

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

WRIT PETITION NO.12424 OF 2019

KUSHALCHAND GANPATI BIRLA
VERSUS
SANJAY GANPATI BIRLA THROUGH LRS VIDYA SANJAY BIRLA AND
OTHERS

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Advocate for the Petitioners : Shri Anand P. Bhandari

Advocate for Respondents 1A to 1C : Shri Sharad V. Natu

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CORAM: SMT. BHARATI H. DANGRE, J.

DATE :- 13th January, 2022

Per Court:

1. The petitioner, who is defendant No.1B in RCS No.90/2012 (old Special Civil Suit No.70/1993) filed by the present respondent Nos.1A to 1C/ plaintiffs in the Court of the learned Civil Judge, Senior Division, Nandurbar, for partition, is aggrieved by the order dated 30.09.2019 rejecting the application Exhibit-328 filed by him under Order 6 Rule 17 r/w Order 1 Rule 10 of the Code of Civil Procedure, seeking permission to amend his Written Statement.

2. Chronology of events reveal that plaintiff No.1 (Sanjay Birla, now deceased) instituted the civil suit in the Court of the learned Civil

Judge, Senior Division, Nandurbar vide Special Civil Suit No.70/1993, thereafter, numbered as RCS No.90/2012, where he claimed partition and also stated that as far as the land B.N.36/2 is concerned, it is not included in the suit as it is self acquired property. The evidence in the suit being recorded and when it was scheduled for argument, the plaintiffs moved an application for amendment of the plaint, which came to be allowed on 22.08.2007. Against which, the Writ Petition was preferred in this Court vide Writ Petition No.5613/2007 in which, Rule was issued and stay was granted. The proceedings in the suit remained stayed till 04.07.2019, when the Writ Petition was dismissed and the direction was issued to terminate the proceedings in the suit by 25.10.2019.

During the pendency of the said Writ Petition, many of the original parties i.e. the plaintiff and defendant No.1A expired and therefore, their legal heirs were required to be brought on record. Defendant No.1A (Smt.Pramilabai Ganpati Birla) died on 17.11.2015 and she got her share in partition and she also inherited the share of her late unmarried son (Sukumar). Alleging that Smt.Pramilabai had executed the Will on 15.06.2009 and also executed the gift deed in favour of different persons, who are not parties, the petitioner/ defendant No.1B deemed it appropriate to bring subsequent events on record as it would ultimately help in effective final adjudication of the pending suit. He, therefore, moved the application vide exhibit 328 on 25.09.2019, seeking

impleadment of the parties, who were bequeathed certain portion of the property by late Smt.Pramilabai and therefore, their presence in the proceedings was necessary. The Written Statement was also sought to be amended by inserting paragraph 16-A and impleadment of Navin @ Kushalchand Birla and and Sau.Shantabai Kushalchand Birla, since some rights were created in their favour in terms of the Will. Amendment in the Written Statement was sought on the ground of effective adjudication of the proceedings and to avoid multiplicity of the suit proceedings. This application filed by the petitioner/ defendant No.1B came to be rejected vide the impugned order dated 30.09.2019.

3. Perused the impugned order where, the learned Judge has determined the point for consideration, whether, the proposed amendment in the Written Statement deserves to be allowed. The order impugned reflects that the learned Judge was impressed by the fact that the present suit is 25 years old and therefore, while allowing the amendment by invoking Order 6 Rule 17, the proviso which provides for due diligence to be demonstrated by the parties before amendment could be allowed, ought to be taken into consideration. Recording that defendant No.1B has not made out that inspite of due diligence, he could not have raised the matter within time and the application was filed at the time of final argument, and by placing reliance on the decision of the Apex Court in the case of *Rajkumar Gurawara (dead) Thr. Lrs. vs. M/s*

S.K.Sarwagi & Company Limited, 2008 SAR (Civil) 641, the amendment to the Written Statement came to be turned down as it could not have been entertained at the time of argument. Another decision of the Apex Court in the case of Bibi Zubaida Khatoon vs. Nabi Hassan Saheb, AIR 2004 SC 173 was also relied upon in rejecting the amendment.

As far as the claim of defendant No.1B to raise the counterclaim, the provision of Order 8 Rule 6-A was specifically referred to and it is recorded that the defendant can raise the counterclaim in respect of the cause of action accruing to him against the plaintiff either before or after filing of the suit, but before the defendant has delivered his defence. Though in the present case, defendant No.1B has attempted to show that the cause of action is accrued during the pendency of the suit, he failed to make out a case for carrying out amendment and therefore, the counterclaim by way of amendment in the Written Statement is also rejected.

4. While passing the impugned order, the learned Judge has failed to take into consideration the important aspect of the matter that the amendment, which is sought in the Written Statement, pertains to the cause of action which was not available at the time when the suit was instituted, being in the year 1993. It is worth to note that from 2007 to 2019 i.e. more than a decade, the proceedings in the suit were stayed by the High Court and during its pendency, certain subsequent events had

occurred, which included the death of Smt.Pramilabai and the property being bequeathed by her to different persons including the present petitioner. It is during the pendency of the proceedings, defendant No.1A (Pramilabai), mother of the late Plaintiff (Sanjay Birla) and the petitioner/ defendant No.2B (Kushalchand Birla), expired in the year 2015. Late Pramilabai (Defendant No.1A) was entitled for share in partition between her sons and the share of her son, who was bachelor, was also inherited by her. She also executed the will of her property and also the gift deed in favour of the daughter, daughter-in-law, son Kushalchand, grandson Navin, etc.. Defendant No.1A Pramilabai had obtained the loan from the State Bank of India to develop her land by mortgaging some portion of her property and since the loan was not repaid, the land was put to auction and the amount due was settled by the petitioner by repaying the amount of Rs.18,14,344/-. The persons to whom she had bequeathed/ gifted the property, therefore, became necessary parties and in order to avoid multiplicity of the proceedings, the subsequent amendment was perfectly justified.

5. Further pertinent to note that, the proviso to Order 6 Rule 17 came to be inserted in the 2002 and could not have governed the suits filed prior to it. The proviso, in any case, cannot be an absolute embargo upon the power of the Court to bring the amendment on record, since the amendment can be granted by the Court at any stage of the proceedings,

if it is necessary for effective adjudication of the suit. The ground of due diligence being attributed to the present petitioner, is also not sustainable since the events, which he seeks to bring on record through amendment, had not occurred when he filed his original Written Statement. In any case, the suit was stayed for more than a decade and events occurred during its pendency and therefore, the learned Trial Court was not right in rejecting the application by resorting to the proviso of Order 6 Rule 17. Though amendment in the Written Statement being sought at the stage of hearing/ argument, the impugned order, which did not take into consideration the very important aspect that the amendment would avoid multiplicity of the proceedings and would help in effective adjudication of the claim in the suit, deserves to be set aside.

6. By order dated 11.10.2019, the proceedings in the suit are again adjourned and it is high time that the proceedings in RCS No.90/2012 are expedited in time bound manner by setting aside the impugned order. Accordingly, the Writ Petition is allowed by setting aside the impugned order. The application to amend the Written Statement is allowed. Necessary amendment should be carried out by the petitioner/ defendant No.1 within a period of two weeks from today and pursuant thereto, the learned Judge shall proceed with the suit and make every endeavour to conclude the same within a period of six months from the amendment being carried out in the Written Statement.

7. Needless to state, both the parties shall render their cooperation to the learned Judge in expeditious disposal of the proceedings.

kps

(SMT. BHARATI H. DANGRE, J.)