

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR.**

MISC. CIVIL APPLICATION NO.1057 OF 2014

IN

WRIT PETITION NO.3437 OF 2014 (D)

Shri Pratap Kudawale and ors

..vs..

Shri Ramesh Pachave and ors

Office Notes, Office Memoranda of
Coram, appearances, Court's orders
of directions and Registrar's orders

Court's or Judge's order

Mrs. R.S. Sirpurkar, counsel for the applicants.
Shri N.B. Kalwaghe, counsel for the respondents.

CORAM : A.P. BHANGALE, J.

DATE : JUNE 23, 2015.

Heard learned counsel for the parties.

By this application, the applicants seek review of order dated 15.7.2014 passed in Writ Petition No.3437 of 2014 on the ground that the trial Court had lost sight of the fact that the plaintiffs failed to demonstrate that in spite of due diligence, the amendment could not have been moved at the initial stage. It is thus contended that when the suit was part-heard and some witnesses were already examined, the amendment of pleadings could not have been granted by

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learned trial Judge.

Thus, it is prayed that order dated 15.7.2014 passed in Writ Petition No.3457 of 2014 be quashed and set aside.

Learned counsel for the applicants placed reliance in the case of Vidyabai and others ..vs.. Padmalatha and another reported at [2009(4) Mh.L.J. 30] which reverses to Order VI Rule 17 of the Code of Civil Procedure. What is emphasized is that the trial has commenced pursuant to the issues framed, unless it is demonstrated that the party could not have raised the matter in spite of due diligence before the commencement of the trial, the pleadings ought not to have been allowed to be amended pending disposal of the suit. Hence, the suit was barred.

The Honourable Apex Court had considered the proviso to Order VI Rule 17 of the Code of Civil Procedure which is apparently

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mandatory for the legislature intended the amendment in the year 2002 introducing proviso by the Code of Civil Procedure (Amendment) Act, 2002 with an intention to ensure early disposal of the trial once it has commenced. In my opinion, however, before reading proviso, the main provision needs look in which enables judicial discretion generally to allow either party to alter or amend 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. The proviso is carved out as an exception to the main provision and the Bombay High Court by amendment in civil procedure substituted Rule 17 to Order VI as follows:

The Court may at any stage of 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.

However, the application for amendment was made by the plaintiffs in a suit in which the defendants have not appeared though served with summons and wherein the opinion of the Court is expressed that the Court can allow amendment applied for. It is true that the Court shall give notice of the application to the defendants before allowing the amendment and although in the absence of the defendants the Court may grant any amendment to determine real controversy between the parties to suit. Of course, copy of the amended plaint shall be served on the defendants.

Thus, Order VI Rule 17 was substituted and introduced as applicable in the State of Maharashtra.

In the present case, learned counsel for

the respondents opposes the review application on the ground that learned trial Judge was satisfied that the proposed amendment would not change the nature of the suit and had sufficiently compensated defendants by imposing costs in the sum of Rs.4,000/- on the plaintiffs. The order was passed after learned Judge was satisfied that the proposed amendment was necessary to determine real questions in controversy and would not change the nature of the suit. This Court considered the detailed order passed by learned 4th Joint Civil Judge Junior Division, Nagpur below Exh.48 on 17.12.2013 after notice to the defendants. Both the sides were heard as well as record was also seen and the rulings which cited were also considered. Learned trial Judge was satisfied that , thus :

“In the present suit also, the plaintiffs merely claimed declaration of their status. Albeit they claimed declaration that they are entitled for

correction of land record, they failed to pray for partition and separate possession. I have already held that the proposed amendment would not change the nature of the suit and by adding the relief of declaration that they are entitled for partition and separate possession of half share, it would avoid multiplicity of proceedings. It is because even if the present suit is decreed, the plaintiffs will have to file suit for partition. In view of the issuance of notice dated 30/08/2003, the claim for partition is well within limitation. The evidence of the plaintiffs is already over. Therefore, to compensate the hardship that would be caused to the defendants by this application, cost can be saddled upon the plaintiffs. For the above reasons, I am of the opinion that the proposed amendment is necessary to determine the controversy between the parties. It would not change the nature of the suit and it is necessary to be allowed subject to costs.”

Thus the amendment which was granted by the trial Court was necessary in order to determine the real questions in controversy between the parties. It was essential to avoid multiplicity of the proceedings and was granted

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subject to payment of costs in the sum of Rs.4,000/- imposed upon the plaintiffs. Learned Judge was satisfied that the amendment if made would not change the nature of the suit.

This Court after considering the detailed order had dismissed the writ petition *in limine*. Learned counsel for the respondents rightly submitted that in the absence of any error apparent on the fact of the record no review is permissible in respect of the order passed by this Court.

My attention is invited to the ruling in the case of **Dr. Subramanian Swamy ..vs.. State of Tamil Nadu and others**, reported at **(2014)5 SCC 75** wherein it is observed that, “*even an erroneous decision cannot be a ground for the court to undertake review, as the first and foremost requirement of entertaining a review petition is that the order, review of which is sought, suffers from*

any error apparent on the face of the order and in the absence of any such error, finality attached to the judgment/order cannot be disturbed.”

The reference is also made to the ruling in the case of Anil Motiram Kalyankar and others ..vs.. Shree Jogeshwar Mahadev Mandir Trust, thr its Trustees Machindra Shankar Rawal reported at 2015(2)Mh.L.J. 221 wherein this Court considered the scope of the review petition and observed thus :

“Admittedly the review applicants did not move the higher forum to challenge the judgment and order whereby the matter was remanded for fresh consideration by the Jt. Charity Commissioner, Pune Region, Pune. Having considered the submissions and record placed before me, I do not find any apparent error in the record or error of law or facts so as to warrant interference in the reasoned judgment and order already passed by this court.”

In the present case, I have considered the submissions in the light of the rulings cited and

the order passed by the learned trial Judge which was challenged in writ petition as well as order passed by this Court dismissing the writ petition. Considering the real questions in controversy between the parties, the plaintiffs merely claiming declaration of their status that they are entitled for correction on land record. They had failed to pray for relief of partition and separate possession. The learned trial Judge considered that the proposed amendment would not change the nature of the suit merely by adding the relief of declaration that the plaintiffs are entitled for partition and separate possession which would avoid multiplicity of the proceedings as learned trial Judge refused amendment. It was not in conformity with public policy of ensuring early decision in pending cases by the competent civil Court. Furthermore, when belated amendment was compensated by imposing reasonable costs upon the plaintiffs after learned trial Judge was

satisfied that the proposed amendment was necessary to determine the real questions in controversy between the parties and it would not change the nature of the suit it was allowed subject to payment of costs.

Under these circumstances, I do not find any apparent error on the face of the record so as to allow the present application. The parties will have full opportunity to lead evidence as they may choose upon real questions in controversy between them. The trial, if proceeds, would also avoid multiplicity of the legal proceedings.

In the result, the civil application is dismissed accordingly. There shall be no order as to costs.

JUDGE

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