

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.6441 of 2014
(Kaushalyabai w/o Narayan Jadhav and others Vs. Sakharam s/o
Karbhari Khune and others)

Mr.G.K.Thigale (Naik), Advocate for the petitioners.
Mr.S.V.Natu, Advocate for respondent Nos.1 to 3.

(CORAM : Ravindra V.Ghuge, J.)

DATE : 03/08/2017

PER COURT :

1. The petitioners are aggrieved partly by the order dated 21/02/2014 passed by the Trial Court, by which his application Exh.106 seeking an amendment, was partly allowed.
2. This matter was heard at length on 02/08/2017.
3. Issue is as regards the petitioners/plaintiffs' claim that their step brother was dis-entitled to any share in the ancestral property and the said aspect was not pleaded in the plaint and was sought to be introduced by way of an amendment when the suit was about 10 years old.
4. The contention of the said step brother who is defendant No.1

is that specific admissions were given in the plaint admitting that there should be 4 shares in the ancestral property and 3 shares would go to the 3 real sisters who are original plaintiffs and 1 share would go to defendant No.1. An affidavit in lieu of examination-in-chief was also filed by the plaintiffs conceding the said share of defendant No.1. Consequentially, the plaintiffs have sought to indirectly withdraw these statements and admissions through the amendment by contending that the mother of defendant No.1 Sheshabai was the second wife of Karbhari Khune and the said marriage was allegedly performed during the lifetime of the first wife Janabai. As such, defendant No.1 would not be entitled to have share in the ancestral property considering the provisions of the Hindu Succession Act.

5. Defendant No.1 has placed reliance upon the following judgments :-

- [a] Modi Spinning and Weaving Mills Company Limited Vs. Ladha Ram and Company, [1976(4) SCC 320],
- [b] Heeralal Vs. Kalyanmal, [1998(1) SCC 278],
- [c] Janu Laxman Kumbhar Vs. Pandurang Laxman Kumbhar, 2001(4) Mh.L.J. 159 = 2002(1) Bom.C.R. 212.

6. It is canvassed by Mr.Natu based on the above cited judgments

that the Hon'ble Apex Court has consistently taken a view that an amendment, which would amount to withdrawing of certain admissions, cannot be permitted and such an amendment has to be discarded. This Court has also taken such a view based on the judgments of the Hon'ble Apex Court, in the matter of Janu Laxman Kumbhar (supra).

7. Learned Advocate for the petitioners submits that the plaintiffs have not specifically claimed through the amendment that all admissions given earlier in the plaint and in the examination-in-chief, would be withdrawn. When the plaintiffs have not so suggested, the apprehension of defendant No.1 is misplaced. In the alternative, he submits on instructions specifically taken from the petitioners/plaintiffs that the amendment may be permitted subject to the discretion of the Trial Court to discard the said amended portion in the plaint if it would tantamount to withdrawing any admission given by the plaintiffs in the plaint and in their examination-in-chief. Learned Advocate for defendant No.1 submits that the said statement be recorded and the Trial Court be indicated that the admission of the plaintiffs as regards the 1/4th share of defendant No.1 shall not be withdrawn and shall not be affected by such amendment.

8. Considering the above, this petition is partly allowed. The impugned order stands modified. The petitioners are permitted to add the proposed paragraph No.6-A to the plaint with liberty to the defendants to file their say. The petitioners state on instructions that the prayer to amend the prayer clause for replacing the digits 1/4th by 1/3rd, is not being pressed, It, therefore, stands disallowed.

9. The Trial Court shall note that the admission given by the plaintiffs with regard to the share of defendant No.1 in the plaint and in the examination-in-chief, shall not be affected by the amendment and if the case of the plaintiffs through the amendment runs counter to the share conceded in favour of defendant No.1, in that case, the contents of paragraph No.6-A of the plaint shall be discarded.

(Ravindra V.Ghuge, J.)