

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO. 3878 OF 2017

Shri Baliram Tukaram Patil @ Naik
(since deceased) through his lega heirs
Smt. Akkabai Baliram Patil & Ors.

...Petitioners

Versus

Shri Dattatraya Shankar Patil
(since deceased) through his legal heirs
Smt.Shobhatai Shamrao Patil & Ors.

...Respondents

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Mr. Chetan G. Patil for the Petitioners.

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**CORAM: Mrs.MRIDULA BHATKAR, J.
DATED: JUNE 7, 2017**

P.C. :

1. Rule. Rule made returnable forthwith. By consent, petition is heard finally and disposed of at the stage of admission.
2. This petition is directed against the order dated 09.12.2016 passed by the learned Civil Judge, Junior Division, Malkapur-Shahuwadi thereby rejecting the application for amendment as per Order VI Rule 17 of Code of Civil Procedure. The petitioners/ original plaintiffs had filed Regular Civil Suit No. 18 of 1992 against the respondents for partition. Issues were settled in the year 1994. After filing of the affidavit of examination in chief of the petitioners/ original

plaintiffs, their cross examination was continued till 07.12.2012. As per the case of the petitioners/ original plaintiffs, the plaintiffs and the defendants have entered into amicable settlement and a Written Deed of Partition was executed between the petitioners/ original plaintiffs and the defendants on 24.12.2012. On 18.10.2016, the petitioners/ original plaintiffs had filed the application for amendment of the plaint. The petitioners/ original plaintiffs wanted to amend the prayer on the basis of the said written Deed of Partition. On the basis of the said Deed of Partition, apportionment of the shares were fixed and they wanted to seek a declaration. Accordingly, the learned trial Judge has rejected the said application after hearing both the sides. Hence, this Writ Petition.

3. The learned counsel for the petitioners/original plaintiffs has submitted that in the cross examination of the petitioners/ original plaintiffs on 16.09.2016, the learned counsel for the defendants put them questions in respect of the said written Deed of Partition. The fact of the said written Deed of Partition was first time disclosed before the Court and therefore, on the basis of the said document, the petitioners/plaintiffs have sought relief of declaration and sought amendment. He has further submitted that the observation of the learned trial Judge that the plaintiffs were not diligent in taking out the application is erroneous. In support of his submission, he relied on the

Roznama and the progress of the Suit. He has pointed out that the cross examination of the petitioners/ original plaintiffs was taken on 07.12.2012 and thereafter, as Deed of Partition was executed by the parties, there was no progress in the Suit. However, cross examination has commenced after four years i.e. on 02.09.2016. He has further submitted that this gap of four years speaks itself about the execution of the said document and therefore, the petitioners/ original plaintiffs want to seek relief of declaration on the basis of the said document. He has further submitted that this amendment will not change the nature of the Suit, as the Suit itself is for partition. He has further submitted that in all, there are 55 defendants, who are not sharers and all of them have not signed the said document. Therefore, it is not possible to withdraw the Suit.

4. Heard submissions. Perused the impugned order passed by the learned trial Judge and the same is well reasoned. The petitioners/ original plaintiffs were undergoing the cross examination till 07.12.2012. As per submission of the petitioners/ original plaintiffs, the said document was executed on 24.12.2012 and therefore, nearly for four years, there was no progress and no further cross examination of the petitioners/ original plaintiffs were taken and thereafter, the petitioners/ original plaintiffs did not step into the witness box to face further cross

examination. In this gap of four years, the petitioners/ original plaintiffs should have brought this written Deed of Partition on record, as it was amicably settled between the parties either or they would have been withdrawn the Suit, as the matter was amicably settled.

5. Be that as it may, nothing was said about the said Deed of Partition for a long period of four years and still the petitioners/ original plaintiffs want to put questions in the cross examination. Moreover, this is a Suit for partition and this document is pertaining to amicable settlement as claimed by the petitioners/ original plaintiffs is challenged by the defendants in the cross examination. The cross examination of the petitioners/ original plaintiffs is still in continuation. The petitioners/ original plaintiffs may very well produce the said document on the next date of cross examination alongwith the application, as the questions are put in the cross examination by the defendants. The said fact can be argued by the plaintiffs.

6. In view of the above, I do not find any ground to set aside the order dated 09.12.2016 passed by the learned trial Judge. Hence, Writ Petition is dismissed.

(MRIDULA BHATKAR, J.)