

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

941 WRIT PETITION NO.14458 OF 2019

**PETRAS SHANKAR SARODE AND ANOTHER
VERSUS
VITHABAI WAMAN SARODE AND OTHERS**

...
Advocate for Petitioners : Mr. Vijay B. Jagtap
Advocate for Respondent Nos.1 to 4 : Mr. Z.M. Pathan
...

CORAM : SANDEEP V. MARNE, J.

DATE : 14-10-2022

PER COURT :

. By this petition, the petitioner has challenged the order dated 26.09.2019 passed by the Jt. Civil Judge, Senior Division, Newasa in Regular Civil Suit No.01/2013. By that order plaintiffs application for amendment has been allowed. The petitioners are the defendants in the suit. They have challenged the order granting amendment in the present petition.

2. Admittedly, the trial in the suit had not commenced when the amendment was allowed on 26.09.2019. Therefore, the present case would not be governed by proviso to Order 6, Rule 17 of the Code of Civil Procedure and it was not necessary for the plaintiffs to prove due diligence.

3. The main objection that the learned counsel for the petitioner raises to the order passed by the trial Court is that the plaintiffs sought raising a challenge to the compromise decree passed in RCS No.382 of 2006 *inter alia* on the ground that the same was an outcome of fraud practiced on them. He relies upon the provisions of Order-XXIII, Rule 3A which provides for a bar of a suit to set aside a decree on the ground that the compromise on which the decree is based is not lawful. He therefore submits that if the plaintiffs were to institute an independent suit to challenge the decree dated 21.02.2011, the same would be hit by the bar under Order-XXIII, Rule 3A. Therefore, what cannot be done directly should not be permitted to be done indirect manner by amending the plaint.

4. The counsel for the petitioner also raises the issue of limitation submitting that the issue raised in the proposed amendment was otherwise barred by the limitation as the plaintiffs sought amendment challenging compromise decree passed in RCS No.382 of 2006 by filing application on 07.04.2014. He therefore submits that the same was beyond the period of limitation.

5. The counsel for the petitioner relies upon the decision of

the Apex Court in **Chander Kanta Bansal vs. Rajinder Singh Anand**, AIR 2008 SC 2234.

6. The counsel appearing for the respondents on the other hand opposes the petition and supports the order.

7. After having heard the learned counsel for the parties, I find that the most clinching factor while deciding correctness of the impugned order is the fact that the trial in the suit has not commenced. Therefore, before commencement of the trial the plaintiff has every right to amend the plaint to the extent that it does not introduce a new cause of action. It is a matter of fact that the compromise decree passed in RCS No.382 of 2006 was set up as a defence by the defendants in their written-statement. This itself shows that the compromise decree passed in RCS No.382 of 2006 has a bearing on the issue involved in the suit. It therefore cannot be stated that by proposed amendment, the plaintiffs were seeking to change the nature of the suit.

8. Coming to the issue of bar of the suit, this would be something which is to be determined at the stage of final adjudication of the suit. The trial Court, while deciding the application for

amendment, would not have been in a position to decide the plaintiffs' challenge to the compromise decree passed in RCS No.382 of 2006 is legally maintainable or not. Same is the issue with regard to the limitation which can be decided at the time of the final adjudication of the suit.

9. Reliance of the counsel for the petitioner on the decision of the Apex Court in **Chander Kanta Bansal** (*supra*) is of no avail as the facts in that case were clearly distinguishable. In the case before the Apex Court, the suit was filed on 23.05.1986 and the written statement was filed in the year 1986 itself. The application for amendment in written- statement was filed on 12.05.2004, by which time the trial in the suit was already completed. It is in the facts of that case that the Apex Court held that the amendment at that stage of the suit was impermissible. As against this, in the present case, the trial in the suit was yet to commence when the application for amendment was filed. A decision is therefore clearly distinguishable.

10. The writ petition being devoid of any merits is liable to be dismissed and the same is dismissed without any orders as to costs.

(SANDEEP V. MARNE, J.)