

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO. 9061 OF 2019

Abdul Aziz Mohammad Nasir
Age : 61 years, Occu : Agriculture
r/o Pimparkhed Tq. Chalisgaon
District Jalgaon at present r/o
Madani Nagar Galli no.3, Tq.
Malegaon District Nashik.

... PETITIONER

VERSUS

- 1) Abbu s/o Budhan Shaikh
Age 19 years, Occu. Agri.
R/o Pimparkhed Tq. Chalisgaon
District Jalgaon.
- 2) Shaikh Ashraf Husain Akhtar
Husain, Age 34 years, Occu.Agri.
R/o Pimparkhed Tq. Chalisgaon
District Jalgaon.
- 3) Shaikh Javed Ashraf Husain
Age 39 years, Occu.Agri.
R/o Pimparkhed Tq. Chalisgaon
District Jalgaon.

... RESPONDENTS

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Advocate for the Petitioner : Shri R K. Jadhavar
Advocate for respondent Nos. 1 to 3 : Shri Paresh B.
Patil

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CORAM : RAVINDRA V. GHUGE, J.

DATED : 05th NOVEMBER, 2019.

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ORAL JUDGMENT :

1. Rule. Rule made returnable forthwith and heard finally by the consent of the parties.

2. On 26/07/2019, I had passed the following order :-

"1. The petitioner, who is the original plaintiff in RCS No. 138/2018, is aggrieved by the order dated 2.2.2019, by which the Trial Court has rejected Application Exhibit 39, filed by the petitioner in RCS No. 138/2018, seeking amendment.

2. The contention of the petitioner is that respondent No.1, original defendant No.1 Abdul s/o Budhan Shaikh was born on 20.02.2001 and not on 20.05.2000. Copy of the School Leaving Certificate has been obtained by the petitioner, indicating that, he was born on 20.2.2001 and therefore, was a minor when the sale-deed was executed by him. The said sale-deed therefore, is rendered invalid. As soon as the petitioner received the copy of the school record, he moved Exhibit 39 for seeking an amendment.

3. I find that the Trial Court has gone into

*the merits of the proposed amendment and concluded that Abu Budhan Shaikh is 18 years old and there is no reason to amend the complaint. The Honourable Apex Court has held in the matter of **Revajitu Builders & Developers versus Narayanswamy & Sons & others ((2009) 10 SCC 84)** that, discretion conferred to grant or refuse the amendment must be exercised judiciously and with great care. The Court must not refuse a legitimate and a necessary amendment.*

4. Issue notice to the respondents, returnable on 30.8.2019. Until then, the Trial Court would adjourn RCS No.138/2018.

5. Copies of the petition paper book shall be supplied on or before 2.8.2019, for issuance of notices, failing which, this petition shall stand dismissed, without reference to the Court on 3.8.2019."

3. Shri Patil, learned Advocate appearing on behalf of the respondents has strenuously opposed the petition. Contention is that the petition deserves to be dismissed with costs. No ground was raised in the plaint as regards defendant No.1 being born on 20/02/2001 or that he was a minor. The said ground is

now being raised as an after thought. If the said amendment is permitted, the nature of the cause of action would be altered. It is further submitted that no explanation is tendered in view of the proviso below Order VI Rule 17 of the Code of Civil Procedure as to why the petitioner could not seek an amendment at the earliest.

4. In the alternative, it is submitted that if this Court is inclined to entertain the petition, liberty may be granted to the defendants to file an additional written statement and oppose the amendment.

5. I find from the pleadings of the parties and the record available that the date of birth of defendant No. 1 Abdul is being disputed. The plaintiff now claims that Abdul was born on 20/02/2001 and was, therefore, a minor when the sale-deed was executed by him. Since the date of birth of Abdul would be a decisive factor *insofar* as the legality of the sale-deed is concerned, a litigant needs to be granted an opportunity to put forth the best evidence available.

6. Moreover, since the plaintiff claims that Abdul is born on 20/02/2001, the onus and burden would lie on the petitioner plaintiff to prove the said aspect. Unless the burden is discharged, it would not shift on to Abdul to prove that he was born on 20/05/2000. Read **Babu Vs. State of Kerala, (2010) 9 SCC 189 and Anil Rishi Vs. Garbaksh Singh, (2006) 5 SCC 558** on Reversal of Burden of Proof.

7. This amendment, upon being allowed, would not change the nature of the cause of action. It would only be a factor to be considered while assessing whether the sale-deed is legal or not.

8. In view of the above, this petition is partly allowed. The impugned order dated 02/02/2019 is quashed and set aside and application Exhibit 39 is partly allowed, Subject to costs of Rs. 6,000/-.

9. By the consent of the learned Advocate for the respondents, the said amount shall be donated for the

treatment of poor patients being admitted in the Government Hospital (Ghati) at Aurangabad.

10. The petitioner, shall, therefore, deposit the abovesaid amount of Rs. 6,000/- would be deposited with the Government Medical College and Hospital, Aurangabad, **through Medical Officer, High Court Dispensary, Aurangabad**, either in cash or by Demand Draft (Demand Draft be drawn in the name of **“Dean, Government Medical College and Hospital, Aurangabad Dengi Samiti”**), on or before 22/11/2019 and the copy of the receipt of such deposit shall be produced before the Trial Court in Regular Civil Suit No. 138/2018, on or before 30/11/2019. After the receipt is produced, the Trial Court would permit the petitioner to amend the plaint on or before 06/12/2019. A freshly typed copy of the amended plaint shall be filed on or before the same date.

11. The respondents would be at liberty to file an additional written statement to oppose the amended portion and the same shall be filed on or before 20/12/2019.

12. Rule is made partly absolute in the above terms.

(RAVINDRA V. GHUGE, J.)

shp/-