

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 1049 OF 2014

1. Indalsingh s/o Champalal Bamnawat
Age : 36 years, occup. Agriculture,
R/o Sanjarpurwadi (Jamanwadi),
Tal., Vaijapur, Dist. Aurangabad
 2. Lalchand s/o Champalal Bamnawat
Age : 31 years, occup. Agriculture,
R/o Sanjarpurwadi (Jamanwadi),
Tal., Vaijapur, Dist. Aurangabad
 3. Shantilal s/o Champalal Bamnawat
Age : 27 years, occup. Agriculture,
R/o Sanjarpurwadi (Jamanwadi),
Tal., Vaijapur, Dist. Aurangabad
- .. Petitioners / orig.
.. Defendants no.2 to 4

versus

Bharatabai w/o Poonamsingh Sulane .. Respondent / orig.
Age 25 years, occup. Household, Plaintiff

Mr. S. S. Kazi, Advocate for petitioners
Mr. S. S. Phatale, Advocate for respondent

CORAM : SUNIL P. DESHMUKH , J
DATE : 27-11-2017

ORAL JUDGMENT: :

1. Rule. Rule made returnable forthwith. Heard learned counsel for appearing parties finally by consent.

2. Writ petition questions propriety of order passed on 01-01-2014 by 2nd Joint Civil Judge, Junior Division, Vaijapur, on Exhibit - 42 in regular civil suit bearing no. 210 of 2008.

3. Present respondent is the plaintiff and petitioners are defendants in aforesaid suit instituted for declaration of ownership and possession of suit properties.

4. It is being submitted by Mr. Kazi, learned counsel appearing on behalf of the petitioners that after issues were framed, lot of time had been consumed in presenting affidavit in examination in chief and the matter had not been prosecuted by plaintiffs. In the meanwhile, petitioners had moved application for amendment to the written statement, however, the same had been rejected considering that the trial had commenced.

5. He submits that in such a case, while the plaintiff had applied for amendment to the plaint subsequently seeking claim for partition the same had been granted, after order as aforesaid had been passed denying request of the petitioners for amendment to the written statement, which in his submission, is incorrect and improper, as the yardstick ought to have been uniformly applied. He submits that the change in view with change of the incumbent deciding the matter would hardly be palatable.

6. Mr. Kazi purports to rely on a decision of the apex court in the case of *Kenchegowda (since deceased) by legal representatives vs. Siddegowda alias Motegowda*, reported in 1994 DGLS (Soft.) 504=1994 4 SCC 294, wherein, according to learned counsel, in similar situation

while the high court had passed a preliminary decree and the same had been set aside by the supreme court.

7. He purports to refer to that in said case as well, suit had been instituted initially for declaration and possession of suit property and subsequently amendments had been sought to covert it into suit for partition on the basis of application under Order VI, Rule 17 of the Code of Civil Procedure, 1908. The suit had failed and in an appeal therefrom, the same abated against defendant no. 1 since his legal representatives had not been brought on record. However, the first appellate court purportedly considered that cause of action survives against defendant no. 2 and had dismissed the appeal and in second appeal along with application for amendment to plaint pursuant to order VI, rule 17 of the Code of Civil Procedure, the high court had granted 1/3rd share in the suit property drawing preliminary decree. The supreme court in said case had considered that high court decision was not proper since the appeal could not survive against defendant no. 2 while it had abated against defendant no.1.

8. Learned counsel for respondent - plaintiff contends that citation relied on, on behalf of the petitioners, would seldom have application in the fact-situation in present matter. He submits that the age of the plaintiff shall receive its due because while the suit had been instituted she was barely 19 years of age and had hardly

any experience of litigation nor proper advice had come through for her. In the circumstances, while it had been realized in the proceedings that partition would be required to be sought, accordingly, amendments had been prayed for and application made to that effect had been granted.

9. He refers to order passed by the court and submits that it is considered in the order that the amendment is necessary for deciding controversy between the parties finally. It is not the case that there had been no due diligence on plaintiff's behalf and referring to certain stages in the suit, it had been considered by the court that application would not be liable to be rejected, taking into account the basic intent underlying the provisions for amendments.

10. He submits that it is not the case of the petitioners that they had been aggrieved by the order rejecting their application for amendment to the written statement. He, therefore, submits that while it had been considered expedient taking into account all the surrounding circumstances particularly that the plaintiff is a woman and of young age, extraordinary powers may not be exercised to cause interlude in impugned order.

11. Looking at aforesaid, petitioners appear to have moved writ petition for discretionary relief and objection sought to be raised to propriety of impugned order, taking overall view, can be mended awarding costs observing that the petitioners - defendants would

have an opportunity, while they would defend amendment to plaint, and can renew their claim for amendment to written statement which had been declined earlier considering that the same had been sought after trial had commenced.

12. The general position of law would show that the courts are supposed to be liberal when amendments are sought. This matter undoubtedly is coming from rural / moffussil area. As such, it would be expedient that the request made under the writ petition would not be indulged into by imposing costs of Rs.2000/- in addition to Rs.200/- already awarded by the trial court.

13. As such, costs awarded by trial court are enhanced to Rs.2200/-. Balance amount of cost of Rs. 2000/- is liable to be paid by plaintiff to defendants or be deposited in the trial court within a period of three months from the date of receipt of writ of this order.

14. Writ petition stands disposed of with observations as aforesaid.

15. Rule discharged.

SUNIL P. DESHMUKH
JUDGE

pnd