

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

Writ Petition No.10983 of 2016

- 1) Sainath s/o Baban Sable,
Age 32 years,
Occupation : Agriculture.
- 2) Ganga w/o Balasaheb Damre,
Age 31 years,
Occupation : Household.
- 3) Jijabai w/o Baban Sable,
Age 52 years
Occupation : Household.

All R/o Plot No.7, B Type,
Ashirwad Society,
Saint Tukaram Nagar,
Near Police Chowki, Pimpri,
Pune - 18.

.. Petitioners.

Versus

- 1) Survarna w/o Vijay Borude,
Age 37 years,
Occupation : Household.
 - 2) Mitali Babanrao Sable,
Age 23 years,
Occupation : Education.
- Both R/o Tange Galli,
Behind Court,
House No.5428, Ahmednagar.
- 3) Yuvraj s/o Vishwanath Netake,
Age 28 years,
Occupation : Agriculture,
R/o Takalsing, Taluka Ashti,
District Beed.

- 4) Haridas s/o Maroti Wable
Age 60 years,
Occupation : Agriculture,
R/o Deulgaon Rasal,
Taluka Baramati,
District Pune.

.. Respondents.

With

WRIT PETITION NO. 10984 OF 2016

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.. Respondents.

Shri. Rahul R. Karpe, Advocate, for petitioners.

Shri. K.D. Bade Patil, Advocate, for respondent No.1.

CORAM: T.V. NALAWADE, J.

DATE : 22 NOVEMBER 2016

ORAL JUDGMENT:

1) Rule. Rule made forthwith. Heard both the sides for final disposal by consent.

2) Writ Petition No.10983/2016 is filed to challenge the order made on Exhibit 134 in Special Civil Suit No.37/2014 (Old Regular Civil Suit No.16/2009) by which the prayer was made by defendant Nos.1 to 3 for allowing them to amend the written statement in view of

the amendment of plaint allowed by the Court. This application is rejected by the trial Court. The other proceeding, Writ Petition No.10984/2016 is filed to challenge the order dated 1-12-2014 made on Exhibit 117 by which amendment in the plaint was allowed. By allowing the amendment the Court has allowed to include more properties as suit property in the partition suit.

3) The submissions made show that defence was taken by the present petitioners, original defendant Nos.1 to 3, that some properties were not included in the suit and so the suit was bad for non inclusion of the remaining property in the suit filed for partition. It appears that subsequently those properties came to be mentioned in the amendment application and the Court allowed the amendment by order dated 1-12-2014. To challenge the said order, Writ Petition No.10984/2016 is filed. It can be said that it is filed after 2 years from the date of the order. In any case, the suit could not have been dismissed in entirety due to such defence and it was open to the Court to allow the plaintiff to include some properties if the parties were thinking that these properties also need to be

considered in the suit. Thus, on merits also it cannot be said that the Court committed any error. In any case the defendants took almost 2 years for challenging the order and the suit is filed for relief of partition. The real intention behind filing this petition can be inferred. Due to this circumstance, the writ petition challenging the amendment order cannot be allowed.

4) When the plaint was allowed to be amended, in ordinary course, the Court ought to have allowed the defendants to file additional written statement. It appears that by making some observations the Court has refused to allow this application. It appears that the defendants want to make counter claim that the property which was newly added was their self acquired property. In a suit for partition the burden is on the plaintiff to prove that he is entitled to the share in the property and the property is the joint Hindu family property. When there is no such proof, the suit itself fails and there is virtually no necessity of counter claim. By making similar observations the trial Court has held that there is no necessity of making counter claim. However, the defendants want to contend

that in the past there was one suit in respect of some properties, which are newly added and the suit is decided and so the previous decision would operate as *res judicata* to the present suit. This point can be decided by simply filing copy of judgment of the said suit. If the properties, which now the plaintiff has added as the suit property, were the suit properties in the previous suit, in ordinary course, the defendants need to be allowed to file additional written statement and issue on that point also needs to be framed. In view of this, this Court holds that permission needs to be given to the defendant Nos.1 to 3 to file additional written statement in respect of the amendment to the plaint allowed by the Court. It appears that the suit is kept for final argument. In view of these circumstances, both the sides are to appear before the trial Court on 28th November 2016 and additional written statement be filed prior to 2nd December 2016. After filing written statement additional issue if required is to be framed and the suit is to be decided. There is no necessity to lead oral evidence if the issue of *res judicata* is framed and the certified copy of the judgment delivered in the previous suit can be considered for said the issue. With

these observations, following order is made :

5) Writ Petition No.10984/2016 is dismissed. Rule is discharged.

6) Writ Petition No.10983/2016 is allowed. The order made by the trial Court on application Exhibit 134 is set aside to some extent and the defendants are allowed to file written statement with regard to the amendment made in the plaint. Both the parties are to appear before the trial Court on 28-11-2016 and additional written statement is to be filed before 2nd December 2016. After filing of additional written statement, additional issues if required are to be framed on the same day. There would be no necessity to lead oral evidence if issue of *res judicata* is framed and certified copy of the judgment delivered in the previous suit is to be considered for the said issue. Rule is made absolute in the above terms.

Sd/-
(T.V. NALAWADE, J.)

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