

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

WRIT PETITION NO.3131 OF 2013

Ashok Shivram Kamble

.. Petitioner

Vs.

Rajakka Bajirao Kamble & Ors.

.. Respondents

Mr.Sukand R. Kulkarni for the petitioners.

Mr.Surel S. Shah for the respondent nos.1 to 4.

CORAM : R.D. DHANUKA, J.

DATE : 9th October 2018

P.C.:

. By this petition filed under Article 227 of the Constitution of India, the petitioner (original defendant no.2) has impugned the order dated 23rd January 2013 passed below Exhibit-76 thereby allowing the application for amendment filed by the respondents (original plaintiffs) under Order VI Rule 17 of the Code of Civil Procedure, 1908.

2. The plaintiffs had filed a suit for partition and separate possession. In the said suit, the defendants have filed written statement alleging that no part of the suit property was sold by them.

3. It is the case of the original plaintiffs that when they have visited the site on 1st December 2012, they came to know about the execution of two alleged sale deeds by some of the defendants in favour of third parties. Accordingly, the plaintiffs filed an application on 3rd December 2012 for amendment of the plaint i.e. for impleading the third parties and challenging the validity of those two sale deeds. The said application for amendment was resisted by the original defendants. By

the impugned order, the learned trial Judge after recording detailed reasons on 23rd January 2013 has allowed the application on payment of costs of Rs.500/-.

4. Learned counsel appearing for the petitioner submits that the application for amendment filed by the original plaintiffs was totally vague. The date of alleged knowledge about the sale deeds was not disclosed in the application for amendment. He submits that two of witnesses have been already examined by the plaintiffs and the cross-examination of those witnesses is completed.

5. The next submission of the learned counsel for the petitioner is that if the amendment as prayed even if was rightly allowed by the learned trial Judge, the plaintiffs have not been asked to pay the deficit Court Fees.

6. Learned counsel placed reliance on the judgment of this Court in the case of ***Dnyandev Ramlal Patil Vs. Sanjeev Bhavlal Patil & Ors., 2014 (6) Mh.L.J. 400*** and in particular paragraphs 21 to 25 thereof in support of the submission that the plaintiffs had not acted with due diligence and thus the application filed under Order VI Rule 17 of the Code of Civil Procedure, 1908 could not have been entertained by the learned trial Judge belated stage.

7. Mr.Shah, learned counsel for the original plaintiffs invited my attention to the averments made in the plaint and also in the written statement. He submits that it was the specific case of the defendant no.2 that no part of the suit property was sold. He submits that however when

his clients went to the site, they were informed by a person present there that the two sale deeds were executed by the defendants in favour of the third parties. They came to know about such creation of third parties only on 1st December 2012.

8. It is submitted by the learned counsel that the third parties who were sought to be impleaded by the plaintiffs by way of amendment and challenge to the sale deeds was necessary. The impugned order passed by the learned trial Judge allowing the application for amendment filed by the plaintiffs is thus proper.

9. In so far as the payment of deficit Court fees, if any, required to be paid by virtue of allowing the application for amendment filed by the plaintiffs under Order VI Rule 17 of the Code of Civil Procedure, 1908 is concerned, it is submitted that the learned trial Judge can consider such objection at any stage and if any deficit court fees are required to be paid by the plaintiffs, the plaintiffs would pay the same.

10. It is not in dispute that the suit was filed for partition and for separate possession. In the written statement filed by the defendant no.2, it was alleged that no part of the suit property was sold by the defendant no.2. I am inclined to accept the submission of the learned counsel for the plaintiffs that his clients came to know about the creation of third parties only when he visited the site on 1st December 2012 and were informed that the third parties rights were created in the suit property. The plaintiffs thereafter immediately filed an application under Order VI Rule 17 of the Code of Civil Procedure, 1908. The learned trial Judge has considered all the submissions made by both the parties and

passed a detailed order on 23rd January 2013 allowing the application for amendment (Exhibit-76) filed by the plaintiffs.

11. Though two of witnesses were already examined by the plaintiffs and the cross-examination were completed, in my view, since the plaintiffs came to know about the sale of the suit property in a suit for partition and separate possession subsequently, it became necessary to bring the additional facts on record by including the sale deeds by impleading third parties along with those documents. The plaintiffs had acted with the due diligence for filing of an application for amendment during the course of recording the evidence.

12. The judgment of this Court in the case of ***Dnyandev Ramlal Patil (supra)*** thus would not assist the case of the petitioner and is clearly distinguishable in the facts of this case. Payment of deficit Court fees, if any, required to be paid, the learned trial Judge can consider the said issue before passing the final decree and if the Court comes to the conclusion that if any deficit Court fees are required to be paid by the plaintiffs, the plaintiffs can be ordered to pay such amount. In that event, the plaintiffs would pay such deficit Court fees within the time prescribed by the learned trial Judge.

13. I do not find any infirmity in the impugned order dated 23rd January 2013 passed by the learned trial Judge below Exhibit-76. Writ petition is devoid of merit and is accordingly dismissed. It is made clear that merely because the application for amendment was permitted by the learned trial Judge, the contents of the amendment is not accepted by the defendants. All the defendants are permitted to file additional written

statement within four weeks from today. On the basis of the additional written statement and the amendment granted by the trial Court, if any additional issues are required to be framed, the same shall be framed after hearing both the parties.

R.D. DHANUKA, J.