

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

WRIT PETITION NO.13041 OF 2016

Jayashree Jaisingrao Nimbalkar and others ... Petitioners
v/s
Balaso Sadsahivrao Nimbalkar (since
deceased) through his LRs and others ... Respondents

Mr Satyavrat Joshi for Petitioners.

CORAM : RAJESH G. KETKAR, J.

DATE : 22nd NOVEMBER, 2016.

P.C. :-

1. Not on board, At the request of Mr Joshi, taken up for admission.

2. By this Petition under Article 227 of the Constitution of India, the Petitioners, hereinafter referred to as Defendant Nos.1, 3 and 4, have challenged the judgment and order dated 19th September 2016 passed by the learned Civil Judge, S.D., Kolhapur below Exh.64 in R.C.S. No.151 of 2010. By that order, the learned Trial Judge rejected the Application made by the Defendant Nos.1, 3 and 4 under Order 6 Rule 17 of Civil Procedure Code for amending the written

statement. The learned Trial Judge rejected the Application mainly on two grounds - (1) The proposed amendment is already covered in the defence taken by the Defendants and (2) The Defendants have not established due diligence as provided in proviso to Order 6 Rule 17 of Civil Procedure Code.

3. In support of this Petition, Mr Joshi invited my attention to the prayers made in the Suit and submitted that the Plaintiffs have instituted a Suit for partition and their separate 3/4th share. The Suit is instituted against the widow of Jaisingrao Nimbalkar and daughters. Defendant Nos.1, 3 and 4 filed written statement at Exh.15 inter alia contending that the suit property was purchased from the income of Jaisingrao, husband of Defendant No.1 and father of Defendants No.3 and 4 in the name of his father – Sadashivrao B. Nimbalkar. As the suit property was purchased from the income of Jaisingrao, the Plaintiffs do not have any right to claim partition in respect thereof.

4. During the pendency of the Suit, Defendant Nos.1, 3 and 4 filed application Exh.64 for incorporating paragraph 5A in the

written statement. By paragraph 5A, the Defendants contended that Sadashivrao B. Nimbalkar was working in Military. He retired in the year 1951. In Kolhapur, ex-servicemen Co-operative Housing Society was established. Jaisingrao requested his father to make application for allotment of plot and accordingly, Sadashivrao B. Nimbalkar was allotted plot No.54 by the said Society. After attaining the age of superannuation, Sadashivrao Nimbalkar was getting meagre pension. Son and daughters of Sadashivrao were also not in a position to raise the amount. The consideration was paid by Jainsingrao. In short, by the proposed amendment, it is contended that the suit property is self acquired property of Jaisingrao from his own income.

5. Mr Joshi submitted that the Defendants are relying upon the correspondence to substantiate their plea that it is self acquired property of Jaisingrao and therefore, the learned Trial Judge should have allowed the Application.

6. While rejecting the Application dated 20th August 2016, the learned Civil Judge observed that the Defendants filed affidavit of examination-in-chief of their witness. However, he remained absent

and therefore on 8th August 2016, order was passed below Exh.58 to the effect that the evidence of witness could be read as he was absent on that date. The learned Trial Judge therefore held that as the trial has commenced and the Defendants have not established due diligence, amendment cannot be allowed. Apart from that, the learned Civil Judge observed that the proposed amendment is already covered by the written statement. In view thereof, I do not find any merit to interfere with the impugned order.

7. Hence, Petition fails and is dismissed. It is, however, expressly made clear that where a decree is appealed from by the petitioner, any error, defect or irregularity in the impugned order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of appeal as contemplated by Section105(1) of C.P.C.

(RAJESH G. KETKAR, J.)