

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

WRIT PETITION NO.9693 OF 2018

**PRAMOD DATTATRAYA KSHIRE
VERSUS
MANDAR PRAKASH KSHIRE AND OTHERS**

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Advocate for the Petitioner : Shri A. S. Savale

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CORAM : RAVINDRA V. GHUGE, J.

DATED : 28th JANUARY, 2019.

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PER COURT :

1. The petitioner – original defendant is aggrieved by the order dated 06/06/2018 passed by the Trial Court, by which, the application Exhibit 105, filed by the plaintiff seeking amendment in RCS 281/2001, has been allowed. The plaintiffs are directed to furnish necessary court fees for the additional relief of partition claimed.

2. Contention of the petitioner is that the suit preferred by the plaintiff is purely for permanent and mandatory injunction and the declaration that the defendant should not resort to any construction on that portion of the suit property which has come to the share of the plaintiffs. It is further prayed that the

illegal construction made by him be demolished.

3. In this backdrop, it is contended that the amendment permitted by the Trial Court vide the impugned order would amount to allowing the plaintiffs to seek a declaration of their ownership with regard to the 1/3rd share in the suit property. Grievance is that the amendment granted is likely to change the nature of the litigation and such amendment is impermissible since all the ancestral properties have not been included in the suit property.

4. Reliance is placed upon the judgment of the Honourable Apex Court in the matter of *Kenchegowda Vs. Siddegowda alias Motegowda, (1994) 4 SCC 294* and the judgment delivered by this Court in *Rajbahaddur Jiyaram Yadav Vs. Prakash @ Pappu Jiyaram Yadav and others, 2016(2) Mah. L.J. 639*.

5. I find from the record that the petitioner – original defendant has filed a counter claim in the said suit clearly setting out that the defendant has a particular share in the suit

property. Such share came to him on account of a partition that took place many years ago. Several details of such partition have been mentioned and finally it is prayed that plot No. 14 claimed by the plaintiffs should be subjected to a declaration that they do not have 1/3rd share in the said property and accordingly an injunction may be granted. The record further reveals that the suit was earlier dismissed and the plaintiffs preferred Civil Appeal No. 23/2012 which was allowed partly and the Appellate Court remitted the suit to the Trial Court permitting the parties to lead fresh evidence.

6. The plaintiffs after realizing the grounds on which the Appellate Court had remanded the matter and upon assessing the claim made by the defendant in the counter claim with regard to their shares in the suit property, that application Exhibit 105 was moved for seeking amendment.

7. As such, I find that as they sought a declaration through the counter claim that the plaintiffs' share to the extent of 1/3rd share in the property should be negated, that the plaintiffs introduced the prayer for seeking a proper partition

of the said property. Hence, I do not find that the impugned order could be termed as being perverse unless failure of justice is caused in passing the said order.

8. The petitioner has raised one more ground as regards the issue of limitation contending that as the said suit property was already subjected to partition several years ago, the prayer put forth by the plaintiffs would be barred by limitation. This apprehension of the petitioner can be taken care of as an amendment to the plaint would grant this petitioner a right to file an additional written statement to oppose the amendment. While doing so, he can raise the issue of limitation which the Trial Court can consider as additional issues will have to be framed in view of such amendment.

9. As such, this petition is dismissed.

(RAVINDRA V. GHUGE, J.)

shp/-