

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

WRIT PETITION NO.6432 OF 2013

Rasool Usman Attar

...Petitioner

vs.

Mohammed Usman Attar & Ors.

...Respondents

Mr. Machhindra A. Patil for the Petitioner.

Mr. Datta Mane for Respondent No.5.

CORAM : SMT. SADHANA S. JADHAV, J.

DATE : 16th November, 2017

P.C.:

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

2. The Petitioner happens to be the Plaintiff in Regular Civil Suit No.63/2006. The Petitioner herein had filed a suit for partition and possession on 5/12/2006 before the learned Civil Judge, Junior Division, Atpadi. The Defendants had filed their written statement and specifically denied the contention of the Plaintiff and had submitted that there has been suppression of facts.

3. The Plaintiff had filed an application under Order VI Rule 17 on 8/4/2013 seeking amendment of the plaint. It was contended by the Plaintiff that inadvertently, it is not mentioned in the plaint that the father of the Defendant Nos.1 to 4 and 11 and 12 had made a gift deed in favour of Defendant No.5 and on the basis of the gift deed, sale deeds were executed in favour of Defendant No.5 on 29/9/2006 and 6/10/2005. It was therefore prayed that the Plaintiff be permitted to carry out amendment in paragraph 6 as 6B1 and 6B2. The learned Judge by order dated 16/4/2013 had rejected the said application seeking proposed

amendment. The learned Court has specifically observed that the partition was effected in the year 1975. Since then the possession of respective shareholders is distinct and separate. The parties are governed by Mohammedan Law. The learned Court had observed that there is no concept of joint possession or joint ownership. The father of Defendant No.1 to 4 viz., Amin was the purchaser of the property. That the amendment is preferred at a belated stage. This Court also cannot be oblivious of the fact that the proposed amendment is barred by the proviso to Order VI Rule 17 of CPC which reads as follows:

“The Court may at any stage at the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties:

Provided that no application for amendment shall be allowed after the trial has commenced, unless the court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial.”

4. It is clear from the records that the suit was filed in the year 2006 and the application for proposed amendment was made after 7 years i.e. on 8/4/2013. There is no question of due diligence. Moreover the only reason assigned by the Applicant is that inadvertently the said documents were not referred in the plaint and the facts were not brought on record. The learned court has rightly observed that it would change the very nature of the suit. It is under these premises that it cannot be said that the learned Judge has committed an error. The findings recorded by the learned Judge while rejecting the application on 16/4/2013 calls for no interference.

5. Accordingly, petition being sans merit deserves to be dismissed. Rule is discharged. Needless to say that the ad-interim relief granted vide order dated 9/2/2017 stands vacated. The learned Judge is hereby requested to make an endeavour to expedite the trial as far as

possible.

6. Mr. Patil, learned counsel for the Petitioner has placed reliance on the judgment of Single Bench of this Court at Aurangabad (Coram: S.S.Shinde, J.) in the case of *Shakuntala w/o Balasaheb Balsaraf through legal heirs & Ors. vs. Ramdas s/o Laxman Balsaraf & Ors.*¹ The learned Court has placed reliance on the judgment of the Apex Court in the case of *Abdul Rehman and another vs. Mohd. Ruldu and Ors.*,² wherein it was held that voidness of sale deed was implicit in the factual matrix set out in the unamended plaint and relief of cancellation of sale deed as sought by amendment does not change the nature of the suit. In the factual matrix of the case, the learned Judge has held that voidness of the sale deed is implicit in the pleadings in the plaint and the Plaintiffs have sought relief of restoration of possession of the suit land since according to them, possession of suit land is taken by Defendant Nos.2 and 3 with the police aid and that too during pendency of the suit. In the present case, it is an admitted position that the documents which were to be relied upon by way of the proposed amendment were prior to the institution of the suit which was for partition and possession and by way of proposed amendment the Plaintiff had sought that the sale deeds dated 29/9/2006 and 6/10/2005 were not binding upon the Plaintiff. It is clear that the said proposed amendment would change the very nature and constitution of the plaint itself and, therefore the judgment which is relied upon by the learned counsel would have no relevance in the present case.

(SMT. SADHANA S. JADHAV, J.)

1. 2013 2 ALLMR 298

2. 2012 (11) LJSFT (SC) 37