

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.2328 OF 2021**

Lalita Subhash Nahar

..Petitioner

v/s.

Shivaji Khanderao Matale & Ors.

..Respondents

Sr. Adv. Mr N.V.Walawalkar i/b.Mr. Suresh M. Sabrad a/w. Amey Sawant and Neha Parte for the Petitioner/s.

**CORAM : ANUJA PRABHUDESSAI, J.
DATED : JUNE 30, 2021.**

P.C.

1. The Petitioners, who are the heirs of Defendant No.4 have challenged the order dated 19.3.2021 whereby the learned Civil Judge, Senior Division, Nashik, has permitted the Respondent herein to amend the plaint in Special Civil Suit No.331 of 2002.

2. Shri Walawalkar, ld. Sr. Counsel for the Petitioner contends that the application for amendment was filed after the issues were settled and the matter was posted for evidence of Plaintiff. He submits that the trial court has allowed the application for amendment without recording any satisfaction regarding fulfillment of precondition as envisaged in the proviso under Order

6 Rule 17 of CPC i.e. satisfaction as regards exercise of due diligence by the Respondent-Plaintiffs. He has relied upon the decisions of the Apex Court in *Vidyabai & Ors. Vs. Padmalatha & Anr. (2009) 2 SCC 409* and *M. Revanna vs. Anjanamma (dead) by Lrs. & Ors. (2019) 4 SCC 332*.

3. Learned Counsel for the Petitioners further submits that the Petitioners had entered into a Development Agreement with Respondent No.1 and had paid part consideration and thus acquired right to develop the said property. Taking note of this fact, this court had dismissed the Appeal from Order No. 497 of 2004 filed by the Respondent-Plaintiffs challenging dismissal of application for temporary injunction. He further contends that the amendment is not bonafide as it seeks to defeat this order and adversely affect the rights of the Petitioners.

4. Learned Counsel for the Petitioner further contends that by allowing the said amendment the trial Court has permitted the Plaintiffs to change the suit from suit for general partition to suit for partial partition. He has relied upon the decision of the Apex

Court in *Kenchegowda vs. Siddegowda (1994) 4 SCC 294* to contend that the suit for partial partition is not maintainable.

5. I have perused the records and considered the submissions advanced by Shri Walawalakar, Id. Sr. Counsel for the Petitioners.

6. The Respondent-Plaintiffs had filed a suit for partition, possession and permanent injunction in respect of several properties more particularly described in para 1 of the plaint. The case of the Respondent-Plaintiffs was that the suit properties are common undivided properties originally owned by Khanderao Shivram Matale. The grievance of the Respondent-Plaintiffs was that the Respondent No.1 (a) to (d) had entered into a Development Agreement in favour of the Petitioners herein in respect of part of the suit property without consent of the other co-owners. The Respondent-Plaintiffs therefore questioned the legality of the said Development Agreement and Power of Attorney executed in favour of the Petitioners and filed a suit for partition, cancellation of Development Agreement and other consequential reliefs.

7. The Application for temporary injunction filed by the Respondent-Plaintiffs was dismissed by the trial court in an Appeal against Order No. 497 of 2004, this Court observed that the Petitioners had entered into a Development Agreement and paid part consideration and that there was no reason to restrain them from developing the property. It was observed that the claim of the Respondent-Plaintiffs would be restricted to the money. This Court, however, restrained the Petitioners and others from transferring, alienating, parting possession of the properties except those which were already handed over to Respondent Nos.1 to 8.

8. Subsequently, after framing of the issues, the Respondent-Plaintiffs filed an application for amendment stating that during the pendency of the suit, they had entered into a settlement with Respondent Nos.1 and 2 in respect of suit properties except the properties at serial nos.5 and 6 of para no.1(a). The Respondent-Plaintiffs therefore claimed that they do not wish to proceed against the original Defendant Nos.3 and 7 to 14 and that they do not wish to seek any relief in respect of the other property except the property described at serial nos.5 and 6 in para no.1(a) of the

plaint.

9. A perusal of the said application clearly indicates that the Respondent-Plaintiffs have not sought to incorporate any pleadings which would change the nature of the suit, or which are inconsistent with the original pleadings. The decision in Kenchegowda (supra) is not applicable to the facts of the present case as by the application, styled as amendment application, the Respondent-Plaintiffs have only sought to incorporate para 4 and to bring on record that they are abandoning their claim in respect of part of the suit and restricting the claim only to properties at serial nos.5 and 6 of para no.1(a) of the plaint. Suffice it to say that there is absolutely no embargo to abandon the suit or part of the claim against all or any of the Defendants. Infact, Rule 1 of Order 23 CPC confers absolute right on the Plaintiff to abandon the suit or part of the claim against all or any of the Defendants. The only consequence of such abandonment is that the Plaintiff is precluded from suing again on the same cause of action. It is also to be noted that there is no specific time limit for abandoning the claim. It can be done at any stage during the pendency of the suit

or in an appeal, provided no vested right accrued in favour of the Defendant is sought to be defeated by such abandonment.

10. In the instant case, the Respondent-Plaintiffs had sought to abandon the claim in view of the settlement arrived with other Defendants during the pendency of the suit. The amendment which was necessitated by subsequent events only gives the details of the claim which is sought to be abandoned. Hence the decisions in Vidyabai and M. Revanna are not applicable to the facts of the case.

11. Shri Walawalkar, ld. Sr. Counsel submits that if the Respondent-Plaintiffs are allowed to abandon the claim in respect of the other properties, the Petitioners will not be able to raise a defence and/or contend that the property at serial Nos.5 and 6 at para no.1(a) should be allotted to Defendant No.1. It is to be noted that the Petitioners, have not filed a counterclaim and no vested right has accrued in their favour. Hence they cannot compel the Respondent-Plaintiffs to proceed with a claim in respect of which they do not wish to proceed for whatsoever

reason. Furthermore, the amendment cannot be disallowed on an assumption that the Respondent-Plaintiffs and the original Defendant Nos.1 and 2 are in collision to defeat the interest of the Petitioner. Suffice to say that the defence, if any, can always be raised in the additional written statement to the amended pleadings. The question whether the Respondent-Plaintiffs would be entitled for reliefs only in respect of these two properties would be adjudged on merits of the case.

12. Under the circumstances, and for the reasons stated above, the Petition has no merits and is accordingly dismissed.

(ANUJA PRABHUDESSAI, J.)