

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.1738 OF 2009

Ganpati S/o Naga Pandge,
Age-75 years, Occu-Agriculturist,
R/o Selu, Tq. Ausa,
Dist.Latur

PETITIONER

VERSUS

1. Archana W/o Bhalchandra Salunke,
Age-20 years, Occu-Household,
R/o Ghargaon, Tq.Kallamb,
Dist.Osmanabad,
2. Swayam D/o Rajkumar Pawar,
Age-18 years, Occu-Household,
3. Meera D/o Rajkumar Pawar,
Age-16 years, Occu-Education,
4. Dhiraj S/o Rajkumar Pawar,
Age-14 years, Occu-Education,
5. Sona D/o Rajkumar Pawar,
Age-12 years, Occu-Education,
6. Latabai W/o Rajkumar Pawar,
Age-40 years, Occu-Household,

Plaintiff Nos. 3 to 5 are minors and
Under guardianship of their mother i.e.
plaintiff no.6, R/o. Selu,
Tq. Ausa, Dist.Latur,

7. Rajkumar S/o Murlidhar Pawar,
Age-45 years, Occu-Agriculturist,
R/o Selu, Tq. Ausa,
Dist.Latur,

8. Deelip S/o Bhaskarrao Patil,
Age-48 years, Occu-Agriculturist,
R/o Selu, Tq. Ausa,
Dist. Latur,

9. Satish S/o Annasaheb Patil,
Age-35 years, Occu-Agriculturist,
R/o Basweshwar Chowk, Kava Road,
Latur.

RESPONDENTS

Mr.A.N.Irpatgire, Advocate for the petitioner.
Mr.R.D.Biradar, Advocate for respondent Nos.1, 3 to 6.
Respondent Nos. 7 to 9 served.

(CORAM : RAVINDRA V. GHUGE, J.)

DATE : 15/02/2016

ORAL JUDGMENT :

1. This petition was admitted by order dated 12/08/2009 and interim relief in terms of prayer clause "C-1" was granted by this Court. Consequentially RCS No.166/2004 has been stayed by this Court.

2. The petitioner is aggrieved by the impugned order dated 19/01/2009 by which the Trial Court has allowed application Exh.76 and permitted respondent No.1 / original plaintiff to amend the plaint under Order 6 Rule 17 of the CPC.

3. Mr.Irpatgire, learned Advocate for the petitioner has strenuously contended that respondent No.1 has made certain allegations against defendant No.1 that he had become a vagabond, had developed the habit of drinking liquor and due to his addiction, he has sold a part of the property to the petitioner only to satisfy his bad habits.

4. The issue of legal necessity has been raised by respondent No.1. However, it is submitted that despite the pleadings in paragraph No.3 and 4 of the plaint, respondent No.1 has to first establish that she has a right to the ancestral property in her suit for partition and separate possession. Until such right is established, she cannot assail the sale deed signed by defendant No.1 in favour of the petitioner. So also, it is not necessary that respondent No.1 would be entitled to a share out of the land which defendant No.1 has transferred to the petitioner / defendant No.2 by a nominal sale deed dated 26/05/1993. Therefore, the proposed amendment is an outcome of the misplaced apprehension and sheer speculation of respondent No.1.

5. He further submits that the issue of limitation is involved. So also, after the trial of the suit has commenced, the proviso below

Order 6 Rule 17 would preclude an amendment to the plaint. He, therefore, prays for setting aside of the impugned order.

6. Mr.Biradar, learned Advocate appearing on behalf of respondent Nos.1, 3, 4, 5 and 6 submits that the plaintiffs have set out all the pleadings as were required in the plaint. The suit is for partition and separate possession. The suit property is ancestral property and hence any alienation of any portion of the suit property by defendant No.1 in favour of defendant No.2 petitioner, will have to be tested on the principle of “legal necessity”.

7. Similarly, the plaintiff, by inadvertence, did not set out a prayer clause in the plaint which was necessary so as to enable the Trial Court to consider the pleadings in the light of the prayers. Therefore, the proposed prayer 1-A and the proposed paragraph 9-A was aimed at ensuring that the pleadings are complete in so far as the plaintiffs are concerned. Neither has the nature of the cause of action changed, nor would the petitioner be precluded from opposing the amended portion on its merits.

8. He further submits that merely because the Trial Court has allowed the application for amendment, would not mean that the

rights of respondent No.1 have been decided and that the petitioner's rights have not been considered. He, therefore, prays for the dismissal of this petition.

9. I have considered the submissions of the learned Advocates.

10. It is not in dispute that the suit has been preferred by respondent No.1 and other plaintiffs for seeking partition and separate possession with regard to the purported ancestral property. The nominal sale deed in between defendant No.1 and defendant no.2 / petitioner herein has been assailed in paragraph Nos. 3, 4 and 5 of the plaint. I find that the plaint lacked the necessary prayer clause which can be formulated on the basis of the pleadings of the plaintiffs. The Trial Court had, therefore, rightly considered the application Exh.76 and has allowed the same so as to ensure that the pleadings could be translated in a proper prayer clause.

11. It is trite law that neither the merits of the proposed amendment are to be considered by the Court, nor would allowing of the amendment tantamount to accepting the claim made by the applicant seeking the amendment. In this backdrop, the rights of the petitioner could be protected to the extent of the proposed

amendment and the issue of limitation.

12. As such, though the impugned order dated 19/01/2009 is not being interfered with, this petition is partly allowed by modifying the order only to the following extent :-

- [a] After the plaintiffs amend the plaint by virtue of the order dated 19/01/2009 below Exh.76, the petitioner will be at liberty to file an additional written statement for countering / opposing the amended portion.
- [b] The Trial Court shall consider the contents of the additional written statement while deciding the suit on its own merits.
- [c] Issue of limitation if any, that may have cropped up on account of the added prayer clauses, shall also be dealt with by the Trial Court in the light of the additional written statement of the petitioner.
- [d] Needless to state, all contentions of the litigating sides are kept open.
- [e] The Trial Court is at liberty to re-cast the issues if felt necessary.

13. Rule is made partly absolute in terms of the above directions.

(RAVINDRA V. GHUGE, J.)