

JPP

***IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE SIDE JURISDICTION***

WRIT PETITION NO. 2010 OF 2015

Mr. Ramchandra C. Shrimangle. ... Petitioner.

V/s.

Kalavati Narsappa Nandwar. ... Respondent.

Mr. A.A. Valsangkar a/w. Samir Kumbhakoni for the Petitioner.
Mr. Shrishail Sakhare a/w. A.S. Pandire for the Respondent.

CORAM : N.M. Jamdar, J.

04 October, 2016.

Oral Order :-

By order dated 8 May 2015 notice was issued to the Respondent indicating that the matter will be disposed of finally at the stage of admission. The matter has been argued from time to time. On the last date none had appeared on behalf of the Respondent and therefore, the matter was kept today.

2. Heard the learned Counsel for the parties.

3. By the impugned order the learned Civil Judge, Junior Division, Solapur has rejected the application for amendment taken out by the Petitioner – Plaintiff. The ground for rejection is that admission given by the Petitioner cannot be retracted by the Petitioner. This is the sole ground by which the application was rejected. The learned Counsel for the Petitioner submitted that what is sought in the plaint is an order of injunction wherein the Petitioner has prayed that till there is a partition, no third party rights be created in respect of the suit property. It is submitted that this relief of injunction has not undergone any change and only a reason why injunction needs to be granted is sought to be explained and therefore, there is no question of any admission or change of the case of the Petitioner.

3. The learned Counsel for the Respondent relied upon the decisions of the Apex Court in the case *Vidyabai & Ors. v/s. Padmalatha & Anr.* reported in 2009(1) All MR 471 and *Chander Kanta Bansal v/s. Rajinder Singh Anand* reported in 2008(4) All MR 423, and submitted that the trial court cannot grant any amendment unless parameters are satisfied and it was also contended that the nature of the suit will be changed.

4. The learned Judge has not stated that the trial has commenced, In the plaint the Petitioner has stated that the

Petitioner is the sister of the Respondent – Defendant. The property was initially belonging to the father of the parties in which there was a share of deceased Chandram and deceased Mahadev of which Mahadev had executed will deed and since he did not have any heirs given one and half share to the Petitioner. It is stated that thereafter, the property has come to the Petitioner and the property which came to the share of Chandram, after his death, entry was taken in the records in the name of both the Plaintiffs and Defendants. It was then contended that even though the share of the Respondent was entered in the 7/12 extract, the share was in fact lesser than what the Respondent is entitled to. Since the Respondent was trying to dispose of the property and relief of injunction was necessary. The suit was filed on 11 February 2013. Thereafter, amendment application was moved on 7 August 2014. In the application for amendment, a reference to Mahadev dying issue-less was sought to be replaced with a reference to his daughter Tarabai and it was sought to be contended that even though there was a heir that heir was looked after by the Petitioner and therefore, will was executed in favour of the Petitioner. It was then stated that the name of the Respondent which has been entered into 7/12 extract is by way of an error and the marriage of the Respondent took place some time in the year 1978. It was also sought to be contended that the Petitioner not only has become owner of the part of the property by way of a will but by way of heir-ship has become owner of the entire property.

This amendment application was opposed by the Respondent. The learned Civil Judge held that there is an averment in the plaint that the Respondent has a share however, by way of amendment it is sought to be contended that the Respondent has no share in the property and therefore, the admission has been sought to be withdrawn.

5. Whether what is stated by the Petitioner is an admission and whether it changes the nature of the suit is the question that is to be considered. What is sought is a relief of injunction. Relief is sought on the basis that the Respondent has no right to alienate the suit property. It was initially stated that the Respondent cannot alienate the property because the Respondent does not have more than one and half share, and has some share but it is wrongly reflected in the 7/12 extract. By way of amendment, it is sought to be contended that the Respondent cannot alienate the suit property because the Respondent does not have any share. The main cause of action that the Respondent should not alienate the property because the Respondent does not have any right remains consistent. What is sought to be changed is a ground on which the relief of injunction is sought. Even going by the earlier case taken in the plaint by the Petitioner that the Respondent's share has been incorrectly reflected in the 7/12 extract the Petitioner can maintain a suit for injunction. Therefore, it is not that the suit for injunction will fail moment this

statement stands changed. Even otherwise there is no admission that a share has come to the Respondent in his own right the averment is made that the share which the Respondent claims on heir-ship basis has been wrongly reflected in the 7/12 extract.

6. In the case of *Vidyabai* though the Apex Court has stated that the proviso to Order 6 Rule 17 of the Code of Civil Procedure places an embargo on the exercise of the jurisdiction. This observation is made in the context of the need to ascertain whether amendment is necessary to decide the real dispute in the present case. The learned Civil Judge has not undertaken the task of analyzing what is the exact amendment that is sought and how it would change the nature of the dispute or what is the admission which is sought to be withdrawn. The learned Judge ought to have considered that whether the Petitioner contends that the Respondent cannot sale the property because he does not have any right in the entire property or does not have half share will make no difference as far as the claim of the Petitioner as regard prayer for injunction is concerned.

7. In the circumstances, the view taken by the learned Judge that there is a withdrawal of admission is incorrect. Mere change of ground which does not affect the final outcome can be permitted if other ingredients of allowing the amendment exist. In

the circumstances, the Writ Petition deserves to be allowed and is accordingly allowed in terms of prayer clause (a). Amendment to be carried out within period of four weeks from today. Needless to state that all contentions of the Respondent as regard the amended portion are kept open. It is open to the Respondent to file an additional written statement. The suit will be decided on its own merits. The Writ Petition disposed of in above terms.

(N.M. Jamdar, J.)