

IN THE HIGH COURT OF JUDICATURE AT MUMBAI
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.12473 OF 2015

Maruti Sopan Patil (decd.) through LRs and others ... Petitioners
Vs.
Ramchandra Sopan Patil (decd.) through LRs and others ... Respondents

Mr. Kisan B. Sonwalkar for Petitioners.
Mr. Shankar M. Katkar for Respondents No.1A to 1C, 2 and 5.

CORAM : R. G. KETKAR, J.
DATE : APRIL 27, 2016

P.C. :

Heard Mr. Sonwalkar, learned Counsel for petitioners and Mr. Katkar, learned Counsel for respondents No.1A to 1C, 2 and 5 at length.

2. By this Petition under Article 227 of the Constitution of India, petitioners have challenged the judgment and order dated 01.10.2015 passed by the learned 3rd Joint Civil Judge, Junior Division, Malshiras, below exhibit-198 in Regular Civil Suit No.299 of 1992. By that order, the learned trial Judge partly allowed the application made by the petitioner, hereinafter referred to as plaintiff, under Order VI, Rule 17 of the Code of Civil Procedure, 1908 (for short 'C.P.C.') to the extent of amendment as per claim clause 1a.

3. Plaintiff has instituted Suit inter alia for declaration that the Will deed executed by Draupadabai bequeathing the property in favour of defendants No.2 and 3 is bogus and fabricated document; for partition and separate possession of the plaintiff's share in the suit property. Defendants No.1 to 3 resisted the Suit as also application for interim relief at exhibit-5 by filing written statement and say to exhibit-5 on

07.10.1992. Plaintiff filed application at exhibit-198 on 12.06.2015 for amending the plaint. By the proposed amendment, plaintiff wanted to give proper description of the suit property and also incorporate paragraphs 4-A and 4-B in the plaint. By paragraph 4-A of the proposed amendment, plaintiff has contended that without prejudice to the contentions advanced earlier, in fact there was oral partition between Sopan, since deceased and his children. In that oral partition, Draupada was not given separate share. In that partition, 6 acres out of 20 acres of Survey No.23/2 came to the share of Sopan and Draupada and 12 to 13 acres land was given to the children. Out of 6 acres allotted to Sopan and Draupada, 4 acres land was recorded in the name of Draupadabai in view of some difficulties and also convenience of the family. However, Draupada did not become owner of 4 acres land.

4. It was further contended that on 07.12.1966, 2 acres out of Survey No.23/2 and 1 acre out of Survey No.82/2 was purchased Benami in the name of Draupada. In fact, it was never intended to confer ownership on said Draupada. In paragraph 4-B, plaintiff further contended that without prejudice to the contentions advanced earlier, if it is held that in fact Draupada had executed Will on 28.11.1991, she was physically as well as mentally incapable to execute the Will. Defendants No.1 to 3 brought in existence so called Will dated 28.11.1991, which is illegal and no rights devolve upon defendants No.2 and 3 on the basis of that Will.

5. By the impugned order, the learned trial Judge rejected the application on the ground that plaintiff cannot, by way of amendment, introduce inconsistent / alternative pleas. Aggrieved by this order, plaintiff has instituted the present Petition.

6. In support of this Petition, Mr. Sonwalkar submitted that by way of amendment, plaintiff can take up inconsistent or alternative pleas and there is no bar for allowing such amendment. In support of this submission, he relied upon the decision of this Court in the case of ***Mabel Reeves Vs. Confraria de Igreja de Cortalim*, 2015 (6) ALL MR 167**. He, therefore, submitted that the learned trial Judge ought to have allowed the application in its entirety. On the other hand, Mr. Katkar supported the impugned order.

7. I have considered the rival submissions advanced by the learned Counsel appearing for the parties. I have also perused the material on record. As noted earlier, plaintiff has instituted Suit for declaration that the Will executed by Draupadabai is bogus and fabricated document. In other words, plaintiff came with a positive case that the Will deed was never executed by Draupada, since deceased. By the proposed amendment, by way of alternative plea, plaintiff wants to contend that even if it is presumed that Draupada had executed Will on 28.11.1991, she was not physically as well as mentally capable to execute the Will due to old age. The learned trial Judge observed that no doubt the alternative plea can be taken but plaintiff cannot be allowed to take alternative plea which is contradictory to the previous plea.

8. Mr. Sonwalkar relied upon decision of ***Mabel Reeves*** (*supra*). Perusal of this decision does not indicate that this Court held that by way amendment, plaintiff can take up inconsistent / alternative pleas, which is destructive to the earlier pleas. It is settled position in law that while considering the application for amendment of plaintiff and defendant, Court has to adopt different approach. While considering the application for amendment of the defendant, the Court has to adopt liberal approach; but same is not the case while considering the

application for amendment at the instance of the plaintiff. In view thereof, I do not find that the learned trial Judge has committed any error while passing the impugned order. Hence, Petition fails and the same is dismissed.

9. It is 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 Section 105(1) of C.P.C.

(R. G. KETKAR, J.)

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