

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO.2985 OF 2019

**KUMUDINI BHAGWAN TAYADE AND OTHERS
VERSUS
INDUBAI SAJAN KOLI (SONWANE) AND OTHERS**

...

Advocate for Petitioners : Mr. Balaji S. Shinde
Advocate for Respondents No.1 & 2 : Mr. R. R. Kazi h/f
Mr. P. R. Katneshwarkar

...

CORAM : NITIN B. SURYAWANSHI, J.

DATE : 11th JULY, 2022

PER COURT :

1. The petitioners, by this petition filed under Article 226 and 227 of the Constitution of India, challenge the order passed by the learned Joint Civil Judge, Junior Division, Chopda below Exhibit-60 in R.C.S. No.86/2012, thereby rejecting the application filed by the petitioners under Order 6 Rule 17 of the Code of Civil Procedure.

2. The suit is filed by the respondents/original plaintiffs for partition and separate possession of the ancestral properties in which the petitioners are the original defendants. The defendants/petitioners appeared in the suit and filed written statement on 06/02/2013, thereby admitting that the suit properties are the ancestral properties. On 10/04/2017 issues were framed by

the trial Court. Thereafter on 26/09/2018 the application Exhibit-60 is filed by the defendants/petitioners seeking amendment in the written statement. By way of amendment the petitioners have claimed that one of the properties mentioned in the plaint is self acquired property. Further amendment is sought to the effect that the plaintiff's marriage has been performed prior to 1968 and therefore, as per the Hindu Succession Act, she has no right to claim the partition. An amendment is also sought that, the suit is barred as per the provisions of Maharashtra Prevention of Fragmentation and Consolidation of Holdings Act, 1947. By way of amendment it is also claimed that suit is barred by limitation.

3. The said application is resisted by the plaintiffs by filing a detailed say. The plaintiffs contended that by way of amendment the defendants are trying to withdraw the admissions given in the written statement. The application is belatedly filed and hence, they prayed for rejection of the application. The trial Court has rejected the application. Hence the present petition.

4. Heard the learned advocate for petitioners and the learned advocate for respondents. Perused the documents placed on record.

5. Indisputably, suit is filed in the year 2012 and written

statement is filed in the year 2013. The issues are framed in the year 2017. Thereafter, evidence affidavit is filed by the plaintiffs and then the present application seeking amendment is filed on 26/09/2018. The trial Court has rejected the application holding that there is no due diligence on the part of the defendants in filing the application, it is not stated in the application as to what are the necessary documents and the defendant has taken diligent efforts to collect the documents. The trial Court has also recorded a finding that if the amendment is allowed it would amount to withdrawal of admissions given by the defendants in favour of the plaintiffs and therefore, the amendment would cause prejudice to the plaintiffs.

6. In the suit for partition, though the petitioners have stated in their written statement that all the properties are ancestral properties, after they found out certain documents which are mentioned in application Exhibit-60, the petitioners realised that one of the suit properties is self acquired property. Therefore, the application for amendment is filed proposing amendment that the said property is self acquired property.

7. The defendants are entitled to take inconsistent pleas in the written statement, as the defendants have discovered documents subsequent to the filing of written statement, opportunity needs to be given to the petitioners to raise the said

contentions by way of amendment and to prove them by leading evidence. It is for the defendants to prove on record that the said property is self acquired property. Allowing amendment would avoid multiplicity of proceedings. No prejudice is likely to be caused to the plaintiffs if the said amendment is allowed. The plaintiffs will have opportunity to file reply to the amendment and to cross-examine defendants. In that view of the matter and in the facts of the present case, the amendment needs to be allowed.

8. Other amendments in respect of the marriage of plaintiff is prior to 1968 and therefore, she is not entitled to claim any share in the suit property, that suit is barred by provisions of Maharashtra Prevention of Fragmentation and Consolidation of Holdings Act, 1947 and that the suit is barred by limitation, are legal submissions and the said amendments are liable to be allowed.

Absence of due diligence on the part of defendants is apparent on the face of record. The plaintiffs, however, can be compensated adequately for lack of due diligence on the part of defendants.

9. In that view of the matter, the writ petition is allowed. The impugned order passed by the learned Joint Civil Judge Junior Division, Chopda below Exhibit-60 in R.C.S. No.86/2012, is hereby

quashed and set aside. Application Exhibit-60 is allowed, subject to the payment of cost of Rs.10,000/-, to be paid by the petitioners/defendants to the respondents/plaintiffs in the trial Court.

(NITIN B. SURYAWANSHI, J.)

SVH