2004 which judgment and order was confirmed by the Apex Court. It is in

view of the changed circumstances arising out of the dismissal of the First Appeal by this Court and confirmation of the same by the Apex Court, that the cause for executing the decree even against the Defendant No.10 arose and therefore the Plaintiff sought deletion of what was mentioned in column (9) of the application to be substituted by what is now mentioned in the amendment application viz that the word “except the Defendant No.10” be deleted, removed from column No.9 of the original application. The decree holder also sought the replacement of prayer clauses in the original execution application by prayer clauses (a), (b) and (c) of paragraph 11 of the amendment application. This was sought on the basis that it was necessary to amend the prayer clauses so as to enable the decree holder to enjoy the fruits of the decree.

3 The Trial Court held that since the amendment sought is to the application for execution, Order 1 Rule 10 and Order VI Rule 17 of the Code of Civil Procedure are strictly not applicable as the execution proceeding does not come within the ambit of pleadings. The Trial Court was of the view that the amendment is a mere technicality which does not affect the substantial right of any party. The impugned order passed by the Trial Court is sought to be challenged on the ground that the said amendment application was sought to be moved almost 16 years after filing of the application for execution wherein in the application as originally filed it was stated that the decree was to be

executed against all the Defendants except the Defendant No.10. The reasons why the Defendant No.10 was excluded at the time of filing of the application for execution have been stated herein above viz. that the First Appeal filed by the Defendant No.10 was pending. Thereafter the First Appeal was dismissed by the judgment and order of this Court and was also confirmed by the Apex Court that the decree holder has sought deletion of the word “except the Defendant No.10” from column (9) of the application for execution. It is required to be noted that the Defendant No.10 was always a party to the suit and the decree passed was also against him. However, the execution against him was not applied for as at the relevant time the First Appeal filed by him was pending. After the said impediment was removed, the decree holder was deemed it fit to execute the decree even against the Defendant No.10. In so far as the substitution of prayer clauses is concerned, in my view, what is sought by the application for execution is the execution of the decree and therefore the substitution of the prayer clauses would not materially prejudice any party as the Executing Court obviously cannot travel beyond the decree.

4 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.

[R.M.SAVANT, J]