

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

**WRIT PETITION NO. 10901 OF 2011
WITH
CIVIL APPLICATION NO. 2626 OF 2013
IN
CIVIL APPLICATION NO. 1829 OF 2013**

Smt.Shobha Satischandra Sawant @
Shobha Kondiba Magar ... Petitioner
V/s.
Balasaheb Kondiba Magar & Ors. ... Respondents

- Mr.Ashok Tajane for the Petitioner.
- Mr.G.H. Keluskar for Respondent Nos.2 and 3.
- Mr.Kirankumar J. Phakade a/w. Mr.Jaysing Bangar for Respondent Nos.6 to 8.

CORAM : DR.SHALINI PHANSALKAR-JOSHI, J.

DATE : 16th JANUARY, 2018.

P.C. :

- 1] Heard learned counsel for both the parties.
- 2] By this Writ Petition, filed under Article 227 of the Constitution of India, the Petitioner is challenging the order dated 30th April, 2011 passed by the 6th Jt. Civil Judge Senior Division, Pune, below Exhibit-243 in Special Civil Suit No.508 of 2004.

3] The application at Exhibit-243 was preferred by the present Petitioner for amendment in the plaint. The said application was opposed by the Respondents and the trial Court, after hearing learned counsel for both the parties, was pleased to reject the same.

4] At the time of admission, when this Writ Petition came up for circulation before this Court on 19th December, 2011, learned counsel for the Petitioner has stated that the Petitioner is not praying for addition of parties as well as the addition of paragraph Nos.10 and 14 as contained in the amendment application and the Petitioner is restricting the amendment application to incorporate prayer clause in respect of the Will in question and abandonment of the claim, as contained in the original plaint, in paragraph (4)(1) and (4)(2).

5] The submission of learned counsel for the Petitioner is that as regards the amendment relating to Will, in paragraph No.10 of the plaint, the Petitioner has categorically mentioned about the said Will and also stated how the said will is not legal and valid but it is a false and fraudulent document and by taking disadvantages thereof, Defendant No.2 may create obstruction for the Plaintiff in getting the partition of his share in the suit property. It is urged that, by way of proposed amendment, the Petitioner only wants to get the relief of

declaration that the Will-deed dated 15th December, 2003 is illegal, null and void and hence, not binding on the Plaintiff; hence whatever transactions which had taken place on the basis of the said Will are therefore automatically canceled. It is urged that, this being a consequential relief, in view of the averments appearing in the plaint, the trial Court should have allowed the same.

6] As regards the deletion of the properties, it is urged that the Respondents should not have any grievance about the same, if the Petitioner wants to give up certain suit properties from the suit claim.

7] In the normal circumstances, this argument would have been accepted to allow this application for amendment. However, if one considers the conduct of the present Petitioner and the facts of the case, then it becomes difficult to do the same. In this case, the Petitioner was very well aware of the existence of the said Will-deed as stated by him in paragraph No.10 of the plaint itself. The Will is also executed in the year 2003 i.e. before filing of the suit. Despite that, the Petitioner has not sought the consequential relief in the plaint but thereafter also till the trial commenced. It is pertinent to note that earlier also, the Petitioner has filed application for amendment of the plaint vide Exhibit-219 and at that time also, he has not sought these

amendments. The said application came to be rejected and, thereafter, he has filed the present application. By this time, the trial has already commenced. Moreover cross-examination of the Plaintiff is also completed. Hence, at this stage, when the application for amendment is sought, then the bar as laid down under Proviso to Order-VI Rule-17 of C.P.C. comes into play. As held by the Apex Court in the case of *Vidyabai & Ors. Vs. Padmalatha & Anr. [(2009) 2 SCC 409]*, the Proviso to Order-VI Rule-17 is couched in a mandatory form. Hence the Court's jurisdiction to allow such an application is taken away unless the conditions precedent laid down therein therefor are satisfied viz. Court must come to a conclusion that inspite of due diligence the party could not have raised the matter before the commencement of the trial.

8] Here that jurisdictional fact is required to be proved by the Petitioner, showing that despite exercise of due diligence on his part, he could not have sought this amendment earlier. However, the entire application for amendment of the plaint filed by the Petitioner at Exhibit-243 before the trial Court is conspicuously silent as to why such amendment was not sought at earlier stages; especially when previously also such application for amendment of the plaint was filed.

9] To once again quote the observations made by the Apex Court in the case of *Vidyabai & Ors. Vs. Padmalatha & Anr. (supra)*, “the Proviso appended to Order-VI Rule-17 C.P.C. restricts the power of the Court. It puts an embargo on exercise of its jurisdiction. The Court's jurisdiction in a case of this nature is limited. Thus, unless the jurisdictional fact, as envisaged therein, is found to be existing, the Court will have no jurisdiction at all to allow the amendment of the plaint”. The impugned order passed by the trial Court, therefore, does not call for any interference.

10] Moreover, in this case, the bar raised by Order-2 Rule-2 Sub-Rule-3 of C.P.C. also comes into play, as by this amendment application, the Petitioner is seeking the additional relief and there is nothing on record to show that he has sought the leave of the Court, before omitting to ask for that relief, when the suit was filed. In view thereof, no fault can be found in the impugned order passed by the trial Court, rejecting the Petitioner's application for amendment.

11] Writ Petition, therefore, being without merits, stands dismissed.

12] At this stage, a request is made by learned counsel for the Petitioner to stay the proceedings of the suit for further period of

three weeks. However, considering the fact that the suit is of the year 2004 and already more than 14 years have lapsed, no case is made out for extending the stay.

13] In view of disposal of Writ Petition, nothing survives in the Civil Application(s) and hence, it stands disposed of.

[DR.SHALINI PHANSALKAR-JOSHI, J.]