

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

WRIT PETITION NO. 2982 OF 2018

YESHWANT TOPA MAHAJAN
VERSUS
UDDHAV TOPA MAHAJAN AND OTHERS

...

Advocate for the Petitioner : Shri Gholap Ajit M..
Advocate for Respondent 1 : Shri Katneshwarkar PR..

...

CORAM: RAVINDRA V. GHUGE, J.

DATE :- 21st August, 2018

Per Court:

1 While issuing notice, I had recorded the submissions of the learned Advocate for the Petitioner/ Defendant No.4 in the order dated 23.03.2018 which reads as under :-

- "1. *The petitioner /defendant No.4 is aggrieved by the order dated 31.1.2018, by which, the trial Court has allowed the application Exhibit 59 permitting the plaintiff to add a prayer to the claim in RCS No.84 of 2013.*
2. *Grievance is that an attempt to introduce the pleadings with regard to partitioning the suit property vide application Exhibit 51, was turned down by the trial Court by rejecting the said request vide order dated 26.9.2017. The rejection was on the ground that the amendment is not necessary for the purpose of determining the real question in controversy as the suit was for declaration and perpetual injunction. In this backdrop, allowing Exhibit 59 by the impugned order by permitting the plaintiff to add the prayer seeking partition, which*

- was earlier rejected, would be unsustainable one.*
3. *Issue notice to the respondent No.1 / plaintiff, returnable on 3.5.2018.*
 4. *Until the returnable date in this matter, the impugned order shall stand stayed.*
 5. *Copy of the petition paper book shall be furnished for issuance of notice on/or before 4.4.2018, failing which this petition shall stand dismissed without reference to the Court on 5.4.2018."*

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

3 On perusal of the cause title in the plaint and upon considering the prayers put forth below paragraph 11, it is apparent that the Plaintiff desires that the sale deed with reference to Gat No.152 and Gat No.153/2 at Kolwad, Taluka Yawal, District Jalgaon dated 21.11.2012 be declared as not binding on the Plaintiff. The other prayer made is that Defendant No.1 be prevented from transferring the property mentioned in the sale deed in favour of Defendant Nos.2 and 3 and permanent injunction be issued to that extent. It is obvious that the suit was not filed for seeking partition and separate possession in the ancestral property, by putting all such properties in the common hotchpotch.

4 By order dated 03.07.2014, the Trial Court had allowed the application Exhibit-21 filed by the Plaintiff/ Respondent No.1 herein and he was permitted to carryout the amendment with regard to the sugarcane

crop and the claim for mesne profit in respect of his 1/3rd share in the land Gat No.152 and 153/2. Though Exhibit-21 was allowed by order dated 03.07.2014, the Plaintiff did not carryout the amendment and leave to amend the plaint was given up as the amendment was not carried out within 14 days. The request was not made for enlargement of time under Section 148 of the Code of Civil Procedure. The said liberty to amend the plaint was thus, lost.

5 By an application Exhibit-51, the Plaintiff prayed for extensive amendment in the following nature :-

(a) A partition by metes and bound be carried out and mesne profit to the extent of the share of the Plaintiff may be granted.

(b) Additional court fees may be permitted to be deposited since the prayer for partition of the properties was being put forth.

6 By order dated 26.09.2017, the application Exhibit-51 was rejected by the Trial Court for the reason that the suit is only with regard to the declaration that the sale deed is not binding upon the Plaintiff and that the Defendants be enjoined from executing the said sale deed. The nature of the cause of action was likely to be altered and hence, the Trial Court rejected Exhibit-51 by order dated 26.09.2017.

7 In the application Exhibit 59, which is at issue, the Plaintiff has altered the language in the application so as to make it appear to be

different from Exhibit 51. With regard to the properties mentioned in the prayer clause 11-A, some more properties were sought to be added and the suit is sought to be converted into a suit for partition and separate possession. The proposed amendment set out in Exhibit-59 would indicate that all the properties are now sought to be put in common hotchpotch and the Plaintiff is seeking a share in these properties as well as mesne profit and has volunteered to pay the additional court fees. This application Exhibit 59 is allowed by the impugned order by the Trial Court after concluding that the proposed amendment would be necessary for deciding the real question in controversy.

8 Upon considering the submissions of the learned Advocates and on perusing the impugned order, I find that the proposed amendment was not necessary for a declaration that the sale deed be held as being not binding upon the Plaintiff and such sale deed be restrained from being implemented in favour of Defendant Nos.2 and 3. When the suit was not filed for seeking partition and separate possession, the proposed amendment, which effectively seeks partition and separate possession as well as mesne profit to the extent of the share of the Plaintiff, clearly indicates that it is a distinct and different cause of action.

9 In view of the above, this Writ Petition is allowed. The impugned order dated 31.01.2018 is quashed and set aside and the application Exhibit-59 stands rejected.

10 Needless to state, in the event, the Plaintiff desires to institute a suit for partition and separate possession and if such a suit is not otherwise barred by any law applicable, the Plaintiff may take recourse to the said remedy, if so advised.

kps

(RAVINDRA V. GHUGE, J.)