

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 2340 OF 2023

Shivraya s/o Siddappa and Another ...Petitioners

VERSUS

Mohan s/o Kondiba Wadikar and Another ...Respondents

.....

Mr. V.P. Latange, Advocate for the petitioners.

Mr. A.M. Gaikwad, Advocate for the respondents.

.....

[CORAM : NITIN B. SURYAWANSHI, J.]

RESERVED ON: 3rd APRIL, 2023

PRONOUNCED ON: 28th APRIL, 2023

ORDER :

1. By this petition filed under Article 227 of the Constitution of India, petitioners challenge the order passed by learned District Judge-1, Biloli, District- Nanded, below Exhibit-18 in Regular Civil Appeal No. 06 of 2021.

2. Respondents/original plaintiffs filed Regular Civil Suit No. 82 of 2018 for declaration and ownership of the suit land and for recovery of possession claiming that their father Kondiba was the owner of the suit land. He used to give suit land on batai basis to Hotalappa. Kondiba expired on or about the year 1974-75. Plaintiffs recently found copy of 7/12 extract of the suit land

for the year 1958-59, in which name of Kondiba was mentioned as owner and by scoring his name Hotalappa's name was mentioned as purchaser. The plaintiffs, therefore, issued legal notice and called upon the defendants to give details of sale deed, if any, executed by deceased Kondiba in favour of Hotalappa. The defendants replied the notice claiming that, plaintiffs have no right to ask the said information.

3. In response to the inquiry under the Right To Information Act, Tahsildar informed the plaintiffs that there is no mutation number in the 7/12 extract, which records name of Hotalappa. It is further claimed that in the year 1998-99, in 7/12 extract of the suit land name of Shivappa Hotalappa is entered by mutation entry no. 1360 and in 7/12 extract dated 05.09.2018, Shivraya Siddappa Patil's name is shown in the column of Kabjedar. Plaintiffs claimed that no such sale deed was ever executed and the mutation entry as well as possession of the defendants is illegal.

4. Defendants resisted the suit by filing written statement contending that the suit land was purchased by Hotalappa in the year 1958-59 and since then the land was in his possession. As per mutation entry name of Hotalappa is shown

as purchaser of suit land in 7/12 extract. After the death of Hotalappa the suit land is transferred in the name of defendant No. 2, who is adopted son of Hotalappa. After becoming owner of the suit land, defendant No. 2 executed registered sale deed in favour of defendant No. 1 on 08.04.2013. Accordingly, mutation entry No. 2181 was certified on 15.04.2013 and since then defendant No. 1 is in possession of the suit land.

5. Trial Court after recording evidence and hearing the parties decreed the suit.

6. Being aggrieved by the judgment and decree passed by the Trial Court in favour of plaintiffs, defendants filed Regular Civil Appeal No. 6 of 2021. In the said appeal, application Exhibit-18 is filed seeking amendment in the written statement for raising a plea of adverse possession and a prayer is made to remit back the matter to the Trial Court for just and proper adjudication.

The application was resisted by the written say cum arguments filed by the plaintiffs. The Appellate Court has rejected the said application. Hence, the present petition.

7. Heard the learned advocate for the petitioners and

learned advocate for the respondents. Perused the memo of petition, annexures thereto, impugned order, reply affidavit and citations relied on by both the parties.

8. Learned advocate for the petitioners/defendants by relying on *North Eastern Railway Administration, Gorakhpur v. Bhagwan Das (D) By L.Rs.*, 2008 AIR SCW 3159 submits that amendment of pleadings is permissible even at appellate stage with a view to give fair opportunity to plead his case and Appellate Court ought to have liberally allowed the amendment in view of settled legal position that amendment needs to be liberally allowed.

9. Per contra, learned advocate for the respondents has supported the impugned order by placing reliance on *M. Revanna vs. Anjanamma (Dead) By Lrs. And others*, 2020 (3) CCC 137 and *Revajeetu Builders and Developers vs. Narayanaswamy and Sons and others*, 2009 AIR (SCW) 6644.

10. It is a matter of record that the suit was filed on 24.09.2018. The defendants filed their written statement on 13.11.2018 contending that in the 7/12 extract of the year 1958-59 there is a entry that the suit land was sold by Kondiba

to Hotalappa. After the death of Hotalappa, defendant No. 2 became owner and possessor of the suit land. Thereafter, parties led evidence and the Trial Court has decreed the suit by judgment and decree dated 26.02.2021.

11. In the evidence before the Trial Court, defendants showed their willingness to produce the sale deed of the suit land, but same could not be produced. The defendants claimed that the sale deed could not be traced out.

12. Indisputably, the application seeking amendment is filed not only after commencement of trial, but after conclusion of trial and at a appellate stage, that too by raising a new plea of adverse possession, which was available to the defendants at the time of filing of written statement. In these facts, the Appellate Court has rightly rejected the application holding that, in appeal appellants/defendants are not entitled for taking new plea of adverse possession. The Appellate Court has observed that if the application is allowed, then it would amount to allowing appeal without hearing. Allowing the proposed amendment of the defendants would cause serious prejudice to the interest of the plaintiffs.

13. Ratio in M. Revanna (supra), supports the case of plaintiffs.

14. In North Eastern Railway (supra), it is held that 'amendment of pleadings is permissible even at appellate stage, provided the amendment does not work injustice to other party and is necessary for determination of question in controversy.'

In the case in hand, since amendment would cause injustice to the plaintiffs, the same is rightly disallowed by the appellate Court.

15. There is no illegality or perversity in the order impugned in the present petition. No case is made out by the petitioners for exercise of extra ordinary writ jurisdiction. Writ petition being devoid of merit is dismissed.

[NITIN B. SURYAWANSHI, J.]