

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

28 WRIT PETITION NO.3021 OF 2017

**M/S KUBER DEVELOPERS LATUR THROUGH PARTNER
NARENDRA DEVICHAND AGRAWAL AND OTHERS**

VERSUS

**SUBHASH GANGADHARPRASAD PANDE (DIED) LRS REKHA
SUBHASH PANDE AND OTHERS**

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Advocate for Petitioners: Mr. R. P. Adgaonkar
Advocate for Respondents No.1A-1, 1A-4, 1B to 1E,
2A1, 2A4, 2B, 2C: Mr. V. D. Salunke

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CORAM: SMT. BHARATI H. DANGRE, J.

DATE: 14th FEBRUARY, 2022

PER COURT:

1. Heard the learned Counsel for the Petitioner and the learned Counsel for the Respondents.

2. The *inter se* relationship between the parties can be described to the effect that the Plaintiff, Defendant Nos. 2 and 3 are the sons of Defendant No. 1 and they are covered by the Mitakshara School of Hindu Law. Defendant No. 1 claiming to be the head of the coparcenery and the Defendant Nos. 2 and 3 and the Plaintiff are the coparceners. Defendant No. 4 is a partnership of Defendant Nos. 5 to 13 and they have purchased the joint family property of the Plaintiff and that is

how came to be inserted as parties in the Suit. The Suit was instituted for partition and separate possession and the and the copacenary property of the Plaintiff and the Defendant Nos. 1, 2 and 3 as set out in Paragraph No.2 of the plaint. The Plaintiff claims that he has right to claim partition of 4 Acres and 10 Gunthas out of the Suit land by effecting actual division of Suit land and get his portion carved out on the basis of division having equal benefit. He therefore staked claim for possession of $4\frac{1}{4}$ Acres of land and also pleaded in the alternative that if it is held that the family arrangement disrupted the joint status of the parties as on 15.12.1996 is not proper, then the Plaintiff is entitled to partition and possession of all the properties described in Paragraph No.2 of the plaint. Ultimately a declaration was sought from declaring the Sale Deed dated 07.02.2004 executed by Defendant Nos. 1 to 3 in favour of Defendant Nos. 4 to 13 dated 07.02.2004 as null and void and not binding upon the Plaintiff. The Plaintiff also

prayed that he shall be put in possession of the 4 Acres and 10 Gunthas portion of Suit land by effecting partition by meets and bounds as allotted to him in the family arrangement dated 15.12.1996 which is the property described in para No. 2.

3. The present Petitioners being impleaded as Defendant Nos. 4 to 13 filed their Written Statement and opposed the claim placed by the Plaintiff.

4. During the pendency of the said Suit, an Application for amendment of Written Statement came to be filed by invoking Order VI Rule 17 and the Defendant proposed to amend the Written Statement by pleading that all the claims set out by the Plaintiff in the alternative are in respect of the entire suit property and therefore the pleading which was sought to be inserted is to the following effect-

"It is pertinent to be noted that except the land purchased by the defendants remaining

land about 10 acre out of land survey no. 160/A/1 and 162/A/1 have been also sold to various persons by Late Gangadhar Prasad."

5. On perusal of the averments made in the pleading, the averments in the Written Statement and the proposed amendment it can be seen that by the proposed amendment the Defendants are merely seeking to project their claim qua the alternate claim of partition in respect of the properties which has been set out in the plaint. He therefore states that if this relief is to be granted then the plaint suffers from non-joinder of parties as well as it is deficit in payment of Court Fees in respect of the declaration and therefore the Suit is prayed to be dismissed on the said counts.

6. It is this Application which is rejected under the impugned order and on it's perusal it can be seen that the learned Judge has invoked the proviso appended to Order VI Rule 17 and found substance in the argument of the Plaintiff opposing the application that the amendment has been moved after more than 10 years and therefore

the principle that due diligence was not adopted has to be followed. It is also recorded that the issue regarding non-joinder of necessary parties is already framed and it is permissible for the Defendants to lead evidence in respect of said issue. The application is rejected on 16.01.2017 by recording that amendment cannot be allowed at this stage as the Defendants have not averred as to what prevented them from bringing on record the facts sought to be incorporated by the proposed amendment.

7. I am unable to agree to the reasoning recorded in the impugned order on two counts; (1) that the learned Judge ought to have examined the effect of the proposed amendment in the Written Statement and if the same is carefully read, instead of bringing any fact on record, the proposed amendment proposed to bring on record the fact of the alternative plea by the Plaintiff as regards partition and possession of all the properties. (2) The proposed amendment do not also contain any statement of fact which will have the

effect on the trial of the issues which are already been framed and that made at a later stage, I do not find that the learned Judge was justified in invoking the principle of due diligence as provided in the Proviso to Order VI Rule 17 as no new facts are sought to be pleaded but only the fact of alternative plea of the Plaintiff in the Suit is sought to be projected.

8. In any case the plaintiff has chosen either to claim his share ($\frac{1}{4}$) into the Suit property or in the alternate has prayed that if the said family settlement for some count is held to be not proper then he shall be entitled for share in the entire property described in Paragraph No.2 of the plaint.

In the wake of the aforesaid circumstances the principle of due diligence as provided in the Proviso to Order VI Rule 17 ought not to have been referred to by the learned Judge and in any case, the amendment and the Written Statement did not propose to bring any new fact on record which is not present in the plaint or in the original

Written Statement by the Respondent. The rejection of the application is therefore suffers from an error and the application ought to have been allowed.

For the reasons recorded above, the impugned order is quashed and set aside. The application deserves to be allowed. However this must be with the costs being paid by the applicants to the Plaintiff and the same is quantified in the sum of Rs.10,000/- (Rs. Ten Thousand only). The costs shall be paid within a period of four (04) weeks. The Writ Petition is allowed in the aforesaid terms by setting aside the impugned order.

Needless to state that the stay of the proceedings granted on 07.03.2017 is vacated and the learned Judge shall expeditiously conclude the proceedings in R.C.S. No.67/2012 (Old No. Special Civil Suit No.30/2006) within a period of eight (08) months.

[SMT. BHARATI H. DANGRE, J.]