

**FARAD CONTINUATION SHEET No.
IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH AT NAGPUR**

WRIT PETITION NO. 5046/2019

(RAJE SHIVRAJSINGH RAJE VIJAYSINGH BHONSLE **VERSUS** RAJE AMARSINGH RAJE VIJAYSINGH BHONSLE)

Office Notes, Office Memoranda of Coram,
appearances, Court's orders of directions
and Registrar's orders

Court's or Judge's orders

Shri Rohit Joshi, counsel for petitioner.
Shri S.C. Mehadia, counsel for respondent.

CORAM : A.S. CHANDURKAR, J.

DATE : OCTOBER 16, 2019.

The challenge raised in the present writ petition is to the order passed by the trial Court below Exhibit 67 allowing the application for amendment as moved by the respondent.

The respondent is the original plaintiff who has filed a suit for declaration that the partition-deed dated 29.09.1975 does not effect equal division of the properties mentioned therein. Relief is sought that the property be equally divided amongst the parties. The suit in question has been filed against the plaintiff's brother. In paragraph 6 of the plaint, there is an averment that the mother of the plaintiff had no right to bequeath the properties beyond her legal share. The defendant filed his written statement and in reply to paragraph 6 of the plaint averments, it was stated that Will dated 24.03.2005 was executed by the mother who was having good health. After the plaintiff filed his affidavit in lieu of evidence, he also moved an application seeking amendment in the plaint. By that amendment, he sought to raise a challenge to the Will dated 24.03.2005 and also sought addition of parties who were beneficiaries under the said Will. This amendment was opposed by

the defendant on the ground that it would change the nature of the suit and that the trial had in fact commenced. By the impugned order, the trial Court has allowed that application.

Shri Rohit Joshi, learned counsel for the petitioner submitted that there was absence of due diligence on the part of the plaintiff in seeking amendment to the plaint. He referred to the proceedings before the Tahsildar with regard to correction of mutation entries and submitted that based on the aforesaid Will, the Tahsildar has been moved for carrying out mutation entries in that regard. The plaintiff participated in those proceedings by filing reply and opposing that application. The said application was allowed by the Tahsildar on 20.01.2016. Despite that the application for amendment was moved belatedly only on 05.04.2018. He further submitted that in the application for amendment, these aspects were not referred to. The order passed by the Tahsildar indicated the fact that the Will was duly registered bearing No.1913. Its copy was placed on record. It was thus submitted that the prayer made by the plaintiff lacks *bona fides* and in view of suppression of these facts the amendment was not liable to be allowed. He referred to the decision in *S.P. Chengalvaraya Naidu (dead) by L.Rs Versus Jagannath (dead) by L.Rs & Others* [AIR 1994 SC 853]. According to him, the impugned order therefore was liable to be set aside.

Shri S.C. Mehadia, learned counsel for the respondent supported the impugned order. According to him, the plaintiff was not aware about the exact date of that Will and it was a fact that it was duly registered. Reference to the right of the mother to execute the Will was made in paragraph 6 of the plaint. Though the plaintiff had initially participated in the mutation proceedings before the Tahsildar, he had not remained present when the final

order was passed. Even in that order specific details of that Will were not mentioned. After applying for its certified copy on 30.03.2018 and after receiving the same, the application for amendment was moved immediately. Since the application was moved by the plaintiff at a stage when the affidavit in lieu of evidence was placed on record, no prejudice was caused to the defendant. The discretion having been exercised by the trial Court, the same did not call for any interference.

I have heard the learned counsel and I have perused the documents placed on record. In paragraph 6 of the plaint, there is a passing reference to the legal right of the plaintiff's mother of not having any right to bequeath suit property beyond her legal share. The relief sought in the suit is for a declaration that the partition-deed dated 29.09.1975 did not effect equitable partition. In the written statement it has been stated that such Will was executed on 24.03.2005. It is an admitted position that the copy of the Will was not placed on record of the trial Court by the defendant. In the mutation proceedings initiated by one of the beneficiaries under the said Will, the original plaintiff was not present when the final orders were passed therein. That order indicates the said Will being registered and having Registration No.1913. Except these details, the said order does not indicate the place where the Will was registered. Though according to the defendant a copy of said Will was placed on record in those proceedings, the fact remains that the said order dated 20.01.2016 itself records that the plaintiff was not present before the Tahsildar. Be that as it may, it is seen that the plaintiff applied for certified copy of that Will on 30.03.2018 and received the same on 04.04.2018. The application in question has been moved on 05.04.2018.

According to the defendant, it was incumbent upon the plaintiff to have averred about the orders passed in the mutation proceedings by the Tahsildar. It is found that firstly the plaintiff was not present when the order dated 20.01.2016 was passed nor was this order placed on record of the trial Court. Except for reference of the Will in that order, nothing much would turn insofar as the present application is concerned. The fact that the plaintiff applied for its copy and then sought amendment has weighed with the trial Court. In the aforesaid facts, it cannot be said that the trial Court exceeded its jurisdiction in allowing the application for amendment below Exhibit 67. Moreover considering the nature of the suit as filed and it being a contest between two brothers, the amendment as allowed in my view does not deserve to be disallowed. In that view of the matter, I do not find any reason to interfere in the writ jurisdiction.

The Writ Petition is dismissed. No costs.

Needless to state that the defendant is free to consequentially amend his written statement and raise all permissible defences that are available in law. The observations made in this order are only for considering the prayer for amendment.

Order accordingly.

JUDGE

APTE