

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Writ Petition NO. 3200 OF 2016

SMT. LAXMIBAI MARUTI PAWAR
AND ANR

...Petitioners

Versus

SOU. SAKHUBAI NATHURAM DHOTHRE

...Respondent

....

Mr. Mithun Mahajan, Advocate for the Petitioners.

....

CORAM : R. G. KETKAR, J.

DATE : 16th MARCH, 2016

P.C.

1. Heard Mr. Mithun Mahajan, learned Counsel for the petitioners, at length.

2. By this Petition under Article 227 of the Constitution of India, the petitioners have challenged the judgment and order dated 18.12.2015 passed by learned District Judge-5, Kolhapur below Exh.10 in Regular Civil Appeal No.242./2015. By that order, the learned District Judge allowed the application made by the respondent, hereinafter referred to as the 'plaintiff' under Order 6 Rule 17 of Code of Civil Procedure, 1908 (for short, 'CPC') for amending the plaint subject to cost of Rs.500/-.

3. The respondent had instituted Regular Civil Suit No.2441/2012 against the petitioners, hereinafter referred to as 'defendant Nos.1 and 2', for declaration that she has half share in the suit property in view of the Will dated 3.8.2008 executed by Ramu Mahadu Wadd, since deceased, for separate possession of half share and for mesne profits. The suit was dismissed on 3.7.2015. Aggrieved by that decision, the plaintiff preferred Regular Civil Appeal No.22/2015 in the District Court. During pendency of that appeal, the plaintiff took out application Exh.10 under Order 6 Rule 17 of CPC on 27.7.2015. In para-2, the plaintiff asserted that she had instituted the suit claiming half share on the basis of will executed on 3.8.2008 by Ramu Mahadu Wadd. She however could not examine the attesting witness. Even otherwise as per the Hindu Succession Act, 1956, she is entitled to 1/3rd share. She, therefore, applied for amending the plaint by incorporating alternate prayer that as the plaintiff is the real sister of the defendants and that the plaintiff and the defendants are the children of Ramu Mahadu Wadd, since deceased, as per provisions of the Act, she would be entitled to 1/3rd share. By the impugned order, learned District Judge allowed the application. It is against that order, defendant

Nos.1 and 2 have instituted the present petition.

4. Mr. Mahajan submitted that the suit is instituted in the year 2012 i.e. to say post CPC amendment of 2002. The amendment application is governed by provisions of Order VI Rule 17 of CPC and in particular proviso to order VI Rule 17 of CPC lays down that no application for amendment shall be allowed after the trial has commenced, unless the Court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial. He submitted that the plaintiff has not established due diligence and in fact the learned District Judge while allowing the appeal has also not dealt with this aspect, namely, whether the plaintiff has proved the condition laid down in proviso to Order VI Rule 17 of CPC. In support of this submission, he relied upon following decisions :

[I] ***Vidyabai and others vs. Padmalatha and another,***
(2009) 2 SCC 409 [in particular paragraph-10] :

In paragraph-10, the Apex Court reproduced the proviso to Order VI Rule 7 and observed that the proviso is couched in a mandatory form. The court's

jurisdiction to allow such an application is taken away unless the conditions precedent therefor are satisfied, namely, it must come to a conclusion that in spite of due diligence the parties could not have raised the matter before the commencement of the trial. In paragraph-11, the Apex Court has held that filing of an affidavit in lieu of examination-in-chief of the witness, would amount to 'commencement of proceeding'. He submitted that as the suit is instituted in the year 2012, before granting application under Order 6 Rule 7 of CPC, the Court has to record a finding that in spite of due diligence the plaintiff could not have raised the matter before the commencement of the trial.

[II] ***Girish s/o. Bapusaheb Bhor vs. Ambadas s/o. Chandrabhan Perne, 2015(1) Mh.L.J. 916*** : Which, in turn, follows the decision of the Apex Court in the case of ***Vidyabai*** (supra).

5. I have considered the submissions advanced by Mr.Mahajan learned Counsel appearing for the petitioners. I have also perused the material on record.

6. Mr. Mahajan fairly did not dispute the relationship between the parties. Perusal of the plaint shows that the plaintiff asserted that in pursuance of the decree passed in Regular Civil Suit No.308/2008, final decree proceedings were filed and the decree was executed on 23.6.2007. The suit property was actually given in possession of Ramu Mahadu Wadd, since deceased. The plaintiff and the defendants are the children of said Ramu Mahadu Wadd. On 3.8.2008, he had executed a Will bequeathing half share each to the plaintiff and defendant No.1. Ramu died on 23.7.2010. on the basis of Will, the plaintiff claimed half share in the suit property. As noted earlier, the Suit was dismissed. The plaintiff preferred appeal against this decision. During pendency of the appeal, on 27.7.2015 the plaintiff filed an application Exhibit-10 for amending the plaint *inter alia* contending that she could not establish the Will for non examining the attesting witness. Even otherwise, under the provisions of the Act she is entitled to 1/3rd share in the suit property. As the defendants have not disputed the relationship between the parties, in my opinion, learned District Judge was justified in allowing the application.

7. Mr. Mahajan relied upon the decisions in **Vidyabai's** case (supra) and **Girish's** case. In the case of **Abdul Rehman and another vs. Mohd. Ruldu and others, (2012) 11 SCC 341**, the Apex Court dealt with the question of amendment of plaint after commencement of the trial. It was held that all amendments which are necessary for the purpose of determining real questions in controversy between the parties should be allowed if it does not change basic nature of suit. Making clear and explicit what was already implicit in plaint, does not amount to changing the nature of the suit, provided it does not cause injustice or prejudice to other side. The main purpose of allowing amendment is to minimise litigation. In the present case, the relationship between the parties is not disputed. Even if the plaintiff fails to claim half share on the basis of the Will executed by Ramu Mahadu Wadd, nonetheless under the provisions of the Act she is entitled to claim share in the suit property. The proposed amendment is implicit in plaint and does not cause any injustice to the defendants. The decisions relied by Mr. Mahajan do not advance the case of defendant Nos.1 and 2.

8. In view thereof, I do not find that any case is made out

for invocation of powers under Article 227 of the Constitution of India. Hence, the Petition fails and the same is dismissed.

9. It is made clear that where a decree is challenged by the petitioner, any error, defect or irregularity in impugned order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of the proposed proceedings as contended by section 105(1) of Civil Procedure Code.

(R. G. KETKAR, J.)

Deshmane (PS)