

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR.**

WRIT PETITION NO. 423 OF 2022

Rajkumar s/o Parasram Walke,
Aged about 60 years,
Occupation – Agriculturist,
R/o Plot No.10, Namdeo Nagar,
Nagpur.

.... **PETITIONER**

VERSUS

- 1) Rajendra s/o Parasram Walke,
Age 49 years,
Occupation – Agriculturist,
- 2) Rajesh s/o Dhanraj Walke,
Age 48 years,
Occupation – Agriculturist,
- 3) Sharad s/o Dinkarrao Walke,
Aged about 34 years,
Occupation – Agriculturist,
- 4) Dinkar s/o Parashram Walke,
Aged about 70 years,
Occupation – Agriculturist,

Respondent Nos.1 to 4 R/o At post
Dhapewada, Tahsil - Kalmeshwar,
District - Nagpur.

- 5) Sau. Nirmala w/o Bhaurao Kapse,
Aged about 66 years,
Occupation – Housewife,
R/o At post Pipla (Kinkhede),
Tahsil - Kalmeshwar, District-Nagpur.
- 6) Sau. Mangla w/o Chandrabhan Game,
Aged about 64 years,

Occupation – Housewife,
R/o Plot No.44, Near NIT Garden,
Uday Nagar, Nagpur.

.... **RESPONDENTS**

Mr. S.P. Kshirsagar, Counsel for the petitioner,
Mr. N.B. Bargat, Counsel for respondent Nos.1 to 4,
Mr. S.S. Taram, Counsel for respondents 5 & 6.

CORAM : ROHIT B. DEO, J.
DATED : 21st MARCH, 2022

ORAL JUDGMENT :

Petitioner is the plaintiff in Special Civil Suit 760/2013, which is instituted seeking decree for cancellation of Will dated 16-11-2012 and declaration and permanent and mandatory injunction, against the respondents-defendants.

2. The plaintiff is aggrieved by the order dated 18-11-2021 rendered by the learned 18th Joint Civil Judge (Senior Division), Nagpur allowing the application for amendment in written statement preferred by defendants 1 to 4.

3. It is common ground that the application seeking amendment was preferred after the commencement of trial and examination of three witnesses on behalf of the plaintiff. It would be necessary to briefly note the averments in the application under Order VI Rule 17 of

the Civil Procedure Code (Code), which is allowed by the order impugned. The defendants aver that during the course of the trial, they received notice in Land Acquisition Case 77/A-65/2016-17 in response to which the defendants approached the Land Acquisition Officer seeking compensation, to which claim the plaintiff objected. The Land Acquisition Officer then issued notice dated 17-8-2020 as regards the reference of the dispute touching the entitlement and apportionment of compensation to the civil court. The defendants preferred an application dated 21-9-2020 requesting the Land Acquisition Officer to release the amount of compensation and simultaneously learnt that the plaintiff had transferred the share of deceased Parasramji in his favour. The defendants engaged new counsel in September, 2020 and made available to the new counsel the entire documents. The defendants then averred that the inspection of the documents revealed that certain facts and documents were not placed on record by the earlier counsel, which are relevant. It is further averred that defendants 1 to 3 have already instituted Regular Civil Suit 28/2020 seeking declaration and cancellation of Will dated 06-6-2000 and relief of partition and separate possession against the plaintiff, which suit is pending. The defendants sought to incorporate pleadings after paragraph 15 as paragraphs A to V touching the alleged illegality of the Will executed by deceased Parasramji in favour of the plaintiff. While the original written

statement runs into four pages, the proposed amendment is quite verbose and runs into as many as thirteen pages.

4. The verbosity of the amendment apart, I am satisfied that the proviso to Order VI Rule 17 of the Code is triggered and it is not established that even with due diligence the matter could not have been brought before the commencement of the trial. The explanation that the earlier counsel did not bring on record certain facts and documents is insufficient to establish due diligence as is held by this Court in *Conception Fernandes and another v. Tasneem Shaikh and others*, 2014(5) Mh.L.J. 494.

5. The aspect of due diligence apart, even according to the defendants, a separate and substantive suit is already instituted by the defendants seeking to challenge the Will allegedly executed by deceased Parasramji in favour of the plaintiff. Perusal of the written statements placed on record in the present petition reveal that even according to respondents 1 to 4, Regular Civil Suit 126/2022 which the defendants have instituted seeking cancellation of Will executed by Parasramji in favour of the plaintiff, is transferred to the same court which is in seisin of Special Civil Suit 760/2013 from which arises the order impugned. In this view of the matter, I see no prejudice as such

to the defendants if the proposed amendment is disallowed. Apart from the fact that due diligence is not established and the trial has progressed significantly, the substantive suit filed by the defendants seeking cancellation of the Will on the basis of which the plaintiff-petitioner herein is asserting rights, is already instituted and is transferred to the same court.

6. In my considered view, the order impugned is unsustainable. The two suits are already transferred in the same Court, is the submission of the defendants. It would be more appropriate if the defendants prefer an application seeking consolidation of the two suits and if such an application is preferred, the same shall be decided by the trial Court on its own merits. However, the learned trial Court shall ensure that if the trials are consolidated, the proceedings are expedited since the suit filed by the plaintiff-petitioner herein has progressed substantially.

7. Considering the belated stage at which the amendment was moved and the fact that the defendants have already filed substantive suit in which the averments in the proposed amendment will be subjected to scrutiny, I am inclined to set aside the order impugned subject to the observation supra that the defendants shall be at liberty to seek consolidation of the suits.

8. The order impugned is set aside.
9. The petition is allowed in the aforestated terms.

JUDGE

adgokar