

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

WRIT PETITION NO.6375 OF 2016

Anil Dhondiram Phadatare & Ors.	...Petitioners
vs.	
Arvind Dhondiram Phadatare & Ors.	...Respondents

Mr. D. D. Rananaware for the Petitioners.	
Mr. Dilip Bodake for the Respondents.	

CORAM : SMT. SADHANA S. JADHAV, J.
DATE : 8th November, 2017

P.C.:

. Heard. Rule. Rule is made returnable forthwith with the consent of the parties.

2. The Petitioners herein challenges the impugned order dated 12/4/2016 passed by the learned Civil Judge, Junior Division, Vaduj in Regular Civil Suit No.392/2012. The Petitioners herein happen to be the original Plaintiffs and the prayer in the suit was for seeking partition and possession as well as the prayer that the sale Deed executed by the original Defendant No.1 in favour of Defendant Nos.2 and 3 is not binding upon the original Plaintiffs.

3. The suit has proceeded to the stage of recording of evidence. Cross examination of the Plaintiffs was concluded on 19/1/2016. On 1/4/2016 the Plaintiffs had filed an application seeking amendment under prayer clause 7 of the original suit and had also made a statement in respect of the facts to be brought on record. It was contended in the proposed amendment that the Plaintiffs had demanded a copy of the sale deed to the original Defendant No.1. However, the same was denied. That the Defendant No.1 had sold the entire share of the joint family property

without the consent of other persons of the family. The Defendant Nos.2 and 3 had admitted that the Defendants were fully aware that the suit property is a joint family property and the Defendant No.1 is the manager of the joint family property. That they had taken certain record and had also signed 7/12 extract in respect of the suit property and were fully aware that it is a joint family property. It is pertinent to note that the said application seeking amendment was made only at the vague end of the recording of the evidence. The Plaintiffs have not demonstrated in the application as to why there was delay in filing the application seeking amendment. The amendment was to the extent that the sale deed to be declared as invalid since the consent of the co-parceners was not taken at the time of execution of the sale deed.

4. Mr. Rananaware, Learned counsel for the Petitioners submits that the proposed amendment would not change the nature of the suit. He has drawn attention of this Court to the pleadings in paragraph 2 and 5 wherein it is specifically stated that only to deprive the present Petitioners of their rights the property was sold by Defendant No.1 without obtaining the consent letter. It is submitted that there are pleadings to the effect that the sale deed is not valid and, therefore, the proposed amendment would not change the nature of the suit.

5. Mr. Bodake, Learned counsel for the Respondents submits that as contemplated in Order 6 Rule 17 of Civil Procedure Code, 1908 under the proviso no application for amendment shall be allowed after the trial has commenced, unless in spite of due diligence, the matter could not be raised before the commencement of trial. The prayer of amendment of the plaint will be time barred as it is not only filed after the cross examination but it was filed after 3 years of the institution of the suit.

6. Mr. Rananaware, Learned counsel for the Petitioners submits that by not allowing the amendment it would cause a great prejudice to their rights in the joint family property. However, the Court cannot be oblivious of the fact that the suit is for partition and possession of the joint family property and the claim of the Plaintiffs cannot be changed.

7. Mr. Bodake, Learned counsel for the Respondents submits that the property was sold to him for legal necessity of the family. The issues that are framed are as follows:

1. Whether the Respondent No.1 had sold the property for legal necessity ?
2. Whether the suit is barred by limitation ?
3. Whether the suit is bad for non joinder of necessary party ?
4. Whether the Plaintiffs are entitled to a share in the joint family property ?

8. Mr. Rananaware, Learned counsel for the Petitioners submits that the issues which are framed are in consonance with the pleadings in the plaint. There is a specific prayer in the pleadings that the sale deed executed by Defendant Nos.1 in favour of Defendant Nos.2 and 3 are not binding upon them and no issue in that regard is framed. Learned counsel has placed implicit reliance on Order 14 Rule 3 of Civil Procedure Code which reads as under:

“3. Materials from which issues may be framed.- The court may frame the issues from all or any of the following materials:—

- (a) allegations made on oath by the parties, or by any persons present on their behalf, or made by the pleaders of such parties;
- (b) allegations made in the pleadings or in answers to interrogatories delivered in the suit;
- (c) the contents of documents produced by either party.”

9. There are specific allegations in the plaint that the Plaintiffs were not apprised of the sale deed. Learned counsel for the Petitioners also placed implicit reliance on Order 14 Rule 5 which reads as under:

5. Power to amend and strike out, issues.- (1) The Court may at anytime before passing a decree amend the issues or frame additional issues on such terms as it thinks fit, and all such amendments or additional issues as may be necessary for determining the matters in controversy between the parties shall be so made or framed.

(2) The Court may also, at any time before passing a decree, strike out any issues that appear to it to be wrongly framed or introduced.

10. Mr. Rananaware, learned counsel for the Petitioners submits that the proposed amendment would not cause any prejudice to the Defendants.

11. Mr. Bodake, learned counsel for the Respondents submits that the issue No.1 which is framed pertains to the pleadings as to whether Respondent Nos.2 and 3 proved that it is for legal necessity and that the sale deed would be covered in the said issue and therefore the learned court has rejected the application seeking proposed amendment. It is true that by virtue of Order 46 Rule 7 application for amendment can be made at a belated stage. However, the Court may consider the pleadings in the plaint before arriving at a proper conclusion. Petition stands rejected.

12. Learned Civil Judge, Junior Division, Vaduj is directed to take into consideration the pleadings in the plaint before passing the final decree. Rule is discharged.

(SMT. SADHANA S. JADHAV, J.)