

Anand

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

WRIT PETITION NO.9379 OF 2016

Smt. Chandrakala Chandrakant Patil .Petitioner

Vs.

Sou. Darshana Dattatrey Thakur & ors. .Respondents

Mr.P.M.Arjunwadkar, Advocate, for the Petitioner
Mr.A.J.Almedia, Advocate, for the Respondent No.1

CORAM : R.G.KETKAR, J.

DATE : 06.03.2017

P.C.

. Heard Mr. Arjunwadkar, learned counsel for the Petitioner
and Mr. Almedia, learned counsel for the Respondent No.1 at length.

2. By this Petition under Article 227 of the constitution of India, the Petitioner, hereinafter referred to as 'Defendant No.6' has challenged the Judgment and Order dated 29.07.2016 passed by the learned Jt.C.J.J.D., Palghar, below Exh.138 in R.C.S.No.83 of 2013. By that order, the learned trial Judge allowed the Application made by Respondent No.1, hereinafter referred to as 'Plaintiff' under Order VI, Rule 17 of the Code of Civil Procedure, 1908 (For short "CPC") for amendment of the plaint.

3. Mr. Arjunwadkar has taken me through (i) paragraphs 13, 14 & 15 of the plaint; (ii) paragraphs 13, 14 & 15 of the Affidavit in support of the plaint; (iii) paragraphs 13, 14 & 15 of the Application for injunction & (iv) Application Exh.138 for amendment. He submitted that the Plaintiff specifically took stand that Survey No.827, Hissa No.5 admeasuring 0.69.8R was purchased jointly by Vasudeo Nana Bhandari alias Patil and his brother, Kashinath Nana Bhandari alias Patil in the year 1937 from Nanaji Dinkar Purandare. On 17.02.2006, Vasudeo Nana Bhandari alias Patil and Smt. Yamuna Bhandari alias Patil (widow of Kashinath Nana Bhandari alias Patil) executed the Sale Deed in favour of Defendant No.6 and her husband, Chandrakant Baburao Patil. The Plaintiff also asserted that the properties referring paragraphs No.12, 13 & 14 were purchased by Vasudeo Nana Bhandari alias Patil during his life time and the said fact was within the knowledge of the Plaintiff and Defendants. He further submitted that the Plaintiff had taken out two Applications for amending the plaint in the past. This is the third Application and in the Application, Plaintiff has levelled allegations against her Advocate. However, it is material to note that the Application for injunction and other Applications were filed through the same Advocate.

4. He submitted that a perusal of the plaint and other proceedings clearly show that the Plaintiff admitted that Survey No.827, Hissa No.5 admeasuring 0.69.8R was self acquired property of Vasudeo Nana Patil and Kashinath Nana Patil who in turn had sold the property to the Defendant No.6 and her husband. By the proposed amendment, the Plaintiff is withdrawing the admission given in the plaint which is not permissible. He relied upon the decision of the Apex Court in the case of *Heeralal Vs. Kalyanmal, 1998(1) SCC 278*. He submitted that in that case, the Plaintiff had instituted suit for partition of 10 items of immovable properties mentioned in Schedule A of the plaint and also for partition of other properties listed in Schedule B of the plaint. The contesting Respondents 1 and 2, who were Defendants No.1 & 2 in the suit, being real brothers of the Plaintiff filed a joint Written Statement on 01.10.1933. In the Written Statement, a definite stand was taken by the contesting Defendants that out of the listed properties in Schedule A only three properties at Items 4, 9 and 10 were exclusively belonging to the contesting Defendants and were not joint family properties of the Plaintiff and Defendants 1 and 2. In para 11 of the Written Statement, it was submitted that “the Plaintiff is only entitled for partition regarding the properties of Schedule A except Items 4, 9 and 10 and all the properties mentioned in Schedule B”. It was also stated in the said para

II of the Written Statement that so far as admitted properties were concerned, the Plaintiff was entitled to 1/3rd share and remaining 2/3rd share belonged to Defendants 1 and 2.

5. Mr. Arjunwadkar submitted that the Apex Court after referring to the statement made in the Written Statement observed that only three properties at Items 4, 9 and 10 were exclusively belonging to the contesting Defendants and were not joint family properties of the Plaintiff and Defendants 1 and 2. Meaning thereby that the other seven properties listed in Schedule A were admitted to be joint family properties. The decision applies on all fours to the facts of the present case. He, therefore, submitted the learned trial Judge was not justified in allowing the Application for amendment of the plaint.

6. On the other hand, Mr. Almedia supported the impugned order.

7. With the assistance of both the learned counsel I have perused the material on record. In particular, plaint, Affidavit in support of the plaint, the Application for injunction as also the Application for amendment of the plaint. A perusal of paragraphs 13, 14 and 15 does not

indicate that the Plaintiff admitted that Survey No.827 is the self acquired property of Vasudeo Nana Patil and his brother, Kashinath Nana Patil. Admission has to be explicit, clear and unequivocal.

8. Mr. Arjunwadkar relied upon the decision in *Hiralal's case* (Supra). Paragraph 3 of the decision reads thus :-

“(3) THE appellant-plaintiff had filed a civil suit for partition of 10 items of immovable properties mentioned in Schedule A of the plaint and also for partition of other properties listed in Schedule B of the plaint. The suit was filed in 1993 in the court of District Judge, Bundi for partition of the suit properties mentioned in diverse schedules annexed to the plaint. The contesting Respondents 1 and 2, who are Defendants 1 and 2 in the suit, being real brothers of the plaintiff filed a joint written statement on 1/10/1993 in the trial court. In the written statement a definite stand was taken by the contesting defendants that out of the listed properties in Schedule A only three properties at Items 4, 9 and 10 were exclusively belonging to the contesting defendants and were not joint family properties of the plaintiff and Defendants 1 and 2. Meaning thereby that the other seven properties listed in Schedule A were admitted to be joint family properties. Not only that but in para 11 of the written statement it was submitted that “the plaintiff is only entitled for partition regarding the properties of Schedule A except Items 4, 9 and 10 and all the properties mentioned in Schedule B”. They also stated in the said para II of the written statement that so far as admitted properties

were concerned, the plaintiff was entitled to 1/3rd share and remaining 2/3rd share belonged to Defendants 1 and 2. It appears that thereafter the suit remained pending for trial for a number of years. On the basis of the aforesaid stand taken by the contesting parties in the written statement, issues were framed by the trial court. Issue 2, amongst others, read as under :

“WHETHER the property mentioned in Items 4, 9 and 10 of Schedule Aa attached with the plaint is the property of Hindu Undivided Family ?”

Perusal of paragraph 3 clearly shows that Defendants 1 and 2 clearly admitted that except the properties at Items 4, 9 and 10, rest of the properties were joint family properties and the Plaintiff was entitled to 1/3rd share and remaining 2/3rd share belonged to Defendants 1 and 2.

9. In view thereof, the decision of the Hiralal's case does not advance case of the Defendant No.6. In any case, Defendant No.6 will be entitled to file Written Statement to the amended plaint and whether Survey No.827 is self acquired property of Vasudeo Nana Patil and Kashinath Nana Patil or is an ancestral property is a matter of evidence. Hence, no case is made out for invocation of powers under Article 227 of the Constitution of India. Hence, Petition fails and the same is dismissed. However, it is made clear that where a decree is challenged

by the petitioner, any error, defect or irregularity in the impugned order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of the proceedings as contemplated by Section 105(1) of C.P.C.

(R.G.KETKAR, J.)