

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR.

WRIT PETITION NO.4659 OF 2017

Jaikishor s/o Brijkishor Jaiswal

... Petitioner

-VS-

**Ashok s/o Brijkishor Jaiswal
and ors.**

... Respondents.

Shri N. L. Jaiswal, Advocate for petitioner.

Shri S. R. Deshpande, Advocate for respondent No.1.

Shri Shyam Dewani, Advocate for respondent Nos.5 and 7.

Shri Tariq Zahir, Advocate for respondent No.14.

Shri R. O. Chhabra, Advocate for respondent No.15.

CORAM : A.S.CHANDURKAR, J.

DATE : April 17, 2018

P.C.

The petitioner who is the defendant No.6 in the suit for partition and separate possession filed by the respondent No.1 is aggrieved by the order passed by the trial Court permitting the plaintiff to amend the plaint. The suit in question was filed in September 2016. After the suit summons came to be issued the plaintiff moved an application under provisions of Order VI Rule 17 of the Code of Civil Procedure, 1908 (for short, the Code) on 17/01/2017 praying that the plaint be permitted to be amended. That application was allowed giving rise to present challenge.

2. It is submitted by the learned counsel for the petitioner that as the trial Court has issued suit summons it should have awaited service on all the defendants. However, before the defendants were duly served, the plaint has been permitted to be amended. There was no opportunity to oppose that amendment and hence the impugned order is liable to be set aside. The amendment in effect permits a time barred claim to be raised and therefore the trial Court had no jurisdiction to permit such amendment. The amendment also resulted in ousting the jurisdiction of the trial Court and in view of the decision in *Lalji Ranchhoddas vs. Narottam Ranchhoddas AIR 1953 Nagpur 273* such amendment could not have been allowed.

3. The learned counsel for the respondent No.1 supported the impugned order. According to him as the defendant No.6 was not served when the application for amendment was moved, no illegality was committed by the trial Court in permitting the amendment. Moreover, by said amendment certain properties and parties were added in the suit which was for partition and separate possession. The amendment having been sought at the initial stage, it was liable to be allowed.

The learned counsel for respondent Nos.5 and 7 supported the contentions as urged on behalf of respondent No.1.

4. Perused the impugned order. It is not in dispute that when the application for amendment was taken up for consideration the defendant No.6 was not served with the suit summons. The amendment as sought seeks to include some properties as well as addition of some defendants. Considering the fact that the suit has been filed for partition and separate possession, I do not find any error committed by the trial Court in permitting the amendment. There is no bar to allow such amendment prior to service of the suit summons.

5. The submission that the trial Court could not have allowed the amendment which has the effect of ousting its jurisdiction is urged by relying upon the decision in **Lalji Ranchhoddas** (supra) of the Nagpur High Court. The learned counsel for respondent No.1 has relied on the subsequent Division Bench judgment of this Court in **Benisham Mohanlal Khetan vs. Mahadeo Tukaram Borkar 1985 Mh.L.J. 397**. It has been held therein that such amendment can be allowed after which the plaint can be directed to be returned for presentation to the proper Court. The judgment of the Division Bench is binding on this Court. Moreover, by directing the course as prescribed by Order VII Rule 10 of the Code, no prejudice has been caused to the petitioner.

6. The application for amendment was moved shortly after filing of the

suit and before the suit summons were served on the defendant No.6. It is essentially a pre-trial amendment in a suit for partition and separate possession. Merely because the amendment was allowed prior to service of the suit summons on the defendant No.6, the same cannot be a ground to disallow the same.

In view of aforesaid, I do not find any reason to interfere in writ jurisdiction. By clarifying that it is open for the defendant No.6 to raise all permissible defences to oppose the suit as filed, the writ petition stands dismissed.

The *ad interim* order granted on 20/07/2017 shall continue to operate for a period of four weeks from today and shall cease to operate automatically thereafter.

JUDGE