

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

WRIT PETITION NO. 13567 OF 2016

Prakash Vishwanath Ratnaparkhi

..Petitioner.

Vs

Mr. Vivek Vinayak Ratnaparakhi
and Ors

.. Respondents

Mr. Mohan Jadhav i/b Ms.Meenal S. Deshmukh, Advocate for
Petitioner.

**CORAM : R.G.KETKAR,J.
DATE : 13/12/2016**

PC:

1. Heard Mr.Mohan Jadhav, learned counsel for the petitioner at length.
2. By this Petition under Article 227 of the Constitution of India, the petitioner, hereinafter referred to as 'defendant no.1', has challenged the Judgment and order dated 14.11.2016 passed by the learned Civil Judge, Jr. Dn., Chandwad, below Exhibit 127 in Regular Civil Suit No. 102 of 2005. By that order the learned trial Judge allowed the application made by the plaintiffs under Order VI, Rule 17 of C.P.C., for amending the plaint.
3. Plaintiffs have instituted the suit for partition and separate possession. Pending the suit, they filed application Exhibit-56 on 23.2.2011 under Order VI, Rule 17, inter alia, contending that plaintiff no.3 Indirabai B.Laxman died on 9.10.2007. She

executed Will on 18.12.2004 bequeathing her share in favour of plaintiffs no.1 and 2. By order dated 8.11.2011, the learned trial Judge rejected the application. The plaintiffs thereafter filed application Exh.127 on 22.8.2016 under Order VI, Rule 17 of C.P.C., for amending the plaint. The plaintiffs contended that plaintiff no.3 Indirabai died on 9.10.2007. She executed Will on 18.12.2004 bequeathing her share in favour of plaintiffs no.1 and 2. By the impugned order, the learned trial Judge allowed the application. It is against this order, defendant no.1 has instituted the present petition.

4. In support of this petition, Mr. Jadhav has raised twofold contentions. In the first place, the learned trial Judge was not justified in allowing the application once the application for identical amendment was rejected earlier. Mr Jadhav submitted that perusal of the application Exh.56 and the present application Exh.127 shows that the plaintiffs wanted to incorporate the same amendment which was earlier turned down. Application Exh.127 was, therefore, not maintainable. Secondly, the plaintiffs have filed application after five years, though they were aware of the Will executed by plaintiff no.3. Plaintiff no.3 died on 9.10.2007. First application was filed in the year 2011 and the present application is filed in the year 2016. He submitted that the plaintiffs' witness is under cross examination. On this ground also, the learned trial Judge was not justified in allowing the

application, though belatedly filed.

5. I have considered the submissions advanced by Mr.Jadhav. I have also perused the material on record. It appears that pending the suit, plaintiff no.3-Indirabai died on 9.10.2007. The plaintiffs filed application Exh.56 on 23.2.2011 for amending the plaint. The learned trial Judge rejected the application mainly on the ground that though the plaintiffs contended that plaintiff no.3-Indirabai executed Will on 18.12.2004, they did not produce the same. Subsequently, the plaintiffs filed application on 22.8.2016 at Exh.127. It appears that the plaintiffs have produced Will along with list at Exh.66 dated 26.9.2013. The learned trial Judge has considered the earlier application and observed that nature of the suit does not change as basically the plaintiffs will have to establish the Will and at the most the plaintiffs will be entitled to share of plaintiff no.3 in view of the Will. As far as the aspect of delay is concerned, the learned trial Judge has observed that delay can be compensated by imposing costs on the plaintiffs.

6. As the suit is instituted in the year 2005 and development took place pending the suit, I do not find that the learned trial Judge has committed any error in allowing the application. Further application was rejected as plaintiffs did not produce Will. Along with the present application they have produced the Will executed by plaintiff no.3. While allowing the application, the

learned trial Judge gave liberty to the defendants to carry out consequential amendment to their written statement to the proposed amendment carried out by the plaintiffs. Hence, Petition fails and the same is dismissed. All contentions of the parties on merits are expressly kept open.

7. 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 Section 105(1) of C.P.C.

(R.G.KETKAR, J.)