

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

WRIT PETITION NO. 9611 OF 2017

KAMALBAI PRALHADRA SHINGARE
VERSUS
BABU ISA SABLE DIED AND OTHERS

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Advocate for Petitioner : Mr. Gholap h/f Bhumkar R.P
Advocate for Respondents 2,3 : Mr Shirsat Suhas R.
Respondent No.1 died

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CORAM : V.K. JADHAV, J.
Dated: January 17, 2018

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PER COURT :-

1. Heard finally with consent at admission stage.
2. Being aggrieved by the impugned order passed below Exh.96 and Exh.100 in Regular Civil Suit No.29/2012, the original plaintiff has approached to this Court by filing present writ petition.
3. Brief facts, giving rise to the present writ petition are as follows :-
 - a] Petitioner/plaintiff has instituted the Regular Civil Suit for partition and separate possession in respect of the ancestral property against her father, step mother,

aaa/-

real brother of the step mother and subsequent purchaser. During pendency of the said suit, on 8.10.2010 defendant no.1 (father of petitioner/plaintiff) died. Petitioner/plaintiff has instituted the suit for partition and separate possession with specific pleading that she is the only child of defendant no.1 from his first wife and defendant no.2-being a second wife is having no concern with the ancestral land. Petitioner/plaintiff has, therefore, filed an application Exh.96 under Order 6 Rule 17 of the Civil Procedure Code for carrying out the amendment in the pleadings in light of the subsequent development of sad demise of her father/original defendant no.1. By way of proposed amendment, the Petitioner/plaintiff sought to amend the plaint and also the relief with the averment that after death of defendant no.1, she would be the sole legal heir and, as such, declared her as an owner in respect of entire property alongwith the other reliefs those are already with the suit.

b] Respondents/original defendants have strongly

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resisted the said application by filing their say. Trial court by impugned order dated 20.1.2017 has rejected the said application on the ground that proposed amendment would entirely change the nature and basic structure of the suit. Said application exh.96 rejected also on the ground that though defendant no.1 died on 8.10.2010 application seeking amendment in the plaint is filed belatedly in the month of June 2016 and, till that time, trial of the suit was already commenced. Thereafter, Petitioner/plaintiff has filed an application Exh.100 for the same relief and the learned Judge of the trial court by impugned order dated 22.6.2017 rejected the said application Exh.100 mainly on the ground that earlier application exh.96 for the same relief came to be rejected by the Court and, there is no reason to consider the second application seeking the same relief. Hence, this writ petition.

4. Learned counsel for the petitioner submits that, the petitioner/plaintiff being a sole heir of defendant no.1, after death of her father/defendant no.1, wants

her plaint to be amended by incorporating the relief of declaration of her ownership in respect of the entire land when prayer in the earlier suit about partition with regard to the ancestral property against the father would be meaningless. Learned counsel for the petitioner submits that, the petitioner by her original pleadings seeking partition and separate possession in the ancestral property with specific averments/pleadings that she is the child born to defendant no.1 from his first wife and as such she is entitled for partition of the ancestral land to the extent of half of the share and that the defendants i.e. her step mother is having no concern with the said property. Learned counsel submits that, in light of the subsequent event i.e. death of father of petitioner/plaintiff has rightly filed an application for the proposed amendment which does not change the nature/basic structure of the suit. In the earlier suit, the petitioner/plaintiff has sought relief against the purchaser to the effect that sale deed executed in their favour by original defendant no.1 through original defendant no.2 is not binding on her share and said

pleadings and relief claimed on the basis of the said pleadings would remain as it is.

5. Learned counsel for respondents submits that, proposed amendment would change the nature and structure of the suit entirely. Petitioner/plaintiff has instituted the suit for partition and separate possession and by way of the proposed amendment seeking relief of declaration of her ownership in respect of the land with a decree of perpetual injunction. Learned counsel submits that, though, father of petitioner/plaintiff i.e. defendant no.1 died on 8.10.2010, in the year 2014 the petitioner/plaintiff had applied for heir-ship certificate and in the year 2015 she got said certificate. Learned counsel submits that, on 13.6.2016 petitioner/plaintiff for the first time filed an application Exh.96 when issues were already framed in the suit on 3.3.2010. Learned counsel, on instructions, submits that even parties have also filed their affidavit of evidence in the suit. Learned counsel submits that, there is no due diligence on the part of the petitioner/plaintiff to file

such an application seeking amendment and, there is an inordinate delay in filing the application and same was filed after commencement of the trial of the suit. Learned counsel submits that, trial court has, therefore, rightly rejected the application exh.96. Petitioner/plaintiff without challenging the said order below exh.96 filed another application exh.100 for the same relief and, accordingly, the trial court has rightly rejected the said application on that ground alone. Learned counsel for respondents, in the alternate, submits that, if, this court is inclined to allow the application exh.96, in that event, petitioner/plaintiff may be saddled with heavy costs.

6. On careful perusal of the pleadings and after taking note of the subsequent event i.e. death of defendant no.1, who happened to be the father of petitioner/plaintiff, it appears that the petitioner/plaintiff has filed an application exh.96 on 13.6.2016 seeking amendment in the plaint. Though, suit came to be instituted initially for partition and

separate possession and also declaration in respect of the sale deed executed in favour of defendant purchaser, the said relief would be meaningless, as on death of defendant no.1, petitioner/plaintiff being sole legal heir (as per pleadings in the original plaint). By way of proposed amendment she intends to incorporate the relief in the original suit for declaration in respect of the entire suit land and also for the consequential relief. Thus, considering the original pleadings of the petitioner wherein she has specifically sought partition of the land against her father to the extent of her 50% share in the ancestral property, by way of proposed amendment, I do not think that basic structure of the suit and nature of the suit is changed. Learned counsel for respondent during the course of the arguments vehemently submitted that the petitioner/plaintiff may institute a separate suit for the relief as sought by way of the proposed amendment, however, it is well settled that in order to avoid the multiplicity of litigation, such amendment in the plaint can be allowed. In the instant case, even though issues are framed long back, i.e. prior

to death of defendant no.1, after death of defendant no.1, framing of issues on the basis of earlier pleadings would be meaningless. In view of the same, I do not think that, the trial of the suit is commenced in this case in its strict sense. However, the petitioner/plaintiff is certainly guilty of causing the delay in filing the application seeking amendment in the plaint for which the petitioner/plaintiff is liable to pay the costs to other side. In view of the same, if the impugned order passed below exh.96 is quashed and set aside and, if the application exh.96 is allowed, there is no question of considering the application exh.100. It would suffice the purpose if the application at Exh.100 is only said to be "Filed". Hence, following order.

O R D E R

1. Writ Petition is hereby allowed.
2. Impugned order passed below Exh.96 dated 20.01.2017 in R.C.S. No.29/2012 passed by the Civil Judge (J.D.), Wadwani, Dist. Beed is hereby quashed and set aside.

3. The application at exh.96 is allowed in terms of its prayer clause subject to costs of Rs.10,000/- (Rs. Ten Thousand) to be paid by the petitioner/plaintiff to respondents/defendants within four weeks from the date of this order.
4. So far as the order passed below exh.100 is concerned, same does not survive in the light of the order passed as aforesaid. Hence, application at exh.100 is "Filed".
5. Writ Petition is accordingly disposed of.

(V.K. JADHAV, J.)

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