

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 549 OF 2020

1. Mankarnabai Ganpat Patil (Mali),
Age 77 years, Occu. Agrilculture,
2. Sajan Ganpat Patil (Mali),
Age 57 years, Occu. Agril and Service,
3. Dnyaneshwar Ganpat Patil (Mali),
Age 54 years, Occu. Agri. And Service,

All R/o. Tukaramwadi, Near Satsang Hall,
Jalgaon, Taluka and District Jalgaon

.. Petitioners
(Original Plaintiffs)

Versus

1. Kaushalabai Sampat Patil (Patil),
Age 77 years, Occu. Household,
2. Dinesh Sampat Patil (Mali),
Age 34 years, Occu. Service,

R/o. Ghar No.742, Joshi Peth,
Taluka and District Jalgaon
3. Kokilabai Ramkrishna Kapade,
Age 48 years, Occu. Household,
R/o. Tukaramwadi, Near Satsang Hall,
Behind Neri Naka,
Taluka and District Jalgaon
4. Suman Manoj Jaktap,
Age 46 years, Occu. Household,
R/o. Navegaon Kalwadi Nashik,
Taluka and District Nashik
5. Vijaya Shriram Borse,
Age 42 years, Occu. Household,
R/o. Kalikamata Mandir,
Sat Koyala Kanchan Nagar,
Taluka and District Jalgaon

6. National Highway Authority,
Project Implementation Unit,
Dhule, Thorough its Director,
Nahi, Survey No. 10/2,
Plot No. 11, Mansaramnagar,
Near Circuit House, Sakri Road,
Dhule, District Dhule .. Respondents
(Original Defendants)

...
Mr. Sanket Kulkarni, Advocate for Petitioners
Mr. D. S. Bagul, Advocate for Respondents no. 1 to 5

...
CORAM : NITIN B. SURYAWANSHI, J.

DATE : 14-01-2022

JUDGMENT :-

Rule. Rule made returnable forthwith. Heard finally with the consent of learned Advocates for the appearing parties.

2. Order rejecting amendment application (Exhibit-44) dated 17.10.2019 passed in Regular Civil Suit No. 117 of 2018, by the learned Civil Judge, Senior Division, Jalgaon, is assailed in the present petition.

3. Regular Civil Suit No. 519 of 1992, seeking partition and separate possession of ancestral property by the petitioners, was decreed. It was held that plaintiffs no. 1 to 3 were having 1/8th (one eighth) share and plaintiff no. 4 (petitioner, herein and plaintiff No.1 in RCS No.117 of 2018) was having 1/16th share and defendant no.2 (father of respondent no. 2) was having one half (1/2) share, in the suit properties.

. Petitioners, then, filed RCS No. 117 of 2018 seeking a declaration and permanent injunction with a prayer that, they have 1/8th share in the suit properties, which is the same as mentioned in the earlier suit. Petitioners also claimed that the land area of 2300 Square meters out of the suit property is acquired and compensation amount of the same should not be given to the defendants / respondents till the rights of the petitioners/plaintiffs are adjudicated by the trial Court.

. RCS No.117 of 2018 is resisted by respondents no. 1 to 5 (defendants) by filing written statement. According to the respondents/defendants, on 15.03.1999, partition deed was effected between the parties on stamp paper of Rs.100/-, and the respective shares were given to petitioners and defendants in terms of the partition deed.

. The petitioners then filed application Exhibit-44 under Order VI, Rule 17 of the Code of Civil Procedure, 1908, seeking amendment of plaint for incorporating pleadings about partition deed and a prayer that the partition deed is not binding on the share of petitioners-plaintiffs. The said application was resisted by the respondents-defendants and the trial Court has rejected the application. Hence, the present petition.

4. Learned Advocate for the petitioners assailed the impugned

order contending that the trial Court has erred in going into the merits of the amendment. The question of limitation also cannot be gone into by the trial Court at the time of consideration of the amendment application. The trial Court ought to have allowed the amendment as it is necessary to resolve the dispute between the parties. He, therefore, submits that the impugned order deserves to be quashed and set aside by allowing the petition. In support of submission, he relied on *(i) Rajesh Kumar Aggarwal and Others Versus K. K. Modi and Others, (2006) 4 SCC 385, (ii) Dela Gurudal Vanjari Versus Uddhal Goverdhan Rathod, 2012(3) Mh.L.J. 940.*

5. Per contra, learned Advocate for the respondents vehemently opposed the prayer of petitioners contending that there is no pleading in the suit in respect of the partition deed. During execution proceeding filed pursuant to decree passed in RCS No. 519 of 1992, a compromise was arrived at and the partition deed was executed between petitioners and respondents and the same is acted upon. The petitioners have sold the properties, which were given to them in terms of the partition deed. All these facts are suppressed by the petitioners while filing the civil suit and partition deed executed in year 1999 was sought to be challenged, the period of limitation is over in the present suit. Therefore, trial Court was justified in rejecting the

amendment.

6. Perusal of record indicates that the trial has not commenced. Present application filed by the petitioners seeking amendment to incorporate relief for setting aside the partition deed executed between the parties. The amendment is necessary to conclusively resolve the dispute between the parties.

7. The trial Court has failed to take into consideration the fact that the merit of the amendment cannot be gone into at the time adjudication of the amendment application. Even the question of limitation can be kept open to be contended by the defendants in the suit. While passing the impugned order, the trial Court has gone into the merits of the amendment and has erroneously dismissed the application.

8. In **Dela Gurudal Vanjari** (*supra*), this Court, after considering the ratio of the Honourable Supreme Court and the English Courts laid down basic principle while considering the application for amendment held thus :

“13. In this context, reliance can be placed on the Judgment of the Apex Court in the matter of *Revajeetu Builders & Developers Versus Narayanaswami & Sons and others*, reported in 2009 (6) All M.R. 986. In paragraph 67 of the judgment, the Apex Court has observed thus :

67 On critically analyzing both the English and Indian cases, some basic principles emerge which ought to be taken into consideration while allowing or rejecting the

application.

- (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 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.

The proposed amendment does not fundamentally change nature of the suit. The application tendered by the plaintiff appears to be bona fide and permitting amendment would certainly curtail multiplicity of litigation. The amendment sought is necessary for proper adjudication of controversy between parties and as such should have been permitted.”

9. In **Rajesh Kumar Aggarwal** (*supra*), the Honourable Apex Court held thus -

“21. From the above noted dates, it is clear seen that the respondents have filed their amended written statement and the appellants their replication to the amended written statement and conducted admission and denial of documents and more so the issues were framed and despite the said fact, the High Court has allowed the appeal of the respondents and dis-allowed the application of the petitioner for amendment of the plaint. Since the Court has entered into a discussion into the correctness or falsity of the case in the amendment, we have no other option but to interfere with the order passed by the High Court. Since it is settled law that the merits of the amendment sought to be incorporated by way of amendment are not to be adjudged at this stage of allowing prayer for amendment, the order passed by the High Court in *Sampath Kumar V. Ayyakannu* and *Anr. MANU/SC/0812/2002* :

[2002] SUPP2SCR397. We make it clear that we are not expressing any opinion on merits of the rival claims. Now that the amended plaint written statement and the issues have been framed it is for both parties to contest the suit on merits on the basis of amended plaint written statement and the issues now framed.”

. The above referred ratios support the case of petitioners.

10. In the result, the impugned order cannot sustain and the same deserves to be quashed and set aside. Hence, the order :-

ORDER

- i) Writ petition is allowed.
- ii) The impugned order dated 17.10.2019 passed in Regular Civil Suit No. 117 of 2018, by the learned Civil Judge, Senior Division, Jalgaon, in Regular Civil Suit No. 117 of 2018, is hereby quashed and set aside.
- iii) Application (Exhibit-44) is allowed subject to petitioners paying the cost of Rs.10,000/- (Rs. Ten Thousand Only) to the respondents no. 1 to 5 (defendants). Amount of cost to be paid in the trial Court.
- iv) The question of limitation is kept open.
- v) Respondents no.1 to 5 (defendants) shall be entitled to raise the question of limitation and oppose the amendment, on merits during the trial.
- vi) Rule is made absolute in above terms.

**(NITIN B. SURYAWANSHI)
JUDGE**