

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

918 WRIT PETITION NO.1751 OF 2022

SUSHMA DEVIDAS PATIL
VERSUS
SHANKARRAO ALIAS POPAT TRIMBAKRAO SHRIKANT (DIED) AND
OTHERS

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Advocate for Petitioner : Mr. Ravindra Vitthal Gore
Advocate for Respondent No.3 : Mr. N.K. Tungar & Mr. H.S. Vaidya
Advocate for Respondent No.4 : Mr. PP Patni h/f. Mr. PF Patni
Advocate for Respondent No.5 : Mr. S.S. Ghumare & Mr. G.S. Mene

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CORAM : SANDEEP V. MARNE, J.

DATE : 21-12-2022

PER COURT :

1. By this petition, petitioner has challenged the order dated 01.01.2022 passed by the Civil Judge Junior Division, Kannad rejecting application for amendment of plaint. R.C.S. No.152 of 2013 has been instituted by plaintiff / petitioner seeking partition of the suit property. A prayer for declaration that few sale deeds executed in respect of suit properties are not binding on her is also included in the suit. The suit was decreed *ex parte* on 27.01.2015. The defendant in the suit filed R.C.A. No.196 of 2016 on 20.10.2015 and the District Judge was pleased to allow the appeal and restored the suit vide judgment and order dated 20.07.2021.

2. After restoration of the suit and after filing of the

written-statement by various defendants, an application was filed by petitioner on 02.08.2021 seeking amendment to the plaint by adding various paragraphs therein. The amendment application was allowed by the trial Court by order dated 06.10.2021.

3. The plaintiff thereafter moved one more application for amendment of the plaint on 23.11.2021 by making following averments:

“3. That, during pendency of appeal the Advocate of the plaintiff came across that, there is ancestral and Joint Hindu family property bearing row House No. B-8, C.T.S. No.20155/1, situated at – Mohalla Padampura, Aurangabad admeasuring 111.5 sqr. Mtr and constructed area 50.41 sqr. Mtr. Which Is bounded as – East – Row House / Gala No. C; West Row House / Gala No. C5, South – Way ; North – Row House / Gala No. B-7 and said property is not included in suit for partition and separate possession. That, plaintiff got knowledge of gift Deed in the year 2016. plaintiff got knowledge that, her father alienated the suit house in the name of defendant no.3 and from the date of the knowledge suit is well within limitation.”

4. By her second application for amendment, now she wants to include property bearing house No.B-8, CTS No.20155/1 Mohalla Padampura, Aurangabad in the suit and to further seek a prayer for cancellation of Gift Deed in respect of such added suit property.

5. The trial court has proceeded to reject second application

for amendment by order dated 01.01.2022.

6. I have heard the learned counsels appearing for the parties and have perused the record.

7. Before considering whether the trial Court could have allowed the amendment application, it would be apposite to refer to the judgment of the Apex Court in **Life Insurance Corporation of India vs. Sanjeev Builders Private Ltd & Anr, 2022 LiveLaw (SC) 729** in which the Apex Court has summarised the principles relating to amendment of pleadings. Para 70 of the Judgment reads thus:

“70. Our final conclusions may be summed up thus:

(i) Order II, Rule 2 CPC operates as a bar against a subsequent suit if the requisite conditions for application thereof are satisfied and the field of amendment of pleadings falls far beyond its purview. The plea of amendment being barred under Order II Rule 2 CPC is, thus, misconceived and hence negated.

(ii) All amendments are to be allowed which are necessary for determining the real question in controversy provided it does not cause injustice or prejudice to the other side. This is mandatory, as is apparent from the use of the word “shall”, in the latter part of Order VI Rule 17 of the CPC.

(iii) The prayer for amendment is to be allowed

(i) if the amendment is required for effective and proper adjudication of the controversy between the parties, and

(ii) to avoid multiplicity of proceedings, provided

(a) the amendment does not result in injustice to the other side,

(b) by the amendment, the parties seeking amendment does not seek to withdraw any clear admission made by the party which confers a right on the other side and

(c) the amendment does not raise a time barred claim, resulting in divesting of the other side of a valuable accrued right (in certain situations).

(iv) A prayer for amendment is generally required to be allowed unless

(i) by the amendment, a time barred claim is sought to be introduced, in which case the fact that the claim would be time barred becomes a relevant factor for consideration,

(ii) the amendment changes the nature of the suit,

(iii) the prayer for amendment is malafide, or

(iv) by the amendment, the other side loses a valid defence.

(v) In dealing with a prayer for amendment of pleadings, the court should avoid a hypertechnical approach, and is ordinarily required to be liberal especially where the opposite party can be compensated by costs.

(vi) Where the amendment would enable the court to pinpointedly consider the dispute and would aid in rendering a more satisfactory decision, the prayer for amendment should be allowed.

(vii) Where the amendment merely sought to introduce an additional or a new approach without introducing a time barred cause of action, the amendment is liable to be allowed even after expiry of limitation.

(viii) Amendment may be justifiably allowed where it is intended to rectify the absence of material particulars in the plaint.

(ix) Delay in applying for amendment alone is not a ground to disallow the prayer. Where the aspect of delay is arguable, the prayer for amendment could be allowed and the issue of limitation framed separately for decision.

(x) Where the amendment changes the nature of the suit or the cause of action, so as to set up an entirely new case, foreign to the case set up in the plaint, the amendment must be disallowed. Where, however, the amendment sought is only with respect to the relief in the plaint, and is predicated on facts which are already pleaded in the plaint, ordinarily the amendment is required to be allowed.

(xi) Where the amendment is sought before commencement of

trial, the court is required to be liberal in its approach. The court is required to bear in mind the fact that the opposite party would have a chance to meet the case set up in amendment. As such, where the amendment does not result in irreparable prejudice to the opposite party, or divest the opposite party of an advantage which it had secured as a result of an admission by the party seeking amendment, the amendment is required to be allowed. Equally, where the amendment is necessary for the court to effectively adjudicate on the main issues in controversy between the parties, the amendment should be allowed. (See Vijay Gupta v. Gagninder Kr. Gandhi & Ors., 2022 SCC OnLine Del 1897)”

(Emphasis supplied)

8. Having considered the exposition of law by the Apex Court on the issue of amendment of pleadings, now I turn to the facts of the case. Admittedly, the trial in the suit is yet to commence. Though the suit is of the year 2013, since the same has been remanded by the Appellate Court on 20.07.2021 the Trial in the suit has apparently not yet commenced. Ordinarily therefore amendment, to the extent it does not change the nature of the suit, is required to be allowed.

9. However, there is a twist in the present case. Plaintiff has also filed R.C.S. No.749 of 2016 in respect of very the same property which she intends to incorporate by amending R.C.S. No.152 of 2013. Not only this, prayer for cancellation of the Gift Deed dated 02.08.2007 and partition of that property is already incorporated in R.C.S. No.749 of 2016. Shockingly plaintiff did not disclose filing of R.C.S No.749 of 2016 in her application for

amendment. That fact was required to be brought to the notice of the trial Court by defendants by filing reply opposing amendment application.

10. Apart from suppression of fact of filing of R.C.S. No.749 of 2016 claiming same reliefs in respect of same property, plaintiff made false averments in her application for amendment that her Advocate came across the information about existence of an ancestral and joint family property bearing House No.B-8, CTS No.20155/1, Mohalla Padampura, Aurangabad. It is further averred in the application that plaintiff got knowledge of Gift Deed in the year 2016. By the time these averments were made, plaintiff had already instituted Regular Civil Suit no.749 of 2016 seeking cancellation of Gift Deed and partition of the property included in that suit.

11. To make things worst for plaintiff / petitioner, the trial in R.C.S. No.749 of 2016 has already commenced. Plaintiff has already examined herself in R.C.S. No.749 of 2016 and her cross-examination has been recorded. The learned advocate appearing for respondents submits that plaintiff has given certain admissions in her cross-examination in R.C.S. No.749 of 2016 and that the amendment application is moved with a view to wriggle out those admissions.

12. Faced with the difficulty where petitioner / plaintiff has attempted to file two proceedings in respect of the same property for same reliefs, the learned advocate for petitioner has offered to withdraw R.C.S. No.749 of 2016. This in fact further buttresses contention of the advocate for respondents that the objection behind filing amendment application was to wriggle out admissions given in the cross-examination in R.C.S. No.749 of 2016, which is now offered to be withdrawn.

13. Considering the above position, there can be no matter of doubt that the filing of application for amendment was *mala fide*. Petitioner suppressed filing of R.C.S No.749 of 2016 in her amendment application. She has made an attempt to include the cause of action in respect of same property in R.C.S. No.152 of 2013 by amending it when in fact the same already formed subject matter of R.C.S No.749 of 2016. Such conduct of petitioner leads to inescapable conclusion that the amendment sought to be introduced was clearly *mala fide*.

14. Also of relevance is the fact that after remand of the suit by the trial Court, plaintiff filed first application for amendment on

02.08.2021 and consciously chose not to incorporate averments and prayers in respect of the property bearing house No. B-8 CTS 20155/1 Mohalla Padampura, Aurangabad within the ambit of proposed amendment. It must be noted here that when the first application for amendment was filed on 02.08.2021, R.C.S. No.749 of 2016 in respect of that property seeking the same relief was already pending. This is the possible reason why plaintiff wisely did not seek to incorporate amendment relating to that property in her application dated 02.08.2021. However, after that amendment application was allowed by order dated 06.10.2021, plaintiff / petitioner immediately moved second application for amendment within a month on 23.11.2021 to incorporate something which is already a subject matter of separate suit bearing R.C.S. No. 749 of 2016. Such conduct on the part of plaintiff / petitioner is clearly deplorable.

15. The Apex Court in **Life Insurance Corporation of India** (*supra*) has clearly held that if the amendment is *mala fide*, the same is required to be rejected. It is also held that if the proposed amendment seeks to wipe out any valid defence in favour of defendants, the same is also required to be rejected. In the present case, the amendment is not only *mala fide* but the same is filed with an intention to wriggle out of the admissions given in

cross-examination in the R.C.S. No.749 of 2016. The trial Court has thus rightly rejected the application for amendment.

16. The present petition is gross abuse of process of law and the same is dismissed with costs of Rs.30,000/-. Costs to be deposited in the trial Court within a period of four weeks from today.

17. Defendant nos.3, 4 and 5 in the suit would be at liberty to withdraw the amount of Rs.10,000/- each from the deposited amount of costs.

(SANDEEP V. MARNE, J.)

GGP