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IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.10252 OF 2013

Nilesh Chandrakumar Jaiswal and Another PETITIONERS

VERSUS

Ananda Limbaji Nagare RESPONDENT

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Mr. D. M. Shinde, Advocate for the petitioners

Mr. Shashikant S. Londhe, Advocate for the respondent

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[CORAM : NITIN B. SURYAWANSHI, J.]

DATE : 24th AUGUST, 2022

ORDER :

1. This petition, filed under Article 227 of the Constitution of India, takes exception to the order dated 19th August, 2013 passed by learned Civil Judge, Senior Division, Hingoli below Exhibit-29 in Special Civil Suit No. 15 of 2012 thereby rejecting the application filed by the plaintiffs – petitioners for amendment to the plaint.

2. The petitioners have filed Special Civil Suit No. 15 of 2012 seeking specific performance of contract in respect of the suit property and perpetual injunction. The suit is resisted by the defendant – respondent, by filing written statement on 25th September, 2012. In the written statement, the defendant

claimed that Regular Civil Suit No. 115 of 2012 was filed by his wife, sons and daughters seeking partition of the suit property. He claims that the suit property is joint family property in which the defendant's two sons, three daughters and wife have undivided share.

3. The plaintiffs thereafter filed application Exhibit-29 under Order VI, Rule 17 of the Civil Procedure Code, seeking amendment, incorporating pleadings in respect of Regular Civil Suit No. 115 of 2012 having been compromised by the defendant, his wife, sons and daughters and a prayer that the compromise decree passed in Regular Civil Suit No. 115 of 2012 is not binding on the plaintiffs. Said application is opposed by the defendant. The Trial Court, after hearing, has rejected the application on the ground that as evidence affidavit is filed by the plaintiffs, the trial has commenced and no explanation is given by the plaintiffs as to why the amendment is not sought prior to the commencement of the trial. Therefore, by relying on the decision in ***"Vidyabai and Others V/s Padmalatha and Another"* 2009 (4) Mh.L.J. 30** the Trial Court has rejected the application. This order is challenged in the present writ petition.

4. Heard learned advocate for the petitioners and learned advocate for the respondent at length. Perused the documents

placed on record.

5. Learned advocate for the petitioner assailed the impugned order submitting that the Trial Court has erred in rejecting the application. If the amendment is not allowed the plaintiffs will have to file separate suit challenging the compromise decree passed in RCS No.115 of 2012, as the same is obtained by playing fraud by the defendant and his family members, which will lead to multiplicity of proceedings. The application is filed soon after getting knowledge of the fact that the defendant has compromised the suit with his family members and compromise decree is obtained by them. The application is filed by the plaintiffs within reasonable time, i.e. in just six days after filing of affidavit of evidence and the cross-examination is yet to begin. He, therefore, urges to allow the writ petition and the amendment application.

6. On the contrary, learned advocate for the respondent vehemently opposed the writ petition and supported the impugned order by relying on *"Vidyabai and Others" 2009 (4) Mh.L.J. 30* and *"Revajeetu Builders and Developers V/s Narayanaswamy and Sons and Others" (2009) 10 SCC 84*.

7. By the proposed amendment, the plaintiffs seek to

challenge compromise decree in RCS No. 115 of 2012, which is passed between family members of the defendant, by seeking a relief that the said decree is not binding on the plaintiffs. According to the plaintiffs, the said decree is obtained by fraud.

8. Taking into consideration the dispute involved in the present suit, if the amendment sought by the petitioners is not allowed, the same will lead to multiplicity of proceedings. In that view of the matter, the Trial Court ought to have considered this aspect while deciding the amendment application of the petitioners.

9. Though the plaintiffs have tendered their evidence affidavit, their cross-examination is yet to begin. In that view of the matter, the application filed by the petitioners ought to have been favourably considered by the Trial Court.

10. Admittedly, there is not much delay in filing the said application. Written statement is filed by the defendant on 24th September, 2012 and the plaintiffs have filed their evidence affidavit on 12th February, 2013 and the application for amendment is filed on 18th February, 2013. The reason given by the petitioners in the application is that when the suit filed by the plaintiffs was posted for evidence, at that time, they came to

know that the defendant, his wife, sons and daughters have compromised RCS No. 115 of 2012, thereafter, after obtaining certified copies of the compromise decree, the plaintiffs have moved the application. The contention of the plaintiffs that the compromise has been made behind their back and recently they got the knowledge about it, deserves to be accepted in view of the documents placed on record.

11. It is not the ratio of "**Vidyabai**" (*supra*) that every application filed after commencement of trial has to be rejected. Hence, this citation would not assist the defendant – respondent.

12. In fact, the ratio in "**Revajeetu Builders**" (*supra*), supports the case of the plaintiffs – petitioners.

13. Since the Court is of the view that the application is filed within six days from the date of commencement of the trial, i.e. from the date on which evidence affidavit is filed by the plaintiffs and since cross-examination of the plaintiffs is yet to begin, the amendment application deserves to be allowed with a view to avoid multiplicity of proceedings.

14. For the aforesaid reasons, the writ petition is allowed. The impugned order is quashed and set aside, subject to the petitioners paying costs of Rs. 10,000/- to the defendants, in the

Trial Court, within a period of two weeks from the date of receipt of writ of this order. Application Exhibit-29 is allowed. Amendment to be carried out by the plaintiffs within a period of two weeks from the date of receipt of writ of this order. The defendant is entitled to file additional written statement to the amendment. Thereafter, trial to proceed from the stage of cross-examination of the plaintiffs. The defendant is permitted to withdraw the amount of costs deposited by the plaintiffs in the Trial Court.

[NITIN B. SURYAWANSHI]
JUDGE

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