

IN THE HIGH COURT OF JUDICATURE AT MUMBAI
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.1051 OF 2016

Bherulal Sampatlal Lunkad and another ... Petitioners
Vs.
Ramkisan Ramkunwar Bihani and others ... Respondents

Mr. Vineet B. Naik, Senior Advocate with Mr. Sukand Kulkarni for
Petitioners.

CORAM : R. G. KETKAR, J.
DATE : FEBRUARY 18, 2016

P.C. :

Heard Mr. Naik, learned Senior Counsel for petitioners at length.

2. By this Petition under Article 227 of the Constitution of India, petitioners have challenged the judgment and order dated 29.06.2015 passed by the learned District Judge-2, Solapur below exhibit-9 in Civil Appeal No.130 of 2012. By that order, the learned District Judge rejected the application made by the petitioners, hereinafter referred to as plaintiffs, under Order 6, Rule 17 of the Code of Civil Procedure, 1908 (for short 'C.P.C.') for amending the plaint.

3. Plaintiffs instituted Suit for specific performance of contract against the respondents. It is the case of the plaintiffs that the property, more particularly described in paragraph 1 of the plaint is the self-acquired property of the defendant No.1. Defendant No.1 had purchased the plot on 04.09.1962 and carried out construction. The entire property is the self-acquired property of the defendant No.1. Defendant No.1, on the other hand, contended that the suit property is an ancestral property owned by the joint family. Defendant No.1 also contended that mother of defendant No.1 is a necessary party to the Suit.

By judgment and decree dated 22.11.1995, the Suit was dismissed. One of the issues, namely issue No.6, framed by the learned trial Judge and the answer against it, was to the following effect:

No.	Issues	Findings
6	Does the deft.No.1 prove that, the suit property is an ancestral property owned by joint family and mother of the deft.No.1 is necessary party to this suit?	Affirmative

6. Aggrieved by this decision, plaintiffs preferred appeal. During the pendency of the appeal, they took out application exhibit-9 for amending the plaint. By the impugned order, the learned District Judge rejected the application. It is against this order, plaintiffs have instituted the Petition.

7. Mr. Naik strenuously contended that the suit property is the self-acquired property of defendant No.1 and is not the joint family property. Even if it is assumed that it is a joint family property of the defendants, mother cannot be a Karta or Manager of the joint family. Defendant No.1, being the Manager of the joint family, had right to sell the suit property for legal necessity. Defendant No.1 sold the property on account of legal necessity to pay the heavy debt by which all the members of the joint family were benefited. He submitted that since the Suit is instituted prior to 2002 amendment, the proviso to Order 6, Rule 17 of C.P.C. will not be applicable. In any case, he submitted that the nature of the Suit is not changed.

8. I have considered the submissions advanced by Mr. Naik. I have also perused the material on record. As noted earlier, plaintiffs came with a specific case that the suit property is the self-acquired property of the defendant No.1. Defendant No.1, on the other hand, contended that it is the ancestral property owned by the joint family and that mother of

defendant No.1 is a necessary party to the Suit. The learned trial Judge has answered that issue in the affirmative.

9. Aggrieved by this decision, plaintiffs preferred appeal. By the proposed amendment, now, plaintiffs want to incorporate paragraphs 5A and 5B to contend that without prejudice to the rights and contentions of the plaintiffs that the suit property is the self-acquired property of defendant No.1, even if it is accepted that it is a joint family property, defendant No.1 being the Manager of the joint family, had the right to alienate the property for legal necessity. By paragraph 5-B, plaintiffs want to implead mother of defendant No.1 as defendant No.7.

10. By the impugned order, the learned District Judge rejected the application on the ground that by allowing the proposed amendment, plaintiffs are trying to make out new and inconsistent case. Plaintiffs are trying to fill up the lacuna.

11. After considering the material on record, I do not find that the learned District Judge has committed any error. Hence, Petition fails and the same is dismissed. However, it is made clear that where a decree is challenged 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 proposed proceedings as contemplated by Section 105(1) of C.P.C.

(R. G. KETKAR, J.)