

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 13593 OF 2018

Mrs.Urmila Vilas More and Ors. .. Petitioners

Versus

Hanmant Maruti Pawar and Anr. .. Respondents

...

Mr.Dhananjayrao Rananaware for the Petitioners.

Mr.Nikhil Wadikar i/b Mr.Nandu V. Pawar for Respondent No.1

...

CORAM: BHARATI DANGRE, J.

DATED : 05th OCTOBER, 2021

P.C:-

1. The Petitioners, the original plaintiffs, have instituted the present Writ Petition, being aggrieved by the two orders passed in the Regular Civil Appeal No.261 of 2010; being orders below Exhs.61 and 65.

By the former, the application for amendment of plaint under Order 6 Rule 17 of the C.P.C. has been rejected whereas by the latter, the application for production of documents under Order 41 Rule 27 of the C.P.C. has been rejected by the learned District Judge-2, Satara. The common thread which runs through both the orders, which is manifest is that the suit, which is filed by the plaintiffs has already reached finality by judgment and order dated 15/09/2010.

2. In the wake of the contest, being settled by rejection of the suit and the Appeal being instituted, it is incumbent upon the applicant to satisfy the ingredients of Order 41 Rule 27

before he seeks the concerned documents being brought on record on the basis of which, he also seeks the amendment at the stage of Appeal. As far as Order 41 Rule 27 is concerned, it is an accepted position that the parties to an appeal can be allowed to produce additional evidence in the Appellate Court, subject to the rigours set out in Rule 27 which contemplate two contingencies; (a) the Court from whose decree the appeal is preferred has refused to admit evidence, which ought to have been admitted or, (b) the party seeking to produce additional evidence, establishes that notwithstanding the exercise of due diligence, such evidence was not within his knowledge or could not, after the exercise of due diligence, be within his knowledge or could not be produced by him at the time when the decree appealed against was passed. Another contingency contemplated is, when the Appellate Court deem it fit to allow such an evidence to be brought on record.

The amendment which is sought to be introduced at appellate stage by invoking Order 6 Rule 17 is sought on the ground that amendment can be sought for at any stage of proceedings and the Appeal is continuation of suit.

3. In the wake of the said submissions, I have perused the record. The plaintiffs filed a suit seeking declaration that the properties mentioned in the plaint, being property located at Gat No.172/1, Survey No.676(old), New Survey No.1002 admeasuring 1 H. 36 R. situated at Koregaon belongs to the plaintiffs, being purchased from Dinkar Maruti Pawar on 18/04/1986 and the plaintiffs are his daughters, and the defendants shall be restrained from interfering with the

peaceful enjoyment of the suit property. The defendant is the step-brother of the plaintiffs and the reliance is placed on a Partition/Understanding Deed created between Dinkar Maruti Pawar and his cousin brother, but which was not to be acted upon. The defendants filed their written statement denying the claim staked by the plaintiffs. Resultantly, the learned Civil Judge, Junior Division, Koregaon, settled the issues under contest. While deliberating on the issues settled, being (a) whether the plaintiffs prove that they are the owners and are in possession of the suit property and, (b) whether the memorandum of understanding executed on 23/02/1954 is only executed for name sake, learned Judge considered the genealogy and recorded the relevant facts pertaining to the inheritance of the plaintiffs from Janabai, the second wife of Dinkar, who expired on 28/12/1989, whereas the defendant Hanmant is the son of Maruti Pawar and his second wife, Kamlabai.

The plaintiffs are the descendants of Maruti from his wife, Rakhmabai, whose son is Dinkar Maruti. On dealing with the document of partition dated 23/02/1954, the Court returned a finding that plaintiff No.1 was born after the execution of the alleged document and she could not establish the execution of the document, during the suit proceedings. Further, in absence of any evidence being brought on record to establish that the plaintiffs had purchased the property on 18/04/1986 from Dinakar Maruti for consideration of Rs.25,000/-, is also recorded to be not proved and, therefore, the claim that the plaintiffs were enjoying the property in exclusivity, is not believed. The finding recorded is that there

was no partition effected between Dinkar Maruti Pawar and Hanmant Maruti Pawar and the property continued as a joint property and since, the plaintiffs have failed to establish exclusivity against the suit property by the alleged sale deed, the conclusion drawn is that the right over the suit property is not established by the plaintiffs to the exclusion of the defendants. Resultantly, there is refusal to show any indulgence and the suit came to be dismissed. Aggrieved by the said judgment, an Appeal is instituted and at the stage of final hearing of the Appeal, an application for amendment has been moved.

4. It would be necessary to refer to the contents of the said application. By the proposed amendment, the plaintiffs claim that the mother of the defendant Kamlabai has purchased the agricultural land in her name on 16/02/1943 and after her demise on 07/09/1995, Hanmant's (defendant) name was mutated in the land record. What is sought to be brought on record, by way of amendment, is the sale deed dated 11/05/2010 by which the defendant sold the said land to one Dattu Indalkar for consideration of Rs.7,15,000/- and it is alleged that he is presently in the possession of the same. By way of amendment, the subsequent events of sale deed being executed by the defendant on 11/05/2010 has been sought to be brought on record with a necessary consequence, to allege that Kamlabai had no independent source of income and whatever land she had purchased was from the money parted to her by deceased Maruti Pawar, but the defendants had intentionally kept mum on the said aspect of the matter.

5. This amendment is the bone of contention between the parties and the impugned order is passed on the said application.

The learned Judge has specifically recorded the respective contentions and though he makes a reference to Order 2 Rule 2 and record a finding that since the plaintiffs omitted to sue in respect of the said portion of land, they cannot stake a claim about the same at this stage, in my considered opinion, the said reasoning may not be of much relevance. However, the second reasoning and the finding rendered by the learned Judge to the effect that the amendment will have no bearing on the original suit, according to me, is an appropriate reason for rejecting the application for amendment. As far as the suit property is concerned, it is described as land located in Gat No.172/1 whereas the sale deed which is sought to be brought on record is in respect of Survey No.516/2, which is not the subject matter of the original suit. It is not the case of the plaintiffs that the property in the suit has some bearing to the property which has been sold by way of the sale deed executed in May 2010 by the defendant except to demonstrate that the memorandum of understanding, which was entered into between the parties, has a relevance, since it is the property, which is inherited by the defendant from his mother Kamlabai, who had no source of income and necessarily an inference has to be drawn that the nucleus of the suit property came from the earnings of deceased Maruti. This is merely an inference and the subsequent sale deed of some other property, being brought on record will not have any impact on the suit in which the issues

as regards the property, which was claimed by the plaintiff to be of their ownership on the basis of the sale deed executed in the year 1986 and, therefore, the learned Judge has rightly rejected the application vide Exh.61.

6. As far as challenge to Exh.65 is concerned, as the rigours in Order 41 Rule 27 are not made out, the learned Judge has rightly rejected the said application. The provisions of Order 41 Rule 27 are not designed to help parties to patch up the weak points and make up the omissions earlier made. The jurisdiction of the appellate court is restricted to permit such additional evidence as would enable it to pronounce the judgment. However, the evidence which is sought to be brought on record after a long time gap, by seeking permission to produce additional evidence, will not be permitted after the suit itself is decreed. The Court exercising the appellate power must be conscious in allowing such an application to produce additional evidence when the suit of the plaintiffs was already rejected a decade back.

7. On perusal of the said order, I do not find any legal lacuna and necessarily it will have to be upheld. The writ petition deserves a rejection and is accordingly rejected.

(SMT. BHARATI DANGRE, J.)