

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

BENCH AT AURANGABAD

WRIT PETITION NO.2000 OF 2013

- 1 Shivaram S/o Narayan Gatkul,
Age-53 years, Occu. Agriculture,
- 2 Ashok S/o Shivram Gatkul,
Age-21 years, Occu. Agriculture,
- 3 Rupesh S/o Shivram Gatkul,
Age-18 years, Occu. Agriculture,
- 4 Surekha W/o Shivram Gatkul,
Age-48 years, Occu. Household and
Agriculture.

All R/o Khanapur, Tal – Paranda,
Dist. Osmanabad.

...Petitioners...

Versus

- 1 Sou. Vrundavani W/o Goutam Khaire,
Age-40 years, Occu. Household and
Agriculture, R/o Pachapimpla,
Tal – Paranda, Dist. Osmanabad.
- 2 Sou. Siminta W/o Kundalik
Choudhari, Age-48 years,
Occu. Household and Agriculture,
R/o Vadaner, Tal – Paranda,
Dist. Osmanabad.
- 3 Baburao S/o Narayan Gatkul,
Age-43 years, Occu. Agriculture,
R/o Khanapur, Tal – Paranda,
Dist. Osmanabad.

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- 4 Smt. Parubai W/o Narayan Gatkul,
Age -73 years, Occu. Agriculture,
R/o Khanapur, Tal - Paranda,
Dist. Osmanabad.
- 5 Smt. Mangal W/o Baliram Gatkul,
Age-53 years, Occu. Agriculture,
R/o Bhonja, Tal - Paranda,
Dist. Osmanabad.
- 6 Sou. Ulka W/o Dasharath
Suryawanshi, Age-35 years,
Occu. Agriculture,
R/o Bangalwadi, Tal - Paranda,
Dist. Osmanabad.
- 7 Sou. Chitra W/o. Mahadeo Iname,
Age-28 years, Occu. Household,
R/o. Khanapur, Tal - Paranda,
Dist. Osmanabad.
- 8 Kumar S/o Baliram Gatkul,
Age-23 years, Occu. Agriculture,
R/o Bhonja, Tal - Paranda,
Dist. Osmanabad.
- 9 Nikhil S/o. Baliram Gatkul,
Age-22 years, Occu. Agriculture,
R/o Bhonja, Tao - Paranda,
Dist. Osmanabad.
- 10 Pandurang S/o Govardhan Thite,
Age-48 years, Occu. Agriculture,
R/o Khangapur, Tal - Paranda,
Dist. Osmanabad.
- 11 Sudharm S/o. Dattatraya
Bhagyawant, Age-38 years,
Occu. Agriculture, R/o Khanapur,
Tal - Paranda, Dist. Osmanabad.
- 12 Prashant S/o Ramchandra Narsale,
Age 43 yrs., Occu. Agri. R/o Domgaon
Tal - Paranda, Dist. Osmanabad.

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13 Siddeshwar S/o Abhiman Kokate,
Age-33 years, Occu. Agriculture,
R/o Kumbhephal, Tal - Paranda,
Dist. Osmanabad.

...Respondents...

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Shri A.R. Devkate, Advocate for petitioners.

Shri A.S. More, Advocate for respondent nos.1 & 2.

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CORAM: RAVINDRA V. GHUGE, J.

DATE: 22.03.2016

ORAL JUDGMENT :

1] Rule. Rule made returnable forthwith and heard finally by the consent of the parties.

2] The petitioner no.1 is original defendant no.1 whereas the petitioner nos.2 to 4 are original defendant nos.9 to 11. The Regular Civil Suit No.155/2009 is filed by respondent nos.1 and 2, who are plaintiffs, in the Court of Civil Judge, Junior Division, Paranda, for declaration of ownership, partition and separate possession of their ancestral and joint family properties.

3] The petitioners are aggrieved by the order dated 18.2.2013 delivered by the trial Court by which application (Exhibit 110) in Regular Civil Suit

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No.155/2009 seeking amendment to the plaint under Order VI Rule 17 has been allowed. While issuing notice, this Court has stayed the suit by order dated 13.3.2013 and since then the suit has not progressed.

4] Shri Devkate, learned Advocate for the petitioners, has strenuously criticized the impugned order. His submissions can be summarized as follows:-

a] The suit preferred by the original plaintiffs is for partition and separate possession with regard to three block numbers.

b] The plaintiffs and the defendants are close relatives.

c] Written statement was filed by the petitioners on 6.9.2012.

d] In paragraph no.12 of the written statement, it has been specifically averred that since all the properties have not been included in the suit for partition and separate possession and as such do not find place in the common hotch-pot, the suit be dismissed for the failure on the part of the plaintiffs to include all the properties.

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e] Issues were cast on 8.12.2010 and issue no.7, based on the pleadings of the defendants, has been framed to the extent as to whether the suit is bad for not bringing all the properties in the common hotch-pot.

f] The plaintiffs stepped into the witness box and the cross-examination commenced on 13.12.2012.

g] A specific question was posed with regard to a property, which was not included in the suit.

h] The plaintiffs sought an adjournment for further cross-examination and within 20 days moved an application (Exh.110) on 8.1.2013 praying for leave to amend the plaint under Order VI Rule 17 of the Code of Civil Procedure.

i] By the proposed amendment, the plaintiffs desired to add parties, add properties, challenge a decree passed in RCS No.199/2006, correct the mistakes in the names of the parties etc.

j] By challenging the saledeeds and the decree

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as being not binding on the parties, the nature of the suit is sought to be altered.

k] There is no pleading with regard to due diligence in respect of making the application for amendment in the light of the Proviso to Rule 17 under Order VI.

l] Commencement of the trial prohibits an amendment.

m] The plaintiffs were required to file a separate suit for challenging the decree and the saledeeds, which would be barred by limitation and hence to overcome the limitation, an amendment is proposed.

n] Impugned order be quashed and set aside.

5] Shri More, learned Advocate appearing on behalf of respondent nos.1 & 2 - plaintiffs, submits that though the petitioners had raised an issue of maintainability of the suit in paragraph no.12 of the written statement, the petitioners did not realize the seriousness in the objections until the question was posed on 13.12.2012. It was then that the plaintiffs realized that their suit would get dismissed purely on the ground of non-addition

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of properties and non-addition of parties.

6] He further submits that subsequently the plaintiffs gathered knowledge as regards the decree in Regular Civil Suit No.199/2006. They also gathered knowledge as regards the partition-deeds in favour of the petitioners, which were likely to jeopardize the rights of the plaintiffs as well as the issues raised in the suit.

7] The plaintiffs, therefore, thought it fit and proper to amend the plaint before it became too late and to avoid multiplicity of litigation. In the event any issue of the bar of limitation arises post amendment, the plaintiffs are willing to face the situation and the trial Court may be directed to frame an issue to that extent.

8] It is submitted that by the proposed amendment from paragraph no.1A onwards, certain mistakes in the names were sought to be corrected. Addition of parties and addition of properties was sought and a decree was sought to be challenged since the said decree came to the knowledge of the plaintiffs subsequently.

9] Shri More, however, submits that the issue as

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regards due diligence was not appropriately pleaded in the application. The pleadings are drafted at a Mofussil place and hence should be liberally construed.

10] I have considered the submissions of the learned Advocates as have been recorded hereinabove.

11] It is trite law that if all the properties are not included in the common hotch-pot in a suit for partition and separate possession, the said suit would get dismissed purely on such failure. It is also trite law that it is in the interest of all the litigating sides, who are naturally close relatives in a suit for partition and separate possession, to have all the properties included in the suit for proper adjudication. So also, the issue as to whether the properties subsequently purchased are from the common earnings generated from the ancestral properties or as to whether they are self-acquired properties, will have to be dealt with in such a suit.

12] The trial Court while passing the impugned order has considered the fact that the rejection of the amendment application would give rise to the filing of a fresh suit between the parties and which is likely to

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create multiplicity of litigation. The trial Court in its wisdom felt that if all these issues are taken up in the suit for partition and separate possession, all the litigating sides would be able to participate in the said litigation and support their own cause.

13] I, however, find that the issue with regard to the partition-deeds could suffer by the bar of limitation. Same has not been considered by the trial Court, which is likely to prejudice the valuable rights of the petitioners. The said issue of limitation deserves to be kept open and the trial Court is, therefore, required to consider the said issue lest it would amount to the plaintiffs overcoming the issue of limitation by amending their plaint. Considering the above, a slight modification in the impugned order so as to include the issue of limitation with regard to the challenge to the decree in RCS No.199/2006 and the partition-deeds, to be decided by the trial Court, will meet the ends of justice.

14] I have considered the law on amendment in a judgment delivered by this Court in the matter of *Sanjay Suganchand Kasliwal v. Jugalkishor Chaganlal Tapadia*

(2015 (3) Mh.L.J., 121) as follows:-

"33. In the 2010 Apex Court Judgment in case of *Hindustan Construction Company* (supra), paragraph Nos. 16 to 21 are of assistance and as such, I find it necessary to reproduce the said paragraphs herein below:-

"16. Pleadings and particulars are required to enable the court to decide true rights of the parties in trial. Amendment in the pleadings is a matter of procedure. Grant or refusal thereof is in the discretion of the court. But like any other discretion, such discretion has to be exercised consistent with settled legal principles. In Ganesh Trading Co. v. Moji Ram, this Court stated : (SCC p.93, para 2)

"2. Procedural law is intended to facilitate and not to obstruct the course of substantive justice. Provisions relating to pleading in civil cases are meant to give to each side intimation of the case of the other so that it may be met, to enable Courts to determine what is really at issue between parties, and to prevent deviations from the course which litigation on particular causes of action must take."

17. Insofar as Code of Civil Procedure,

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1908 (for short `CPC') is concerned, Order VI Rule 17 provides for amendment of pleadings. It says that 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.

18. The matters relating to amendment of pleadings have come up for consideration before courts from time to time. As far back as in 1884 in *Clarapede & Company v. Commercial Union Association*¹¹ - an appeal that came up before Court of Appeal, Brett M.R. Stated :

".....The rule of conduct of the court in such a case is that, however negligent or careless may have been the first omission, and, however late the proposed amendment, the amendment should be allowed if it can be made without injustice to the other side. There is no injustice if the other side can be compensated by costs; but, if the amendment will put them into such a position that they must be injured, it ought not to be made....."

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19. In *Charan Das and Others v. Amir Khan and Others*, Privy Council expounded the legal position that 11 Vol XXXII *The Weekly Reporter* 262 12 (1920) LR 47 IA 255 1 although power of a Court to amend the plaint in a suit should not as a rule be exercised where the effect is to take away from the defendant a legal right which has accrued to him by lapse of time, yet there are cases in which that consideration is outweighed by the special circumstances of the case.

20. A four-Judge Bench of this Court in L.J. Leach and Company Ltd., v. Jardine Skinner and Co. while dealing with the prayer for amendment of the plaint made before this Court whereby plaintiff sought to raise, in the alternative, a claim for damages for breach of contract for non-delivery of the goods relied upon the decision of Privy Council in *Charan Das & Others* 12; granted leave at that stage and held :

"16. It is no doubt true that courts would, as a rule, decline to allow amendments, if a fresh suit on the amended claim would be barred by limitation on the date of the

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application. But that is a factor to be taken into account in exercise of the discretion as to whether amendment should be ordered, and does not affect the power of the court to order it, if that is required in the interests of justice."

"36. The Apex Court in *Rajeshkumar Aggrawal* case (supra) has observed in paragraph Nos. 18 and 19 as follows:-

"17. In our view, since the cause of action arose during the pendency of the suit, proposed amendment ought to have been granted because the basic structure of the suit has not changed and that there was merely change in the nature of relief claimed. We fail to understand if it is permissible for the appellants to file an independent suit, why the same relief which could be prayed for in the new suit cannot be permitted to be incorporated in the pending suit.

18. As discussed above, the real controversy test is the basic or cardinal test and it is the primary duty of the court to decide whether such an amendment is necessary to

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decide the real dispute between the parties. If it is, the amendment will be allowed; if it is not, the amendment will be refused. On the contrary, the learned judges of the High Court without deciding whether such an amendment is necessary have expressed certain opinions and entered into a discussion on merits of the amendment. In cases like this, the court should also take notice of subsequent events in order to shorten the litigation, to preserve and safeguard the rights of both parties and to sub serve the ends of justice. It is settled by a catena of decisions of this Court that the rule of amendment is essentially a rule of justice, equity and good conscience and the power of amendment should be exercised in the larger interest of doing full and complete justice to the parties before the court."

"49. In *Revajeevu Builders & Developers'* case (supra), the Apex Court, while dealing with the case of amendment has considered the law almost from 1884 onwards. Paragraph Nos. 27 to 47 read as

under:-

"33. The general principle is that courts at any stage of the proceedings may allow either party to alter or amend the pleadings in such manner and on such terms as may be just and all those amendments must be allowed which are imperative for determining the real question in controversy between the parties. The basic principles of grant or refusal of amendment articulated almost 125 years ago are still considered to be correct statement of law and our courts have been following the basic principles laid down in those cases.

34. In the leading *English case of Cropper v. Smith*⁶, the object underlying amendment of pleadings has been laid down by Browne, L.J. in the following words:

"It is a well established principle that the object of the courts is to decide the rights of the parties and not punish them for mistakes they make in the conduct in their cases by deciding otherwise than in

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accordance with their rights ... I know of no kind of error or mistake which, if not fraudulent or intended to overreach, the court ought not to correct if it can be done without injustice to the other party. Courts do not exist for the sake of discipline but for the sake of deciding matters in controversy, and I do not regard such amendment as a matter of favour or grace ... it seems to me that as soon as it appears that the way in which a party has framed his case will not lead to a decision of the real matter in controversy, it is as much a matter of right on his part to have it corrected if it can be done without injustice, as anything else in the case is a matter of right."

35. In *Tildersley v. Harper*⁷ which was decided by the English Court even earlier than the Cropper's case (supra), in an action against a lessee for setting aside a lease, in the statement of claim it was alleged that the power of attorney of donee had

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received specified sum as a bribe. In the statement of defence, each circumstance was denied but there was no general denial of a bribe having been 6 (1884) 29 Ch D 700 7 (1878) 10 Ch. D 393 given. A prayer for amendment of the defence statement was refused.

36. The Court of Appeal held that the amendment ought to have been allowed. Bramwell, L.J. made the following pertinent observations:

"I have had much to do in Chambers with applications for leave to amend, and I may perhaps be allowed to say that this humble branch of learning is very familiar to me. My practice has always been to give leave to amend unless I have been satisfied that the party applying was acting mala fide, or that, by his blunder he had done some injury to his opponent which could not be compensated for by costs or otherwise." (Emphasis added)

38. The rule, however, is not a

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universal one and under certain circumstances, such an amendment may be allowed by the court notwithstanding the law of limitation. The fact that the claim is barred by law of limitation is but one of 8 (1880) 19 QBD 394: 56 LJ QB 621 the factors to be taken into account by the court in exercising the discretion as to whether the amendment should be allowed or refused, but it does not affect the power of the court if the amendment is required in the interests of justice.

42. In a concurring judgment ((1909) 33 Bom 644), Beaman, J. observed:

"The practice is to allow all amendments, whether introducing fresh claims or not, so long as they do not put the other party at a disadvantage for which he cannot be compensated by costs."

His Lordship proceeded to state:

"In my opinion two simple tests, and two only, need to be applied, in order to ascertain whether a given case is within the

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principle. First, could the party asking to amend obtain the same quantity of relief without the amendment? If not, then it follows necessarily that the proposed amendment places the other party at a disadvantage, it allows his opponent to obtain more from him than he would have been able to obtain but for the amendment. Second, in those circumstances, can the party thus placed at a disadvantage be compensated for it by costs? If not, then the amendment ought not, unless the case is so peculiar as to be taken out of the scope of the rule, to be allowed."

15] So also considering the introduction of the Proviso below Rule 17 under Order VI of the Code of Civil Procedure, the plaintiffs will have to compensate the petitioners by payment of costs.

16] In the light of the above, this petition is partly allowed. The impugned order dated 18.2.2013 is modified by directing the trial Court to frame an issue

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of limitation after the amendment is carried out with regard to the challenge to the decree in Regular Civil Suit No.199/2006 and the partition-deeds.

17] The plaintiffs shall carry out the amendment within three weeks. The petitioners shall be at liberty to file an additional written statement within three weeks thereafter. The plaintiffs shall deposit an amount of Rs.15,000/- as costs before the trial Court, which shall be withdrawn by the petitioners in equal proportions without any conditions.

18] After the amendment and the written statement having been filed by these petitioners, the trial Court shall frame an additional issue, in the light of the amendment and the pleadings of the parties, with regard to limitation considering the objections of the petitioners. Needless to state, the suit shall be decided on its own merits.

19] Rule is made partly absolute in the above terms.

20] At this stage, learned Advocate for the petitioners - defendants prays that this judgment be stayed for a period of six weeks. The learned Advocate for the respondent nos.1 & 2 - plaintiffs vehemently

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opposes the said request.

21] Considering the fact that this Court had stayed the suit by its order passed on 13.3.2013 and since then the said suit has been stayed till this date, operation of this judgment shall stand stayed for a period of four weeks from today.

(RAVINDRA V. GHUGE, J.)