

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 10992 OF 2016

Balasaheb Devram Wagh & Ors. Petitioners

VERSUS

**Ranganath Laxmanrao Wagh,
since deceased through LRs. & Ors. Respondents**

Mr.P.B.Shah, i/b. Mr.K.P.Shah for the Petitioners.

Mr.Gurudas S. Gorwadkar for the Respondent nos.1 and 2.

CORAM : R.D. DHANUKA, J.

DATE : 24th SEPTEMBER, 2018

P.C.

By this petition filed under Article 227 of the Constitution of India, the petitioner who is 84 years old (the original defendant) has impugned the order dated 2nd September, 2014 passed by the learned Civil Judge, Senior Division, Nashik below Ex.287 allowing the application filed by the plaintiff under Order 6 Rule 17 of the Code of Civil Procedure, 1908 *inter alia* praying for impleadment of two of the parties and inclusion of some of the properties in a suit for partition.

2. Admittedly, the suit was filed in the year 2005. The written statement was filed by the defendants in the year 2006. The plaintiff had carried out amendment to the plaint twice i.e. once in the year 2008 and another on 1st February, 2011. The evidence of the plaintiff is closed.

3. Mr. Shah, learned counsel for the petitioners invited my attention to the application filed by the original plaintiff *inter alia* praying for amendment to the plaint and would submit that no details were furnished by the plaintiff as to why the amendment proposed in the application were not made out inspite of due diligence. He submits that at this stage, the learned trial judge was thus not justified in allowing the application for amendment though no case of due diligence was made by the original plaintiff. He submits that his client would not raise any issue of the non-joinder of necessary party or non-inclusion of the properties which were sought to be included by amendment in the application filed by the original plaintiff at the time of final hearing of the suit. Statement is accepted.

4. Learned counsel for the original plaintiff on the other hand submits that the application for amendment was made after demise of the original plaintiff and in view of the objection raised by the petitioner in the written statement. He placed reliance on the judgment of this court Bench at Aurangabad in case of ***Rajbahaddur Jiyaram Yadav vs. Prakash @ Pappu Jiyaram Yadav & Ors.*** in Writ Petition No.7029 of 2015 dated 29th July, 2015 and would submit that since the suit was for partition of the properties, no prejudice would be caused to the petitioners even if the amendment is permitted by the learned trial judge at this stage.

5. It is not in dispute that the suit was filed in the year 2005 *inter alia* praying for partition of the suit properties. Written statement was filed as far back as in the year 2006 by the petitioners. The evidence of

the respondent (original plaintiff) is already concluded. The original plaintiff was already granted two opportunities by the learned trial judge to carry out amendment to the plaint. By those amendments, the plaintiff was allowed to include several properties being the alleged properties of the joint family/ancestral properties.

6. A perusal of the application filed by the original plaintiff indicates that no case was made out for condoning the substantial delay in filing the application for carrying out amendment to the plaint for the third party after the evidence of the plaintiff came to be closed. Though by virtue of the amendment to Order 6 Rule 17 for application for amendment can be made even after commencement of trial, such application shall be allowed only if the party proves that inspite of due diligence, application could not be made earlier. In this case, no case was made out by the original plaintiff showing due diligence by the respondents for seeking amendment to the plaint. The judgment of this court in case of ***Rajbahaddur Jiaram Yadav*** (supra) relied upon by the learned counsel for the original plaintiff is thus clearly distinguishable in the facts of this case.

7. Be that as it may, the learned counsel for the petitioner states before this court that his client will not raise the issue of non-joinder of parties and for non-inclusion of properties which are sought to be included as ancestral properties. He submits that on the contrary the petitioners have strongly denied in the affidavit in reply filed to the application filed by the original plaintiff that those properties were ancestral properties and had contended that those were self acquired

properties. The statement made by the learned counsel for the petitioners is accepted.

8. In my view, the learned trial judge in these circumstances ought not to have allowed the application for amendment at this stage though no case was made out by the plaintiff. Impugned order dated 2nd September, 2014 is accordingly quashed and set aside. The application at Ex.287 is rejected. The parties are directed to proceed with the trial without any further delay.

9. Writ petition is allowed in the aforesaid terms. There shall be no order as to costs.

[R.D. DHANUKA, J.]