

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

**17 WRIT PETITION NO. 9759 OF 2012
WITH CA/8263/2014 WITH CA/419/2014**

1. Yusuf Khan s/o Noor Khan,
Age : Major, Occu.: Household,
2. Sharifabee w/o Noor Khan ,
Age : Major, Occu.: Household,
3. Gajrabeen w/o. Ibrahim,
Age : Major, Occu.: Household,
4. Hanif Khan s/o Noorkhan,
Age : Major, Occu.: Agril.,
5. Tasleembee w/o. Turab Khan,
Age : 35 years, Occu.; Household,
6. Asif s/o Turab Khan,
Age : 25 years, Occu.: Agril.,
7. Salim Khan s/o Noorkhan,
Age : Major, Occu.: Household,
8. Kalim Khan s/o Noorkhan,
Age : Major, Occu.: Household,
9. Javed Khan s/o Noor Khan,
Age : Major, Occu.: Household

All R/o.: Ohar, Tal. &
Dist. Aurangabad.

.... PETITIONERS

VERSUS

1. Jaitunbeen w/o Habib Khan
Age : 70 years, Occu.: Household

2. Salamkhan s/o Habib Khan
Age : 50 years, Occu.: Agril.,
3. Hasankhan s/o Habib Khan,
Age : 45 years, Occu.: Household,
4. Daudkhan w/o Habib Khan,
Age : 40 years, Occu.: Household,
5. Mankhan w/o Habib Khan,
Age : 35 years, Occu.: Household,
6. Dadakhan s/o Habib Khan
Age : 30 years, Occu.: Household,
7. Ahmedkhan w/o Ismaoil Khan,
Age : 58 years, Occu.: Household

Respondent Nos. 1 to 7 above are
all R/o.: Ohar, Tq. & Dist. Aurangabad.

8. Janbeen w/o Hussain Khan,
Age : 60 years, Occu.: Household,
9. Rehmat Khan s/o Hussain Khan,
Age : 40 years, Occu.; Agril.,
10. Refiq Khan s/o Hussain Khan,
Age ; 38 years, Occu.: Agril.,
11. Mukhtar Khan s/o Hussain Khan,
Age ; 35 years, Occu.; Agril.,
12. Shaker Khan s/o Hussain Khan
Age : 31 years, occu. Agril.,
13. Zakir Khan s/o Hussain Khan,
Age : 27 years, Occu.: Agril.,
14. Nasir Khan s/o Hussain Khan,
Age : 25 years, Occu.: Agril.,
15. Hasrabee d/o Hussain Khan
Age : 40 years, Occu.: Household,

16. Mariam d/o Hussain Khan,
Age : 40 years, Occu. : Household

17. Kismatbee d/o Hussaini Khan,
Age Minor, Occu.: Nil.

Through Guardian real mother:
Chandbee w/o Hussain Khan,
Age : 60 years, Occu.: Household
R/o.; Oher, Tal.
& Dist. Aurangabad. RESPONDENTS

...

Advocate for Petitioners : Mr. Mantri Ramesh R.
Advocate for respondent Nos. 8 to 17 : Mr. A. S. Gandhi
Advocate for Respondents Nos. 2,3, 4 to 7: Mr. M. M. Joshi

...

CORAM: SUNIL P. DESHMUKH, J.
DATED: 14TH AUGUST, 2017.

ORAL JUDGMENT :

1. Rule. Rule made returnable forthwith. Heard learned counsel for the parties finally with consent.

2. Petitioners-original defendants are before this court against order passed by trial court on application-Exhibit-67 in regular civil suit No. 708 of 2005 dated 03-08-2012 whereunder request of the respondents-original plaintiffs for amendment to the plaint in said suit has been granted.

3. Learned counsel Mr. Mantri appearing on behalf of petitioners, with quite some vehemence, submits that in the second round of litigation, a far too belated attempt to make amendments to the plaint is being made by respondents-plaintiffs vide application Exh-67. He submits that initially the plaintiffs who are respondents No. 1 to 7 herein had instituted regular civil suit No. 992 of 1999 for perpetual injunction restraining the defendants therein from alienating or transferring suit properties referred to in said suit and also restraining them from causing obstruction to plaintiffs' possession over the suit property.

4. Learned counsel submits that regular civil suit No. 992 of 1999 came to be withdrawn and present suit bearing regular civil suit No. 708 of 2005 has been instituted through a new lawyer alleging that the earlier lawyer did not present the facts properly in previous suit had not been prosecuting the matter diligently, which entailed withdrawal of the earlier suit.

5. Learned counsel states that regular civil suit No. 708 of 2005 has been instituted seeking partition and separate possession of plaint properties and for perpetual

injunction, while in the earlier suit, there was no claim for partition and only injunction against defendants was sought.

6. Petitioners had filed their written statement to present suit and almost five years thereafter present amendment application under Exhibit-67 has been moved for addition of new properties, claiming partition also of the properties requested to added as suit properties, which have already been alienated. He submits that reliefs claimed under the amendment are hit by Order-II Rule-2 of Civil Procedure Code, 1908 and are now beyond the period of limitation within which relief in respect of the properties ought to have been sought.

7. In support of his submissions, Mr. Mantri refers to Article-137 of Limitation Act, 1963 and also cites case of *Harinarayan Bajaj and another Vs. Vijay Agrawal and another* reported in 2012 (2) Mh.L.J. 106 and puts emphasis particularly on head note 'B' contending that said judgment in turn refers to the Supreme Court decision in the case of *Kerala State Electricity Board Vs. T. P. Kunhaliumma* reported in (1976) 4 SCC 873 which categorically refers to

that applications contemplated under Article-137 of Limitation Act are not the applications confined only to the Code of Civil Procedure. While this is so, according to him, for application pursuant to Order-VI Rule 17 of Civil Procedure Code, viz; to present application for amendment, observations in *Kerala SEB* case (supra) apply on all fours.

8. Over and above aforesaid, according to him, impugned order deserves to be set aside on a single most important aspect, namely, negligence, as despite filing reply at Exhibit-68 to Exhibit-67, the order does not take into consideration any aspect pointed out in the same. He submits that several instances have been referred to in the reply, showing that the application Exhibit-67 does not have merits and in fact, is moved with malafides. But none of those instances has been referred to in impugned order. Order-II Rule-2 does not find consideration and as such order reflects gross non-application of mind to Exhibit -68. Further he contends that parties are facing multiplicity of proceedings in respect of the properties. He, therefore, urges to allow the writ petition or to remit the matter.

9. On the other hand learned counsel Mr. M. M. Joshi appearing for respondent-plaintiffs contends that order impugned keeps in view the scope of the application for amendment and powers of the court. He submits that exercise of discretion by trial court has been proper. No issues as yet have been framed. Legal provisions provide for allowing amendment at any stage. While application for amendment is to be considered, merits of the amendments are not supposed to be gone into. He submits that it is open for the petitioners to submit their amended written statement to the amended plaint. No prejudice can said to have been caused to the petitioners by grant of application. He submits that the law accommodates amendment application liberally. He submits, resistance to the amendment on the ground of limitation may ostensibly appear to carry some weight, however, the same is illusory.

10. Mr. Joshi submits taking into consideration the fact that Division Bench has over-turned aforesaid decision of the Hon'ble learned Single Judge, reported in *2012(2) Mh.L.J. 106 Harinarayan Bajaj and other Vs. Vijay Agrawal* and others in *LPA No. 200 of 2012 in Chamber Summons No.*

106 of 2010 in Suit No. 2256 of 1998 with Crol. No. 4 of 2012 decided on 27-02-2013 and *Vijay Vs. Harinarayan*, reported in *2013 (3)Mh.L.J. 298* categorically holding that application for amendment is an interlocutory application. There is no specific provision under which period of limitation is prescribed for interlocutory application for amendment of pleadings. As such, Article 137 of the Limitation Act is not applicable to the same. Resistance to the amendment application on the ground of limitation does not carry any force at all.

11. He further refers to paragraphs 9 and 10 of the decision of Division Bench of this Court in the case of *Vijay Vs. Harinarayan (supra)* and submits that even *Kerala State Electricity Board* case (*supra*) has been taken into account in *Vijay's* case. He, therefore, supports the order impugned.

12. Perusal of the impugned order shows that the learned judge while dealing with application seeking amendment has considered that the plaintiffs have claimed relief of partition of suit properties as also by present application, of additional properties. It is necessary to

incorporate all the properties in the suit. Perusal of say Exhibit-68 shows that application Exhibit-67 has been opposed on the merits of amendment while incorporating new properties and also on the ground of delay.

13. So far as aspect of merits of amendment are concerned, it may have to be referred to, as has been submitted on behalf of plaintiffs-respondents, that at this stage, merits of the amendments may not be of much relevance considering the stage of the suit. So far as limitation is concerned, it may have to be considered that a few judgments refer to that limitation may not be a ground to deny amendment and resistance on that ground would be available to be taken up. In the present matter, undisputedly issues are yet to be framed and application is moved for incorporation of amendments in the plaint, claiming partition of additional properties along with the suit properties. Resistance to amendment with reference to Order-II Rule-2 is not relevant at a stage before amendment

14. Although, during course of submissions Mr. Mantri purports to hint this may cause alteration in the suit,

however, such a hint in the present scenario, does not appear to carry substance as suit is for partition and the amendment pertains to incorporating certain additional properties in the suit claim.

15. Looking at that the suit has already been filed for partition of some properties and some properties have been added under amendment as observed and considered by the trial court to avoid multiplicity of proceedings and further litigation, it is expedient to allow amendment. As such, it does not appear to me any interception is called for.

16. Taking overall view and looking at the legal position that generally amendments are to be liberally construed and allowed, I do not deem it appropriate to interfere with the impugned order in writ jurisdiction.

17. The writ petition, as such, is not entertained and stands dismissed. Rule stands discharged.

18. However, looking at that the matter has been pending from a long time and amendment has been sought

long after written statement has been filed, inconvenience being caused in the process to the petitioners can be compensated by awarding suitable costs.

19. In the circumstances, application Exhibit-67 stands allowed on condition of payment of costs quantified at Rs.25,000/- to be paid to the petitioners. The costs shall be deposited in the trial court within a period of four months from the date of receipt of writ of this order. Failure to deposit costs may call for consideration of recall of this order.

(SUNIL P. DESHMUKH, J.)