

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.7644 OF 2019

Shri. Trimbak S/o Pandharinath Thombre ...Petitioner

Versus

Shri. Dr. Bhaskar S/o Pandharinath Thombre
And Others ...Respondents

Mr. Mukul Kulkarni h/f. Mr. Mahesh Ubale, Advocate for the
Petitioner.

Mr. G.K. Naik-Thgile, Advocate for Respondent No. 1.

Mr. S.T. Mahajan, Advocate for Respondent No. 2.

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[CORAM : NITIN B. SURYAWANSHI, J.]

DATE : 26th AUGUST, 2022

ORDER :

1. This petition filed under Article 227 of Constitution of India, takes exception to the order passed by the learned Civil Judge, Junior Division, Kaij, below Exhibit-206 in Regular Civil Suit No. 50/12, thereby allowing the amendment application filed by Respondent No. 1.

2. Respondent No. 1/original plaintiff filed suit for partition and separate possession of the ancestral joint family property on 04.07.2011. The suit is resisted by the petitioner/original defendant and other respondents who are

defendants in the suit by filing their respective written statements, on 03.11.2011. The Trial Court framed issues on 11.12.2016. The plaintiff filed his evidence affidavit on 21.01.2017. Before commencement of his cross examination, present application Exhibit-206 came to be filed under Order 6 Rule 17, seeking amendment in the plaint and for addition of the parties. The application was strongly opposed by the defendants on various grounds including that under Order 2 Rule 2, no suit can be instituted in respect of property omitted, while filing the suit. The plaintiff has not taken permission of the Court for inclusion of land Gat Nos. 170, 171 and 161. They also claimed that there can be amendment of the pleadings, but pleadings cannot be deleted completely. The application has been filed at belated stage after commencement of trial and on that ground the application is liable to be dismissed. The Trial Court after hearing the parties by order dated 23.01.2019 allowed the application, subject to payment of cost Rs. 50 each to the defendants. This order is impugned in the present petition.

3. Heard the learned advocate for the petitioner, learned advocate for respondent No. 1 and learned advocate for respondent No. 2.

4. The learned advocate for the petitioner assailed the impugned order contending that the admissions given by the plaintiff in the plaint are sought to be withdrawn by way of proposed amendment. The amendment is hit by the provisions of Order 2 Rule 2. The reliefs sought by way of proposed amendment are beyond limitation and could not have been allowed by the Trial Court. By relying on *Pandit Malhari Mahale Vs. Monika Pandit Mahale & Ors.* [2021 (3) ALL MR 702, *Van Vibhag Karmchari Griha Nirman Sahkari Sanstha Maryadit (Registered) Vs. Ramesh Chander and Others* [(2012) 1 SCC (Civ) 777 and *Prabhakar Sadashiv Gokhale and another Vs. Ramesh Shankar Ladkat and others* [2017 4 Mh.L.J. 634], the learned advocate for the petitioner vehemently submitted that the impugned order cannot be sustained and same is liable to be quashed and set aside.

5. The learned advocate for respondent No. 1 on the other hand supported the impugned order contending that the amendment was necessary for deciding real controversy between the parties. No prejudice is caused to the defendants by allowing the said amendment. According to him, to avoid multiplicity of litigation, amendment is rightly allowed by the

Trial Court. Further submission is that, in respect of will deed foundation is already there in the pleadings of the plaint and formal prayer inadvertently remained to be made, which is sought to be incorporated by way of amendment and therefore, there cannot be a bar under Order 2 Rule 2. According to him, as per Order 7 Rule 7, the Court can mold the relief and therefore the Trial Court was justified in allowing the amendment. He further submits that defendant no. 2 has already carried out the amendment and defendants No. 3, 8 to 10 have filed application under Order 6 Rule 17 seeking amendment to their written statement, which is also allowed by the Trial Court. He therefore submits that there is no substance in the petition and the petition is liable to be dismissed.

In support of his contention, the learned advocate for the Respondent No. 1 placed reliance on Kamal Kumar Shivkishan Agrawal Vs. Navnirman Developers and Ors. [MANU/MH/0853/2020], Pradeep Vs. Digambar [MANU/MH/1010/2022] and Mankarnabai Ganpat Patil (Mali) and Ors. Vs. Kaushalabai Sampat Patil (Patil) and Ors (MANU/MH/0189/2022).

6. The learned advocate for respondent No. 2 adopted the argument of the petitioner. He further submitted that the

amendment is belatedly proposed after a period of almost 7 years from the date of filing of suit. There is total lack of due diligence on the part of respondent No. 1 while filing the application for amendment. He therefore submits that the impugned order cannot be sustained.

7. Heard the learned advocate for the petitioners and learned advocate for the respondents at length. Perused the grounds raised in the petition, documents filed on record, the impugned order, so also, citations relied upon by the parties.

8. The suit for partition and separate possession of joint family property is filed by the plaintiff on 04.07.2011. The defendants filed their written statement on 05.11.2011. The Trial Court framed issues on 11.12.2016 and the plaintiff has filed evidence affidavit on 21.01.2017. His cross examination is yet to begin. Application Exhibit-206 for amendment is filed on 23.01.2018. While allowing the application for amendment the Trial Court held that it is the basic principle of partition that ancestral joint family property should be put in common hotchpotch. By application the plaintiff wants to include remaining ancestral property in the schedule of suit property. It is further held that the plaintiff has averred that some

defendants have alienated their lands to third persons who are sought to be added as respondents. The Trial Court, therefore, held that though the purchaser pendent lite are not necessary parties to the suit for partition, considering the fact that they have purchased some portion of the suit property, their presence in the suit is necessary for proper adjudication. It is further held that in order to determine real question in controversy between the parties and to arrive at just decision of the case, proposed amendment appears to be just and proper. For belatedly filing application, the plaintiff is directed to pay cost of Rs. 50/- to each defendant.

9. Under Rule 17 of Order 6, the Court may at any stage of the proceeding allow either party to alter or amend its pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real question in controversy between the parties.

The proviso stipulates that no application for amendment shall be allowed after trial has commenced, unless the Court comes to a conclusion that in spite of due diligence, the party could not have raised matter before commencement of

trial. In the present case though the plaintiff has filed his evidence affidavit his cross examination is yet to begin.

10. In *Kamal Kumar* (supra), this Court relied on *Revajeetu Builders and Developers v. Narayanaswamy and sons others* [2009 (6) ALL MR 986], wherein the Supreme Court has laid down the factors to be taken into consideration while dealing with the application for amendment as follows:-

"63. On critically analysing both the English and Indian cases, some basic principles emerge which ought to be taken into consideration while allowing or rejecting the application for amendment'

(1) whether the amendment sought is imperative for proper and effective adjudication of the case;

(2) whether the application for amendment is bona fide or mala fide;

(3) the amendment should not cause such prejudice to the other side which cannot be compensated adequately in terms of money;

(4) refusing amendment would in fact lead to injustice or lead to multiple litigation;

(5) whether the proposed amendment constitutionally or fundamentally changes the nature and character of the case; and

(6) as a general rule, the court should decline

amendments if a fresh suit on the amended claims would be barred by limitation on the date of application.

These are some of the important factor which may be kept in mind while dealing with application filed under Order 6 Rule 17. These are only illustrative and not exhaustive.

It is further observed "while deciding applications for amendment the courts must not refuse bona fide, legitimate, honest and necessary amendments and should never permit mala fide, worthless and/or dishonest amendments."

11. Applying above ratio to the case in hand it is clear from the record that amendment sought by the plaintiff is necessary for proper and effective adjudication of the suit. The application for amendment cannot be said to be malafide. In the facts of the present case, it cannot be said that the amendment would cause prejudice to other side, which cannot be compensated adequately in terms of money. Refusing amendment would lead to injustice and it may also lead to multiplicity of litigation. The amendment allowed by the Trial Court does not fundamentally change the nature of suit.

12. In Surendra kumar Sharma Vs. Makhan Singh (2009 ALL SCR 2452), the Hon'ble Supreme Court has held that *"belated application for amendment is not liable to be rejected merely on the ground of delay, if the trial Court finds that by allowing the application real controversy between the parties may be resolved the Court can allow the application where opposite party can be compensated by costs or otherwise."*

13. In Pradeep Vs. Digambar (supra), this Court relied on B.K. Narayana Pillai Vs. Parameswaran Pillai and Another (2000 1 SCC 712), wherein it is held:

"the purpose and object of Order 6 Rule 17 CPC is to allow either party to alter or amend his pleadings in such manner and on such terms as may be just. The power to allow the amendment is wide and can be exercised at any stage of the proceedings in the interests of justice on the basis of guidelines laid down by various High Courts and the Supreme Court. It is true that the amendment cannot be claimed as a matter of right and under all circumstances. But it is equally true that the courts while deciding such prayers should not adopt a hypertechnical approach. Liberal approach should be the general rule particularly in cases where the other side can

be compensated with the costs. Technicalities of law should not be permitted to hamper the courts in the administration of justice between the parties. Amendments are allowed in the pleadings to avoid uncalled-for multiplicity of litigation. All amendments of the pleadings should be allowed which are necessary for determination of the real controversies in the suit provided the proposed amendment does not alter or substitute a new cause of action on the basis of which the original lis was raised or defence taken. Inconsistent and contradictory allegations in negation to the admitted position of facts or mutually destructive allegations of facts should not be allowed to be incorporated by means of amendment to the pleadings. Proposed amendment should not cause such prejudice to the other side which cannot be compensated by costs. No amendment should be allowed which amounts to or results in defeating a legal right accruing to the opposite party on account of lapse of time. The delay in filing the petition for amendment of the pleadings should be properly compensated by costs and error or mistake which, if not fraudulent, should not be made a ground for rejecting the application for amendment of plaint or written statement.”

14. The above rulings settled the legal position that dominant purpose of allowing amendment is to minimize the litigation. The amendments are to be liberally allowed and the Trial Court should not adopt hypertechnical approach while deciding the amendment applications. A liberal approach should be a general rule particularly in case where the other side can be compensated with cost. The technicalities of law should not be permitted to hamper courts in administration of justice between the parties. The amendments which are necessary for determination of real question in controversy in the suit should be allowed.

Applying these principles to the facts of the present case it is clear that the Trial Court has judiciously exercised discretion while allowing the amendment application filed by the plaintiff. The amendment is necessary for determining real question in controversy and no prejudice or injustice is likely to be caused to the defendants, if the amendment is allowed. The amendment would avoid multiplicity of proceeding.

15. In *Prabhakar Gokhale* (supra), co-ordinate bench of this Court while considering the effect of proviso to Order 6 Rule 17 held '*Court is bared from allowing any amendment after trial*

has commenced unless condition set out in Order 6, Rule 17 is satisfied.'

16. In the facts of case in hand it is clear that condition set out in Order 6 Rule 17 is satisfied.

17. *Van Vibhag Karmachari* (supra), was decided by the Hon'ble Supreme Court in different facts, wherein amendment of prayer to incorporate specific relief after 11 years of filing suit was opposed. In these facts it was held "*such amendment alters character of the suit and hence is impermissible.*" Such are not the facts of the present case.

18. In *Pandit Mahale* (supra), by relying on *Vidyabai & Ors. v. Padmalatha & Anr.* (2009) 2 SCC 409, the Hon'ble Supreme Court held that "*in absence of finding that the court is satisfied in spite of due diligence, it is primal duty of the Court to decide as to whether such an amendment is necessary to decide the real dispute between the parties. Only if such condition is fulfilled, the amendment is to be allowed.*" There cannot be any dispute about the above ratio in *Vidyabai* (supra), however, as is noted herein above in the present case, the Trial Court has recorded a satisfaction that the amendment is necessary for

deciding real question in controversy between the parties, hence the Trial Court is justified in allowing the amendment.

19. Coming to the challenge of the petitioner for inclusion of prayer of setting aside will deed on the ground that it is beyond limitation, the challenge of the petitioner can be considered by the Trial Court at the time of final decision of the suit. The point of limitation and the merit of amendment is kept open for consideration of the Trial Court.

20. This Court is of the view that the Trial Court has imposed negligible cost while allowing the amendment application, which needs to be enhanced.

21. For the aforesaid reasons, there is no merit in the challenge raised by the petitioner to the impugned order. This Court is not inclined to interfere in the discretion exercised by the Trial Court while passing the impugned order. The writ petition is therefore dismissed.

22. The plaintiff is directed to pay cost of Rs. 25,000/- to the contesting defendants, who are brothers of plaintiff, in the

Trial Court within a period of four weeks from today.

23. At this stage, the learned advocate for the petitioner seeks stay to this order for a period of six weeks. This order shall remain stayed for a period of six weeks from today.

[NITIN B. SURYAWANSHI, J.]