

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.1298 OF 2020

Dnynoba Narayan Dhore (since deceased)

through LRs and Ors.

.. Petitioners

Versus

Smt.Champabai Deoji Dhore (since deceased)

through LRs

.. Respondents

...

Mr.Prathamesh Bhargude with Mr.Sumit Sonare i/b
Mr.Ajinkya Udane and for the Petitioners.

Mr.Prafulla Shah with Mr.K.P.Shah i/b Mr.Gunjan Shah for the
Respondent Nos.1A to 1C.

...

CORAM: BHARATI DANGRE, J.

DATED : 08th DECEMBER, 2021

JUDGMENT :-

1. Rule. Rule made returnable forthwith. By consent of parties, the petition is heard finally.

2. The petition is filed by the original defendants, who are aggrieved and dissatisfied by the judgment and order passed by the Ad-hoc District Judge-8, Pune on 10/01/2020 below Exh.33, under which the Appeal filed by the plaintiff is allowed and the order passed by the trial Court in Misc.Civil Application No.95 of 2012 is set aside.

3. The genesis of the dispute lie in a property situated at Sangvi, Tal.Haveli, Dist. Pune. The plaintiffs filed Regular Civil Suit No.60 of 1988 in the Court Civil Judge, Senior Division, Pune against the defendants, for permanent injunction and for restraining the defendants from selling the suit property, which was claimed to be the ancestral property.

During the pendency of the suit, on 25/07/2012, an application was filed under Order 6 Rule 17 of the CPC in which it was pleaded that the suit property is a joint family property and the plaintiffs and the defendants have equal share therein, as there is no separate partition effected. But, since the defendants were in an attempt to dispose of the property, so as to deprive the plaintiffs of their share, the plaintiffs sought the following amendment in the pleading;

“That plaintiff has got ½ share in the suit property mentioned in Schedule-I in Para No.5 of the suit property. There is no separate partition between the plaintiff and defendant. Therefore, the plaintiff share be separated from the defendant”

Accordingly the prayer clause was also sought to be amended by inserting the following,

“The ½ share of the plaintiff be separated from the defendants and defendants may kindly directed to demarked the suit property and to hand over the possession of the same to the plaintiff and if the fail to do so this Hon’ble court may be please to appoint Commissioner to demarked the property and handover the ½ share and possession of the same be directed to give to the plaintiff.”

4. The defendants opposed the amendment on the ground that it is hopelessly time barred under the provisions of the Limitation Act, since the suit for partition ought to have been brought within 12 years from the date of violation of plaintiffs' alleged $\frac{1}{2}$ share in the suit property. It was pleaded that the nature of the suit will undergo a change and the defendants will suffer irreparable loss, which cannot be compensated in terms of money. It was prayed that the application be rejected.

5. The 7th Joint Civil Judge, J.D., Pune, by order dated 03/09/2012, allowed the application by recording that the suit is filed for perpetual injunction and by way of amendment, plaintiff seek to insert a prayer for partition and since, admittedly the property is joint family property, the amendment deserve to be allowed, in order to avoid multiplicity of the proceedings and the proposed amendment do not change the real controversy between the parties.

6. Being aggrieved by the said order, Miscellaneous Civil Application No.95 of 2012 was filed by the defendants, by invoking Section 114 of the CPC in form of power of review. It was pleaded that the amendment was allowed after 24 years of filing of the suit and it ought to have been rejected and if at all the amendment of the pleadings is to be allowed, then the amendment ought to have been deemed to be incorporated on the day of bringing the application, thus keeping the right of the defendants to challenge the suit on the ground of limitation.

On 03/10/2013, the learned Judge allowed the review application, which resultantly amounted to rejection of the amendment. While exercising the power of review, the learned Judge found support in the decision of the Hon'ble Supreme Court in case of *Pirgonda Hongonda Patil Vs.Kalgonda Shidgonda Patil & Ors.*¹ wherein the proposition of law had been laid to the effect that when the application is filed seeking an amendment, if the fresh suit on the amended plaint is barred by limitation, the amendment must be rejected. Another decision in case of *Sampath Kumar Vs.Ayyakannu & Anr.*² was also relied upon.

In the wake of the aforesaid decisions, the learned Judge has recorded as under :-

"11. As per Order 6 Rule 17 of CPC application for amendment may be allowed to decide the real controversy between the parties. In this case the trial has not been commenced. Admittedly this suit for permanent injunction filed in the year 1988 and after 24 years, plaintiff wants to add prayer of partition. As per the citation filed above the base is required to be seen that if plaintiff filed fresh suit for the prayer made in exh.71 whether such suit will be in the limitation or not. By perusing the plaint and other documents the plaintiff knows he has share in the said suit property. Therefore, at this stage this prayer is made after 24 years. It means it is after 20 years. This application is filed for amendment at belated stage. This practice is required to be curtailed. Hence it is required to be review the order passed by this Court, as it was not passed after hearing both the sides."

1 AIR 1957 SC 363

2 AIR 2002 SC 3369

7. Being aggrieved by the decision of the trial court reviewing its earlier order, the plaintiffs instituted Miscellaneous Civil Appeal before the District Judge, Pune by urging that the review has been entertained unnecessarily and since the pleading qua the partition, which was sought by way of amendment, already form the core of the plaint seeking a suit for perpetual injunction, the amendment was rightly allowed at the first instance by the trial court.

8. The learned District Judge, Pune, on consideration of the Appeal, determined the point for consideration, as to whether the Defendants have made out any ground for review of the order passed below Exh.71 in R.C.S.No.60/1988 and whether the trial court has committed an error in allowing the Miscellaneous Civil Application.

The aforesaid point came to be determined by referring to provisions of Section 114 and Order XLVII Rule 1 of the CPC, which relate to the power of review of the judgment/order, recording that any person feeling aggrieved by a decree or order for which Appeal is permitted, but no Appeal has been preferred, an application for review can be filed, but where there is no provision of Appeal against any decree or order, a review can be entertained. Further, it is also held that, restricting scope of review only to the cases where there is discovery of new and important matter of evidence, which after due diligence was not within the knowledge of the party when the decree was passed, review can be entertained.

In light of the aforesaid settled principle, the Appellate Court determined as to on what ground, the review was permitted.

Since, the review was sought on two grounds; being (a) amendment sought by the plaintiffs was hopelessly time barred and, (b) the learned trial court has passed order below Exh.71, without giving an opportunity of hearing, the learned District Judge, on scrutinising the record, noted that as far as Exh.71 is concerned, it was contested by the defendants by filing their say at Exh.73, but at the time when the application was argued, they remained absent, which prompted the Court to pass an ex-parte order, meaning thereby that an opportunity was offered, but it was not availed by the defendants and, therefore, the review could not have been allowed on the said point. Further, recording that the power of review is limited in its scope, which could be exercised only on existence of ground which are covered by Section 114 and/or Rule 1 of Order XLVII of the CPC, appreciating the settled legal position that the review proceedings are not the proceedings of an Appeal and must strictly confined in its scope and since the application did not satisfy the conditions set out in Order XLVII Rule 1 and there being no error apparent on the face of record in passing the order below Exh.71, the application was found to be wrongly entertained. Necessarily, the Appeal came to be allowed and the order passed by the trial court in review i.e. in Miscellaneous Civil Application No.95 of 2012 was set aside and the order passed below Exh.71, allowing the amendment, stood restored.

9. In the backdrop of the aforesaid facts, I have heard learned counsel Mr.Prathamesh Bhargude alongwith Mr.Ajinkya Udane for the petitioners and Mr.Gunjan Shah alongwith Mr.K.P.Shah for the respondents Nos.1A to 1C.

The short point that fall for consideration in the present writ petition is whether the amendment sought by the plaintiffs, could have been allowed, when it was opposed on the ground that if a fresh suit was to be filed by the plaintiffs for the cause of action, it would have been barred by law of limitation and subsequently on the ground that it amounted to changing the nature of the suit itself.

10. The respective parties have relied upon series of judgments. Learned counsel for the petitioners, has relied upon the decision of the Hon'ble Supreme Court in case of **Revajeetu Builders And Developers Vs. Narayanaswamy And Sons And Others**³ where the principles governing the exercise of power under Order 6 Rule 17 and Section 35 have been crystallized and according to him, the factors which are to be taken into account while dealing with the application for amendment, which have been set out in para 63 of the decision, the amendment which is sought by the plaintiffs clearly fall outside the ambit and scope.

Para 63 of the judgment reads as under,

“On critically analyzing both the English and Indian cases, some basic principles emerge which ought to be taken into consideration while allowing or rejecting the application for amendment;

3 (2209) 10 SCC 84

- (1) whether the amendment sought is imperative for proper and effective adjudication of the case;
- (2) whether the application for amendment is bona fide or mala fide;
- (3) the amendment should not cause such prejudice to the other side which cannot be compensated adequately in terms of money;
- (4) refusing amendment would in fact lead to injustice or lead to multiple litigation;
- (5) whether the proposed amendment constitutionally or fundamentally changes the nature and character of the case; and
- (6) as a general rule, the court should decline amendments if a fresh suit on the amended claims would be barred by limitation on the date of application.

These are some of the important factors which may be kept in mind while dealing with application filed under Order VI Rule 17. These are only illustrative and not exhaustive.”

Relying upon clause (6), where the Court should decline amendment if a fresh suit on the amended claims would be barred by limitation on the date of the application, learned counsel would submit that this factor of limitation should be of great significance, since the claim of the plaintiffs is for partition, which ought to have been brought within a period of 12 years. According to him, the case is governed by Article 110.

He would also place reliance on the decision of *Sampath Kumar Vs. Ayyakannu & Anr.*⁴ and the following observations in para 11 are relevant.

“In the present case the amendment is being sought for almost 11 Years after the date of the institution of the suit. The plaintiff is not debarred from instituting a new suit seeking

4 (2002) 7 SCC 559

relief of declaration of title and recovery of possession on the same basic facts as are pleaded in the plaint seeking relief of issuance of permanent prohibitory injunction and which is pending. In order to avoid multiplicity of suits it would be a sound exercise of discretion to permit the relief of declaration of title and recovery of possession being sought for in the pending suit. The plaintiff has alleged the cause of action for the reliefs now sought to be added as having arisen to him during the pendency of the suit. The merits of the averments sought to be incorporated by way of amendment are not to be judged at the stage of allowing prayer for amendment. However, the defendant is right in submitting that if he has already perfected his title by way of adverse possession then the right so accrued should not be allowed to be defeated by permitting an amendment and seeking a new relief which would relate back to the date of the suit and thereby depriving the defendant of the advantage accrued to him by lapse of time, by excluding a period of about 11 years in calculating the period of prescriptive title claimed to have been earned by the defendant. The interest of the defendant can be protected by directing that so far as the reliefs of declaration of title and recovery of possession, now sought for, are concerned the prayer in that regard shall be deemed to have been made on the date on which the application for amendment has been filed.”

11. Another decision in case of *L.C.Hanumanthappa (since dead) represented by his legal representatives Vs. H.B.Shivakumar*⁵ on the point of doctrine of relation back is also placed on record where the amendment was also subject

5 (2016) 1 SCC 332

to the pleas of limitation and the Court had refused to invoke the doctrine of relation back.

12. Per contra, learned counsel Mr.Shah relied upon the decision of the Hon'ble Supreme Court in case of **L.J.Leach & Co. Ltd. & Anr. Vs. Jardin Skinner & Co.**⁶ and the observations in paragraph Nos.15 and 16 are sought to be relied upon. Another decision in case of Mohinder Kumar Mehra Vs. Roop Rani Mehra & Ors.⁷, which also makes reference to the earlier decisions, is argued to be the latest binding precedent and Mr.Shah placed reliance on the following observations :-

“18.In the facts of the present case, final determination as to whether the claim could be held to be barred by time could have been decided only after considering the evidence led by the parties. Whether plaintiff had any share in the property, which was sold in the year 2000 and what was the nature of his share and whether he can claim recovery of his share within twelve years were all the questions on which final adjudication could have been made after considering the evidence and at the stage of considering the amendment in the facts of the present case, it was too early to come to a conclusion that limitation was only three years and not twelve years as claimed by the plaintiff. The High Court on the one hand refrained from expressing any opinion and on the other hand has expressed his agreement with the view taken by the Additional District Judge rejecting the application as barred by time.

6 AIR 1957 SC 357

7 2018(2) SCC 132

19. While considering the prayer of amendment of the pleadings by a party, this Court in the case of *Mahila Ramkali Devi & Ors. Vs. Nandram (Dead) through Legal Representatives & Ors.*, (2015) 13 SCC 132 has again reiterated the basic principles, which are to be kept in mind while considering such applications in Paragraphs 20, 21 and 22, which is quoted as below:-

“20. It is well settled that rules of procedure are intended to be a handmaid to the administration of justice. A party cannot be refused just relief merely because of some mistake, negligence, inadvertence or even infraction of rules of procedure. The court always gives relief to amend the pleading of the party, unless it is satisfied that the party applying was acting mala fide or that by his blunder he had caused injury to his opponent which cannot be compensated for by an order of cost.”

13. The latest position in case of *Raj Kumar Bhatia Vs. Subhash Chander Bhatia*⁸ is also pressed into service where the following observations are made by their Lordships

“Whether an amendment should be allowed is not dependent on whether the case which is proposed to be set up will eventually succeed at the trial. In enquiring into merits, the High Court transgressed the limitations on its jurisdiction under Article 227. In *Sadhna Lodh v National Insurance Company* (2003) 3 SCC 524, this Court has held that the supervisory jurisdiction conferred on the High Court under Article 227 is confined only to see whether an inferior court or tribunal has proceeded within the parameters of its jurisdiction. In the exercise of its jurisdiction under Article

8 (2018) 2 SCC 87

227, the High Court does not act as an appellate court or tribunal and it is not open to it to review or reassess the evidence upon which the inferior court or tribunal has passed an order. The Trial Court had in the considered exercise of its jurisdiction allowed the amendment of the written statement under Order 6 Rule 17 of the CPC. There was no reason for the High Court to interfere under Article 227. Allowing the amendment would not amount to the withdrawal of an admission contained in the written statement (as submitted by the respondent) since the amendment sought to elaborate upon an existing defence. It would also be necessary to note that it was on 21 September 2013 that an amendment of the plaint was allowed by the Trial Court, following which the appellant had filed a written statement to the amended plaint incorporating its defence. The amendment would cause no prejudice to the Plaintiff.”

14. The position of law, which stand as on today is as above. It has to be applied to the facts in hand.

The suit filed by the plaintiffs claimed permanent injunction with a relief of restraining the defendants from selling the property set out in Schedule ‘A’ of the plaint. The plaintiffs pleaded that one Devji Bhiku expired on 31/03/1987, leaving behind his legal heirs, plaintiff No.1 and plaintiff No.2 and there was some landed property belonging to him, which was claimed to be a joint family property. The joint family property was pleaded to be belonging to Bhiku Dhondiba Dhore, who had two sons, Narayan and Deoji. In paragraph 3, it is further pleaded that the joint family property was transferred to Narayan and Devvji, after the death of Bhiku Dhondiba in equal share. The plaintiffs claim to be belonging

to the branch of Devji whereas the defendants are from the branch of Narayan. It is pleaded that Narayan expired and his share was transferred to his sons, Dnyanoba and Nivrutti, defendant Nos.1 and 2. Nivrutti expired in June 1985, leaving behind his wife, son and daughter i.e. defendant Nos.2 to 6. The predecessor of the plaintiffs is alleged to have expired on 31/03/1987, leaving behind the plaintiffs as his legal heirs. In paragraph 5 of the plaint, the suit property is described as belonging to the joint family and the original pleadings read thus:

“5. That the property is Hindu Joint family. The said suit property which is explained below Schedule I is situated at Sangvi and is a part of Hindu Joint family belonging to plaintiff. And the defendant in equal share i.e. $\frac{1}{2}$ each.

SCHEDULE-I

Property situated at Sangvi, Tal.Haveli, Dist.Pune,
S.No.17/3 admeasuring 03 Acre38 Gunthas.

On or towards North	-	Military Compound
On or towards South	-	River
On or towards East	-	Landed property Dattoba Gopal dhore
On or towards East	-	property belong to Shri. Damle

Further in paragraph 6, it is pleaded by the plaintiffs that the plaintiffs approached several times for partition of the property, but the defendants refused to comply and on the other hand, they raised quarrel. This is specifically pleaded in paragraph 6 in the following words :

“6. That it is further contended that the Plaintiff shall approached several time to the deft. For the partition of the

property, but the defendant refused to comply with the same. They have abused and had quarreled with the plaintiffs without any reason or cause for the same and drove them out of the house.”

15. The suit for injunction, which was filed, pleaded cause of action by stating that the defendants are selling the property in which plaintiff Nos.1 and 2 have $\frac{1}{2}$ share and the property is not yet partitioned/divided, and being Hindu joint property, the defendants are unlawfully disposing of the same.

The aforesaid pleadings are the part of the original plaint, which is sought to be amended by inserting para 9A where the plaintiffs reiterated their claim that they have $\frac{1}{2}$ share in the suit property and there is no partition and, therefore, their share be separated. Corresponding to this, prayer (f) was sought to be inserted.

16. In the wake of the position of law which is highlighted in the above paragraphs and which was placed before me, it is evident that the pleadings supporting the claim of the partition are already pleaded in the suit, as filed originally and plaintiffs already averred that the property is joint family property and, since, the defendants were in an attempt to dispose of the same, without considering that the plaintiffs have $\frac{1}{2}$ share in the same, the prayer for permanent injunction was made in the plaint. The foundation for amended prayer being already laid in the pleadings, the relief of partition which is sought would cause no prejudice to the defendants, as the cause of action for the suit of partition was already find a mention in the pleadings. By allowing the amendment,

multiplicity of the proceedings can be avoided and in any case, the position of law emerging from the authorities cited before me, being to the effect that the procedure is a mere handmaid of justice and technicalities shall not elude the parties from the real justice. The aforesaid proposition of law being applied to the facts in case, the amendment sought in the suit, allowed by the first court on 03/09/2012, cannot be faulted with. The learned Judge has rightly focused on the essence of the matter, being existence of pleadings in the plaint, to the effect that the suit property is a joint family property. In order to avoid multiplicity and to determine the real controversy between the parties, the Court has rightly granted amendment. Resultantly, the impugned order passed under review, without any error apparent on record and without justifying the exercise of power of review being erroneously passed, has been corrected by the Appellate Court on 10/01/2020. The impugned order passed by the learned Ad-hoc District Judge-8 Pune in Miscellaneous Civil Appeal No.420 of 2013 is perfectly justifiable one and do not warrant any interference.

By upholding the same, the writ petition is dismissed.

(SMT. BHARATI DANGRE, J.)