

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO.2911 OF 2021

Sanjay Waman Sathe

..Petitioner

Vs.

Shri.Sagar Dattatraya Sakhare & Ors.

..Respondents

Ms.Prachiti Deshpande for the Petitioner.

Mr.Shriram S. Kulkarni for the Respondent Nos.1 and 2.

CORAM : C.V. BHADANG, J.

**DATE : 9 SEPTEMBER 2021
(Through Video Conference)**

P.C.

. Rule. Rule made returnable forthwith. The learned counsel for the contesting Respondent Nos.1 and 2 waives service. Heard finally by consent of parties.

2. By this petition the petitioner (defendant No.1) is challenging the order dated 8 March 2021 (below Exhibit-13) passed by the learned District Judge, Pune in Civil Appeal No.882 of 2016. By the impugned order application for amendment of the appeal memo to add additional grounds has been rejected.

3. The respondent Nos.1 and 2 (Plaintiffs) filed RCS No.1171 of 2006 for declaration and cancellation of a gift deed

dated 10 November 2005 executed by the original defendant Nos.2 and 3 in favour of the petitioner. The plaintiff Swati Dattatraya Sakhare is the widowed daughter-in-law of Pandurang Sakhare and Anusaya Sakhare. Plaintiff Sagar Dattatraya Sakhare is son of Swati Sakhare. The petitioner also happens to be the grand son of Pandurang and Anusaya being the son of Chandrabhaga Sathe who is the daughter of Pandurang Sakhare and Anusaya Sakhare. The defendant No.6 Balu is the son of Pandurang Sakhare. The defendant No.4 and 5 Ravindra Sakhare and defendant No.5 are the sons of Pandurang Sakhare.

4. The case made out in the plaint is that there was a partition amongst the parties on 13 September 2002 in which the properties which are subject matter of dispute have been partitioned. The material contention is that the gift deed executed by Pandurang Sakhare and Anusaya Sakhare in favour of the petitioner is against the terms of the said partition. The plaintiffs had also sought partition of their 1/3rd share.

5. The learned Trial Court by judgment and decree dated 23 October 2008 has partly decreed the suit. The Trial Court, while refusing to grant partition, has declared the gift deed of the year 2005 to be null and void and not binding on the plaintiff and other defendants.

6. Feeling aggrieved by the same the petitioner along with Pandurang and Anusaya have filed Regular Civil Appeal No.882 of 2016 which is pending before the learned District Judge. It is in this appeal that the application for amendment of the appeal memo came to be filed which has been rejected.

7. I have heard the learned counsel for the petitioner and the contesting respondents. With the assistance of the learned counsel for the parties I have gone through the record.

8. It is submitted by the learned counsel for the petitioner that the proposed amendment does not change the nature of the challenge and no new ground is sought to be added. It is submitted that the due to inadvertence certain grounds failed to be incorporated in the appeal memo. It is thus submitted that the amendment deserves to be allowed in the interest of justice.

9. The learned counsel for the petitioner pointed out that the trial Court has also accepted that the grounds raised are mostly points of law. It is submitted that strictly the amendment to the appeal memo cannot be said to be the amendment of the pleadings as such so, as to attract the provisions of Order VI Rule 17 of the Civil Procedure Code.

10. The learned counsel for respondent Nos.1 and 2 has supported the impugned order. It is submitted that the appeal was initially filed before this Court and upon enhancement of the pecuniary jurisdiction the same was transferred to the District Court. It is submitted that the amendments are sought after 11 years of filing of the appeal and has rightly been rejected.

11. The learned counsel points out that the petitioner is seeking exhaustive amendment as set out in the application Exhibit-13.

12. I have carefully considered the rival circumstances and the submissions made. The grounds in the appeal can not be strictly equated to pleadings of fact or law for the reason that the foundation of such pleadings is laid in the Trial Court itself. As per Order VI Rule 1 of C.P.C. pleadings include plaint and the written statement. It does not include appeal memo. The petitioner is not seeking amendment of the pleadings. In my considered view the addition of the grounds in the appeal cannot be viewed as amendment of the pleadings as such. To that extent the learned District Judge is not right in observing that the amendment of the pleadings is sought after the commencement of the trial. It is true that there is a certain amount of delay in seeking the amendment.

13. I have gone through the appeal memo as well as the application for amendment. The learned counsel for the petitioner submitted during the course of the argument that she will produce a truncated/precise draft amendment as sought. She has accordingly produced only four grounds which are as under:-

(1) The learned Trial Court has failed to frame the issues pertaining to the very legality of the condition clause in Partition Deed dated 13/09/2002 restraining Pandrang to alienate his share of property. There is no any finding about the validity of such conditional clause in the judgment of the Trial Court. Being the restraining clause in Partition Deed is the very base of the suit filed by the Respondents (Original Plaintiffs), the Trial Court ought to have framed a separate legal issue that whether such partition amounts to transfer of property under Transfer of Property Act and if such restraining conditions are in violation of section 10 of the Transfer of Property act.

(2) It is submitted that admittedly the properties mentioned in the Suit as "Suit properties" are Survey 102/2, 116/2, 181/6, 133/5 and as such these are also the lands in the Gift Deed dated 10/11/2005 executed between the owner i.e. Pandurang (Defendant No.2 and 3) and the Appellant (Original Defendant No.1). However, the Conditional clause in Partition Deed restraining Pandurang to alienate the lands is in respect of Survey Nos.79/2, 102/2 and 116/2. It is submitted that no any conditionis laid down pertaining to the properties bearing survey Nos.181/6 and 133/5. Without considering this fact, the learned Trial Court has erroneously cancelled entire Gift Deed without considering the aspect of

missing lands hence such declaration regarding cancellation is erroneous improper and invalid.

(3) Trial Court has failed to appreciate that the partition creates the individual ownership and confers the individual title and possessory right. In other words partition can be treated as an internal transfer and so also the condition restraining an alienation is void. The appellant relies upon the judgment passed by Hon'ble Bombay High Court, Nagpur Bench in Second Appeal No.169/2008 dated 18-08-2009 wherein the Honble Court has clearly observed that such condition restraining to alienate the allotted share is void and unlawful.

(4) The condition restraining the alienation laid down in the partition deed dated 13-09-2002 does not entitle the original plaintiffs to seek declaration to the effect that gift deed dated 10-11-2005 is null and void and not binding upon share of other respondent nos.4,5 and 6 being he has no locus standi to that effect.

14. A copy of the said proposed amendment has been served on the contesting respondents and I have also heard the parties on the same.

15. The proposed revised draft amendment if seen in the context of the grounds as already raised in the appeal memo, in my considered view does not raise any grounds for which there is no foundation in the pleadings. It is necessary to note that the challenge by the plaintiffs to the gift deed is essentially on the

ground that the gift deed is in violation of the restrictive conditions as incorporated in the partition deed in respect of land Survey No.79/2, 102/2 and 116/2.

16. The learned counsel for the petitioner has pointed out that there is no such restrictive condition insofar as land Survey Nos.181/6 and 133/5 are concerned. The contention is that thus the Trial Court was not justified in cancelling the entire gift deed on the ground that it is in violation of the restrictive conditions as imposed in the partition deed. The petitioner also seeks to challenge the restrictive condition as included in the partition deed. The learned District Judge has also found that most of the amendment is in the form of argument and not on facts. If that be so in my considered view amendment deserves to be allowed as the contesting respondents are not taken by surprise.

17. In the result the petition is allowed. The impugned order is hereby set aside. The amendment of the appeal memo by introduction of the paragraphs as set out in para 13 above is hereby allowed. The amendment be carried out within three weeks from today. Rule is made absolute in the aforesaid terms, with no order as to costs.

C.V. BHADANG, J.

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