

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Writ Petition NO. 5600 OF 2015
WITH
Writ Petition NO. 5779 OF 2015

SHRI. SUDESH BHARAT MAYEKAR ...Petitioner

Versus

MRS. JYOTI PRAKASH MADYE
AND ORS ...Respondents

....

Mr. Abhay D. Parab, Advocate for the Petitioner.

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CORAM : R. G. KETKAR, J.

DATE : 23rd MARCH, 2016

P.C.

1. Heard Mr. Abhay Parab, learned Counsel for the petitioner in both the petitions, at length.

2. Writ Petition No.5600/2013 is directed against the judgment and order dated 24.3.2015 passed by the learned Joint Civil Judge, Junior Division, Malvan below Exhibit-134 in Regular Civil Suit No.1/2007. Writ Petition No.5779/2015 is directed against the judgment and order dated 24.3.2015 passed by the learned Joint Civil Judge, Junior Division, Malvan below Exhibit-43 in Regular Civil Suit No.139/2012. By these orders,

the learned trial Judge allowed the application made by the plaintiffs (respondent Nos.1 to 5) under Order VI Rule 17 of Code of Civil Procedure, 1908 (for short, 'CPC') for amending the plaint. The plaintiffs instituted Regular Civil Suit No.1/2007 *inter alia* praying for partition and separate possession of half share in the suit properties; for declaration that defendant Nos.8 to 11 have no right, title and interest in certain properties and that the name of defendant No.2 Bharat Kashiram Mayekar, since deceased recorded in the column of Bhogwatdar (cultivator) is illegal; for perpetual injunction restraining defendant No.2 from obstructing the possession of the plaintiffs in respect of property No.2 as also restraining defendant No.2 from carrying out construction.

3. During pendency of the suit, the plaintiffs took out application Exhibit-134 under Order VI Rule 17 of CPC for amending the plaint on the ground that in paragraph-3 of the plaint the plaintiffs asserted that survey No.34 Hissa No.20 exclusively belongs to Pandurang. Said property is the self acquired property of Pandurang and the branch of Kashiram has no right, title and interest therein. By the proposed

amendment, now the plaintiffs contend that said property is jointly owned by them and defendant Nos.1 to 7. The plaintiffs therefore filed application for amending the plaint in R.C.S. No.1 of 2007 to that effect.

4. Likewise, the plaintiffs also took out application Exhibit-43 under Order VI Rule 17 of CPC for amending the plaint based on the same contention. By the impugned orders, the learned trial Judge has allowed the applications. It is against this decision, the L.Rs of defendant No.2 have instituted these petitions.

5. Mr. Parab submitted that the trial has already commenced. In view of proviso to Order VI Rule 17 of CPC, unless the parties make out a case of due diligence, the trial Court would not be justified in allowing the amendment. As in the present case, the trial has already commenced, in view of the decision of the Apex Court in the case of ***Vidyabai and others vs. Padmalatha and another, (2009) 2 SCC 409***, the impugned order deserves to be set aside. He further submitted that whereas in the unamended plaint, the plaintiffs specifically came with the case that survey No.34 Hissa No.20 is self-

acquired property of Pandurang and the branch of Kashiram has no right, title and interest, by the proposed amendment the plaintiffs want to contend that it is the joint family property of the plaintiffs and defendant Nos.1 to 7. The proposed amendment is inconsistent with the unamended plaint. Even on this ground, the learned trial Judge was not justified in allowing the amendment.

6. I have considered the submissions advanced by Mr.Parab learned Counsel appearing for the petitioner. It is no doubt true that the application for amendment is taken out after commencement of the trial. It is also no doubt true that in the plaint originally instituted, the plaintiffs came with the case that Survey No.34 Hissa No.20 is self-acquired property of Pandurang and that the branch of Kashiram has no right, title and interest. Based on that assertions, they have claimed reliefs in the respective suits. By the proposed amendment, now the plaintiffs want to contend that survey No.34 Hissa No.20 is the property of the plaintiffs and defendant Nos.1 to 7. The learned trial Judge has considered this aspect in paragraphs-4 and 5 and observed that by the proposed amendment, the plaintiffs

have accepted the share of defendant Nos.1 to 7 in survey No.34 Hissa No.20 and which will not cause any prejudice to defendant Nos.1 to 7 and in particular defendant No.2. In fact the proposed amendment enures to the benefit of defendant Nos.1 to 7. In view thereof, I do not find that the learned trial Judge has committed any error in passing the impugned order. Hence, the petitions fail and the same are dismissed.

7. 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 CPC.

(R. G. KETKAR, J.)