

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.9839 OF 2021

RAGHUNATH ABA POKALE
VERSUS
JAGANNATH ABA POKALE DIED THROUGH LRS MEERA
JAGANNATH POKALE

...
Advocate for Petitioner : Mr. Sandeep Y. Mahajan
Advocate for Respondents No. 1A to 1H: Mr. A.M. Gholap
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[CORAM : NITIN B. SURYAWANSHI, J.]

DATE : 9th JUNE, 2022

ORDER :

1. The petitioner/defendant is aggrieved by the order passed below Exhibit-133 in Regular Civil Suit No. 56/2013 by the learned Civil Judge Junior Division, Jamkhed, thereby allowing the application filed by the respondents/plaintiffs under order VI, Rule 17 of Code of Civil Procedure.

2. The plaintiffs have filed suit for declaration and injunction in respect of land gat No. 1087, admeasuring 01 Hectare 78R situated at Jamkhed, District-Ahmednagar. When the evidence was being recorded in the suit amendment application came to be filed by the plaintiffs contending that recently they came to know that son of defendant/petitioner has

filed suit for partition against him bearing Regular Civil Suit No. 28/2019. The suit came to be compromised and in the compromise properties mentioned in the memorandum of partition which are allotted to the share of plaintiffs are also mentioned. The plaintiffs also contended that defendant for the first time claimed ownership on land gat No. 947. The compromise decree in the said suit is collusive and brought in existence only to deprive plaintiffs from his legal right and to create complications in the suit filed by the plaintiffs. The plaintiffs, therefore, prayed for amendment of his plaint to seek a declaration that compromise decree in Regular Civil Suit No. 28/2019 is not binding on plaintiffs. Further amendment is also sought to add that the suit properties are purchased from joint family nucleus as plaintiffs and defendants were having sufficient income.

3. Said application was resisted by the defendant contending that the amendment is sought after commencement of trial and the same would cause prejudice to the defendant and legal right of the defendant is likely to be infringed. The plaintiffs are trying to establish a new case and the amendment would change nature of the suit. The amendment sought by the

plaintiffs is beyond limitation. Hence, the amendment application be rejected. The Trial Court allowed the application. Hence, this petition.

4. Heard the learned advocate for the petitioner and learned advocate for the respondents.

5. The learned advocate for the petitioner strenuously submitted that the amendment of the plaintiffs is time barred. It is barred by the provisions of Order II, Rule 2. Since the trial is commenced, the Trial Court ought to have rejected the amendment. It is clear that the amendment is beyond limitation and there is no due diligence on the part of plaintiffs in filing amendment application. He relied on Bhikamchand Raghunathmal Jain & Ors. Vs. Vinaykumar Bhikamchand Jain, 2019 (5), MHLJ 352, Prabhakar Sadashiv Gokhale Vs. Ramesh Shankar Ladkat & Ors., 2017 (4), MHLJ 634, Ushadevi Vs. Rijwan Ahamad & Ors. 2008, 3 SCC 717, Kailash Vs. Nankhu, 2005, 4 SCC 480, Ajendraprasadji Pande Vs. Swami, 2006, 12 SCC 1, Vidyabai & Ors Vs. Padmalatha, 2009 (2) SCC 409 and Samithkine Beecham Consumer Healthcare Gmbhy & Ors Vs. Hindustan Lever Limited & Anr., 2002 (1) MHLJ, 453.

6. Per contra, the learned advocate for the respondents supported the impugned order by submitting that in the written statement the defendant has not claimed title over the suit property. He submits that son of the defendant has filed suit for partition during the pendency of the suit and collusive decree is obtained in which lands partitioned between the parties were mentioned. In view of compromise decree which was subsequently passed, the amendment was necessitated. According to him, provisions of Order II, Rule 2 do not apply to the facts of the present case. Hence, he submits that there is no substance in the petition and the petition is liable to be dismissed.

7. It is a matter of record that, during the pendency of present suit, son of defendant has filed Regular Civil Suit No. 28/2019 for partition, against his father i.e. defendant. The said suit came to be compromised. In the said compromise decree properties which are mentioned in the memorandum of partition which were allotted to the present plaintiffs are also mentioned. Admittedly, compromise decree is passed behind the back of the plaintiffs and *prima facie* it appears to be collusive one. In view of passing of said compromise decree amendment application

was moved by the plaintiffs seeking declaration that said decree is not binding on the plaintiffs. Since the amendment was necessitated by subsequent event of passing of compromise decree, the Trial Court is justified in allowing the amendment application filed by the plaintiffs.

8. Though, it is a fact that, the application was moved after commencement of trial, however, since the amendment pertains to the subsequent developments, the same was required to be allowed in the peculiar facts of the present case and no fault can be found with the order of Trial Court in allowing said amendment. The ground of due diligence raised by the petitioner/defendant is not acceptable in view of the fact that during pendency of the present suit compromise decree was passed due to which plaintiffs was required to file amendment application. Since the cause of action has arisen after commencement of trial, the Trial Court has rightly allowed the application by assigning cogent reasons.

9. There cannot be any dispute about the ratio in judgments in *Kailash* (supra), *Ajendraprasadji Pande* (supra) and *Vidyabai & Ors.* (supra), which are on the point of

commencement of trial. Said decisions are of no help to the case of the petitioner in the light of peculiar facts of the present case as in the case in hand cause of action has arisen after commencement of trial.

10. For the aforestated reasons it is clear that the Trial Court is justified in allowing the amendment application by appreciating the facts of the present case in the proper perspective and after considering the rival submissions and the judgments cited on behalf of respective parties. There is no illegality or perversity in the impugned order. No case is made out by the petitioner to warrant interference in the extraordinary writ jurisdiction. The writ petition is therefore, dismissed. No costs.

[NITIN B. SURYAWANSHI, J.]