

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO. 991 OF 2017

**SHAMIN BEGAM MOHAMMAD KHALEK AND ANOTHER
VERSUS
DATTA DNYANOBA THITE AND OTHERS**

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Advocate for the Petitioners : Shri S. V. Mundhe

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CORAM : RAVINDRA V. GHUGE, J.

DATED : 27th NOVEMBER, 2018.

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PER COURT :

1. None present for respondent No.1. Rest of the respondents have not caused an appearance despite service of court notice.

2. The petitioners are original defendant Nos.2 and 5, who are aggrieved by the amendment permitted by the Trial Court vide the impugned order dated 04/01/2017, by which, application Exhibit 54 filed by the plaintiff in RCS No. 27/2011 has been allowed after the issues have been re-cast on 05/07/2016.

3. The learned Advocate for the petitioners has strenuously criticized the impugned order and submits that the said order

deserves to be quashed and set aside. He contends that the plaintiff has earlier stated in the plaint that there was an oral partition and subsequently the written oral partition was prepared. By way of an amendment, the plaintiff seeks to add that pursuant to the oral partition in 1994, a written document on a Hundred Rupees bond paper was prepared by his father and the said bond paper was handed over to the Talathi. Now the Talathi states that the bond paper is missing. Contention of these petitioners is that conflicting stands are taken by the plaintiff and such an amendment should not be permitted, more so after the issues have been re-cast.

4. I find that the suit has been preferred by the plaintiff for seeking partition and separate possession alongwith future mesne profit. As such, issue involved is with regard to the partition and separate possession. The Honourable Apex Court has laid down the law that the merits of the proposed amendment should not be considered. It should be assessed as to whether the amendment would avoid multiplicity of litigation, would not alter the nature of the suit and the cause of action should not be otherwise barred by limitation if a separate suit was to be instituted.

5. In the instant case, issue of partition has been averred and the plaintiff desires to add that the bond paper of Rs. 100/- was utilized for writing down the oral partition. The onus and burden would, therefore, lie on the shoulders of the plaintiff to prove this aspect. The defendants can be granted the liberty to file an additional written statement to the extent of the amendment allowed.

6. In view of the above, this petition is disposed off.

7. The defendants would be at liberty to file an additional written statement to the extent of controverting the amended portion. The Trial Court would frame an additional issue with regard to whether the plaintiff proves that there was a written partition on a bond paper of Rs. 100/- at the behest of his father.

8. Since the suit is pending adjudication for more than seven years, the Trial Court would endeavor to decide the said suit as expeditiously as possible and in any case, on or before 31/10/2019.

(RAVINDRA V. GHUGE, J.)

shp/-