

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.642 OF 2018

Suklal Dagdulal Jain
Deceased – Through His LR's,

- 1-a] Shantabai w/o Suklal Jain,
Age-77 years, Occu-Household,
R/o Vadala – Vadali, Tq.Chalisgaon,
Dist.Jalgaon,
- 1-b] Bebibai @ Padmabai w/o Champalal
Kankriya,
Age-43 years, Occu-Household,
R/o Lakshmi Nagar, Chalisgaon,
Dist. Jalgaon,
- 1-c] Vijayabai @ Ujwalabai w/o Kantilal
Chhaged,
Age-41 years, Occu-Household,
R/o Phagane, Tq. And Dist. Dhule,
- 1-d] Shakunala w/o Sumatilal Kothari,
Age-37 years, Occu-Household,
R/o Kumbharwada, Amalner,
Dist.Jalgaon,
- 1-e] Jayabai d/o Suklal Jain,
Age-31 years, Occu-Household,
R/o Vadala-Vadali, Tq.Chalisgaon,
Dist.Jalgaon,
- 1-f] Prakashchandra Suklal Jain,
Age-55 years, Occu-Agriculturist
and business,
R/o Vadala-Vadali, Tq.Chalisgaon,
Dist.Jalgaon,
- 1-g] Rikhabchand s/o Suklal Jain,
Age-50 years, Occu-Agriculturist
and business,

R/o Vadala-Vadali, Tq.Chalisgaon,
Dist.Jalgaon,

- 1-h] Vinodkumar s/o Suklal Jain,
Age-48 years, Occu-Service,
R/o Prakash Chandrakant and
Co. Chalisgaon, Dist.Jalgaon

All through their Power of
Attorney Holder Shri Rikhablal
(Rikhabchand) Suklal Jain,
Age-57 years, Occu-Agriculturist
and Business,
R/o Vadala-Vadali, Tq.Chalisgaon,
Dist. Jalgaon

– PETITIONERS

VERSUS

1. Rajendra Kachardas Jain,
Age-40 years, Occu-Agriculturist,
R/o Vadala-Vadali, Tq.Chalisgaon,
Dist.Jalgaon,
2. Chandmal Dagdulal Jain,
Deceased-through his LR's,
- 2-a] Mahendra Chandmal Jain,
Age-47 years, Occu-Agriculturist
and Business,
R/o Vardhman Krushi Kendra,
Neharu Point, Chalisgaon,
Dist.Jalgaon,
- 2-b] Narendra Chandmal Jain,
Age-43 years, Occu-Agriculturist
and Business,
R/o Lakshmi Nagar, Near Sahyadri
Apartment, Near Rajput Mangal
Karyalal, Chalisgaon,
Dist.Jalgaon
- 2-c] Smt.Navalbai Chandumal Jain
Age-83 years, Occu-Household,

All R/o Near Suyog Krishi Seva,
Ghat Road, Chalisgaon,
Dist.Jalgaon

- 2-d] Mangalbai Ramesh Bhansali,
Age-44 years, Occu-Household,
R/o Quality Provision Stores,
"B" Shradha Tower, Kopargaon,
Dist. Ahmednagar
- 2-e] Kalpanabai Pukhraj Sancheti,
Age-39 years, Occu-Household,
Ketan Lohan Bhandar Shopping,
Near Vardhaman Krushi Kendra,
Neharu Point Chalisgaon,
Dist. Jalgaon,
- 2-f] Shobha Prakashchand Chordiya,
Age-37 years, Occu-Household,
Opp.Patwardhan Hospital,
MHADA Society, IIIrd floor,
Aurangabad,
- 2-g] Surekhabai Kevalchand Samdadiya,
Age-32 years, Occu-Household,
R/o Dipesh Cloth Centre,
Main Road, Beed, Dist.Beed,
3. Javarilal Dagdulal Jain,
Deceased, Through His LR's,
- 3-a] Pushpabai Javarilal Jain,
Age-58 years, Occu-Household,
- 3-b] Sunil Javarilal Jain,
Age-34 years, Occu-Business,
Both R/o Vadala-Vadali,
Tq. Chalisgaon, Dist.Jalgaon

– RESPONDENTS

Mr.K.C.Sant, Advocate for the petitioners.

Mr.S.P.Brahme h/f Mr.L.V.Sangit, Advocate for respondent No.1, 2A to
2G, 3A and 3B.

(CORAM : RAVINDRA V. GHUGE, J.)

DATE : 06/02/2018

ORAL JUDGMENT :

1. Rule. Rule made returnable forthwith and heard finally by the consent of the parties.

2. The petitioners / original plaintiffs are aggrieved by the order dated 29/11/2017 passed by the Appellate Court below Exh.48, which was filed by the original plaintiffs/ appellants in RCA No.215/2014, seeking leave to amend the plaint during the pendency of the appeal.

3. I have considered the strenuous submissions of the learned Advocates for the respective sides and have gone through the petition paper book with their assistance.

4. The petitioners have relied upon the following judgments :-

[a] Pirgonda Hongonda Patil Vs. Kalgonda Shidgonda Patil and others [AIR 1957 SC 363].

[b] A.K.Gupta and Sons Ltd., Vs. Damodar Valley Corporation [AIR 1967 SC 96]

[c] Raj Kumar Vs. Dipender Kaur Sethi [2004 AIR SCW 7179]

5. The learned Advocate for the respondents relied upon the

following judgments :-

- [a] Darshan Singh Vs. Gujjar Singh [2002 AIR (SC) 606].
- [b] Gurudwara Sahib Vs. Gram Panchayat Village Sirthala and another [2014(1) SCC 669]

5. The petitioners are the original plaintiffs, who have preferred RCS No.135/1992 praying for injunction against the defendants with regard to the suit property. The suit was dismissed by the judgment and order dated 07/11/2014. After the appeal was preferred in 2014, the plaintiffs have moved application Exh.48 seeking leave to introduce the proposed paragraph No.2A.

6. The plaintiffs are the legal heirs of deceased Dagdulal Chunilal. It is contended in the plaint that a partition occurred in the undivided ancestral property in 1964. Thereafter, Dagdulal got his share of the property and the said share continued to be in his possession and subsequently with the legal heirs. It is admitted in the plaint that the other properties which were shared by the other shareholders pursuant to the partition, are in possession of those litigating sides and they have been cultivating the said lands. By the proposed amendment, the plaintiffs desire to virtually raise a plea of adverse possession by stating that the suit land remained in the

possession of Dagdulal and thereafter the legal heirs, which possession was undisturbed and un-controverted. As the said possession continued till the demise of Dagdulal on 03/01/1979 and continued even thereafter, the plaintiffs are in possession of the said suit properties and hence the defendants need to be enjoined.

7. It is strenuously canvassed by the learned Advocate for the plaintiffs that the Appellate Court could not have rejected the proposed amendment since the pending appeal is a continuation of the suit and such an amendment is permissible. Moreover, it did not change the nature of the litigation and did not put forth any new cause of action. It is also canvassed that the plaintiffs do not intend to suggest or claim adverse possession by virtue of the proposed amendment.

8. Reliance is placed upon the 3 judgments of the Hon'ble Apex Court to support the contention of the plaintiffs that even if the suit may have been dismissed and the appeal is pending, an amendment, if is necessary and would assist the Court in the proper adjudication of the dispute, can be allowed. When the cause of action is not altered and no new cause of action is introduced, an amendment can be permitted in order to do complete justice.

9. Learned Advocate for the respondents / original defendants submits that the plea of adverse possession is never open to the plaintiffs. When a suit is preferred for seeking injunction against the defendants on the basis of the plea that the plaintiffs are in the uninterrupted, unobstructed and peaceful possession of the suit properties, the defendants ought to be restrained and injuncted perpetually from causing any interference in such peaceful possession. There is no room for adverse possession and more so when the plaintiffs can not prefer a suit claiming adverse possession as the concept of adverse possession cannot have the trappings of a claim, but can be set up only in defence to be used as a shield against the reliefs sought by the plaintiffs.

10. Learned Advocate for the defendants has drawn my attention to the exhaustive reply filed by the defendants to Exhibit 48 before the Appellate Court. It is pointed out that the litigation is practically more than 25 years old. The plaintiffs have specifically pleaded in the plaint that after the partition that took place in 1964, the distribution of the shares of the properties has taken place and all those shareholders, who were allotted particular shares, were put in possession and since then have been in the peaceful possession of their respective shares. The proposed amendment in paragraph

No.2A in Exh.48 would virtually amount to withdrawing the statements (made in the complaints) indirectly.

11. Learned Advocate for the defendants has pointed out those specific pleadings from the plaint and has compared them with the proposed pleadings, in paragraph Nos. 6 to 9 of the reply filed before the Appellate Court. It is also pointed out that specific admissions have been given by the plaintiffs and their witnesses which are in tune with the original stand taken by the plaintiffs in the plaint. If the proposed amendment is permitted, it would amount to practically washing away the specific pleadings in the plaint as well as the evidence that was recorded on behalf of the plaintiffs in support of their contentions in the plaint. The purpose of an amendment is to ensure that a material aspect left out is brought to the notice of the Court so as to lead to a proper adjudication. An amendment cannot be permitted to water down material pleadings in the plaint and nullify or dilute the oral and documentary evidence recorded.

12. Reliance is placed upon the judgment of the Hon'ble Supreme Court in the matter of Darshan Singh (supra) and Gurudwara Sahib (supra). Paragraph Nos. 7 and 8 in the Darshan Singh case (supra) read as under :-

“7. The next question which requires our decision is whether Rulia Singh and after his death the present appellants, who were in possession of the land since 1930 and also got their names mutated, have perfected their title by adverse possession over the land of Jagjit Singh. It is well settled that if a co-sharer is in possession of the entire property, his possession cannot be deemed to be adverse for other co-sharers unless there has been an ouster of other co-sharers.

8. Learned counsel appearing for the appellants has placed reliance on the decision of the Lahore High Court in Sardar Amar Singh versus Sardami Shiv Datt Kaur. The learned Judge held that removal of the name of the absentee co-sharer from revenue records at the instance of other co-sharers is an overt act amounting to ouster and commences adverse possession of the co-sharers in possession, the reason being that removal of the name was done openly and if the absentee co-sharers would have taken an interest in the land, he would not have failed to notice of it in the ordinary course and hence his knowledge of the adverse claim for other co-sharer may be reasonably presumed. In reply, learned counsel for the respondents has placed reliance on a decision in Bashir Ahmad & Ors. versus Parshotam & Ors. The learned Single Judge held that if a property belongs to several co-sharers and one co-sharer is in possession of the entire property, his possession cannot be deemed to be adverse to other co-sharers and he must be deemed to be in possession on behalf of all other co-sharers and adverse possession cannot be founded on the basis of such exclusive possession, unless there has been ouster of other co-

sharers. Regarding mutation in the revenue record learned Judge held that mutation in the name of one co-sharer cannot be any indication of adverse possession until it is shown that it was obtained after a clear declaration to the effect that title of other co-sharers was denied.”

13, Paragraph Nos. 7 and 9 of the Gurudwara Sahib judgment (supra) read as under :-

“7. In the Second Appeal, the relief of ownership by adverse possession is again denied holding that such a suit is not maintainable. There cannot be any quarrel to this extent the judgments of the courts below are correct and without any blemish. Even if the plaintiff is found to be in adverse possession, it cannot seek a declaration to the effect that such adverse possession has matured into ownership. Only if proceedings filed against the appellant and appellant is arrayed as defendant that it can use this adverse possession as a shield/defence.

9. As the appellant is in possession of the suit property since 13.4.1952 and has been granted the decree of injunction, it obviously means that the possession of the appellant cannot be disturbed except by due process of law. We make it clear that though the suit of the appellant seeking relief of declaration has been dismissed, in case respondents file suit for possession and/or ejectment of the appellant, it would be open to the appellant to plead in defence that the appellant had become the owner of property by adverse possession. Needless to mention

at this stage, the appellant shall also be at liberty to plead that findings of issue No.1 to the effect that the appellant is in possession of adverse possession since 13.4.1952 operates as res-judicata. Subject to this clarification, the appeal is dismissed.”

14. Considering the above, I am of the view that the Appellate Court, while placing reliance upon the judgment of the Hon'ble Apex Court in the matter of Laxman Marotirao Paunikar Vs. Kesharao Rambhau Paunikar [2000(4) Mh.L.J. 482] and M/s Revajettu Builders and Developers Vs. M/s Narayanaswamy and Sons and others [AIR 2009 SC (supp) 2897] has rightly concluded that the amendment that the plaintiffs have proposed, would lead to putting forth a claim of adverse possession, which has never been the case of the plaintiffs. Though the plaintiffs have taken a stand that they are not claiming adverse possession, the proposed amendment clearly hints at setting forth the plea of adverse possession, which was never taken by the plaintiffs for 25 years during the litigation. Even otherwise, the issue is not about seeking a declaration of ownership to a particular portion out of the suit land and is restricted only to the extent of seeking injunction.

15. Considering the above and keeping in view the law laid down

by the Hon'ble Apex Court in the matter of Syed Yakoob Vs.K.S.Radhakrishnan and others [AIR 1964 SC 477] and Surya Dev Rai Vs. Ram Chander Rai [2003(6) SCC 682], this Court cannot cause an interference in the impugned order until the impugned order indicates that gross injustice would be caused to the applicant and the impugned order could be termed as being perverse or erroneous. Merely because a different view can be taken in a matter, would not be a ground for causing any interference, notwithstanding the fact that in this matter, I do not think that any different view than the one taken by the Appellate Court, can be said to be a possible view. Considering the above, this petition, being devoid of merit, is therefore, dismissed. Rule is discharged.

16. At this juncture, learned Advocate for the defendants prays for expediting the appeal which is pending for more than 3 years and is in the 4th year. Learned Advocate for the petitioners submits that the petitioners never intend to delay the proceedings. As such, the Appellate Court would consider deciding the appeal expeditiously since the same is pending for about 4 years.

(RAVINDRA V. GHUGE, J.)