

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION 11015 OF 2019

Shankar Vithal Koli

...Petitioner

vs.

Jayashri Nayaku Sutar & Ors.

...Respondents

Mr.Bhushan Walimbe for Petitioner.

Mr.V.S. Tadke for Respondent 1.

CORAM : ROHIT B. DEO, J.

DATED : 1 JULY 2022

P.C. :

1. The Petitioner is the original defendant 6 in Regular Civil Suit 666/2012 which is brought by Respondent 1 against Respondents 2 and 5 and the Petitioner seeking decree of partition and separate possession. The challenge is to the order dated 5 July 2019 whereby the learned trial Judge has permitted the plaintiff to amend the plaint and to *inter alia* incorporate the relief of redemption of mortgage.

2. The suit property is described as agricultural field admeasuring 0.54 HR assigned Gat 1777 situated at Mouje Tambave, Taluka Walwa, District Sangli.

3. It would not be necessary to elaborately refer to the genealogical tree and averments in the plaint on the basis of which right to partition the suit property is asserted. Suffice it to note, that while the Petitioner is impleaded as defendant 6, there is absolutely no averment in the plaint explaining why and in which capacity is the Petitioner

impleaded. Indeed, it is not even the case of the plaintiff that the Petitioner is in possession of the suit property. The cause of action which is averred in the plaint as originally filed is that the defendant 1 has refused to acknowledge the share of the plaintiff and further disclosed his intention of alienating the suit property, on 7 August 2012.

4. The plaintiff filed her affidavit in lieu of oral examination-in-chief on 2 February 2016 and she was cross-examined on 4 July 2017. It was at this stage, after the commencement of the trial that the plaintiff preferred an application under Order 6 Rule 17 of the CPC seeking amendment of plaint to incorporate the pleading that vide document dated 3 October 1979, her father had executed conditional deed of conveyance in favour of the Petitioner-defendant 6; that the said document is mortgage deed; that the suit property is in possession of defendant 6, and that the plaintiff is entitled to decree of redemption of the mortgage.

5. The learned trial Judge has allowed the application seeking amendment of the plaint. Dealing with the objection that the proviso to Order 6 Rule 17 stood triggered and due diligence is not established, the learned trial Judge observed that the plaintiff is a lady and that her contention that she was not able to collect the relevant documents is acceptable.

6. The learned trial Judge has not considered whether by amending the plaint, the nature and structure of the suit will be changed. In my considered view, the learned trial Judge erred, in the factual matrix, in permitting the plaintiff to incorporate the relief that the document be considered as mortgage deed and that she be permitted to redeem the

mortgage, particularly since, this is an entirely new version and in the original plaint, the only pleading is that the plaintiff is entitled to share in the suit property since the suit property is ancestral property. Further, the learned Judge failed to appreciate that the trial having commenced, the plaintiff was obligated to make out a case that the matter could not have been brought before the court before the commencement of the trial despite exercising due diligence. I have perused the application under Order 6 Rule 17 and in my view, due diligence is not pleaded, and axiomatically not established.

7. In this view of the matter, the order impugned is clearly unsustainable and the same is set aside.

8. At this stage, the learned Counsel for the Respondent-plaintiff submits that separate suit seeking redemption of mortgage shall be instituted. The plaintiff is always at liberty to institute independent and substantive suit for redemption of mortgage and if such suit is instituted, the same shall be tried on its own merits uninfluenced by any observation in this order.

9. The petition is allowed in the aforestated terms.

10. Needless to observe the interim order operating stands vacated.

(ROHIT B. DEO, J.)