

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

WRIT PETITION NO.1028 OF 2011

Baburao Zibal Wankhede and anr.

-vs-

Vitthal Maroti Wasade and anr.

Office notes, Office Memoranda of
Coram, appearances, Court's orders
or directions and Registrar's orders.

Court's or Judge's Orders.

Shri S. V. Sirpurkar, Advocate for petitioners.
Shri R. J. Kankale, Advocate for respondent No.1.
Respondent No.2 served.

CORAM : A. S. CHANDURKAR, J.

DATE : November 18, 2019

The challenge raised in the present writ petition is to the order passed by the trial Court below Exhibit-55 whereby the amendment application moved by the defendants has been allowed. As a result of that order the counter-claim filed by the defendants has been permitted to be amended.

2. The petitioners are the original plaintiffs who have filed a suit for permanent injunction seeking to restrain the defendants from obstructing their possession with regard to field Survey Nos.134 and 135. The defendants filed their written statement and also raised a counter-claim. In the counter-claim relief of declaration was sought that it be declared that the defendants are the owners of 0.44R land from Survey

No.134. The plaintiffs had thereafter filed their written statement to that counter-claim. After the issues were framed the defendants moved an application at Exhibit-55 seeking to amend their pleadings. As per that amendment a declaration was sought that the defendant No.1 and his legal heirs were the owners of 2/3rd share in both the suit fields. This amendment was opposed by the plaintiffs on the ground that the relief sought was barred by limitation and that the same was not liable to be allowed. By the impugned order the trial Court has allowed the amendment by observing that the question of limitation could be kept open by framing an issue in that regard.

3. Shri S. V. Sirpurkar, learned counsel for the petitioners submitted that as the issues had been framed by the trial Court and written statement to the counter-claim had been filed on 08/12/2009, the application at Exhibit-55 had been moved belatedly without any justifiable reason. Though initially relief was sought with regard to O.44R land from Survey No.134, the nature of dispute was being changed by seeking relief in respect of both the lands. By the amendment a declaration was sought that the defendants have 2/3rd right in the suit field. He also submitted that the amendment sought was time barred and the

sale-deeds in favour of the plaintiffs had not been challenged. On these counts the amendment was not liable to be allowed.

4. Shri R. J. Kankale, learned counsel for the respondents supported the impugned order. According to him the trial had not commenced and no prejudice would be caused to the plaintiffs in view of the fact that the question of limitation raised by the plaintiffs had been kept open. According to him the amendment was not liable to be refused only on the ground of bar of limitation and that aspect was required to be considered after the evidence is recorded. He relied upon the decision in *M/s N. C. Banerjee and Company vs. Manoj Balkrishna Shah and ors.* 2011 (5) ALL MR 252 in that regard.

5. I have heard the learned counsel for the parties and I have perused the respective pleadings. The suit as filed is for perpetual injunction. In the counter-claim filed the defendants initially sought relief with regard to 0.44R land from Survey No.134. The application for amendment was moved after the issues were framed. The amendment sought is for declaration that the defendants have 2/3rd share in the suit property. The question as to whether the relief sought by virtue of amendment

was barred by limitation or not has been kept open by the trial Court by observing that an issue in that regard can be framed. Thus at this stage by permitting the amendment to be brought on record no prejudice is caused to the original plaintiffs. The nature of the suit has not undergone any change especially when initially in the counter-claim relief was sought for part of land and now it has been sought for both the lands. The observations in the decision of *M/s N. C. Banerjee and Company* (supra) relied upon by the learned counsel for the respondents support his contentions. As the question of limitation has been kept open I do not find any reason to interfere with the impugned order. In that view of the matter if the plaintiffs consequentially raise a plea that the relief sought by virtue of the amended pleadings is barred by limitation, the trial Court shall frame an issue in that regard. Keeping all points open, the writ petition is dismissed. The proceedings in the suit are expedited.

Rule stands discharged with no order as to costs.

JUDGE