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

CIVIL REVISION APPLICATION NO.687 OF 2016

Yadav Dharmaji Bhole and ors	...	Petitioners
V/s.		
Ratan Umaji Bhole and ors	...	Respondents

Mr. Suresh S. Lanke, for the Petitioners

CORAM : DR. SHALINI PHANSALKAR-JOSHI, J.

DATE : 4th JANUARY, 2018.

P.C. :

1] Heard learned counsel for the petitioners, finally at the stage of admission itself.

2] By this Revision Application filed under Section 115 of the Code of Civil Procedure, the petitioners are challenging the order dated 18.07.2016, passed by the District Judge-2, Nashik, thereby rejecting the petitioners' application for amendment of the plaint Exh.14, filed under Order VI Rule 17 of the Code of Civil Procedure in Civil Appeal No.253 of 2011.

3] The submission of learned counsel for the petitioners is that the petitioners are the original plaintiffs and they had filed Special Civil Suit No.215 of 2004, for declaration that the suit property is their ancestral property and they have exclusive

ownership right and possession over the same. However, after appreciation of evidence placed on record, the trial Court was pleased to dismiss the suit on the count that the suit property is the ancestral joint family property of petitioners, respondents and some other owners and co-sharers. In view thereof, it is submitted that, now the petitioners want to seek alternate prayer for partition and possession of their shares out of suit properties. For that purpose, it is necessary to join the other co-sharers, namely Respondent Nos 7 to 19 as defendants. As a consequential relief, it is also prayed that the petitioners may be permitted to insert the genealogy tree of the of family of plaintiffs and defendants, by carrying out necessary amendment.

4] According to learned counsel for the petitioners, learned trial Court has, however, rejected the said application on the ground that it is filed at the belated stage and also on the ground that now the petitioners are making out new case. It is urged by learned counsel for petitioners that in view of the provisions of Order VI Rule 17 of Code of Civil Procedure (Amendment) Act, 2002, the Court can at any stage of the proceeding allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the

purpose of determining the real controversy in dispute between the parties. Here in the case, according to learned counsel for the petitioners the real question in controversy between the parties is whether the suit property is ancestral joint family property of plaintiffs and defendants, if yes, whether the plaintiffs are entitled to get partition and separate possession of their share and this issue can be decided finally, if the proposed amendment is carried out.

5] The perusal of the order passed by the the Appellate Court reveals that the petitioners have filed this suit for declaration that the suit property is their ancestral property and they have exclusive ownership right over it. Now by way of proposed amendment, the petitioners want to change the nature of the suit by seeking alternate relief of partition and separate possession of their share in the suit property, thus giving up their exclusive ownership and possession over the same. Thus, the nature of the suit is definitely going to change by the proposed amendment.

6] Apart from that, in addition to the defendant Nos 1 to 6, who were parties to the suit, the petitioners want to add defendant Nos. 7 to 19 as additional parties they also being co-owners and co-sharers in the said property.

7] Therefore, again the suit will start from beginning in view of addition of the parties when admittedly the suit is at the Appellate stage. It is pertinent to note that the suit was filed in the year 2004. It was dismissed in the year 2011 and this application for amendment is filed in the year 2016. Thus, after the lapse of about 12 years the petitioners want to drag the respondents again to the original stage of the litigation. The Appellate Court, was therefore clearly justified in rejecting this application for amendment, especially when no satisfactory explanation worth the name, is offered by the petitioners as to why at such a belated stage, this application was moved. It may be stated that after Bombay Amendment was introduced in the year 1983 w.e.f. 1st October, 1983 providing that the Court can at any stage of the proceeding allow either party to alter or amend his pleading and all such amendments shall be allowed as may be necessary for the purpose of determining the real controversy between the parties, there is amendment in Order VI Rule 17 of Code of Civil Procedure w.e.f. 1st July, 2002, inserting Proviso thereto which categorically lays down that, no application for amendment shall be allowed after trial is commenced, unless the Court comes to the conclusion that inspite of due diligence party could not have raised the matter before commencement of the trial.

8] In view of this Proviso to Order VI Rule 17 of C.P.C., a clear embargo is laid down to the effect that once the trial has commenced, no amendment in the pleading shall be allowed, unless the party makes out a case that despite due diligence, he could not have sought such amendment earlier. As held by the Apex Court in the case of ***Vidyabai & ors -vs- Padmalatha and 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. In the present case, it is evident that the Petitioners have not been able to fulfill the said condition.

9] Here in the case, there is not a single averment as to why the petitioners did not seek this amendment, before commencement of the trial. The entire application is conspicuously silent about exercise of any due diligence on the part of the petitioners, in moving this application before the commencement of the trial. It is necessary to note that even when the petitioners' suit was dismissed in the year 2011 itself, on the ground that the suit properties appear to be joint family property of plaintiffs, defendants, other co-owners and co-sharers, the petitioners did not seek amendment immediately

thereafter, but only in the year 2016 i.e. after lapse of five years from the decision of the suit and no explanation worth the name is offered for such delay when the appeal is fixed for hearing.

10] Hence, in view of the law laid down by the Apex Court in the case of ***Vidyabai & ors Vs. Padmalatha and Anr (supra)***, as the Proviso appended to Order VI Rule 17 CPC restricts the power of the Court, the Court's jurisdiction in a case of this nature is limited. Thus, unless the jurisdictional fact as envisaged there in, is found to be existing, the Court will have no jurisdiction at all to allow the amendment of the plaint.

11] In view of this Proviso to Order VI, Rule 17 of Code of Civil Procedure, there was no alternative before the Appellate Court to reject said application. The impugned order passed by the Appellate Court hence needs no interference. The Revision Application, therefore being without merits stands dismissed.

[DR. SHALINI PHANSALKAR-JOSHI, J.]