

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD
WRIT PETITION NO. 3631 OF 2018

Balkrishna s/o Somnath Lahoti
age 55 years, Occ. Agril. & Business
R/o Subhash Chowk, Nandurbar,
Dist. Nandurbar

Petitioner

Versus

1. Sau. Kusum Vishnudas Baheti
R/o C/o Dr. Vishnudas Baheti
Prathmik Rogya Kendra, Adavad
Taluka Chopada, Dist. Jalgaon.
2. Ratilal s/o Somnath Lahoti
(Deceased through Lrs)
 - 2A Shashi s/o Ratilal Lahoti
(Deceased through Lrs)
 - 2AI Smt. Ekta w/o Shashi Lahoti
Age 39 years, occ. Household
R/o Koparli, Tq. & Dsit. Nandurbar
 - 2AII Govind S/o Shashi Lahoti
Age 19 years, occ. Education
R/o as above.
 - 2AIII Mahesh s/o Shashi Lahoti
Age 17 years, occ. Education
R/o as above.
 - 2B Sou. Vidhya Dinesh Baheti
age 38 years, Occ. Computer
R/o Murtijapur, Dist. Akola
 - 2C Sou. Sunita Pavin Karwa
Age 30 years, occ. Household
R/o Jawahar Gate, Dist. Amravati
 - 2D Sou. Shobha Gaurav Dangara

Age 28 years, Occ. Household
R/o Katol, Dist. Nagpur

3. Suresh s/o Somnath Lahoti
Age 51 years, occ. Agril & Business
R/o as above.
4. Rajendra S/o Somnath Lahoti
Occ. Agril & Business
R/o as above.
5. Sau Pushpa Vijaykumar Gandhi
Occ. Household
R/o C/o Vithaldas Gandhi
Thandipawani, Tq.Narkhed
Dist. Nagpur.
6. Sau. Chitra Pravinkumar Mal
Occ. Household
R/o C/o Pravinkumar Mal
Jarato, Tq. Abdasa
Dist. Kachhabhuj 370640
7. Ashishkumar s/o Balkrishna Lahoti
Occ. Education
R/o Subhash Chowk, Nandurbar
Tq. & Dist. Nandurbar
8. Sharda Balkrishna Lahoti
(Deceased through Lrs)
 - 8A Balkrishna Somnath Lahoti
(the petitioner hereinabove)
 - 8B Ashishkumar Balkrishna Lahoti
(respondent No. 7 hereinabove)
 - 8C Vrushali Balkrishna Lahoit
R/o Subhash Chowk, Nandurbar
Tq. & Dist. Nandurbar.
9. Ritaben Surendra Lahoti

Occ. Household
R/o Vidhyavihar Colony, Koritroad
Near Railway Station, Nandurbar
District Nandurbar.

Respondents

Mr. Aditya Sikchi, Advocate holding for Mr. S.R. Shah, Advocate for the petitioner.

Mr. R.S. Wani, Advocate for respondent No. 1.

CORAM : M.G. SEWLIKAR, J.

DATE : 2nd August, 2021.

ORAL JUDGMENT :

1. Rule. Rule made returnable forthwith.
2. By consent of the parties, heard finally at admission stage.
3. Respondent No. 1, who is the original plaintiff, filed Special Civil Suit No. 10/1997 for partition and separate possession of the properties City Survey No. 2954/1 B admeasuring 94.81 Sq. Mtrs., City Survey No. 763/8/2 admeasuring 0.9 Sq. Mtrs., City Survey No. 769/2 admeasuring 5.3 Sq. Mtrs. And City Survey No. 2975 admeasuring 12300 Sq. Mtrs. It is contended that all these properties are the ancestral properties of plaintiff (respondent No. 1 herein) and respondents No. 1 to 9. Petitioner and respondents No. 1 to 9 are the brothers.

4. Petitioner filed written statement in the record of the trial Court in which petitioner denied that all the properties are the ancestral properties. He contended that some properties out of the suit properties are self-acquired properties of petitioner. This written statement was filed on 9th July, 1997.

5. Petitioner (original defendant No. 2) filed application seeking amendment at Exhibit 270 on the record of the trial Court contending therein that suit property Survey No. 769/2 admeasuring 9 Sq. Mtrs., City Survey No. 769/2 admeasuring 85.3 Sq. Mtrs., Gat No.189 admesuring 6 H 20 Ares and Gat No. 169 admesuring 9 H 27 Ares are the properties bequeathed to him by his father late Somnath Lahoti. It is further contended in the application Exhibit 270 that Gat Nos. 32/1, 32/2, 32/3 were owned by Balkrishna Somnath Lahoti. However, in consolidation these properties came to be recorded in the name of Ratilal Somnath Lahoti- deceased defendant No. 1. Said Ratilal sold these properties during his lifetime. It is further contended that Gat No. 33 situated at village Amalde was a joint family property in which petitioner (defendant No. 2) had undivided share. This land has also been sold by deceased respondent No.2. He, therefore, prayed for deleting these properties

from the suit.

6. Plaintiff filed his say to the application at Exhibit 272 in the record of the trial Court. He denied all the contentions made in the application for amendment. It was contended in the say that respondent No. 1 (plaintiff) has tendered affidavit in lieu of examination-in-chief. To avoid cross-examination of plaintiff, the petitioner has filed this application for amendment with malafide intention of stalling the progress of the suit. He, therefore, prayed for rejection of the application.

7. Learned trial Court, after hearing all the parties, dismissed the application holding that trial of the suit has commenced as plaintiff (respondent No. 1) filed affidavit in lieu of examination-in-chief. Learned trial Court, therefore, rejected the application for amendment vide order dated 26th September, 2017. This order is impugned in this writ petition.

8. Shri Sikchi, learned counsel for the petitioner submitted that amended proviso to Order VI Rule 17 of the Code of Civil Procedure is not applicable to the suits which were instituted before

this proviso was brought on the Statute book. He submitted that the proviso of Order VI Rule 17 of the Code of Civil Procedure came on the Statute book in the year 2002 whereas the present suit was filed in the year 1997. Therefore, this proviso cannot be made applicable to the pending suit. For this he placed reliance on the case of Sumita Pradipkumar Dixit vs. Pushpadevi G. Makharia and others reported in **2011(3) Mh.L.J. 755**. He further submitted that petitioner has already taken a defence in the written statement that some of the properties are ancestral properties and some properties are self-acquired properties. He submitted that the amendment which he has sought is explanatory in nature. He is only amplifying the plea which he has already raised in the written statement. Therefore, nothing new is being brought on record nor it will amount to change of defence. He further submitted that so far as amendment as regards the properties are concerned, there is reference in the plaint. Therefore, this will not amount to change in defence of defendant No. 2-petitioner herein. He further submitted that the amendment as regards Gat No. 33 is concerned, he is doing the job of plaintiff. Instead of consenting to the amendment, plaintiff is opposing the amendment. He placed reliance on the cases of B.K. Narayana Pillai vs. Paramesharan Pillai and another reported in **(2000) 1 Supreme**

Court Cases 712, Sampath Kumar vs. Ayyakannu and another reported in (2002) 7 Supreme Court Cases 559, Baldev Singh and others vs. Manohar Singh and another reported in (2006) 6 Supreme Court Cases 498.

9. Shri Wani, learned counsel for respondent No. 1 vehemently opposed the application for amendment contending that petitioner No. 1 committed inordinate delay in preferring the application for amendment. He submitted that the suit was filed in the year 1997 and amendment application came to be filed in the year 2017 i.e. after lapse of 20 years. This humongous delay of 20 years itself is sufficient to reject the application for amendment. He further submitted that Somnath Lahoti – father of petitioner and respondents, died in the year 1984. Petitioner was well aware of existence of will. Still in the written statement, he did not raise this plea. He has raised this plea after lapse of 20 years for which no explanation is forthcoming. He further submitted that petitioner has admitted that this property was ancestral property and in the later part of the written statement he has specifically stated that the property Gat No. 2975 is self-acquired property. Therefore, this clearly shows that he wants to withdraw the admission, which is not

permissible. He further submitted that so far as amendment as regards other properties is concerned, it was completely unnecessary as reference of it has already come in the plaint. Therefore, just to prolong the suit, the petitioner has filed this amendment application. Amendment application lacks necessary details. It only says that the property was sold by the deceased defendant No. 1. No details as regards date and name of purchaser are given. Therefore, he prayed for rejection of the application. He placed reliance on the cases of Shrimoni Gurudwara Committee vs. Jaswant Singh reported in (1996) 11 Supreme Court Cases 690, Heeralal vs. Kalyan Mal and others reported in (1998) 1 Supreme Court Cases 278, Vidyabai and others vs. Padmalatha and another reported in (2009)2 Supreme Court Cases 409 and Sai Shradha Developers, Sangamner vs. Ravindra Ganpatrao Bharitkar and others reported in 2012(6) Mh.L.J. 348.

10. So far as amendment as regards will is concerned, defendant has contended that Survey No. 769/2, Gat No. 189, Gat No. 188 have been bequeathed to him by his father by executing will. Question that arises is whether by this amendment, petitioner wants

to withdraw any admission made in the written statement. It was contended that petitioner has admitted in the written statement that these properties are ancestral properties. Petitioner has nowhere admitted that suit properties are ancestral properties. In the written statement, the petitioner has contended that some of the properties are ancestral and some are self-acquired properties. This does not amount to admission that suit properties are ancestral properties. By this amendment, petitioner is simply clarifying that these properties are self-acquired properties as they were bequeathed to him by will executed by his father. If the defendant is amplifying the plea already raised, it will not amount to withdrawal of admission. Petitioner has nowhere admitted in the written statement that these properties are ancestral properties. Therefore, the question of withdrawal of admission will not arise.

11. The second part of application for amendment is as regards the properties Gat No. 32/1, 32/2, 32/3. Petitioner has contended that these properties were sold by Balkrushna Lahoti. If the averments in the plaint are perused, it is explicit that respondent No. 1 has also contended that these properties were sold by petitioner. Therefore, petitioner is not bringing any new fact on the

record. Petitioner is also seeking amendment as regards suit property Gat No. 33. Petitioner has contended in the amendment application that Gat No. 33 has been sold by deceased respondent No. 2. It is true that to whom this property is sold is not clear from the amendment. However, this being the subsequent event which has happened during the pendency of the suit and for avoiding multiplicity of proceedings, it will be in the interest of both the parties to allow amendment in this respect.

12. Learned counsel Shri Wani submitted that respondent No. 1 has filed affidavit in lieu of examination-in-chief in the trial Court. Therefore, trial has begun and in terms of proviso to Order VI Rule 17 of the Code of Civil Procedure, amendment is not permissible unless petitioner proves that inspite of due diligence he could not bring these facts on record at the time of filing of the written statement. He submitted that application for amendment is conspicuously silent about this aspect of the matter. He submitted that therefore, this amendment deserves to be rejected on this ground alone.

13. This submission, I am afraid, cannot be accepted. In the

case of Sumita Pradipkumar Dixit (supra), relying on the Supreme Court judgments in the matter of State of Hyderabad vs. Town Municipal Council reported in (2007) 1 SCC 765 and Sumesh Singh vs. Phoolan Devi and others reported in 2009(12) SCC 689, this Court held that proviso to Order VI Rule 17 of the Code of Civil Procedure does not apply to the proceedings which were instituted prior to enforcement of proviso to Order VI Rule 17. It has been observed thus :

“16. In my considered view the narrow interpretation as sought to be placed by the learned counsel for the respondents on the provisions of section 16 that only the pleadings are saved from the amended provisions of Order 6, Rule 17, would not be in tune with the principles of interpretation and intention of the legislature. As has been discussed hereinabove since what is saved under clause (b) is “without prejudice to the generality of the provisions of Section 6 of General Clauses Act, 1897”, what has been stated in clause (b) will have to be construed as only illustrative and it cannot be construed in a manner which will restrict the width of what has been generally saved under clause 6 of the General Clauses Act, 1897. As has been held by the Apex Court, rights and the liabilities of the parties would be crystalised on the date of institution of the suit and as such in view of provisions of Section 6 of General Clauses Act and specifically clause (c) thereof, the pending proceedings would be saved unless the Legislature specifically intends otherwise. In my considered view upon harmonious construction of Section 16 of Amendment Act, 2002 with Section 6 of the General Clauses Act, it cannot be said that the legislature has intended to give a narrow meaning to save only pleadings and not the proceedings. As held by the Apex Court in the case of Ambalal Sarabhai

Enterprises Ltd., (supra) it will have to be held that pending proceedings on the date on which Amending Act came into effect are to be continued as if the Statute has not been repelled.

17. Insofar as the judgments of the learned Single Judges of this Court on which the learned counsel places reliance are concerned the same do not take into consideration the words “without prejudice to the generality of provisions of Section 6 of the General Clauses Act, 1897” and also judgment of the Apex Court in the cases of State of Hyderabad and Someshsingh (supra) and therefore will have to be held as not lying down correct position of law.

18. Insofar as the judgment of the learned Single Judge of this Court in the case of Badrinarayan Bansilal Somani (supra) is concerned, the same would not be applicable to the facts in the present case inasmuch as in the said case written statement in fact was filed prior to 1-7-2002.

19. Insofar as various cases of the Apex Court on which the learned counsel for the respondent relies are concerned, there can be no quarrel that when the words used in the Statute are capable of giving their meaning by strict or liberal interpretation no other principle of interpretation is to be adopted. However, as already discussed hereinabove the harmonious construction of Section 16 of the Amendment Act read with Section 6 of the General Clauses Act, 1897, would clearly make out the intention of the Legislature that amended provisions are not intended to be made applicable to the suits filed prior to 1-7-2002.

20. Considering the merits of the matter, it can be seen that apart from rejecting the application on the ground of applicability of provisions of Order 6 Rule 17 of Civil Procedure Code, the learned Judge has found that the amendment was not necessary inasmuch as the averments which are sought to be put on record were already raised in the written statement.

From these observations, it is clear that amendment made by the Code of Civil Procedure (Amendment Act, 2002) shall apply only in respect of suits which were filed thereafter. In the case at hand, suit was filed in the year 1997. This clearly shows that suit was filed prior to enforcement of Amendment Act, 2002. Therefore, the question whether amendment application can be permitted after trial begins does not arise.

14. So far as delay is concerned, learned counsel Shri Wani placed reliance on the case of Shrimoni Gurdwara Committee (supra). In this case, amendment application was moved by the defendant after the parties had adduced evidence and the matter was to be argued. In the case at hand, this is not the factual situation. Delay cannot be measured on the basis of the years that have passed after institution of the suit but it is to be measured in terms of the stage of the suit. In the case of Sampath Kumar (supra) same question had fallen for consideration before the Honourable Supreme Court. The Honourable Supreme Court has observed thus :-

“9. Order 6 Rule 17 CPC confers jurisdiction on the court to allow either party to alter or amend his pleadings at any stage of the proceedings and on such terms as may be just. Such amendments as are directed towards putting forth and seeking determination of the real questions in controversy

between the parties shall be permitted to be made. The question of delay in moving an application for amendment should be decided not by calculating the period from the date of institution of the suit but by reference to the stage to which the hearing in the suit has proceeded. Pre-trial amendments are allowed more liberally than those which are sought to be made after the commencement of the trial or after conclusion thereof. In the former case generally it can be assumed that the defendant is not prejudiced because he will have full opportunity of meeting the case of the plaintiff as amended. In the latter cases the question of prejudice to the opposite party may arise and that shall have to be answered by reference to the facts and circumstances of each individual case. No straitjacket formula can be laid down. The fact remains that a mere delay cannot be a ground for refusing a prayer for amendment.”

From these observations of the Honourable Supreme Court, it is clear that mere delay cannot be a ground for refusing prayer of amendment. In the case at hand, respondent No. 1 has to share some portion of the blame for the delay. The suit was filed in the year 1997. Written statement was filed on 9th July, 1997. Issues were framed. Affidavit in lieu of examination-in-chief was tendered on 23rd September, 2008. Respondent No. 1 did not adduce any evidence nor she offered herself for cross-examination as a result of which, the suit came to be dismissed on 29th July, 2011. It came to be restored on 10th June, 2016 and application for amendment was filed on 9th March, 2017. This clearly shows that the suit has not

progressed much. In this view of the matter, it does not lie in the mouth of respondent No. 1 to say that amendment application is filed after inordinate delay when she herself is responsible for the slow progress of the suit. The suit was not on the file of the Court for a period of five years. In this view of the matter, this submission of learned counsel Shri Wani cannot be countenanced.

15. In view of above, it is clear that the learned trial Court misguided itself while rejecting the application for amendment. Order of the learned trial Court, therefore, cannot be sustained. Writ petition accordingly stands disposed of with no order as to costs. The impugned order is set aside. Amendment application Exhibit 270 is allowed. Rule made absolute in above terms.

(M. G. SEWLIKAR)
Judge

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