

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 1468 OF 2017

SOPAN SURYABHAN MISAL AND OTHERS

VERSUS

RAMESH KONDIBA GAIKWAD AND OTHERS

Advocate for Petitioners : Shri K.D. Khade.
Advocate for Respondent Nos. 1 & 2 : Shri V.B. Anjanwatikar.

CORAM : RAVINDRA V. GHUGE, J.
Dated : 06th September, 2017

PER COURT :

1. The petitioners are aggrieved by the order dated 22/12/2016, by which, the Trial Court has allowed application Exhibit 61 and permitted the plaintiffs to amend R.C.S. No. 259/2011.

2. I have considered the submissions of the learned advocates for the petitioners who are original defendant Nos. 2 to 4 and respondent Nos. 1 and 2 who are the original plaintiffs. Respondent No. 3 is the original defendant No. 1 and has not

caused his appearance, though served by Court notice.

3. In paragraph No. 4 of the plaint, the plaintiffs have stated at line No. 3 that the house property is purchased, "*out of self income*". By Exhibit 61, the said words were sought to be replaced by "*out of Joint Hindu Family income*". This has been permitted by the Trial Court.

4. Learned advocate for the petitioners strenuously submits that firstly, if the amendment is allowed the nature of the suit will be changed and secondly, the issue of limitation would bar the amendment.

5. I find from the suit that the matter is with regard to partition and separate possession. Even, if the plaintiffs contend that the suit property is a Joint Hindu Family property purchased out of its income, the onus and burden would lie upon the plaintiffs to prove the said aspects. Issue No. 1 out of the five issues, cast by the Trial Court on 04/02/2016, placed the onus and burden on the plaintiffs to prove that they have a

right in the suit property.

6. As such, even if they contend that the suit property is purchased from the Joint Hindu Family income, they will have to prove the said aspect under issue No. 1. As such, the amendment permitted would, therefore, fall under issue No. 1. Consequentially, issue No. 3 could be decided on the basis of the oral and documentary evidence.

7. The grievance of the petitioners is that the limitation aspect has not been considered by the Trial Court and there is a possibility that the amendment permitted below Exhibit 61 would render the suit barred by limitation.

8. Though, Shri Anjanvatikar, learned advocate canvassed that issue No. 3 would take care of the limitation aspect, I am unable to accept the said submission as the issue of limitation has to be a separate issue, irrespective of whether it is being tried peremptorily or it is being considered along with the rest of the issues.

9. It is equally settled that if an amendment introduces a cause of action or the cause of action set out in the suit is based on an additional factor introduced through the amendment, the said issue has to be scrutinized, in so far as limitation period is concerned. In short, a challenge which a party/plaintiff could not have posed on account of the bar of limitation, the said challenge cannot be permitted to be taken up indirectly through the amendment.

10. Considering the above, this petition is partly allowed, only to the extent of the framing of a new issue. The Trial Court has framed 5 issues on 04/02/2016 and has framed an additional issue No. 4 A on 01/12/2016. The sixth issue shall, therefore, be added by the Trial Court and the same shall be as under :

"Whether the plaintiffs establish that the cause of action pursuant to the amendment vide the order dated 22/12/2016 under exhibit 61, is within the limitation."

11. This petition, is therefore, partly allowed in the above terms. Needless to state, the litigating sides would be at liberty

to lead oral and documentary evidence even on the added issue.

(RAVINDRA V. GHUGE, J.)

S.P.C.